

**FILED**  
**SAN MATEO COUNTY**

APR 03 2024

Clerk of the Superior Court

By

DEPUTY CLERK

**SUPERIOR COURT OF CALIFORNIA**  
**COUNTY OF SAN MATEO**

INSURANCE COMMISSIONER OF THE  
STATE OF CALIFORNIA,

Applicant,

v.

CALIFORNIA INSURANCE COMPANY, a  
California corporation,

Respondent.

Case No. 19-CIV-06531

**FINAL STATEMENT OF DECISION AND  
ORDER AFTER HEARING 8-23-23**

Dept. 3

Judge: Hon. Susan L. Greenberg

1                   **FINAL STATEMENT OF DECISION AND ORDER APPROVING**

2                   **PROPOSED REHABILITATION PLAN**

3           The following constitutes the Court's Final Statement of Decision and Order After Hearing  
4 August 23, 2023. The Court has read and considered the Respondent California Insurance Company's  
5 General and Specific Objections to Proposed Statement of Decision and Tentative Order After Hearing  
6 August 23, 2023, which was filed March 26, 2024.

7  
8                   **INTRODUCTION AND OVERVIEW OF REHABILITATION PLAN**

9           On November 4, 2019, this Court granted the Verified Ex Parte Application of the Insurance  
10 Commissioner ("Commissioner" or "Conservator" or "Applicant")<sup>1</sup> under Insurance Code section 1011,  
11 subdivision (c),<sup>2</sup> for an Order Appointing Insurance Commissioner as Conservator and Restraining  
12 Order ("Conservation Application") placing Respondent California Insurance Company ("CIC")<sup>3</sup> in  
13 conservatorship ("Conservation Order"). The Conservation Application alleged that CIC was "in the  
14 midst of an attempt to merge with a newly formed New Mexico entity, thereby transferring control of  
15 CIC without obtaining the Commissioner's approval as required by law." (Conservation Appl. ¶ 4, citing  
16 § 1215.2.) California law would automatically revoke CIC's certificate of authority to transact insurance  
17 business upon consummation of this unapproved merger, as the New Mexico entity, a "nonadmitted  
18 insurer," could not transact insurance business in California. (Conservation Appl. ¶ 11, citing §§ 700,  
19 701, 1760.1.)

20           In his Conservation Application, the Commissioner explained that "if CIC is permitted to  
21 consummate the illegal merger, CIC policyholders in California will be left holding policies of a non-  
22 admitted insurer. Since CIC could not legally service those policies, *policyholders, including employees*  
23 *with serious work-related injuries and other claimants entitled to vital and necessary insurance*

24  
25           <sup>1</sup> The Insurance Commissioner and the Conservator are the same state official. For clarity, the  
26 Court shall refer to him solely as the Commissioner, the parties' briefing shall retain original  
references to the Commissioner as Conservator or Applicant.

27           <sup>2</sup> All subsequent statutory citations are to the Insurance Code unless otherwise indicated.

28           <sup>3</sup> The Court shall solely refer to California Insurance Commission as CIC. However, the  
parties' briefing shall retain original references to CIC as Respondent.

1 *benefits, may not have recourse to benefits.*” (*Id.* at 4, ¶ 11 [emphasis added].) The Commissioner  
2 emphasized that, prior to the unlawful merger attempt, “CIC had established a pattern of flouting  
3 regulatory processes designed to protect California policyholders from unfair and deceptive practices,”  
4 citing CIC’s illegal modifications to insurance policies. (*Id.* at 5-6, ¶ 17.)

5 The Court now considers the Commissioner’s Application for Order Approving Rehabilitation  
6 Plan (“Plan Application”), setting out the terms under which the conservatorship would be concluded.  
7 The Commissioner describes the proposed Rehabilitation Plan as “designed to . . . complete CIC’s exit  
8 from the state on terms that protect the Company, policyholders, and the public.” (Plan Appl., p. 19.)  
9 To achieve that goal, he explains, the Plan

10 has been structured around an Assumption Reinsurance and Administration Agreement  
11 (“Reinsurance Agreement”) under which an admitted insurer authorized to write  
12 workers’ compensation insurance in California will assume CIC’s in-force California  
13 policies and reinsure the liabilities under expired CIC California policies. CIC will then  
be permitted to merge with its out-of-state affiliate, CIC II, and will surrender its  
certificate of authority to write insurance in California without diminishing the rights of  
policyholders.

14 (*Ibid.*)

15 CIC opposes approval of the Rehabilitation Plan on several grounds. First, CIC objects to Plan  
16 § 2.6, which incorporates Schedule 2.6. This section concerns litigation arising out of an illegal  
17 modification to CIC’s insurance policies. (See Background and Part II, *infra*.) Under the Plan,  
18 policyholders engaged in such litigation will be offered an opportunity to settle their claims and  
19 associated litigation by electing a remedy among the choices outlined. Second, CIC objects to Plan §  
20 2.2, which outlines a public bid solicitation procedure for CIC’s reinsurer in California. CIC opposes  
21 the public bid process on the grounds that its affiliate, Continental Indemnity Company (“Continental”)  
22 should have a right of first refusal to reinsure or purchase its California business. Finally, CIC opposes  
23 the Rehabilitation Plan’s inclusion of Connecticut and New York policyholders pursuant to requests  
24 filed by the Connecticut Insurance Department and the New York State Department of Financial  
25 Services in November 2022.

26 The Court held two hearings on the Plan Application, on July 25, 2023 and August 23, 2023.  
27 The Court has considered all arguments made by all counsel during the hearing. The Court has also  
28 considered the pleadings filed in this matter, as well as a number of email briefs sent to the Court and

1 all parties, filed and sent both prior to and after the August 23, 2023 hearing. These email briefs include  
2 but are not limited to the following:

3 Applicant's Proposed Order Approving Proposed Rehabilitation Plan (received October 16,  
4 2023);

5 Respondent's Redline Opposition to Conservator's Proposed Order Approving Proposed  
6 Rehabilitation Plan (received December 12, 2023);

7 Respondent's Proposed Order Approving Proposed Rehabilitation Plan Without Sections 2.6  
8 and 2.2 Which Are Not Approved (received December 12, 2023);

9 Declaration of Shand S. Stephens In Support of Respondent California Insurance Company,  
10 Inc.'s Rehabilitation Plan Proposed Order (received December 12, 2023);

11 Respondent California Insurance Company's Redline Opposition to Conservator's Proposed  
12 Order Approving Proposed Rehabilitation Plan (filed December 12, 2023);

13 Email letter brief from attorney Eric K. Larson (dated August 25, 2023);

14 Email letter brief from attorney Cynthia J. Larsen (dated September 1, 2023);

15 Email letter brief from attorney Shand S. Stephens (dated September 1, 2023);

16 Email letter brief from attorney Shand S. Stephens (dated September 5, 2023);

17 Email letter brief from attorney Cynthia J. Larsen (dated September 6, 2023), with attachments  
18 thereto;

19 Email letter brief from attorney Shand S. Stephens (dated September 6, 2023);

20 Email letter brief from attorney Phil Walker (dated September 19, 2023), with attachments  
21 thereto, and with Proposed Inclusion in Draft Order;

22 Email from attorney Cynthia J. Larsen with a redlined version of the Revised Rehabilitation Plan  
23 to the draft Proposed Order containing post-hearing revisions (dated October 18, 2023).

24 Redlined version of the Revised Rehabilitation Plan to the draft Proposed Order containing post-  
25 hearing revisions (filed October 16, 2023).

26 Because the final briefing was filed and received by this Court on December 12, 2023, this matter  
27 was under submission to this Court as of December 12, 2023.

28 After a full review of the pleadings and email letter briefs and consideration of oral argument,

1 the Court adopts its tentative ruling approving the Plan Application. The Court APPROVES the  
2 Insurance Commissioner of the State of California's California Insurance Company Rehabilitation Plan  
3 as filed with this Court on October 16, 2023 (attached hereto as Exhibit A), for the reasons enumerated  
4 below.

### 5 BACKGROUND

6 As the litigation addressed by Plan § 2.6 predates CIC's conservatorship, the Court first explores  
7 the context surrounding those cases. CIC and its affiliates formerly marketed workers' compensation  
8 insurance under a program which they called "EquityComp." Workers' compensation insurance  
9 policies under EquityComp featured two components: (1) a standard "guaranteed-cost" policy that had  
10 been filed with the Commissioner as required by law, and (2) a "Reinsurance Participation Agreement"  
11 (RPA) that was not filed with or approved by the Commissioner and altered certain terms of the  
12 guaranteed-cost policy, including its pricing. (Ins. Code §§ 11658, 11735 [policy filing requirements];  
13 Holloway Plan App. Decl.<sup>4</sup> ¶ 14.)<sup>5</sup> In 2014, Shasta Linen Supply, Inc., which held a CIC guaranteed-  
14 cost policy and an accompanying RPA, filed an appeal with the Commissioner challenging CIC's use  
15 of the RPA. An administrative law judge conducted an adjudicatory hearing and concluded that "CIC's  
16 EquityComp program and the accompanying RPA constitute a misapplication of the filed rates of CIC  
17 in violation of California Insurance Code section 11737" and that "CIC's failure to file and secure  
18 approval of EquityComp and the RPA, in violation of Insurance Code section 11658, renders the RPA  
19 void as a matter of law." (*Matter of Shasta Linen Supply, Inc.* (June 22, 2016) Cal. Ins. Comm'r, No.

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20 <sup>4</sup> Joe Holloway is Deputy Insurance Commissioner, the Chief Executive Officer of CDI's  
21 [California Department of Insurance] Conservation and Liquidation Office, and Conservation Manager  
22 for CIC in conservation. (Holloway Plan App. Decl., ¶ 2.)

23 <sup>5</sup> Citations to the parties' filings in support of and opposition to the Plan Application are  
24 referenced as follows: Exhibits, declarations, and requests for judicial notice filed by the Conservator in  
25 support of the October 19, 2020, Plan Application are designated by "Plan Appl.," as in "Holloway Plan  
26 Appl. Decl." Exhibits, declarations, and requests for judicial notice filed by CIC with its November 10,  
27 2022, Opposition to Conservator's Application for Approval of Rehabilitation Plan are designated by  
28 "Opp.," as in "Silver Opp. Decl." Similarly, filings accompanying the Conservator's February 10, 2023,  
Reply to Respondents Opposition to Application for Approval of Rehabilitation Plan are designated by  
"Reply"; filings accompanying CIC's February 16, 2023, Sur-Reply to the Conservator's Reply are  
designated by "Sur-Opp."; and the Commissioner's Reply to Respondent's Sur-Reply is designated as  
"Reply to Sur-Opp."

1 AHB-WCA-14-31 (*Shasta Linen*.) The Commissioner adopted the *Shasta Linen* decision and  
2 designated it a precedential decision, permitting its citation as authority in subsequent Department of  
3 Insurance (“Department”) hearings.<sup>6</sup> (*Id.* at 70 [citing Gov. Code, § 11425.60, subd. (b)]; see also  
4 Settlement Agreement between the California Department of Insurance, California Insurance Company  
5 and *Applied Underwriters Captive Risk Assurance Company, Inc.*, dated June 7, 2017 (“*Shasta Linen*  
6 *Settlement Agreement*”), Reply Compendium, Exh. 5 at 2 [CIC agrees to precedential effect of *Shasta*  
7 *Linen* decision].)

8 *Shasta Linen* expressly did not address the equitable remedies available to policyholders in a  
9 court of law. (*Id.* at 68 [“Any additional remedies to which *Shasta Linen* is entitled based upon CIC’s  
10 conduct are outside the scope of this proceeding.”].)<sup>7</sup> Numerous cases have since been filed by  
11 policyholders or by CIC and its affiliates, which are collectively known as the “RPA litigation.”

12 With this context, the Court turns to the facts of this case in greater detail.

#### 13 A. CIC and Its Affiliates

14 CIC is a property and casualty insurance company that holds a certificate of authority issued by  
15 the Commissioner authorizing it to transact workers’ compensation business in the State of California.  
16 (Holloway Plan Appl. Decl., ¶ 5; see generally Ins. Code §§ 700, 701, 717 [outlining certificate of  
17 authority requirement and issuance criteria].) CIC is a subsidiary of North American Casualty Company  
18 (“NACC”), which in turn is owned by AU Holding Company (“AU Holding”). Stephen M. Menzies is  
19 the founder, president, and sole shareholder of AU Holding. (Holloway Plan Appl. Decl. ¶ 5.) CIC  
20 marketed the RPA principally through its affiliate Applied Underwriters Inc. (“AUI”). Another affiliate,  
21 Applied Underwriters Captive Reinsurance Assurance Company (“AUCRA”), is an admitted insurer  
22 who serves as the purported “reinsurer” under the RPA. (*Shasta Linen, supra*, at 10-11.)

23 In *Shasta Linen*, the Commissioner found that CIC, AUI, and AUCRA were a joint enterprise  
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25 <sup>6</sup> The Court shall refer to the California Department of Insurance solely as the Department.  
26 Evidence referencing the Department as “CDI” shall retain the original nomenclature.

27 <sup>7</sup> The Supreme Court has confirmed that where the Insurance Commissioner has jurisdiction to  
28 adjudicate disputes over charged rates, “administrative proceedings are not a ratepayer’s exclusive  
remedy for the charging of an unfiled rate.” (*Villanueva v. Fidelity National Title Co.* (2021) 11 Cal.5th  
104, 126.)

1 rather than separate entities. (*Shasta Linen, supra*, at 49.) Two California Courts of Appeal have made  
2 similar findings. (*Nielsen Contracting, Inc. v. AUI* (2018) 22 Cal.App.5th 1096, 1116-1117 (*Nielsen*)  
3 [record on appeal supported conclusion that affiliated entities should be considered as one because they  
4 were “so enmeshed” and “intertwined”]; *Luxor Cabs, Inc. v. AUCRA* (2018) 30 Cal.App.5th 970, 985-  
5 986 (*Luxor Cabs*) [same].) As evidence of a joint enterprise, the Commissioner noted that AUI generated  
6 the marketing material for the EquityComp program and that AUCRA executed the RPA as a “profit-  
7 sharing” plan to override critical terms of the CIC-provided guaranteed-cost policy. (*Shasta Linen*,  
8 *supra*, at 26-31.)

