Case No. A158646

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FIVE

DAVE JONES, INSURANCE COMMISSIONER,
Applicant and Respondent,
v.

CASTLEPOINT NATIONAL INSURANCE COMPANY,
Respondent.

Appeal of Non-Parties Alesco Preferred Funding VIII, Ltd., *et al.*,
from
San Francisco Superior Court
Case No. CPF-16-515183
The Honorable Ethan P. Schulman

INSURANCE COMMISSIONER'S RESPONDING BRIEF

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COURT OF APPEAL FIRST **APPELLATE DISTRICT, DIVISION** FIVE

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SUPERIOR COURT CASE NUMBER: CPF-16-515183

APPELLANT/ PETITIONER: Non-Parties Alesco Preferred Funding VIII, Ltd., et al.

RESPONDENT/ REAL PARTY IN INTEREST: ACP Re, Ltd., et al., Ins. Commissioner as Liquidator of CNIC

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party *(name*): CA Ins. Commissioner in his capacity as Liquidator of CNIC

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)		
(2)		
(3)		
(4)		
(5)		

[x] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 27, 2020

Cynthia J. Larsen
(TYPE OR PRINT NAME)

/s/ Cynthia J. Larsen
(SIGNATURE OF APPELLANT OR ATTORNEY)

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APP-008 [Rev. January 1, 2017]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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ATTACHMENT - APP-008, Item 2

Dave Jones v. CastlePoint National Insurance Company
Court of Appeal Case No.: A158646
Superior Court Case Number: CPF1651583

2.a. The remaining assets of CastlePoint National Insurance Company in Liquidation will be distributed by the California Insurance Commissioner as Liquidator to policyholders and other claimants in accordance with the statutory priorities of claims set forth in Insurance Code § 1033 and related provisions of the California Insurance Code.

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The California Insurance Commissioner ("Commissioner"),[1] in his capacity as the statutory Liquidator of CastlePoint National Insurance Company in Liquidation ("CastlePoint"), hereby submits his Responding Brief.

I. INTRODUCTION

The issue presented in this appeal by non-parties Alesco Preferred Funding VIII, Ltd., *et al.*, is whether the Superior Court properly determined that claims they asserted in a New York lawsuit are enjoined pursuant to injunctions previously entered by the Superior Court and releases approved as part of the Commissioner's comprehensive court-approved Plan of Conservation and Liquidation for CastlePoint National Insurance Company (the "CastlePoint Plan" or "Plan"). *Avikian v. Wtc Fin. Corp.* (2002) 98 Cal.App.4th 1108, as well as an extensive body of case law defining the contours of creditor derivative (and double derivative) actions demonstrate definitively that the Superior Court ruled correctly.

Plaintiffs[2] were investors in trust-preferred securities ("TruPS") of certain parent companies of the insolvent insurer CastlePoint, and they brought claims in New York seeking damages for their losses in investment value flowing from the alleged looting and diversion of assets away from CastlePoint. In ruling on Plaintiffs' motion for clarification regarding the applicability of the Superior Court's injunctions, the Superior Court properly determined that the New York claims were based on damages to

[1] Ricardo Lara is the current California Insurance Commissioner, having succeeded Dave Jones in January 2019.

[2] Interested third-party movants, Alesco Preferred Funding VIII, Ltd., *et al.*, are referred to herein as "Plaintiffs" to conform with Appellants' Opening Brief.

CastlePoint and thus were the property of the CastlePoint estate.[3] The Plaintiffs therefore were enjoined from bringing such claims. The ruling of the Superior Court was appropriate and should be affirmed.

As the court-appointed statutory Conservator and Liquidator for the CastlePoint estate, the Commissioner's fundamental charge is to protect estate assets for the benefit of all policyholders and creditors adversely affected by the failure of CastlePoint. The injunctions entered to protect CastlePoint are standard in insolvency proceedings conducted pursuant to Insurance Code section 1010 *et seq.*, and are a crucial tool utilized by the Commissioner to protect the interests of all policyholders and other creditors of insolvent insurers. The injunctions prevent such adverse consequences as interference with the insolvency proceedings, waste of estate assets, costly litigation, and improper preferences. (See Ins. Code § 1020 [authorizing injunctions for such purposes].) The injunctions, in part, preserve estate assets by maintaining the status quo while the Commissioner structures, obtains court approval for, and carries out a plan of conservation, rehabilitation, or liquidation of an insurer for the benefit of policyholders and other creditors in order of their statutory priorities.