9       The pertinent evidence in this case supports the Commissioner’s conclusion in *Shasta Linen*.  
10 CIC and the affiliates worked collectively under shared management to implement the EquityComp  
11 program, and the companies continue to work in tandem. Under the Management Services Agreement  
12 between CIC and AUI, AUI comprehensively manages CIC’s affairs by: (1) providing actuarial and  
13 claims services in connection with CIC’s policies; (2) providing underwriting services; (3) paying CIC’s  
14 bills and collecting its receivables; (4) managing CIC’s investments; and (5) performing accounting  
15 services, including filing CIC’s required financial statements and tax returns. (Holloway Plan Appl.  
16 Decl. ¶ 12, Exhs. B, C.) AUI provides CIC “necessary and appropriate personnel, administrative, office  
17 and building services.” (*Id.*, Exh. B at 3.) CIC directs and supervises AUI under the terms of the  
18 Management Services Agreement. (Holloway Plan Appl. Decl. Exh. B at 1.) As of the filing of the  
19 Plan Application, the Nebraska Secretary of State’s website listed Menzies, the indirect owner of CIC,  
20 and Jeffrey Silver, CIC’s Secretary and General Counsel, as the only directors of AUI. (Holloway Plan  
21 Appl. Decl. ¶ 11.)

## 22       **B. The Guaranteed-Cost Policy and the Reinsurance Participation Agreement**

23       Employers usually purchase workers’ compensation insurance as a guaranteed-cost policy under  
24 which the policyholder pays a fixed premium and the insurer reimburses all covered workers’  
25 compensation losses. In loss-sensitive policies, on the other hand, the employer’s premium for the policy  
26 year depends on the insured’s actual cost of claims. (Muzzarelli Plan Appl. Decl. ¶ 12.)<sup>8</sup> As the  
27 Commissioner explained in *Shasta Linen*:

28       <sup>8</sup> Giovanni Muzzarelli is a Senior Casualty Actuary at the Department.

1 By definition, loss sensitive plans are ‘profit-sharing.’ Generally, carriers market loss  
2 sensitive programs exclusively to large employers. In fact, many jurisdictions restrict the  
3 sale of loss sensitive programs to employers whose annual premiums exceed \$500,000.  
4 Large employers are typically better able to cope with loss and experience modification  
variations and are in a better position to control claims costs. ... Loss sensitive programs  
are issued as endorsements to guaranteed cost policies and require the Insurance  
Commissioner’s approval.

5 (*Id.* at 15-16.) The EquityComp RPA was a loss-sensitive program, sold without the Commissioner’s  
6 approval in conjunction with the CIC guaranteed-cost policy.

7 CIC, AUI, and AUCRA intentionally failed to seek the Commissioner’s approval for the RPA.  
8 Indeed, they patented the RPA as a vehicle to avoid insurance regulation, and touted the program’s  
9 freedom from state regulatory constraints in the patent application. (*Shasta Linen, supra*, at 24.) The  
10 Commissioner found that AUI “structured EquityComp and the RPA to circumvent state regulators.”

11 (*Id.* at 50.) As the court of appeal subsequently explained in *Luxor Cabs, supra*, 30 Cal.App.5th at 986:

12 Obviously, allowing an insurer to circumvent the comprehensive regulatory structure  
13 applicable to the issuance of workers’ compensation insurance in this state simply by  
14 amending its approved policy forms through a side agreement with a subsidiary is  
contrary to the public policy underlying California’s workers’ compensation law and  
cannot be countenanced.

15 (See also *Nielsen Contracting, supra*, 22 Cal.App.5th at 1118 [finding that failure to file the RPA  
16 “prevent[ed] crucial regulatory oversight and thus render[ed] the unfiled agreement unlawful and void  
17 as a matter of law”]; accord *Minnieland Private Day School, Inc. v. Applied Underwriters Captive Risk  
18 Assurance Company, Inc.* (4th Cir. 2019) 913 F.3d 409, 423.) The design of the EquityComp program  
19 attracted attention nationally. Regulators in Wisconsin, Vermont, New Jersey, and New York each took  
20 steps to stop sale of policies involving RPAs. Some cited CIC and its affiliates for violating prior orders  
21 to halt such sales and imposed penalties of up to \$3 million. (Holloway Plan Appl. Decl. ¶¶ 18.a-d.)

22 The Commissioner found that the EquityComp RPAs departed in material ways from industry-  
23 standard loss-sensitive programs, as the RPAs employed nonstandard terminology<sup>9</sup> and gave CIC “sole  
24 discretion” to determine several variables upon which policyholders’ charges were based. (*Shasta Linen,*  
25 *supra*, at 22-23 [“non-linear retrospective plan” resulted in “fundamentally new premium structure”];  
26 29-31 [“loss pick containment” formula for fees created astronomical fees on low-loss policies]; 31-32  
27 [unusual three-year term, with severe penalties for early cancellation or non-renewal]; 32, 56 [choice-

28 <sup>9</sup> The name “Reinsurance Participation Agreement” is itself a misnomer. CIC conceded in *Shasta  
Linen* that the RPA was not in fact a reinsurance agreement. (*Shasta Linen, supra*, at 25.)



1 of-law and dispute resolution procedures superseded guaranteed-cost policy provisions and required  
2 application of Nebraska law and binding arbitration in the British Virgin Islands]; 33-34 [run-off loss  
3 development factors,” created valuation method “not used by other carriers”]; 34-35 [close-out  
4 distribution precluding return of amounts due policyholders for up to seven years after policy expiration  
5 at CIC’s “sole discretion”].)

6 Moreover, policyholders that executed the RPA were unlikely to be fully aware of its terms. CIC  
7 and its affiliates withheld copies of prospective policyholders’ RPAs until after policyholders had paid  
8 to enroll in the EquityComp program. At that point, refusal to sign the RPA would have resulted in  
9 cancellation of their workers’ compensation coverage. (*Shasta Linen, supra*, at 25, 27-28; Lichtenegger  
10 Plan Appl. Decl. ¶¶ 26, 32.<sup>10</sup>) The RPA that policyholders signed differed materially from the  
11 representations made in the marketing materials, including as to cost of coverage. (*Id.* at 27 [Program  
12 Summary & Scenario document provided to potential policyholders included a “single-year table [that]  
13 does not represent the one-year cost of the program.”].)

14 Obfuscation of the RPA became particularly problematic because the agreement employed  
15 undefined and non-standard terms when describing how to calculate premiums, deposits, or other  
16 payments due. It thus became virtually impossible for policyholders to calculate their monthly  
17 premiums, budget for workers’ compensation insurance, or verify charges based on the RPA. (*Shasta*  
18 *Linen, supra*, at 29-30; Lichtenegger Plan Appl. Decl. ¶¶ 15, 20, 28-29.) The lack of transparency in  
19 billing especially concerned the Commissioner in light of the potential for billing errors; indeed, AUI  
20 ultimately conceded that Shasta Linen’s bill included such billing errors. (*Shasta Linen* at 38.)  
21 Policyholders who sought assistance regarding billing errors were often stonewalled by company  
22 representatives, who claimed that billing calculation methodology was proprietary. (Lichtenegger Plan  
23 Appl. Decl. ¶¶ 20, 29.) This forced policyholders to either pay the monthly bill or face cancellation of  
24 their workers’ compensation insurance. (See *id.* at ¶¶ 6, 29-30, 47.) Policyholders that were unable to  
25 pay despite the lack of transparency in monthly billing often had no choice but to execute promissory  
26 notes extended by AUI to spread out payments. (See *Shasta Linen* at 38; Lichtenegger Plan Appl. Decl.

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27  
28 <sup>10</sup> Larry Lichtenegger is a California attorney who has represented fifty-one business clients in  
actions against AUI, AUCRA, and CIC.

¶¶ 6, 47.)

The RPA also incentivized CIC, AUI, and AUCRA to settle claims related to employee injuries for more money than they should have been paid according to industry practices and to over-reserve case funds at policyholders' expense.<sup>11</sup> (Muzzarelli Plan Appl. Decl., ¶¶ 19, 29, 42.) CIC has not disputed Muzzarelli's explanation of the financial incentives created by the RPA, and evidence suggests that CIC and its affiliates have yielded to those incentives by keeping claims open to reap investment income on policyholder funds. (Lichtenegger Plan Appl. Decl. ¶¶ 43, 56-57.) Policyholders have also reported that CIC failed to pursue subrogation when requested or investigate employees' claims of injury. (Lichtenegger Plan Appl. Decl. ¶¶ 55, 58, 62; *Shasta Linen, supra*, at 38 [AUI's inaction regarding request to investigate potential fraud cost policyholder over \$100,000.]) Then, the RPA penalized dissatisfied EquityComp policyholders by applying much higher loss development factors (LDFs) to the claims of employers that chose not to renew their policies after the three-year active term, essentially penalizing them for non-renewal. (*Shasta Linen* at 58.) The Commissioner considered such a penalty akin to restricting payment of a policyholder dividend due to the policyholder's failure to renew a policy, which is considered a "coercive and illegal ... unfair practice." (*Id.* at 58.)

This scheme frustrated policyholders' profit-sharing expectations. In *Shasta Linen*, the ALJ twice ordered CIC to provide the number of participants that had received profit-sharing distribution, but CIC refused to comply, leading the ALJ to draw the adverse inference that there never had been any profit-sharing distributions. (*Shasta Linen, supra*, at 35.) CIC has not disputed that inference in this Court.

### C. The RPA Litigation

As CIC's Conservator, the Commissioner has reviewed all EquityComp RPA litigation and has identified three categories of cases. (Holloway Plan Appl. Decl. ¶ 15; Larsen Reply Decl.<sup>12</sup>, ¶¶ 10-41.) The first category involves policyholder-initiated lawsuits, arbitrations, and appeals initiated in the Department's Administrative Hearing Bureau. These policyholders allege the RPA's illegality and seek

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<sup>11</sup> Over-reserving occurs when an insurer holds more funds in reserve than its estimate of future loss payments related to an individual claim rather than disbursing the excess funds to the policyholder. (See Muzzarelli Reply Decl. ¶ 42.)

<sup>12</sup> Cynthia Larsen is a California attorney and counsel of record for the Conservator.

1 to cancel their policies, thereby receiving a refund of their excess premium. (Holloway Plan Appl. Decl.  
2 ¶ 15; Lichtenegger Plan Appl. Decl. ¶¶ 6, 25; Larsen Reply Decl. ¶ 19.) The Commissioner argues that  
3 policyholders have been compelled into litigation to receive their refunds because AUCRA leveraged  
4 its discretion under the RPA to retain excess premiums. (Lichtenegger Plan Appl. Decl. ¶¶ 18, 22, 33.)  
5 Once policyholders receive awards in their favor, CIC and affiliates then pursue costly and lengthy  
6 appeals against those awards. (See Lichtenegger Plan Appl. Decl. ¶¶ 37, 51; Larsen Reply Decl. ¶¶ 17,  
7 19, 23-26, 29.) The second category consists of the cross-complaints which AUCRA has filed in the  
8 first category of cases in order to enforce the RPA's terms, despite Court of Appeal precedent that has  
9 concluded that the RPA is illegal. (Lichtenegger Plan Appl. Decl. ¶ 6; Larsen Reply Decl. ¶¶ 14-15; see,  
10 e.g., *Luxor Cabs, supra*, 30 Cal.App.5th at 986; *Nielsen, supra*, 22 Cal.App.5th at 1118; *Jackpot*  
11 *Harvesting, Inc. v. AUI* (2019) 33 Cal.App.5th 719 (*Jackpot*)). CIC has also filed parallel cross-  
12 complaints alongside AUCRA to enforce underlying guaranteed-cost policies in the event that the  
13 EquityComp RPA is found unenforceable. (Lichtenegger Plan Appl. Decl. ¶ 6.)

14 The third category of litigation concerns parallel litigation initiated by AUI in Nebraska to  
15 enforce promissory notes signed by policyholders who could not afford the charges imposed by the  
16 RPA. (Lichtenegger Plan Appl. Decl. ¶¶ 6, 47, 49; Larsen Reply Decl., ¶¶ 23-27, 37.) Although these  
17 cases are almost always dismissed for lack of personal jurisdiction, the Commissioner argues that the  
18 threat of costly litigation has deterred policyholders from asserting the illegality of the RPA.  
19 (Lichtenegger Plan App. Dec., ¶¶ 46-47; Larsen Reply Dec., ¶ 37.)

#### 20 **D. CIC's Attempted Merger Into a New Mexico Affiliate**

21 The Ninth Circuit has summarized the procedural history of this attempted merger as follows:

22 In January 2019, Steven Menzies, as Chief Executive Officer of Applied Underwriters,  
23 Inc. and as President of CIC I, entered into an agreement with Berkshire Hathaway to  
24 purchase Berkshire's controlling interest in CIC I (the "Agreement"). The Agreement  
included a \$50 million "breakup fee" were the transaction not consummated by  
September 30, 2019.

25 California Insurance Code § 1215.2(d) requires the California Insurance Commissioner  
26 to approve any sale (or merger) of a controlling interest in an admitted California insurer,  
and further provides the Commissioner with 60 days to approve or disapprove such  
27 transactions upon submission of the information concerning the transaction required by  
§ 1215.2(a). These required submissions are known as "Form A" submissions. On April  
28 9, 2019, Menzies, acting on behalf of CIC I, submitted to the California Department of  
Insurance ("CDI") his first "Form A," which detailed the proposed Agreement and  
sought official approval. However, upon review, the CDI requested further information  
concerning the Agreement, requiring Menzies to withdraw the first Form A submission

1 and to submit a second Form A on June 12, 2019. After this second Form A submission  
2 was found unsatisfactory, Menzies submitted his third (and final) Form A submission  
concerning the Agreement on September 7, 2019.

3 When it became clear the Agreement would not be approved by the Commissioner in  
4 time to avoid the \$50 million "breakup fee," Menzies attempted to avoid the California  
5 regulatory process altogether by consummating the Agreement without CDI approval.  
6 Menzies sought to effect a merger (the "Merger") between CIC I, which he now  
purported to control, and a newly-formed New Mexico corporation, Appellant California  
Insurance Company ("CIC II"). This newly formed corporate insurer was not subject to  
California insurance regulations.

7 Menzies negotiated a ten-day Agreement deadline extension with Berkshire, at a cost of  
\$10 million. On October 9, 2019, one day before the extended deadline was set to expire,  
8 the CDI notified Menzies that if the Merger were to be consummated without the  
approval of the CDI, "[CIC I] will cease to exist and [CIC II will be] an unlicensed insurer  
9 [ ] precluded from transacting the business of insurance in California." The uncertain fate  
of the Merger notwithstanding, the Agreement between Berkshire and Menzies closed  
on October 10, 2019, with CIC I becoming wholly owned by Menzies.

10 On November 4, 2019, before the CIC I/CIC II Merger could be completed, and without  
11 notice given to Appellants, the Commissioner filed an ex parte conservation application  
in the Superior Court of San Mateo which sought "an order appointing him as conservator  
12 of [CIC I]." The conservation application was based on the Commissioner's allegation  
that Menzies had not "filed and obtained written approval of the Commissioner" to  
13 consummate the Merger, in violation of California Insurance Code § 1215.2(d).

14 Also on November 4, 2019, again without any notice to Appellants, the Superior Court  
granted the Commissioner's conservation application, appointing California Insurance  
15 Commissioner Ricardo Lara as the Conservator of CIC I. In justifying lack of notice to  
Appellants, the Superior Court explicitly found that the Commissioner has ... established  
16 good cause to believe that the State of California would be prejudiced were it to provide  
respondent advanced notice of this proceeding in that [CIC I] has within its authority  
17 power to at any time complete the ostensible consummation of the transaction, which  
would have the effect of at least forfeiting [CIC I's] certificate of authority, rendering  
18 California policyholders ostensibly insured by an out-of-state insurer without authority  
to transact insurance in California.

19 ....

20  
21 CIC I subsequently contested, unsuccessfully, the grounds upon which the  
conservatorship was instituted. Specifically, on March 12, 2020, CIC I filed an  
22 application to vacate the conservatorship with the Superior Court, arguing that: 1) the  
conservatorship was obtained under false pretenses; 2) the conditions cited for imposing  
23 the conservatorship no longer existed; 3) the Commissioner acted arbitrarily,  
capriciously, and in bad faith; and 4) the conservatorship continues to harm CIC I. After  
24 an August 6, 2020 hearing at which CIC I appeared by counsel, the Superior Court denied  
CIC I's application to vacate the conservatorship on August 11, 2020, for the following  
25 reasons:

26 Respondents attempted to take [CIC I] and its assets out of California via a merger  
27 without adequate protection of policyholders and the public and the  
Conservatorship was ordered on those grounds. Respondents have failed to  
28 demonstrate that the conditions necessitating conservation no longer exist. In  
light of Respondent's prior conduct, the Conservation Order ensures that  
Respondents do not again attempt to take [CIC I] and its assets out of California

1 ... [and] the Commissioner's preference to pursue a Rehabilitation Plan [for CIC  
2 I] is reasonable and sufficient under the circumstances.

3 Following this denial, CIC I filed an application for interlocutory appellate review with  
4 the California Court of Appeal, which was also denied. The record does not demonstrate  
5 whether a writ was sought from the California Supreme Court. On October 19, 2020, the  
6 Commissioner filed a proposed Rehabilitation Plan ("Rehabilitation Plan") with the  
7 Superior Court which articulated the terms he would accept to end the conservatorship  
8 of CIC I. CIC I has refused to accept the Commissioner's stated terms, so the  
9 conservatorship proceedings remain ongoing.

10 After CIC I had unsuccessfully challenged the bases of the conservatorship in state court,  
11 Appellants Applied and CIC II filed separate actions in federal court, asserting causes of  
12 action under 42 U.S.C. § 1983 alleging various constitutional violations ("the federal  
13 actions"). Appellants sought, among other forms of relief, orders "declaring the  
14 Commissioner's actions, as alleged, violate [Appellants'] rights to due process and equal  
15 protection under the Fourteenth Amendment to the United States Constitution."  
16 Appellants also sought orders "directing the Commissioner to take all necessary steps to  
17 end [CIC I's] conservatorship pursuant to California Insurance Code § 1012, and  
18 enjoining the Commissioner from continuing the conservation." The district court  
19 dismissed both actions pursuant to Federal Rule of Civil Procedure 12(b)(1), with each  
20 order holding that the district court lacked jurisdiction to hear the cases under both the  
21 "prior exclusive jurisdiction" rule and the *Younger* abstention doctrine.

22 (*Applied Underwriters, Inc. v. Lara* (9th Cir. 2022) 37 F.4th 579, 585–587, *cert. denied* (2023)  
23 143 S.Ct. 748 [affirming "the district court's dismissal of the federal actions"].)

24 Additionally, on October 7, 2019, the Department received a phone message from the New  
25 Mexico Superintendent's Office informing them that he was going to hold a hearing on approval of the  
26 merger, which he held on October 9, granting a New Mexico Certificate of Authority to CIC II and  
27 approving its acquisition of CIC. (*Id.* at ¶¶ 10, 12 & Exh. A.) CIC points out that Department  
28 representatives attended the New Mexico hearing telephonically and did not object. (Silver Opp. Decl.  
29 ¶¶ 64, 66.) However, the Commissioner explains that under the national system of insurance regulation,  
30 whether or not New Mexico wanted to give its approval to CIC II acquiring CIC, California's  
31 Commissioner would also need to approve the merger. (Reporter's Transcript of Proceedings (RT),  
32 Aug. 23, 2023, 127:13-128:19; § 1215.2.) The merger could not lawfully take place without California's  
33 approval of CIC being acquired, irrespective of New Mexico's approval. (*Ibid.*) The Commissioner also  
34 points out that on the evening of the October 9 hearing, the Department wrote Silver a letter advising

1 him that

2 if the merger by and between CIC and California Insurance Company II is completed  
3 without obtaining the prior approval of the California Insurance Commissioner as  
4 required by California Insurance Code Section 1215.2 and 1011(c), the applicant will be  
5 in violation of California law. Additionally, once the merger is completed, CIC will cease  
to exist and California Insurance Company II, as an unlicensed insurer is precluded from  
transacting the business of insurance in California from and after the effective date of the  
merger unless and until it becomes admitted in California.

6 (Letter dated October 9, 2019, from Department attorney Laszlo Komjathy, Jr. to Jeffrey Silver  
7 regarding CIC Form A, Opp. Compendium, Ex. 86, p. 2.)

8 Following the New Mexico action, Menzies proceeded to close the Berkshire Hathaway buyout  
9 and the acquisition of CIC and other affiliated companies without approval of the California Form A  
10 application. (Holloway Plan Appl. Decl. ¶ 26.) At that point, were CIC to have filed with the California  
11 Secretary of State a certificate of merger, the merger of CIC into CIC II would have been completed  
12 (Conservation Appl. ¶ 13, citing Corp. Code, § 1108, subd. (d)), and CIC's Certificate of Authority to  
13 transact the business of insurance in California would have been revoked by operation of law, in which  
14 case "CIC policyholders in California will be left holding policies of a non-admitted insurer. Since CIC  
15 could not legally service those policies, policyholders, including employees with serious work-related  
16 injuries and other claimants entitled to vital and necessary insurance benefits, may not have recourse to  
17 benefits." (Conservation App., ¶ 11.) The Commissioner therefore sought the Conservation Order under  
18 Insurance Code section 1011, subdivision (c), which authorizes him to take over the business of an  
19 insurer that "has transferred, or attempted to transfer, substantially its entire property or business or,  
20 without consent, has entered into any transaction the effect of which is to merge, consolidate, or reinsure  
21 substantially its entire property or business in or with the property or business of any other person."

22 The next day, the Conservation Order was served on CIC through service on Silver as Secretary  
23 of CIC at the company's offices in Omaha, Nebraska, preventing consummation of CIC's merger into  
24 the New Mexico affiliate and preserving its licensure as holder of a California Certificate of Authority.  
25 (Status Report No. 1 to the Court (July 30, 2020) at 2.)

#### 25 **E. Procedural History of the Conservation**

27 Following issuance and service of the Conservation Order, on January 22, 2020, CIC filed a  
28 Verified Application to Vacate the November 4, 2019, Order Appointing Insurance Commissioner as

1 Conservator. That application was denied by the Court following a hearing on August 6, 2020, and an  
2 Order to that effect was entered on August 11, 2020. On October 2, 2020, CIC petitioned the First  
3 District Court of Appeal for a writ of mandate seeking an order directing this Court to set aside its denial  
4 of the verified application to vacate and seeking an interlocutory stay of the conservation proceedings.  
5 On October 10, 2020, the Court of Appeal denied the request for a stay and directed the Commissioner  
6 to file preliminary opposition to the petition, which the Commissioner filed on November 2, 2020. The  
7 Court of Appeal denied CIC's petition on November 25, 2020. (Order Denying Petition, 11/25/2020,  
8 *California Insurance Company v. Superior Court for the County of San Mateo* (Ct. App. 1st Dist., Div.  
9 4, No. A161049.)

10 On July 30, on the motion of the Commissioner, this Court issued its Order Setting Briefing  
11 Schedule, Hearing Date, and Procedures for Conservator's Application for Order Approving  
12 Rehabilitation Plan (Procedural Order). Pursuant to the Procedural Order, on October 27, 2022, the  
13 Commissioner gave written notice of the conservation to policyholders and other interested parties.  
14 (Notice to Policyholders, Claimants, Creditors, Shareholders, and All Other Persons or Entities  
15 Interested in California Insurance Company in Conservation, 10/27/2020.) The Order set dates for the  
16 Commissioner to file his proposed rehabilitation plan, for CIC to file its opposition, and for the  
17 Commissioner to file a reply. Those dates were revised several times, generally on stipulation of the  
18 parties. On or before January 4, 2021, interested parties filed comments with the Court, as provided by  
19 the Order.

20 In July 2020, CIC served discovery on the Commissioner without seeking leave of Court as  
21 required by ¶ 17 of the Conservation Order. On September 15, 2020, the Court granted the Conservator's  
22 Motion to Enforce, Motion to Quash, and Motion for a Protective Order on that ground. On March 11,  
23 2021, CIC filed a Motion for Leave to Conduct Discovery, which the Court granted on April 26, 2021.

24 On October 29, 2020, CIC filed a special motion to strike the Conservation Application (anti-  
25 SLAPP motion) pursuant to Code of Civil Procedure section 425.16, to which the Commissioner  
26 responded on December 30, 2020, and Respondent filed a reply on January 6, 2021. The Court's Order  
27 Denying Anti-SLAPP Motion to Strike was entered on February 26, 2021.

28 On October 20, 2020, CIC affiliates AUI and ARS filed suit in the United States District Court

1 for the Eastern District of California against the Commissioner, seeking the federal court to enjoin the  
2 Commissioner from continuing the conservation and to end CIC's conservatorship. (*Applied*  
3 *Underwriters, Inc. v. Lara* (E.D. Cal. 2021) 530 F.Supp.3d 914.) A second suit in the same court was  
4 brought by CIC II on January 6, 2021, effectively seeking the same relief against this conservation.  
5 (*California Insurance Company v. Lara* (E.D. Cal. 2021) 547 F.Supp.3d 908.) Both cases were  
6 dismissed by the district court and the Ninth Circuit Court of Appeals affirmed. (*Applied Underwriters,*  
7 *Inc. v. Lara* (9th Cir. 2022) 37 F.4th 579, *cert. denied* (2023) 143 S.Ct. 748.)

8 Pursuant to the Procedural Order, as revised by Court orders, the Application presently before  
9 the Court was timely filed on October 19, 2020. On January 4, 2021, the Court received a Statement in  
10 Support of the Plan by BSA Framing, Inc., Moss Management Services, Inc., Platinum Security, Inc.,  
11 and E.C. Group, Inc.; a Declaration in Support of Approval of the Plan by Ronald A. Groden; and a  
12 Notice of Non-Party Papers by CIC and Declaration by Jeffrey Silver attaching letters of opposition to  
13 the Plan. CIC's Opposition was timely filed on November 10, 2022, to which the Commissioner timely  
14 replied on February 10, 2023. CIC also filed a Request for Leave to File Supplemental Briefing and  
15 Proposed Supplemental Briefing on December 19, 2022. Separately, CIC was granted leave to file a  
16 Sur-Reply dated February 17, 2023, and the Conservator was granted leave to Reply to CIC's Sur-Reply,  
17 which was filed on February 22, 2023.

#### 18 **F. Conduct of CIC's Management During Conservation**

19 Rather than wholly displacing the pre-conservation management, the Commissioner "has  
20 permitted CIC personnel to continue to perform day-to-day operations, subject to the oversight of the  
21 Conservator and his representatives." (Holloway Plan Appl. Decl. ¶ 7.) The Commissioner has described  
22 to the Court several instances in which the CIC management took action that he found to have violated  
23 the Conservation Order, including taking steps to initiate the transfer of CIC policies to an affiliate  
24 (Holloway Reply Decl. ¶¶ 6-7; December 4, 2020, Cease-and-Desist Letter from Joseph Holloway to  
25 Jeffrey Silver (December 2020 Cease-and-Desist Letter), Reply Compendium, Exh. 90) and issuing a  
26 \$20 million uncollateralized loan to one of its affiliates without authorization from the Court or the  
27 Commissioner (Holloway Plan Appl. Decl. ¶ 7). The Commissioner has also advised the Court of issues  
28 regarding CIC's audited financial statements following the sudden resignation of the audit, tax, and



1 consulting firm that served as auditor for a combined independent audit of CIC and its affiliates after  
2 indicating it was unable to obtain “timely and accurate information regarding significant related-party  
3 transactions, including information necessary to determine if receivables with related parties are  
4 collectible and admissible’ and ‘continuing with the engagement would have violated [RSM’s] client  
5 acceptance and retention standards.” (Conservator’s Status Report Regarding Additional Management  
6 Controls (Sept. 30, 2022), at 2-3.)