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[3] Plaintiffs filed their motion and memorandum of points and authorities in support of same (collectively, "Motion for Clarification") in the Superior Court to request clarification that the standing injunctions entered under the Superior Court's Orders in that proceeding do not prohibit or stay the continued prosecution of the civil action they filed in the Supreme Court of the State of New York, Index No. 655881/2017 (the "New York Action") against the named defendants (the "New York Defendants" or "Defendants"). The Superior Court denied Plaintiffs' Motion for Clarification by Order dated May 16, 2019 ("Order Denying Motion") and denied Plaintiffs' subsequent request for reconsideration by Order dated August 13, 2019 ("Order Denying Reconsideration") (collectively, "Orders"). (Respondent Insurance Commissioner's Appendix ("AA") 549, Order Denying Motion; AA 693, Order Denying Reconsideration.)

A significant feature of the CastlePoint Plan involved releases of the very liabilities that Plaintiffs have sought relief to pursue.[4] In denying Plaintiffs' Motion for Clarification, the Superior Court relied heavily on existing California insurance insolvency law providing that causes of action derived from harm to the insolvent insurer belong only to the Commissioner as Liquidator. (See *Avikian v. WTC Fin. Corp.* (2002) 98 Cal.App.4th 1108 ["*Avikian*"].) The Superior Court properly concluded that Plaintiffs' New York Action would interfere with property of the CastlePoint estate and thus was enjoined under multiple prior orders of the Superior Court, including the Conservation Order[5] (AA 178-79, ¶¶ 7-8), the Plan Order (AA 253, ¶ 16), and the Liquidation Order[6] (AA 50-51, ¶¶ 20-23).

In addition to disputing the applicability of *Avikian*, Plaintiffs attack the Superior Court's ruling that nine of their ten claims in the New York Action are barred by the Superior Court's prior orders as not sufficiently detailed. (Appellants Opening Brief ("AOB") 29.) They complain that, in its nearly seven-page ruling, the Superior Court did not separately identify the injunctions and release language that applied to each claim contained in

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[4] As indicated in the Commissioner's original petition for the Conservation Order, the financial condition of CastlePoint was dire, and the company would inevitably end up in liquidation. (AA 10.) The Conservator therefore promptly sought the Superior Court's approval of a complex and integrated Plan, (RA 195-222), which the Court approved by its Order dated September 13, 2016 ("Plan Order"). (AA 247.)

[5] On July 28, 2016, the Commissioner sought and received from the Superior Court an order placing CastlePoint into conservation ("Conservation Order"). (AA 176.)

[6] The Superior Court's March 30, 2017 Liquidation Order for CastlePoint National Insurance Company, effective as of April 1, 2017, is referred to herein as "Liquidation Order." (AA 45.)

their 99-page New York complaint, which includes 330 numbered paragraphs. (AA 75-174.) This level of detail was neither required nor warranted. After "read[ing] the papers very carefully," including the underlying complaint in the New York Action and even ordering additional briefing, the Superior Court issued its ruling, finding that nine of Plaintiffs' ten claims have their basis in harm done to the insolvent CastlePoint, which resulted in its inability to upstream the funds Plaintiffs had counted on for payments on the investments. (AA 494-99, March 11, 2019 R.T.; AA 550, Order Denying Motion.) Thus, as expanded on below, Plaintiffs have asserted claims belonging to the Commissioner as Liquidator, something which the prior orders of the Superior Court plainly enjoin and release.

Plaintiffs also rely heavily on their argument that the Superior Court gave unlawful deference to the Commissioner's position. (AOB 32-35.) This argument is rebutted by the Superior Court's Order Denying Motion itself. The Superior Court stated that it found the reasoning of the *Avikian* case "particularly persuasive" and, as to the arguments made by Plaintiffs to distinguish *Avikian*, opined that "[n]one, however, is persuasive." (AA 550, 552, Order Denying Motion, at 2:16-17, 4:22.) And, in any event, as discussed in detail below, California law plainly establishes that both the Commissioner and the Superior Court are entitled to deference in administering the estates of insolvent insurers, including with respect to injunctions to protect the assets and administration of the estate, as well as provisions of agreements involving property of the estate or a plan for its liquidation. The Superior Court's consideration of the Commissioner's views was fully in accord with California law, and its Orders should be affirmed.

II. BACKGROUND

A. The Superior Court Entered Multiple Injunctions Authorized by Insurance Code Section 1020 to Protect the CastlePoint Estate During Its Conservation and Liquidation and Authorized the Release of Defendants as Part of the CastlePoint Plan

1. The Superior Court is Authorized to Issue Injunctions to Protect the Estate and Its Beneficiaries

Under California Insurance Code section 1020, a liquidation or conservation court has the power to issue any orders or injunctions requested by the Commissioner during the administration of an insolvent insurance estate to prevent "interference with the commissioner or proceeding" and "[t]he institution or prosecution of any actions or proceedings." (Cal. Ins. Code § 1020 (a), (c).) The injunctions were entered by the Superior Court, acting as Conservation Court and then Liquidation Court of the CastlePoint estate, to preserve assets of the estate from claims and litigation that would diminish estate assets and to otherwise protect the estate from actions that would reduce the ability of the Commissioner to construct and carry out a plan to conserve and liquidate the estate for the benefit of all interested persons. "The fundamental purpose of section 1020 is to preserve the assets of an insolvent insurer for orderly distribution." (*Webster v. Superior Court* (1988) 46 Cal.3d 338, 350 ["*Webster*"].)

2. The Superior Court Approved the Comprehensive Plan and Ordered Multiple Injunctions to Protect the CastlePoint Estate and Approved the Release of Defendants

(a) The Conservation and Liquidation Plan

Contemporaneous with the conservation of CastlePoint, the Commissioner moved quickly to seek approval of the Plan. The Plan

involved a complicated, multifaceted process, including the approval of various transactions and agreements, all designed to preserve the assets of the estate and ensure the efficient and orderly runoff and eventual liquidation of CastlePoint.[7] (RA 4; RA 195.) Of particular relevance to this Responding Brief, the Plan called for CastlePoint to close on a series of integrated transactions and agreements as set forth in the Conservation Agreement.[8]

Pursuant to the Conservation Agreement, $200 million (net of certain advances) was injected into CastlePoint by several Defendants. (RA 5, Motion, p. 2.) This infusion provided CastlePoint with much needed liquidity to ensure that policy claims and benefits would continue to be paid during the conservation period, while the Commissioner prepared for the eventual liquidation of CastlePoint and the resulting transfer of all claims to the appropriate state insurance guaranty associations. The Conservation Agreement also provided for CastlePoint to receive run-off administration services (policy administration and claims administration) free of charge for up to two years, with an estimated value at the time of as much as $40 million. (RA 7, Motion, p. 3.) As part of the consideration for the liquidity infusion and administration services, the Commissioner executed a Release Agreement (as further set out below in Section 2(c)),

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[7] As part of the Plan, undertaken prior to and in anticipation of conservation, CastlePoint became the successor by merger of nine other affiliated insurance company members of the Tower Group that were domiciled in five other states. The other nine insurance companies that merged with and into CastlePoint are referred to as "Constituent Companies." (AA 274.)

[8] The Commissioner sought approval of all transactions described in the CastlePoint Conservation Agreement and each of the appended agreements thereto (collectively, the "Conservation Agreement"), which agreements included the Release Agreement. (RA 4, Motion, p. 1.)

which broadly released Defendants from claims arising from the business of CastlePoint and the Constituent Companies. (RA 147-49, Release Agreement § 1.01.) The releases were further solidified by the Plan Order, which in part enjoined litigation against Defendants without prior approval related to pre-conservation actions and the management or operation of CastlePoint. (See Section 2(b).)

(b) The Court-Approved Injunctions

At the start of CastlePoint's insolvency proceedings, the Conservation Order entered by the Superior Court included certain provisions enjoining any legal proceedings against the property of CastlePoint as well as interfering with the business of the Conservator, without prior approval of the Superior Court. Specifically, the Conservation Order provides as follows:

> All persons are enjoined from instituting, prosecuting, or maintaining any action at law or suit in equity, and matters in arbitration, including but not limited to actions or proceedings to compel discovery or production of documents or testimony…against CastlePoint or against the Conservator, and from attaching, executing upon, redeeming of or taking any other legal proceedings against any of the property of CastlePoint, and from doing any act interfering with the conduct of said business by the Conservator, except after an order from this Court obtained after reasonable notice to the Conservator.