### 7 **G. The Requests of the States of New York and Connecticut**

8 The initial proposed Plan, filed in 2020, only addressed the disposition of CIC’s California  
9 insurance policies and RPA litigation involving California policyholders. However, in 2022, the States  
10 of Connecticut and New York wrote to the Commissioner to request that CIC policies held by their  
11 residents be included in the assumption reinsurance arrangements of Plan § 2.2. (Conservator’s Notice  
12 of Submission of Requests by the States of Connecticut and New York for Inclusion of Their Policies  
13 in the Rehabilitation Plan, Exhs. A, B.) Both states noted that CIC II is not licensed to transact the  
14 business of insurance in their states, placing policyholders and their employees at risk of losing  
15 insurance coverage when the Merger is completed.

### 17 **STANDARD OF REVIEW**

18 As Conservator, the Commissioner has broad authority to conduct CIC’s affairs in the interest  
19 of the conserved estate, its policyholders, and the public. (Ins. Code §§ 1037, 1043; *State of California*  
20 *v. Altus Finance* (2005) 36 Cal.4th 1284, 1302; *Jones v. Golden Eagle Ins. Corp.* (2011) 201  
21 Cal.App.4th 139, 146.) This authority includes the power to rehabilitate CIC, subject to this Court’s  
22 approval of a rehabilitation plan. (Ins. Code § 1043.) The Court reviews the proposed Rehabilitation  
23 Plan for abuse of discretion, to ensure that the Commissioner exercises the police power of the State in  
24 a manner “reasonably related to the public interest” and is not “arbitrary or improperly discriminatory.”  
25 (*Carpenter v. Pacific Mut. Life Ins. Co. of California* (1937) 10 Cal.2d 307, 331 (*Carpenter*).) A  
26 proposed plan is arbitrary if it is “unsupported by a rational basis, [] contrary to specific statute,  
27 [involves] a breach of the fiduciary duty of the conservator as trustee, or improperly discriminatory.”  
28 (*In re Executive Life Ins. Co. v. Aurora Nat. Life Assurance Co.* (1995) 32 Cal.App.4th 344, 358

1 (*Executive Life*.) This standard requires deference to the Commissioner's "executive judgment" as to  
2 his proposed plan of action given the facts at hand. (*Commercial Nat. Bank v. Sup. Ct.* (1993) 14  
3 Cal.App.4th 393, 398.)

4 The Court notes that in this case, many of the facts cited by the Commissioner are based on  
5 findings in an adjudicatory Department hearing conducted by an administrative law judge in *Shasta*  
6 *Linen*, at which parties were represented, testimony and documentary evidence was received, and  
7 express findings and conclusions were made in a decision the Commissioner designated as precedential.  
8 Such findings provide a rational basis for actions based on them. Legal conclusions are reviewed by the  
9 Court independently, with appropriate deference to the expert agency's construction of the statutes it is  
10 empowered to enforce. (See *PacifiCare Life & Health Ins. Co. v. Jones* (2018) 27 Cal.App.5th 391, 417  
11 ["careful consideration, combined with the Commissioner's expertise in the area, weighs in favor of  
12 according significant deference to the Commissioner's interpretation of [statutory] terms"].)

## 14 ANALYSIS

15 The parties dispute two primary components of the Rehabilitation Plan: Plan § 2.2, which  
16 contemplates a public bid solicitation process for CIC's reinsurer of California policies, and Plan  
17 Schedule 2.6 (incorporated as Plan § 2.6), which empowers CIC's California policyholders to settle their  
18 RPA claims prior to the transfer of their policies to the selected reinsurer. The Court evaluates each  
19 component in turn.

### 20 I. Section 2.2: The Assumption Reinsurance and Administration Agreement

#### 21 A. The Commissioner Has Authority to Reinsure Policies of a Conserved Business

22 As Conservator, the Commissioner may reinsure the business of a conserved company. (Ins.  
23 Code § 1043; see also § 1037, subds. (d) & (e).) Assumption reinsurance agreements are commonly  
24 used in the insurance industry to transfer policies and liabilities from one insurance company to another.  
25 (Holloway Plan Appl. Decl. ¶ 22.) Where a company seeks to withdraw from the California insurance  
26 market, the Insurance Code specifies that a departing insurer must reinsure its policies before exiting  
27 the state. (Ins. Code § 1071.5 ["Every insurer which withdraws as an insurer . . . from this State shall,  
28 prior to such withdrawal, discharge its liabilities to residents of this State . . . [and] shall cause the

1 primary liabilities under such policies to be reinsured and assumed by another admitted insurer.”].) Prior  
2 to cancelling the departing insurer’s California certificate of authority, the Commissioner must examine  
3 the insurer’s books and records to confirm that the insurer has no outstanding liabilities to California  
4 residents or policies which have not been reinsured by an admitted insurer. (*Id.* at § 1072.) While the  
5 Commissioner may waive this requirement in his discretion if a departing company is solvent, he is not  
6 required to do so. (*Ibid.*) Moreover, as federal law reserves to the states the authority to regulate the  
7 business of insurance, the Commissioner may include out-of-state policies in reinsurance agreements  
8 pertaining to a domiciled insurer. (See 15 U.S.C. §§ 1011-1015.)

9 **B. The Assumption Reinsurance Agreement Has a Rational Basis**

10 Exhibit A to the Plan sets out the form of this Assumption Reinsurance Agreement. The  
11 Commissioner will invite qualified insurers to bid on CIC’s in-force policies and the liabilities incurred  
12 under expired policies. Expressions of interest must indicate the financial terms under which the bidder  
13 would agree to assume the portfolio. (Plan § 2.2, subd. (a)(2).) The Commissioner will retain a qualified  
14 actuary to evaluate the accuracy of the information provided. (*Ibid.*) The Commissioner may then  
15 negotiate policy terms before selecting the reinsurer, taking into consideration the interests of  
16 policyholders, creditors, and shareholders consistent with the public interest. (*Id.* at § 2.2, subd. (a)(4).)  
17 Appointment of CIC’s reinsurer will require Court approval. (*Id.* at § 2.2, subd. (a)(7).) Upon Court  
18 approval, the Commissioner will sell CIC’s portfolio to the reinsurer, with net proceeds of the sale going  
19 to CIC. (Plan Appl. at 22.) In exchange for assuming CIC’s liabilities, the reinsurer will receive all  
20 future premiums on active policies plus the unearned premium reserves attributable to future coverage.  
21 (See Muzzarelli Plan Appl. Decl. ¶ 18 [premium reserves are unearned where attributable to future  
22 coverage].) The reinsurer will also be assigned CIC’s rights under third-party reinsurance agreements  
23 which cover CIC’s liabilities that are to be reinsured. (Plan Appl. at 22.)

24 If the Commissioner does not find any prospective insurer to be qualified to reinsure CIC’s  
25 portfolio, the Plan permits the Commissioner to consider any expressions of interest from CIC affiliates.  
26 (Plan Appl. at 21.) CIC has indicated that its affiliate Continental, which is operated by Menzies as  
27 President/CEO and Silver as Secretary, with both individuals serving as Directors (Plan Appl. RJN, Exh.  
28 7), is prepared to assume the portfolio of policies (Holloway Plan Appl. Decl. ¶ 24). The Commissioner

1 has determined that it would be inappropriate to shift CIC's existing policies to Continental, as  
2 Continental and CIC are operated by the same management. (Plan Appl. at 21.) Rather, the  
3 Commissioner would require that applicants who are affiliates of CIC, including Continental, to contract  
4 for claims administration with an independent third-party administrator ("TPA") appointed by the  
5 Commissioner as Conservator. (Plan § 2.2, subd. (a)(3), (a)(5); Holloway Plan Appl. Decl. ¶ 24.) This  
6 requirement is borne of the Commissioner's concerns regarding the integrity of CIC's management and  
7 ongoing claims-handling issues with policyholders. These concerns provide a rational basis for the  
8 assumption reinsurance agreement and TPA described in Plan § 2.2, as discussed further below.

9 **C. The Plan's TPA Provision Is Not Arbitrary.**

10 **1. Substantial Evidence Supports the Commissioner's Concerns Regarding the**  
11 **Integrity of CIC's Management.**

12 California law has long held that "the business of insurance is affected with a public interest,"  
13 and that the state has "an important and vital interest in how insurers operate." (*Carpenter, supra*, 10  
14 Cal.2d at 329.) Accordingly, the Legislature has expressly tasked the Commissioner with evaluating  
15 "[t]he competence, experience, and integrity" of insurance companies' management. (Ins. Code §§  
16 1215.2, subd. (d)(5), 717.) The record reflects the validity of the Commissioner's concerns regarding  
17 CIC's management. Substantial evidence shows that CIC's management routinely evaded the  
18 Commissioner's regulatory authority both pre- and post-conservation.

19 The Insurance Code, in the context of a proposed sale such as Menzies' acquisition of CIC's  
20 controlling interest from Berkshire Hathaway, expressly tasks the Commissioner with evaluating "[t]he  
21 competence, experience, and integrity" of the acquiring company's management. (Ins. Code §§ 1215.2,  
22 subd. (d)(5); 717.) As described above by the Ninth Circuit, CIC proceeded to acquire its controlling  
23 interest from Berkshire Hathaway before the Commissioner could complete his review of the proposed  
24 transaction. In so doing, CIC consciously evaded the Commissioner's regulatory authority and standard  
25 regulatory processes. (*Applied Underwriters, Inc., supra*, 37 F. 4th at 585-85 ["Menzies consummated  
26 the transaction with Berkshire without the Commissioner's approval, and then attempted to bypass the  
27 California insurance regulatory regime altogether by merging CIC I with New Mexico-domesticated  
28 California Insurance Company ('CIC II')".])

29 The record supports the Commissioner's position that CIC's leadership has repeatedly violated

1 the Conservation Order. For example, the Conservation Order broadly prohibits CIC from “transacting  
2 any of the business of CIC,” including the transfer or use of CIC assets, without the “express written  
3 authorization of the Conservator” unless that business “is necessary to continue to administer” in-force  
4 insurance policies in the ordinary course of business. (Conservation Order, Exh. 1 ¶ 15.) However, in  
5 March 2020, CIC made a \$20 million uncollateralized loan to Applied for the development of its new  
6 corporate headquarters in Omaha. (Opening Br. at 17.) The parties do not dispute that CIC completed  
7 this transaction without the Commissioner’s involvement or approval. This loan clearly exceeded the  
8 scope of the Conservation Order, and making the loan without the Commissioner’s knowledge provides  
9 a rational basis for the Commissioner’s concerns regarding CIC’s management.

10 Moreover, in December 2020, the Commissioner learned that CIC had issued letters on behalf  
11 of itself and its affiliates to CIC policyholders, advising them that their CIC policies would be transferred  
12 to Continental in violation of the Conservation Order, forcing the Commissioner to direct CIC to  
13 withdraw the letters and halt the transfer of policies to Continental. (Holloway Reply Decl. ¶ 6; Dec.  
14 2020 Cease-and-Desist Letter, Reply Compendium, Exh. 90.) CIC does not deny that they failed to  
15 obtain the Commissioner’s consent as to these actions, and the experience led the Department to doubt  
16 CIC’s “willingness to deal with the [Commissioner] about such issues in an open manner and in good  
17 faith.” (Holloway Reply Decl. ¶ 9.) The Court cannot find the Commissioner’s concerns about CIC’s  
18 management to be arbitrary or irrational in light of such evidence.

19 Additionally, RSM US LLP, the firm retained by CIC and its affiliates as an independent auditor,  
20 notified the Commissioner in July 2022 that it had withdrawn as auditor because it had been unable to  
21 obtain “timely and accurate information” regarding CIC and the affiliates’ financials. (Conservator’s  
22 Status Report Regarding Additional Management Controls (Sept. 30, 2022) at 2-3.) Following RSM’s  
23 resignation, CIC sought to retain Armanino LLP, which the Department determined was *not* independent  
24 of CIC and its affiliates, to complete the audit. (*Id.* at 4.) Although counsel for Respondents attested  
25 before this Court that Armanino had completed its audit of CIC and the affiliates, the Court has not  
26 received any audited financial statements in evidence. On this record, the Court considers the  
27 Commissioner’s concerns about CIC’s management arising from the absence of an independent audit  
28 rational.

1 CIC argues that the TPA provision is arbitrary because a conservator should “yield[] the control  
2 and direction to the regular officers of the company” where possible. (*Caminetti v. Sup. Ct.* (1941) 16  
3 Cal.2d 838, 843.) The Court finds CIC’s reliance on *Caminetti* unpersuasive. While conservation of a  
4 financially troubled insurer may aim to avoid insolvency and ensure that the company can be returned  
5 to the control of its regular officers, the Insurance Code provides the Commissioner as Conservator with  
6 broad discretion to fashion rehabilitation plans, which may preclude reinstating prior management that  
7 caused the company’s distress. California law does not require a rehabilitation plan to continue to  
8 employ delinquent management of a conserved insurer. Rather, courts have denied the requests of pre-  
9 conservation management to be reinstated after willingly changing their offending business practices  
10 where management has not shown any corresponding change in their state of mind which would  
11 preclude further transgressions. (See *Caminetti v. Guaranty Union Life Ins. Co.* (1942) 52 Cal.App.2d  
12 330, 335 [“To follow to its conclusion appellant’s argument that there could be no hazard to  
13 policyholders so long as the business is solvent would be to sanction the withdrawal of policyholders’  
14 money in the payment of excessive salaries without restriction. This is not the law.”].) The Court finds  
15 that the Commissioner’s concerns regarding CIC’s management are not arbitrary. The Commissioner  
16 has a rational basis for ensuring the independence of the TPA in light of CIC’s management’s conduct.