(AA 31-32, Conservation Order ¶ 8.) The Liquidation Order contains a provision that is nearly identical in all pertinent respects to the above paragraph of the Conservation Order, further emphasizing the injunctions applicable to CastlePoint's assets and property:

> All persons are enjoined from instituting, prosecuting or maintaining any action at law or suit in equity (including without limitation

> actions or proceedings to compel discovery or production of documents or testimony, and matters in arbitration)…against CastlePoint or against the Liquidator, and from attaching, executing upon, foreclosing upon, redeeming of, making levy upon, or taking any other legal proceedings against any of the property and/or assets of CastlePoint, and from doing any act interfering with the conduct of said business by the Liquidator, except after an order from this Court entered after notice to the Liquidator of not less than 30 court days . . . .

(AA 289, Liquidation Order ¶ 21; see also AA 290, Liquidation Order ¶ 25 ("[a]ll persons are enjoined from the waste of the assets of CastlePoint.") Under the foregoing provision no actions may be brought seeking the property or assets of the estate.

Of additional note here are the injunctions contained in the Plan Order that prohibit litigation without prior approval of the Superior Court related to the "Retained Liabilities" belonging to CastlePoint and pre-conservation actions relating to the management or operation of CastlePoint and its affiliates prior to the closing of the transactions contemplated by the Plan. As the Superior Court held in its Order Denying Motion, Plaintiffs squarely seek to pursue such enjoined claims against Defendants:

> Except as otherwise provided under the Conservation Agreement or the Conservation Transaction Agreements, all liabilities of CastlePoint of any kind or nature shall be retained by CastlePoint ("Retained Liabilities"). All creditors of CastlePoint and other interested parties (except for the Conservator, the Commissioner, and their affiliates) are hereby expressly enjoined from asserting or prosecuting, without the prior approval of this Court, any legal proceeding against the Michael Karfunkel 2005 Family Trust, AmTrust Financial Services, Inc., National General

> Holdings Corp., or any of their respective affiliates, predecessors, successors, parent companies, shareholders, assigns, officers, directors, agents, attorneys, accountants, auditors, employees or other representatives, any claim arising out of (1) Retained Liabilities, (2) the management or operations of CastlePoint or its affiliates prior to the closing of the transactions contemplated by the Conservation Agreement and the Conservation Transaction Agreements, or (3) the Plan, Conservation Agreement, or Conservation Transaction Agreements. Holders of claims based on any Retained Liabilities shall have recourse only to the assets of CastlePoint in accordance with the statutory priorities under Section 1033.

(AA 254, Plan Order ¶ 22; see also AA 254-55, Plan Order ¶ 23.) This injunction was crafted to uphold the release of Defendants as part of the necessary bargained-for-exchange, and was specifically requested by the Commissioner (then as Conservator) and approved by the Superior Court. (See also Sections 2(a) and 2(c), *post*.)[9]

Despite Plaintiffs' contention to the contrary, the Superior Court's Plan Order was not superseded by the Liquidation Order. The Plan Order was an order to approve a conservation ***and*** liquidation plan, and included therefore both pre-liquidation and post-liquidation provisions.[10] The

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[9] (See AA 251, Plan Order ¶ 9 ["[t]he Conservation and Liquidation Plan and the accompanying Conservation Agreement and Conservation Transaction Agreements are hereby fully and finally approved and enforceable in accordance with the foregoing and in accordance with their provisions, said provisions being hereby incorporated into this Order"].)

[10] (See, e.g., AA 251, Plan Order ¶ 10 ["All transactions contemplated by the Conservation and Liquidation Plan, Conservation Agreement, and Conservation Transaction Agreements, and all integrated agreements, may be immediately consummated, closed, or performed upon entry of this

(continued)

Liquidation Order contains no provisions terminating or otherwise altering the injunctions of the Plan Order in any way.[11] Given the nature and duration of the Plan Order and underlying transactions, the Commissioner did not deem it necessary to include a superfluous provision extending the Plan Order. The Plan Order was intended to, and did, survive the Liquidation Order.