17 **2. Substantial Evidence Supports the Commissioner’s Concerns Regarding**  
18 **CIC’s Ability to Fairly Treat Policyholders**

19 The Commissioner has insisted on a TPA to administer claims because the RPA has created  
20 perverse incentives for handling claims under workers’ compensation plans. Normally, an insurer tries  
21 to reduce the amount paid out on claims, while the injured employee-claimant seeks a higher payment.  
22 However, the RPA incentivizes the insurer to increase payouts on claims, at the expense of the  
23 policyholders. It is undisputed that under the RPA, unlike in a standard linear retrospective plan, a dollar  
24 paid or reserved on a claim may yield more than a dollar of premium to the insurer. In other words,  
25 overpaying and over-reserving can benefit CIC and harm policyholders. The RPA increases the cost of  
26 claims and therefore the amount of collateral that CIC requires from the policyholder. CIC then enjoys  
27 investment returns on the over-reserved funds. (Muzzarelli Plan Appl. Decl. ¶¶ 21-24, 29; Muzzarelli  
28 Reply Decl. ¶ 41; see also *Shasta Linen, supra*, at 38.)

The evidence before the Court reveals that CIC has, in practice, unfairly applied the RPA in a

1 way to maximize its own benefit at policyholders' expense. Policyholders engaged in RPA litigation  
2 with CIC have repeatedly noted that CIC keeps claims "open" to maximize the investment returns which  
3 CIC derives on those claims. (Lichtenegger Plan Appl. Decl. ¶¶ 33, 56.) The Department, in reviewing  
4 analyses prepared by CIC's actuary, found that "[t]heir analyses, consistent with [the Department's],  
5 found the group to be holding more reserves than their expected losses." ((Muzzarelli Reply Decl. ¶ 42.)  
6 This showing that CIC has kept claims open past the point of unexpected losses raises the inference that  
7 CIC had a policy of over-reserving for profit.

8 CIC has challenged this evidence, highlighting that "[i]n audits performed by the California  
9 Department of Industrial Relations (DIR) in 2013 and 2019, CIC ranked second and fourth in the state,  
10 respectively, in workers' compensation claims handling practices." (Opp. at 42, citing Silver Opp. Decl.  
11 ¶ 81, Exhs. 89-90, & Donegan Opp. Decl.)<sup>13</sup> Ironically, this assertion validates the Commissioner's  
12 concerns. As the Commissioner noted, Respondent's high ratings in DIR audits are entirely consistent  
13 with overpayment of claims because those audits are, by law, conducted to detect *underpayments*, not  
14 overpayments. (Lab. Code, § 129, subd. (a).) Indeed, the DIR reports do not track claims overpayment,  
15 as insurers are assumed to have no reason to overpay claims. (See Opp. Compendium, Exh. 89, at 1 ["Of  
16 foremost importance is the payment of all indemnity owed to the injured worker for an industrial  
17 injury."], Exh. 90, at 2 [same].) Likewise, although CIC correctly notes that Department examinations  
18 of their work did not raise claims handling concerns, the Department's examinations focus on  
19 "identify[ing] and remedy[ing] underpayments." (O'Connell Reply Decl. ¶ 9.) Again, it is not surprising  
20 that, as the Commissioner asserts, an examination to detect underpayments turned up no concerns  
21 regarding overpayment.

22 CIC has also challenged the Commissioner's reliance on specific allegations of claims  
23 mishandling by Lichtenegger to support the TPA. The Court notes that the parties dispute Lichtenegger's  
24 conclusions drawn from his clients' claims files, which are not in evidence as they implicate the right to  
25 privacy. (Lichtenegger Plan Appl. Decl. ¶¶ 8, 60.) The Court accords deference to the Commissioner in  
26 his reliance on Lichtenegger's direct experience with CIC's reimbursement delays. At any rate, evidence  
27 that is in the record corroborates Lichtenegger's assertions. For example, although CIC claims that they

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<sup>13</sup> Michael Donegan is CIC's claims handling declarant.

1 paid Savers \$200,000 in settlement checks in May 2016 (Donegan Opp. Decl. ¶ 26), contemporaneous  
2 communications from a Savers manager show that the claim was not settled as of June 17, 2016.  
3 (Michael Strumwasser Reply Decl. ¶ 10, Exh. A ¶ 4.)<sup>14</sup> The manager recounted that an Applied  
4 employee still “refused to make a settlement offer on this claim and that [their manager] agreed that the  
5 claim was not appropriate for settlement. I recall that I found Applied’s position to be unreasonable  
6 based on my years of experience overseeing workers’ compensation claims, and I remember that the  
7 claim took a long time to settle compared to my experience with similar claims.” (Strumwasser Reply  
8 Decl. Exh. A, ¶ 4.) Other policyholders recounted similar experiences:

9       Our experience with CIC is that there was never any urgency by CIC or its affiliates to  
10       close claims and no clear desire on their part to reduce claims payments, which we came  
11       to conclude was because they could pass high claims costs onto us. As a result, based on  
12       how the RPA operated, we began to receive monthly invoices far higher than anything  
13       we had ever seen before despite having similar claims experiences to what we had in the  
14       past. On two occasions, we received monthly invoices of over one million dollars, and  
15       we had never seen anything close to that with previous insurers, nor have we had such  
16       an invoice with an insurer since we left CIC. With CIC, sometimes our claims would go  
17       down but our monthly invoices continued to go up.

18       (*Id.* at Exh. B ¶ 5.) This all amounts to substantial evidence to support the Commissioner’s  
19       concerns about CIC and its affiliates’ ability to handle claims in a manner that is fair to both claimants  
20       and policyholders. Accordingly, there is a rational basis to include a TPA in the plan in the event that a  
21       CIC affiliate is selected as CIC’s reinsurer.

22       **D. The Commissioner Has A Rational Basis for Denying Continental Priority in**  
23       **Assuming CIC’s Business**

24       CIC proposes that, in lieu of the Commissioner’s competitive bidding process for its reinsurer  
25       described above, the Commissioner should simply transfer CIC’s business to its affiliate Continental, or  
26       at the very least, that Continental “should have a right of first refusal if it is willing to match the highest  
27       bidder to the Conservator.” (Opp. at 46.) CIC maintains that this is necessary because over 85 percent  
28       of its business is in California, and selling that “business to a third party would effectively gut the  
29       company and is directly contrary to the general purpose of conservation proceedings, and the  
30       Conservator’s stated goals.” (*Id.* at 45.) CIC again claims that a rehabilitation plan is supposed to enable  
31       the conserved entity to “resume title and possession of its property and the conduct of its business.”

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<sup>14</sup> Michael Strumwasser is a California attorney and counsel of record for the Conservator.



1 (*Caminetti, supra*, 16 Cal. 2d at 843; Ins. Code § 1012.) The Court may vacate the conservation order  
2 if, after a full hearing, it appears to the court that the grounds for the conservation order no longer exist,  
3 and “that the [conserved entity] can properly resume title and possession of its property and the conduct  
4 of its business.” (Ins. Code § 1012.) However, the “business” contemplated by the Insurance Code is  
5 the operation of an insurance company under a California COA. As CIC has chosen to forfeit their  
6 Certificate of Authority, no rehabilitation plan can preserve its ability to insure its California  
7 policyholders. Under the proposed Plan, regardless of the reinsurer or the proportion of its business  
8 remaining in California, CIC will emerge from conservation with the fair market value of its business  
9 reinsured and with its intellectual property (the talent and knowledge of its management and employees).  
10 As the Commissioner has emphasized, the Plan is not intended to destroy CIC, but to enable CIC to  
11 withdraw from the California insurance market in a manner compliant with the Insurance Code.

12 The Court concludes that there is a rational basis for the Commissioner’s concerns regarding  
13 CIC’s management and their ability to fairly handle claims. The Commissioner has the authority to  
14 require a TPA under the Plan if a CIC affiliate is selected as CIC’s reinsurer. Accordingly, the  
15 Commissioner’s decision to refrain from transferring the policies to Continental, or to give Continental  
16 a right of first refusal, is not an abuse of discretion. Plan § 2.2 as written is reasonably related to the  
17 public interest.

## 18 **II. Schedule 2.6: Settlement of RPA Litigation**

### 19 **A. Applicable Law Empowers the Commissioner’s Resolution of RPA Litigation Via** 20 **Schedule 2.6**

#### 21 **1. The Commissioner as Conservator May Settle Pending and Subsequent** 22 **Litigation of a Company Under Conservatorship**

23 As Conservator, the Commissioner possesses the authority to “compound, compromise or in any  
24 other manner negotiate settlements of claims” against the conserved business “upon such terms and  
25 conditions as the commissioner shall deem to be most advantageous to the estate.” (Ins. Code § 1037,  
26 subd. (c).) The Insurance Code puts forth a “legislative expression of policy favoring claims by  
27 settlement” where “[o]f necessity, if required to satisfy the public interest, the Commissioner possesses  
28 considerable discretion in settling claims.” (*In re Executive Life, supra*, 32 Cal.App.4th at 374-75, 381.)

1 This discretion extends to settlement of claims where “the particular settlement materially contributes  
2 to an appropriate near global settlement which benefits the estate,” so long as the settlement is  
3 “reasonably related to the public interest in rehabilitating the insurer” and is not arbitrary or improperly  
4 discriminatory. (*Id.* at 376, 381.)

5 CIC argues that the Commissioner lacks the power to settle pending RPA litigations because  
6 they are not yet “liabilities” as defined in the Insurance Code. (See Ins. Code § 1071.5 [“Every insurer  
7 which withdraws as an insurer . . . from this state shall, prior to such withdrawal, discharge its liabilities  
8 to residents of this State.”].) In support of this argument, counsel for CIC presented in oral argument an  
9 excerpt from what he identified as “Paper No. 5” of “the statutory accounting principles which govern  
10 the definition of assets and liabilities for insurance companies,” which purportedly stated that reserves  
11 for future losses “are not liabilities because . . . the allegations in a lawsuit don’t meet any of the three  
12 essentials of the definition of liabilities.” (RT Aug. 23, 2023, 10:3-13.) Counsel was apparently referring  
13 to the third criterion, listed on his presentation in court, which requires that “the transaction or other  
14 event obligating the entity has already happened.”

15 However, counsel for CIC misrepresented the authority proffered to support his position.  
16 Counsel for the Commissioner quoted the remainder of the Paper, which provides that such liabilities  
17 include “but [are] not limited to, liabilities arising from policyholder obligations (e.g., policyholder  
18 benefits, reported claims, and reserves for incurred but not reported claims.” (*Id.*, 116:18-117:19.) This  
19 refutes CIC’s argument by clarifying that reported claims and reserves for claims that have not yet been  
20 reported are conventionally treated as liabilities.<sup>15</sup> As CIC is withdrawing from the California insurance  
21 market, the Insurance Code requires CIC to settle outstanding liabilities, such as pending litigation,  
22 before exiting the state. (See Ins. Code 1071.5 [“Every insurer which withdraws as an insurer . . . from  
23 ths State shall, prior to such withdrawal, discharge its liabilities to residents of this State.”].)

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24  
25  
26 <sup>15</sup> “Paper No. 5” was no introduced into evidence or referenced in the parties’ briefing. However,  
27 since CIC’s counsel identified the document as reflecting state law, and since the Commissioner’s  
28 counsel confirmed the authenticity of the full passage, the Court will take judicial notice of the passage  
in its entirety, as represented in the Commissioner’s counsel’s presentation, under Evidence Code  
section 452, subdivisions (b) and (h).

1                   2.       **CIC's Arguments Against The Commissioner's Authority Are Unpersuasive**

2           CIC's contention that Section 2.6 is barred by the June 2, 2017 Shasta Settlement between  
3   CDI, CIC, and AUCRA settling the *Shasta Linen* administrative action disregards the  
4   Commissioner's express reservation of rights:

5                   5. Reservation. Nothing in this Agreement limits the power of the  
6   Commissioner to initiate any legal administrative proceeding, to take any action  
7   permitted by law and to seek and obtain all relief and remedies available  
8   (including any fine or penalties) or to adjudicate the right of others, as otherwise  
9   permitted by law.

10                   (*Shasta Linen* Settlement Agreement at 2.)

11           As the Commissioner correctly argues, CIC cannot plausibly maintain that the  
12   Commissioner is in breach of a contract by taking action that is expressly reserved to him by the  
13   contract. Moreover, the First District has spoken on the good faith dispute recited in the *Shasta*  
14   *Linen* settlement "that [it] is ultimately for the courts to decide . . . as to the remedy authorized  
15   by the California Insurance Code and whether the RPA is void as matter of law under the  
16   California Legislature's comprehensive regulatory scheme and relevant case law." (*Luxor Cabs,*  
17   *supra*, 30 Cal.App.5th at 970, 984 – 987.)

18           CIC also argues that Schedule 2.6 is irrational because CIC's conservation is not  
19   predicated on its insolvency. This position is unfounded. The Insurance Code does not require  
20   a company's insolvency to contemplate the set aside of funds described under Schedule 2.6.  
21   (See Ins. Code §§ 1037, 1043 [outlining non-insolvency related bases for conserving a  
22   company].)

23           CIC's argument that Schedule 2.6 serves no rational basis because the *Shasta Linen*  
24   Settlement approved a "functionally identical" RPA for sale to California employers misstates  
25   the evidence on the record. The Settlement mandated that CIC and affiliates revise the RPA's  
26   marketing materials to contained "improved disclosures in the materials provided by  
27   CIC/AUCRA to potential clients to lessen this chance for misunderstanding." (Muzzarelli Decl.  
28   ¶ 25.) Further revisions to the RPA negotiated between the parties in 2017 required changes in  
  the agreement's calculation methods. (*Id.* at ¶ 28.) Significantly, these revisions also required  
  CIC to value policyholders' accounts annually, limiting CIC's ability to hold onto initial

1 payments and reap the investment income from those funds. (Grodan 2021 Decl. at 11-12, fn.  
2 4.)<sup>16</sup>

3 CIC offers no legal authority for its argument that the Commissioner is usurping the  
4 authority of California's courts. Thus, it is deemed to be without foundation and requires no  
5 discussion. (See *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992)  
6 7 Cal.App.4th 27, 35, superseded by statute on other grounds in *Union Bank v. Sup. Ct.* (1995)  
7 31 Cal.App.4th 573, 583.) The Court will, however, note that the Ninth Circuit confirmed the  
8 centrality of this Court, holding that CIC's affiliates must yield to this Court's prior exclusive  
9 jurisdiction even in civil rights suits brought under federal law. in *Applied Underwriters v. Lara*, which  
10 held that even federal civil rights lawsuits by Respondent's affiliates must yield to this Court's prior  
11 exclusive jurisdiction. (*Applied Underwriters v. Lara, supra*, 37 F.4th at 587, 592-593.)

12  
13 **B. There Is a Rational Basis For Schedule 2.6 in Its Entirety**

14 Schedule 2.6 draws on restitution principles to enable select policyholders to compromise their  
15 claims against CIC. The Commissioner believes this is a fair and equitable process that reflects the rights  
16 of the respective parties and that a substantial majority of eligible policyholders will choose an option.  
17 (Holloway Plan App. Dec., ¶ 27)

18 The options will be available to three groups of policyholders: (1) those engaged in RPA  
19 litigation at the time of the Conservation Order; (2) those against whom CIC believes it has claims for  
20 payments and whom CIC will identify in a Schedule of Subsequent Litigation, with CIC permanently  
21 barred from suing any not listed; and (3) the 10 policyholders who are not currently parties to litigation,  
22 but received notice of the opportunity and have submitted their claims to the Conservator within the  
23 time provided, which has since closed. (Sched. 2.6, art. I, ¶¶ 5, 19, 23, 24, 32, art. VII.) Policyholders  
24 in all three groups will be given the opportunity to resolve the dispute through the three options of  
25 Schedule 2.6.

26 Schedule 2.6 offers three options, all of which are based on individualized calculations of a  
27 "restitution amount," i.e., the amount the policyholder paid CIC minus the amounts it owes under that

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<sup>16</sup> Ronald A. Grodan is a non-party to this litigation.

1 option. The restitution amount may be positive or negative. If it is positive, the policyholder paid CIC  
2 more than it owes under the option, so CIC must pay that amount, with interest, if that option is chosen.  
3 If it is negative, the policyholder paid less than it owes under that option, so the policyholder must pay  
4 that amount to CIC, with interest. (Muzzarelli Plan Appl. Decl. ¶¶ 31-33.)

5 The *Option 1 Restitution Amount* is straightforward: It is simply the amount paid to CIC and its  
6 affiliates minus the amount owed under the CIC guaranteed-cost policy. (*Id.* at ¶¶ 31, 33, 39.)

7 The *Option 2 Restitution Amount* is more complex because Option 2 is based on the cost of a  
8 commercially available retrospective policy. Under such policies, the premium is determined by the  
9 ultimate losses under the policy, which include both paid losses and amounts set aside in reserves on  
10 open claims and on claims not yet reported. Schedule 2.6 prescribes how the losses are calculated from  
11 CIC's data. However, because the propriety and accuracy of claims payments and reserves, which come  
12 from CIC's books, may be disputed, those quantities are subject to review if challenged by a  
13 policyholder. Schedule 2.6 uses the California Retrospective Rating Plan ("Cal Retro") filed by the  
14 Workers' Compensation Insurance Rating Bureau as the commercially available retrospective policy  
15 whose pricing is the standard under Option 2. The Option 2 Restitution Amount is the amount the  
16 policyholder paid minus the premium that would have been charged under the Cal Retro plan. (*Id.* at  
17 ¶¶ 31, 40-44, 47-53.)

18 The *Option 3 Restitution Amount* is the amount paid to CIC minus the amount due under the  
19 RPA. Because the RPA is a retrospective policy, the amount due is determined by the losses under the  
20 policy. Because some policyholders dispute those losses, they may be challenged and reviewed. (*Id.* at  
21 ¶¶ 31, 45-46, 47-53.)

22 Schedule 2.6 outlines its process. First, the Commissioner appoints an Independent Consultant,  
23 who will translate the formulas in Schedule 2.6 into a template to circulate for comments. The  
24 Independent Consultant will then finalize the formula template after receiving and considering  
25 comments. (Sched. 2.6, art. VI.) CIC then submits to the Independent Consultant a data file, conforming  
26 to the template, for each eligible policyholder ("Claimant"), from which the Independent Consultant  
27 calculates the Option 2 Restitution Amount and Option 3 Restitution Amount.<sup>17</sup> The Independent  
28

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<sup>17</sup> The Option 1 Restitution Amount does not depend on the formula template data.

1 Consultant then sends the Commissioner a written Settlement Offer with the three Settlement Amounts,  
2 which the Commissioner tenders to the Claimant, who then has 30 days to select an offer or decline all  
3 of them. (*Id.* at ¶ VI(6).) Alternatively, the Claimant may request review of the paid losses or reserves  
4 by the Independent Consultant (*id.* at art. VII), which extends the time to respond to the Settlement  
5 Offer. (*Id.* at ¶ VI(6).) If the review results in a change in the losses, the Independent Consultant  
6 recalculates the Settlement Offer, from which the Claimant makes its election. (*Id.* at ¶ VII(4).) Each of  
7 the policyholder-specific data elements employed in the calculations—premiums, losses, coverage  
8 periods, payment dates, and so on—come from CIC’s data. (*Id.* at ¶ VI(2), (3).)

9 There is a rational basis for Schedule 2.6 in its entirety. The RPA litigation is related to  
10 the grounds for CIC’s conservation, and substantial evidence supports the Commissioner’s belief  
11 that CIC faces significant liability in RPA litigation. CIC has otherwise failed to show that  
12 Schedule 2.6 is arbitrary or improperly discriminatory.

#### 13 1. The RPA Litigation Is Related to the Grounds for CIC’s Conservation

14 The parties agree that CIC’s conservation arises from its attempted merger with CIC II as  
15 outlined above. They do not agree as to whether CIC’s involvement in RPA litigation incentivized that  
16 merger. CIC argues that the inclusion of Schedule 2.6 renders the Rehabilitation Plan arbitrary and  
17 lacking in a rational basis because the Commissioner did not identify that litigation as grounds for the  
18 conservation in his Ex Parte Application to this Court. The Commissioner disputes that the original  
19 grounds for the conservation limit the provisions of a subsequent rehabilitation plan and still argues that  
20 Schedule 2.6 meets even CIC’s reading of the law.

21 CIC argues that the Commissioner’s discretion to address CIC’s affairs is confined to the  
22 “purposes of the conservatorship proceeding.” (*Caminetti, supra*, 16 Cal.2d at 843.) But that does not  
23 necessarily mean that a rehabilitation plan is limited to the purposes known and pled on the day a  
24 conservation order is sought. The Court may only terminate a conservation after finding, following a  
25 full hearing, that “the ground for the order directing the commissioner to take title and possession does  
26 not exist or has been removed and that the person can properly resume title and possession of its property  
27 and the conduct of its business.” (Ins. Code § 1012.) As such, the Court assesses the pre-conservation  
28 management’s ability to take back the company at the time the company would be *released* from the

1 conservation, not at the time of the order *imposing* the conservation. The RPA litigation clearly  
2 constitutes conduct which the Court must consider prior to terminating CIC's conservation as  
3 contemplated by the Insurance Code.

4 Even under CIC's logic, the RPA litigation provided grounds for the conservatorship. The  
5 Conservation Application referred to CIC's use of "unfiled contract amendments" as an "illegal  
6 scheme," part of CIC's "pattern of flouting California regulatory processes designed to protect  
7 California policyholders." (Conservation Appl. ¶ 17.) These facts form the basis of policyholders'  
8 claims against CIC in RPA litigation. And, as discussed above, CIC's merger with CIC II will not  
9 comply with California law if CIC is able to complete the merger and exist the California insurance  
10 market without settling outstanding liabilities.

11 The Court finds that settlement of RPA litigation is related to the grounds for CIC's conservation.  
12 The Commissioner's decision to settle RPA cases in the conservation is not arbitrary, not lacking in a  
13 rational basis, and not contrary to law.

14  
15 **2. Substantial Evidence Supports the Commissioner's Belief that CIC Faces  
Significant Liability in RPA Litigation**

16 The Commissioner determined that CIC faces significant legal exposure in ongoing and pending  
17 RPA litigation because, in the Department's analysis, the RPA is unlawful and void. (*Shasta Linen*,  
18 *supra*, at 67-68; Code Civ. Proc. §§ 1598, 1608.) While the Court declines to adopt the Commissioner's  
19 legal conclusion, substantial evidence supports the Commissioner's belief that the RPA and related  
20 conduct form the basis for numerous different legal theories of recovery that could jeopardize CIC's  
21 conserved estate.

22 Substantial evidence supports CIC's liability under contract law principles. (See *Jackpot*  
23 *Harvesting, supra*, 33 Cal.App.5th at 735 ["Generally a contract made in violation of a regulatory statute  
24 is void."].) Even if the RPA is unenforceable as a matter of law, California courts have enforced illegal  
25 contracts to avoid unjust enrichment to the defendant drafter. (See, e.g., *Tri-Q, Inc. v. Sta-Hi*  
26 *Corp.* (1965) 63 Cal.2d 199, 219 [enforcement required to "prevent the guilty party from reaping the  
27 benefit of his wrongful conduct, or to protect the public from the future consequences of an illegal  
28 contract"]; *Kyablue v. Watkins* (2012) 210 Cal.App.4th 1288, 1293 [enforcement of illegal contract

1 would prevent a “disproportionately harsh penalty upon the plaintiff.”.) Likewise, substantial evidence  
2 supports CIC’s violation of the implied covenant of good faith and fair dealing, whose breach in the  
3 context of an insurance contract dispute may support punitive damages in a parallel tort action. (See  
4 *Gomez v. Volkswagen of America, Inc.* (1985) 169 Cal.App.3d 921, 927 [“[W]e have emphasized the  
5 ‘special relationship’ between insurer and insured, characterized by elements of public interest,  
6 adhesion, and fiduciary responsibility.”] [quoting *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d  
7 809, 820].) The record before the Court is replete with instances where CIC and its affiliates have  
8 delayed settling open claims to stall distributing funds to policyholders. (Lichtenegger Plan Appl. Decl.  
9 ¶¶ 56-58; Strumwasser Reply Decl., Exh. A ¶ 4 & Exh. B ¶ 5; *Randazzo* Decision, Larsen Decl. Exh. 44  
10 at 13; *Shasta Linen, supra*, at 38 [Applied’s inaction following policyholder’s report of potential fraud  
11 cost policyholder over \$100,000].) Such conduct by a workers’ compensation insurer in administering  
12 a retrospective program is a recognized breach of the covenant of good faith and fair dealing. (See, e.g.,  
13 *California Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 484 [“where a contract confers  
14 on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise that  
15 discretion in good faith and in accordance with fair dealing”]; *Courtesy Ambulance Service v. Superior*  
16 *Court* (1992) 8 Cal.App.4th 1504 [over-reserving may give rise to tort action for breach of covenant of  
17 good faith, exposing workers’ compensation insurer to punitive damages].)

18       There is a rational basis for the Conservator’s conclusion that CIC also faces liability under all  
19 three grounds for relief in California’s Unfair Competition Law (UCL, Bus. & Prof. Code, § 17200 *et*  
20 *seq.*) Under the UCL, insurers may be liable to private plaintiffs for conduct that violates laws other than  
21 the Unfair Insurance Practices Act (UIPA, § 790 *et seq.*; *Zhang v. Sup. Ct.* (2013) 57 Cal.4th 364, 368.)  
22 As outlined in *Shasta Linen*, CIC’s failure to file and secure approval of the RPA in violation of the  
23 Insurance Code may expose CIC to liability under the UCL’s illegality prong. (See *Shasta Linen, supra*,  
24 at 62, 64; Ins. Code §§ 11658, 11735; Cal. Code Regs., tit. 10, §§ 2218, 2268 [requiring filing of forms  
25 and rates and prohibiting use of forms and rates that have not been filed and approved by the  
26 Commissioner].) Subsequent appellate proceedings have found CIC’s conduct unlawful on similar  
27 grounds. (See, e.g., *Jackpot Harvesting, supra*, 33 Cal.App.5th at 736 [“We conclude that the Request  
28 to Bind is such a collateral agreement, triggering section 11658 and Regulations section 2268’s



1 regulatory approval requirement.”]; *Luxor Cabs, supra*, 30 Cal.App.5th at 986; *Nielsen, supra*, 22  
2 Cal.App.5th at 1118; accord *Minnieland Private Day School, Inc. v. Applied Underwriters Captive Risk*  
3 *Assurance Company, Inc.*, 913 F.3d 409, 423 [holding that the RPA is an insurance contract subject to  
4 regulatory approval under Virginia’s insurance laws].) Substantial evidence supports CIC’s potential  
5 liability as to the RPA as an unlawful business practice within the meaning of the UCL.

6       There is a rational basis for the Commissioner’s contention that policyholders can hold CIC  
7 liable for the RPA as an “unfair” business practice under the UCL. (See, e.g., *Daugherty v. American*  
8 *Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 839 “[a]n act or practice is unfair if the consumer  
9 injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition,  
10 and is not an injury the consumers themselves could reasonably have avoided”]; *Smith v. State Farm*  
11 *Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 719 [an unfair policy “offends an established  
12 public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially  
13 injurious to consumers”; *Scripps Clinic v. Sup. Ct.* (2003) 108 Cal.App.4th 917, 940 [an unfair practice  
14 violates a “public policy which is . . . ‘tethered’ to specific constitutional, statutory, or regulatory  
15 provisions.”] [internal citations omitted].)

16       Substantial evidence supports the Commissioner’s conclusion as to CIC’s risk for liability under  
17 the UCL’s unfairness prong. CIC’s use of unfiled, unapproved forms and rates contravenes the  
18 Insurance Code’s filing and public inspection requirement crafted to ensure that employers find  
19 coverage at competitive rates thanks to broad access to filed rate information. (Ins. Code §§ 11735, subd.  
20 (b); 11742, subd. (a).) The transparency-enforcing mechanisms also help protect the state’s workforce  
21 by ensuring benefits are available to employees who are injured or sickened over the course of  
22 employment. (*Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1065.) Other aspects of the RPA  
23 support the Commissioner’s conclusion that the RPA may be an unfair business practice. As previously  
24 noted, policyholders did not receive the RPA until after they were bound into the EquityComp program,  
25 only then realizing that they would have to wait an additional three years following expiration of the  
26 RPA to receive a refund of their excess premium and fees. (*Shasta Linen, supra*, at 34.) Moreover, the  
27 RPA obligated employers to continue depositing collateral until the RPA was terminated on a date to be  
28 determined by AUCRA at its “sole discretion.” (*Id.* at 31-32; Lichtenegger Plan Appl. Decl. ¶ 16.) CIC

1 and affiliates relied on this provision to delay policyholder returns for years, during which time it could  
2 invest those funds and collect the investment income. (*Shasta Linen*, supra, at 31, 35; Lichtenegger Plan  
3 App. Dec., ¶¶ 17-19, 34, 37, 52, 56-58 [detailing cases in which clients had to wait to receive return of  
4 excess funds].) A policyholder anxious to recover its excess funds was, in effect, left with no recourse  
5 aside from litigation, unless it was willing to settle with CIC for amounts far below what it was owed  
6 under the RPA. (Lichtenegger Plan Appl. Decl. at ¶¶ 52, 54.)

7 The Commissioner also determined that CIC faces liability under the UCL's bar on fraudulent  
8 practices. (See *Zhang*, supra, 57 Cal.4th at 380 ["Under the UCL, it is necessary only to show that the  
9 plaintiff was likely to be deceived, and suffered economic injury as a result of the deception."] [citing  
10 *Kwikset Corp. v. Sup. Ct.* (2011) 51 Cal.4th 310, 322].) In *Shasta Linen*, the Commissioner found that  
11 the EquityComp marketing materials prepared by AUI misrepresented the amounts a prospective  
12 policyholder could expect to pay, and other arbitration decisions are in accord. (*Shasta Linen*, supra,  
13 at 27; *Randazzo* Decision, Reply Compendium, Exh. 44 at 11-12.) The Commissioner has concluded  
14 that these practices, among others, give rise to substantial claims under the "fraudulent practices" prong  
15 of the UCL.

16 CIC argues that Schedule 2.6 is unnecessary because courts can assess CIC's liability under any  
17 of the theories at hand, and "[t]here is no evidence anywhere in the record, let alone substantial evidence,  
18 that CIC faces or ever faced material financial liability in connection with the RPA litigation such that  
19 resolution of the RPA litigation through the Plan is necessary for preservation of the conserved estate."  
20 (Opp. at 21:23 – 22:2.) CIC has not provided any legal authority to support its argument that a "material  
21 financial liability" standard should be applied here, so the Court need not consider its argument. (See  
22 *Do It Urself*, supra, 7 Cal.App.4th at 35 "[a] point which is merely suggested by [a party's] counsel,  
23 with no supporting argument or authority, it deemed to be without foundation and requires no  
24 discussion." [internal citations omitted].) CIC's argument that Schedule 2.6 represents a global  
25 settlement which precludes CIC from asserting appropriate defenses to outstanding RPA litigation is  
26 likewise unavailing. CIC has not raised any across-the-board defenses which it has, or could have,  
27 raised. Such an argument therefore appears to be another tactic through which CIC seeks to disregard  
28 its obligation under the Insurance Code to discharge its liabilities to California residents prior to

1 withdrawing from the California insurance market at the conclusion of this conservatorship. (See Ins.  
2 Code § 1071.5 [noting that this obligation applies to every withdrawing insurer].)

3 Given the breadth of the UCL and the evidence of acts and omissions by CIC and its affiliates  
4 that create liability under the UCL violations and breaches of contract, the Commissioner has sought to  
5 settle RPA cases. (Plan Appl. at 32.) The Court does not conclude that the Commissioner's  
6 determinations are arbitrary, lack a rational basis, are contrary to law, or constitute an abuse of  
7 discretion.

### 8 9 **3. Substantial Evidence Shows that CIC Has Made Litigation Onerous for** 10 **Policyholders**

11 As discussed with respect to Plan § 2.2, the Commissioner as conservator possesses the power  
12 to rehabilitate CIC's relationship with its policyholders. Substantial evidence on the record supports the  
13 Commissioner's assertion that CIC has engaged in improper conduct towards its policyholders in RPA  
14 litigation in several ways.

15 There is a rational basis for the Commissioner's conclusion that CIC and affiliates have forced  
16 policyholders to litigate in a number of different forums based on the structure of the RPA's arbitration  
17 provisions. The RPA subjects all disputes to binding arbitration in the British Virgin Islands, under  
18 Nebraska law, and requires that all arbitration awards must be enforced in Nebraska courts. (*Shasta*  
19 *Linen, supra*, at 32, 56.) The Commissioner in *Shasta Linen* described this modification as "extremely  
20 disconcerting since the Insurance Code prohibits the use of arbitration provisions without written notice  
21 to the policyholder that such a provision is negotiable." (*Id.* at 56.) There is evidence that the arbitration  
22 provisions have created obstacles to resolving policyholder disputes in at least two ways. First,  
23 adjudicators have found the arbitration provision unenforceable under Nebraska law, as Nebraska  
24 Revised Statute 25 – 2602.01 forbids arbitration of "any agreement concerning or relating to an insurance  
25 policy." (Final Award in *Applied Underwriters Captive Risk Assurance Company, Inc. v. O'Connell*  
26 *Landscape Maintenance, Inc.*, ICDR Case No. 01-16-0005-0136, dated August 27, 2018, Reply  
27 Compendium, Exh. 85 at 2.) Still, CIC and affiliates sought arbitration of disputes even when the  
28 arbitrators themselves have found that they "do not have jurisdiction to hear the merits of this dispute"  
under governing law. (*Ibid.*) Second, even if a policyholder elected to arbitrate its disputes, some

1 arbitrators nevertheless decided that only the Commissioner had the authority to declare the RPA void.  
2 (See Final Award in *O'Connell Landscape Maintenance, Inc. v. Applied Underwriters Captive Risk*  
3 *Assurance Company, Inc., et al.*, JAMS Case No. 1100084561, dated December 4, 2017, Reply  
4 Compendium, Exh. 83 at 7 [determining that only the Commissioner can claim that the RPA is  
5 unenforceable].) By requiring policyholders to resolve their disputes before an arbitrator, only to have  
6 the arbitration clause be found unenforceable or for the arbitrator to conclude that they cannot decide  
7 the dispute, CIC and affiliates have trapped policyholders in circular litigation at great cost.

8 Substantial evidence also supports the Commissioner's contention that CIC and affiliates have  
9 required policyholders to individually litigate the legality of the RPA. (Lichtenegger Plan Appl. Decl. ¶  
10 27 ["In each and every case on behalf of my client policyholders, AUI, AUCRA and CIC have insisted  
11 on relitigating the illegality of the EquityComp program both before the courts as well in appeals to the  
12 CDI."].) CIC maintains that whether the RPA is void is still an open question (see Opp at 19–21). While  
13 the Court declines to adopt the Commissioner's position as to the illegality of the RPA, the Court notes  
14 that in the years of litigation that ensued following the 2017 *Shasta Linen* Settlement Agreement, not  
15 one California court of appeal or superior court that has considered the RPA has issued any ruling  
16 conflicting with the Commissioner's decision in *Shasta Linen* that the RPA was void and unenforceable  
17 as a matter of law. (Larsen Reply Decl. ¶¶ 9, 13.)

18 Moreover, Nebraska courts have dismissed countersuits by CIC's affiliates for over fifteen years  
19 for lack of jurisdiction over non-Nebraska policyholders. (See, e.g., Order on Defendants' Motion to  
20 Dismiss in *Applied Underwriters Captive Risk Assurance Company, Inc. v. RDR Builders, LP, et al.*,  
21 Dist. Ct. Douglas County, NE, Case No. CI 17-5424, dated March 13, 2018 ("*RDR Order*"), Reply  
22 Compendium, Exh. 59 at 11; *Applied Underwriters, Inc. v. Dinyari, Inc.* (Neb. Ct. App., May 20, 2008,  
23 No. A-07-058) 2008 WL 2231114, at \*7 ["Based on our de novo review, we conclude that [California  
24 policyholder] Dinyari did not have sufficient minimum contacts with Nebraska to satisfy the due process  
25 requirements for the exercise of personal jurisdiction."]; *Applied Underwriters, Inc. v. Emp'r Outsource*  
26 *Serv., Inc.*, 2007 WL 1470454, at \*5 (Neb. Ct. App. May 22, 2007) [Illinois policyholder who executed  
27 payment plan promissory note with AUI did not establish minimum contacts with Nebraska sufficient  
28 to establish personal jurisdiction in Nebraska].) CIC does not dispute that its affiliates regularly sued its

1 California policyholders in Nebraska despite repeated findings of lack of personal jurisdiction.  
2 (Lichtenegger Plan Appl. Decl. ¶ 50; Larsen Reply Decl. ¶¶ 23–27, 37–38; *Applied Underwriters*  
3 *Captive Risk Assurance Co., Inc. v. E.M. Pizza, Inc.* (Neb. Ct. App. 2019) 923 N.W.2d 789 (*E.M.*  
4 *Pizza.*)) Troublingly, AUI appealed every instance where the trial court granted a motion to dismiss, and  
5 all appeals were unsuccessful. (Larsen Reply Decl. ¶ 25; Reply Compendium, Exhs. 56-73.) One  
6 policyholder, O’Connell Landscaping, was sued at least four times in Nebraska (not including an  
7 arbitration action), and each case was dismissed. (Larsen Reply Decl. ¶ 25, 34–38.) The Court need not  
8 conclude that these Nebraska suits were filed to retaliate against policyholders, but the Court finds the  
9 Commissioner’s decision to consider this pattern rational.

10 Commissioner’s counsel characterizes this tactic as a “common practice of CIC and its affiliates  
11 that serves to increase the costs of litigation.” (Larsen Reply Decl. ¶ 17.) There is substantial evidentiary  
12 support for this assertion. Indeed, CIC does not dispute that it has regularly initiated litigation against  
13 California policyholders in Nebraska, nor does it dispute that these actions come at a “tremendous cost[]  
14 to the policyholders.” (Lichtenegger Plan Appl. Decl. ¶ 43.) Neither does CIC dispute that its lengthy  
15 appeals have prolonged the time that it can enjoy the investment income on policyholders’ money.  
16 (*Ibid.*) The record contains evidence that CIC has incentives to prolong litigation through the appellate  
17 process to continue accruing investment income. For example, in the *Barker Management* and *Bayless*  
18 *Engineering* cases, policyholders who agreed to arbitrate their disputes—and who won “substantial”  
19 awards from their respective arbitrators—saw years-long delays in receiving payment. (*Id.* at ¶ 38.) Still,  
20 today, Bayless has yet to receive its award. (*Id.* at ¶ 39; Larsen Reply Decl. ¶ 22, 33; Stephens Opp.  
21 Decl. ¶ 64.) Additionally, after the Ninth Circuit affirmed the federal district court’s confirmation of an  
22 arbitration award against AUCRA for \$550,093 plus interest, AUCRA failed to pay the award, walking  
23 back its promise to post bond as stipulated. (Lichtenegger Plan Appl. Decl. ¶ 38; Larsen Reply Decl. ¶  
24 30; Barzelay Opp. Decl. ¶ 7. Seven weeks later, when CIC entered conservation, CIC’s counsel claimed  
25 that AUCRA could not pay the award because CIC was in conservation. (Larsen Reply Decl. ¶ 30;  
26 Stephens Opp. Decl. ¶ 64.)

27 CIC has objected to the Commissioner’s reliance on the Lichtenegger Declaration. The Court  
28 notes that Lichtenegger’s sworn allegations are consistent with other evidence before this Court,

1 including the Commissioner's own conclusions in *Shasta Linen*, the arbitrator's findings in the  
2 *Randazzo* decision, and sworn statements of the Department's senior casualty actuary. Although CIC  
3 has sought to impeach Lichtenegger, this impeachment evidence does not demonstrate that the  
4 Commissioner abused his discretion or otherwise acted arbitrarily by relying on Lichtenegger's  
5 representations of his own experience. Nor does the Court conclude that it was an abuse of discretion,  
6 irrational, or arbitrary for the Commissioner to consider this aforementioned evidence as indicative of  
7 potentially larger and more endemic issues that demand rehabilitation. A certain amount of disagreement  
8 between insurers and their policyholders is not uncommon, nor is it particularly out of the ordinary to  
9 have those disagreements spill into litigation. But the repetitive and prolonged nature of the RPA  
10 litigation is atypical. CIC does not contend that this litigation is in any way ordinary. The Commissioner  
11 had a rational basis to conclude that CIC's sale of the RPA led to disputes outside the ordinary course  
12 of business between insurance companies and policyholders.

13 The Commissioner additionally has a rational basis for his conclusion that allowing the resolution  
14 of these disputes to continue in the manner that they had been occurring would not be fair and  
15 appropriate to all parties involved. Substantial evidence shows that CIC made resolving disputes  
16 excessively onerous on policyholders in a way that deterred them from actually enforcing their legal  
17 rights. It is consistent with the Commissioner's duty to protect the interests of CIC's estate, its  
18 policyholders, other beneficiaries, and the public by proposing a mechanism for settling this litigation.

#### 19 20 21 **4. CIC Has Otherwise Failed to Show that Schedule 2.6 Is Arbitrary**

22 CIC has offered several arguments against Schedule 2.6. The Court finds each argument  
23 unpersuasive. Schedule 2.6 is not arbitrary, nor is it irrational, as CIC claims.

24 CIC's argument that it has had substantial litigation success is unpersuasive. The  
25 Commissioner's argument in reply that analyzes the litigation successes is more persuasive and  
26 grounded in rational basis:

27 The rosy picture Respondent portrays of its "substantial litigation successes" (Opp. at  
28 16) is incomplete and misleading. As the Declaration of Cynthia Larsen (Larsen Decl.)  
thoroughly documents, Respondent's "victories"—primarily, defeating class  
certification and an unpublished federal decision whose reasoning has been rejected by  
California state courts—are the exception, not the rule [where: (1)] Almost Two Dozen  
California Superior Courts Have Handed Substantive Litigation Defeats to Respondent;

1 [(2)] Unpublished Federal Court Orders Are Not Instructive and Only Confirm the  
2 Benefits of Schedule 2.6; [(3)] Respondent's Losses in Arbitral Forums Far Exceed  
3 Their "Victories"; [and (3)] California Appellate Precedents Make Clear the RPA Is  
4 Unlawful and Void[.]

5 (Reply at 14:15 – 19:4.)

6 First, CIC's citations to cases where it defeated **class certification** are irrelevant here. (Opp. at  
7 17:8 – 18:20; see, e.g., *Pet Food Express, Ltd. v. Applied Underwriters, Inc.* (E.D. Cal., Sept. 12, 2019,  
8 No. 2:16-CV-01211 WBS AC) 2019 WL 4318584, at \*2 ["denied the motion to certify on superiority  
9 grounds"], *Shasta Linen Supply, Inc. v. Applied Underwriters, Inc.* (E.D. Cal., Jan. 29, 2019, No. 2:16-  
10 CV-1211 WBS AC) 2019 WL 358517, at \*6 - \*7 ["the court will deny plaintiffs' motion for class  
11 certification" because manageability and superiority "weigh against class certification"], *Shasta Linen*  
12 *Supply, Inc. v. Applied Underwriters, Inc.* (E.D. Cal., Apr. 17, 2019, No. 2:16-CV-1211 WBS AC) 2019  
13 WL 3244487, at \*2 [denied granting leave to file a renewed motion for class certification where same  
14 issues of manageability and superiority were present "in the context of this newly proposed class"].)

15 Second, CIC's citation to it prevailing on summary judgment of the UCL claim in *Pet Food*  
16 *Express* (Opp. at 18:5-12) is not well taken since on demurrer, a Sacramento Superior Court judge found,

17 Review of *Pet Food Express* has not persuaded this Court to change its tentative demurrer  
18 ruling. There are several reasons for this decision.

19 First, the *Pet Food Express* decision is an unpublished district court decision and not  
20 binding precedent that this Court must follow.

21 Second, *Pet Food Express* addressed related legal issues but not the precise legal issues  
22 set forth in the demurrer, and it addressed these issues in a different procedural posture  
23 from the demurrer in this case. Plaintiffs in this case demur to the First Cause of Action  
24 of the FACC on the ground that the RPA is void and unenforceable as a violation of  
25 Insurance Code section 11658. *Pet Food Express* addressed the lack of evidence of  
26 economic loss to plaintiffs - not an issue raised by this demurrer, which must weigh  
27 allegations rather than consider evidence. *Pet Food Express* also addressed a factual  
28 issue, the marketing of a version of the RPA that was approved by the Insurance  
29 Commissioner, that is not raised by the allegations contained in the First Cause of Action  
30 of the FACC.

31 Third, this Court does not find the manner in which the district court distinguished  
32 *Luxor* and *Nielsen* - essentially confining its interpretation of their holdings to their  
33 precise facts - to be persuasive. Those cases, which by contrast to *Pet Food Express*  
34 squared addressed section 11658, are binding on this Court.

35 (Conserv. Reply Evid., Exh. 29 at 7. See also Reply at 15:22 – 16:5.)

36 Third, CIC's citation to "a favorable judgment in one of the only RPA litigations tried to a

1 California Superior Court” (Opp. at 18:19 – 19:2.) is not well taken. As the Commissioner points out,  
2 CIC’s citation to a Statement of *Intended Decision* in *Roadrunner Management Services, Inc. v. Applied*  
3 *Underwriters, Inc.* (Ventura Sup. Ct. case no. 692017-0049339 -CU-CO-VTA) (“*Roadrunner*”) is not  
4 final. (CIC Evid., Exh. 31.) Notably, CIC admits that this “has not been converted to a final judgment  
5 due to the timing of this conservation and the resulting injunction and stay of litigations.” (Opp. at 19:28,  
6 fn. 6.) As “[a] tentative ruling is, by definition, not final,” the Court declines to accord weight to this  
7 proffered authority. (*People v. Hatt* (2018) 20 Cal.App.5th 321, 324; Reply at 17:26-28, fn. 11) Further,  
8 as the Commissioner argues, “*Pet Food* does demonstrate one salient point: the perils of piecemeal  
9 litigation and its inevitable multiplicity of inconsistent results.” (Reply at 15:6-7.)

10 The Court likewise finds CIC’s assertion of the litigation privilege and constitutional objections  
11 unpersuasive. A conservation is a “special proceeding” (*Applied Underwriters, supra*, 37 F.4th at 589)  
12 that vests the Commissioner with “discretion to settle disputes concerning relative priorities of claimants  
13 in appropriate circumstances.” (*Executive Life, supra*, 32 Cal.App.4th at 370). The Commissioner has  
14 not has exceeded his power to settle claims against a conserved company as Conservator in a way that  
15 violates CIC’s constitutional rights or the litigation privilege. The Court likewise finds CIC’s assertion  
16 that Schedule 2.6 unfairly discriminates against its interests by favoring policyholders without merit.

17 CIC has objected to Schedule 2.6 as applied to its affiliates, claiming that the Insurance Code  
18 only empowers the Commissioner to settle cases pending against the “person” in conservation. (See Ins.  
19 Code § 1037.) The Commissioner has explained that resolving RPA litigation via Schedule 2.6  
20 necessarily involves CIC’s affiliates because they are inextricably intertwined in the RPA scheme and  
21 the subsequent enforcement against policyholders, including as to promissory notes extended by AUI.  
22 (Plan Appl. at 8, 11, 25-26.) Accordingly, the Plan treats these entities as a joint enterprise with shared  
23 identities of interest for purposes of settling suits and claims related to the RPA.<sup>18</sup>

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24  
25 <sup>18</sup> The Commissioner states that entities considered a joint enterprise are also jointly and  
26 severally liable. (See *Gopal v. Kaiser Foundation Health Plan, Inc.* (2016) 248 Cal.App.4th 425, 431  
27 [“Under California law, if [several business] entities are a single enterprise, they are each liable for all  
28 of the acts and omissions of the other components of the enterprise”]; *Toho-Towa Co., Ltd. v. Morgan*  
*Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1108 [“‘single-business-enterprise’ theory is an  
equitable doctrine applied to reflect partnership-type liability principles when corporations integrate  
their resources and operations to achieve a common business purpose”].)



1 The Commissioner's inclusion of CIC's affiliates in this part of the Plan falls squarely within his  
2 authority as Conservator and this Court's jurisdiction, both of which reach non-conserved entities that  
3 share an identity of interest with the conserved estate. (*Garamendi v. Executive Life Ins. Co.* (1993) 17  
4 Cal.App.4th 504, 523.) The Court notes that CIC and its affiliated entities have regularly been treated  
5 as a single enterprise by the Commissioner, trial courts, arbitrators, and California and federal courts of  
6 appeal. (See *Shasta Linen, supra*, at 49-50 [CIC, AUCRA, and AUI are "inextricably intertwined" and  
7 "enmeshed"]; *Nielsen, supra*, 22 Cal.App.5th at 1113-16 [record on appeal supported conclusion that  
8 affiliated entities should be considered together because they were so enmeshed and intertwined]; *Luxor*  
9 *Cabss, supra*, 30 Cal.App.5th at 985-86 [same]; *Applied Underwriters, supra*, 37 F.4th at 592.) CIC  
10 claims that these findings are "inapposite" because they did not apply an "alter ego" test and did not  
11 recite facts that to support piercing the corporate veil. (Opp. at 40.) However, the alter ego doctrine,  
12 which "arises when a plaintiff comes into court claiming that an opposing party is using the corporate  
13 form unjustly and in derogation of the plaintiff's interests" (*Mid-Century Ins. Co. v. Gardner* (1992) 9  
14 Cal.App.4th 1205, 1212), simply has no bearing on whether this Court exercises *in rem* jurisdiction over  
15 the assets of third parties that have an "identity of interests" with the conserved entity, CIC. (*Garamendi*,  
16 17 Cal.App.4th at 516). Indeed, as the Ninth Circuit noted when finding that federal suits by AUI and  
17 CIC II were barred by this Court's prior *in rem* jurisdiction over assets of those CIC affiliates,  
18 "*Garamendi v. Executive Life* [citation] further supports the *in rem* classification here." (*Applied*  
19 *Underwriters*, 37 F.4th at 592.)

20 The Court notes that Schedule 2.6 does not require the affiliates to do anything or pay any  
21 amount. If Schedule 2.6's formulas require payment to a policyholder, *CIC* would make that payment,  
22 *not* the affiliates. (Sched. 2.6 ¶ VI.7.) Likewise, if Schedule 2.6 results in payment by the policyholder,  
23 the policyholder pays *CIC*, after which an eligible affiliate can seek indemnity from *CIC*. And again,  
24 nothing in the Plan affects the ability of *CIC*'s affiliates to pursue relief against *CIC* or *CIC II* once the  
25 Plan is implemented.

26 *CIC*'s objections to specific components of Schedule 2.6 are unpersuasive. *CIC* mischaracterizes  
27 Schedule 2.6 Option 2 as "rewrit[ing]" the RPA based upon an imaginary proxy company. (Opp. at  
28 8, 29.) The Commissioner has a rational basis to rely on an open-market measure for quantum meruit

1 restitution under Option 2, as CIC's own measures of loss-sensitive policies were roughly 33 percent  
2 above market average. (See Reply Compendium, Exh. 92, 238:20-25.) Moreover, as the Commissioner  
3 points out, "a determination of fair market value is necessarily hypothetical." (*Long Beach Memorial*  
4 *Medical Center v. Kaiser Foundation Health Plan, Inc.* (2021) 71 Cal.App.5th 323, 346.) The  
5 Commissioner therefore had a rational basis to conclude that, what matters for purposes of determining  
6 the reasonable market value of a loss-sensitive policy is "the price that a *hypothetical* willing buyer  
7 would pay a *hypothetical* willing seller for the services." (See *id.* at pp. 345-346 [trial court did not err  
8 in jury instruction for quantum meruit claim defining "reasonable value" of services provided as "the  
9 price that a *hypothetical* willing buyer would pay a *hypothetical* willing seller for the services," italics  
10 added].)

11 Finally, with respect to New York's request that the remedies of Schedule 2.6 be made available  
12 to its policyholders engaged in litigation over the RPA, given the Commissioner's oversight, the Court  
13 will not entertain that request at this time. If the Commissioner wishes to propose New York's inclusion,  
14 he may make a subsequent application for amendment of the plan, including citation of authority  
15 showing that Schedule 2.6's remedies represent remedies available under New York law.

## 16 CONCLUSION

17 In light of the Court's determination that the Rehabilitation Plan meets the standard as articulated  
18 in the Standard of Review section above, the Court confirms that:

19 (1) the terms and conditions of this Plan and the other Transaction Documents, and the  
20 transactions contemplated hereby and thereby are enforceable;

21 (2) that this Plan, and the other Transaction Documents are fair, just and reasonable to  
22 Policyholders, creditors, the shareholder of CIC, and the public;

23 (3) that all executory portions of the Transaction Documents are approved and made valid,  
24 binding and enforceable in the event of a future insolvency of CIC; and

25 (4) that the reinsurers of Cedants (other than the Reinsurer) are not prejudiced by and have no  
26 lawful basis to avoid or terminate their contractual obligations to Cedants pursuant to such reinsurance  
27 agreements as a result of the transactions contemplated herein or in the Transaction Documents.

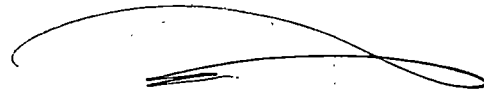
1                                   **ACCORDINGLY, IT IS HEREBY ORDERED THAT**

2           All Objections not otherwise ruled on in this Order are OVERRULED and preserved on appeal.  
3 (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 534.) The Commissioner's Request for Judicial Notice  
4 is GRANTED as to Exhibits 1 -7 and 10 and GRANTED, BUT NOT FOR THE TRUTH OF THE  
5 MATTERS ASSERTED THEREIN, as to Exhibits 8 and 9.

6           The Commissioner's Application and Application for Order Approving Rehabilitation Plan is  
7 GRANTED and the Rehabilitation Plan is adopted as amended. A true and correct copy of the approved,  
8 amended Rehabilitation Plan is attached to this Order as Attachment 1 and incorporated herein by this  
9 reference.

10          The Court's Order Appointing Insurance Commissioner as Conservator and Restraining Orders  
11 remain in full force and effect until expressly lifted or amended by subsequent order of the Court. The  
12 Court shall continue to exercise sole and exclusive jurisdiction over this Rehabilitation Plan and any  
13 claims pending against CIC.

14  
15 Dated: 4-3-2024



\_\_\_\_\_  
Honorable Susan L. Greenberg



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**FILED**

**SAN MATEO COUNTY**

4/3/2024

**Clerk of the Superior Court**

/s/ Alexandrina Ortega

DEPUTY CLERK

**AFFIDAVIT OF MAILING**

Date: 4/3/2024

In the Matter of: INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA

Case No.: 19-CIV-06531

**Document(s)**

**Filed On:**

Final Statement of Decision and Order After Hearing 8-23-23

04/03/2024

I certify that I am a Deputy Clerk of the San Mateo County Superior Court, that I am not a party to this cause, and that the above-listed documents were served upon the persons whose names and addresses are set forth below, on this date in San Mateo County, California, by placing the documents for collection and mailing so as to cause it to be mailed with the United States Postal Service by first class mail in a sealed addressed envelope with postage fully prepaid, following standard court practices. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on: 4/3/2024

Neal I Taniguchi, Court Executive Officer/Clerk

By: /s/ Alexandrina Ortega

Alexandrina Ortega, Deputy Clerk

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