(c) The Court-Approved Releases

In conjunction with the Plan and Conservation Agreement approved in the Plan Order, the Commissioner and CastlePoint executed a Release Agreement, effective as of September 20, 2016, forever releasing and discharging Defendants of any claims in connection with the business of CastlePoint or the Constituent Companies:

> (a) As of the Effective Date, the Conservator, for itself and on behalf of the Company, hereby forever releases and discharges:
>
> (i) The Karfunkel Trust, ACP Re, ANA, AmTrust International, National General, National General Re, Integon, Technology and their Affiliates (other than TGI and its subsidiaries) and their respective past or present

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Order"]); AA 253, Plan Order ¶ 15 ["This Court shall retain jurisdiction of this action to supervise the implementation of the Conservation and Liquidation Plan, to resolve disputes in the manner provided for in the Plan, to adjudicate all third party claims, to make any orders or findings necessary to implement this Order or the Plan"].)

[11] With the shift from conservation to liquidation, the Commissioner included a provision in the Liquidation Order that maintains the injunctions of the Conservation Order: "Unless expressly superseded or amended under this Order, all restraining orders and injunctions set forth in the Court's July 28, 2016, *Order Appointing Insurance Commissioner as Conservator and Restraining Orders* shall remain in full force and effect." (Liquidation Order ¶ 30.)

> predecessors, successors, parent companies, shareholders, assigns, officers, directors, agents, attorneys, accountants, auditors, employees and representatives (together, the "Specified Releasees") from any and all duties, rights, obligations, liabilities, claims and demands of any kind, whether known or unknown ("Claims"), that the Conservator or the Company now has, owns, or holds, or at any time had, owned, or held, or may after the execution of this Agreement have, own, or hold, against any of them in connection with the business or affairs of the Company or the Constituent Companies, except as may arise under the Conservation Agreement, the Conservation Transaction Agreements, the Continuing Agreements or the Acquisition Agreements (as further set forth in Section 1.01(c)); and
>
> (ii) TGI's and its subsidiaries' (including the Company's and the Constituent Companies') respective past or present directors, officers, employees, agents, attorneys, accountants, auditors and other representatives from any and all Claims that the Conservator or the Company now has, owns, or holds, or at any time had, owned, or held, or may after the execution of this Agreement have, own, or hold, against any of them, arising out of any acts or omissions of such persons occurring after the consummation of the Acquisition Transactions in connection with the business or affairs of the Company or the Constituent Companies.

(AA 273-75, Release Agreement, § 1.01.) To the extent that Plaintiffs claim the value of CastlePoint or the Constituent Companies was reduced by any actions undertaken by released parties, such claims belong to the Commissioner and CastlePoint and have been expressly released under this court-approved Release Agreement.

B. Plaintiffs Seek Clarification that the Injunctions and Court-Approved Release Agreement Do Not Apply to Plaintiffs' New York Action

At the direction of the presiding Judge in the New York Action, Plaintiffs brought a Motion for Clarification seeking confirmation from the Superior Court that its Orders do not enjoin their claims in the New York Action. (AA 57-58.) Plaintiffs did not seek either relief from or clarification of the injunctions before filing the New York Action in 2017. Plaintiffs maintain that their claims are outside of the insolvency estate, arguing that they make no claim against CastlePoint or assets of CastlePoint, and that their claims are therefore outside the scope of the insolvency and any Order. (AA 57.)

While Plaintiffs have not sued the CastlePoint estate in New York, they are nonetheless pursing assets there that belong to the CastlePoint estate. The Commissioner explained in the Superior Court proceedings that the claims at issue are therefore enjoined or had been released, and Plaintiffs should not be permitted to pursue those claims in New York or in any other action. Moreover, the beneficiaries of the Release Agreement are entitled to repose with regard to such claims given that they were expressly released as part of a bargained-for-exchange among the Commissioner, CastlePoint, and the Defendants, which was approved as part of the Plan Order. The Commissioner requested that any order of the Superior Court on the Motion for Clarification that allowed the New York Action to proceed also specifically prohibit the Plaintiffs from pursuing such released claims.

C. The Superior Court Denied the Clarification Requested by Plaintiffs, Ruling that Its Injunctions and Court-Approved Release Agreement Apply to Nine of Plaintiffs' Ten Causes of Action in New York

On May 16, 2019, the Superior Court denied Plaintiffs' Motion for Clarification. After reading "the papers very carefully," including the

underlying complaint in the New York Action, holding a hearing on March 11, 2019, and even ordering supplemental briefing, the presiding judge issued his ruling and provided a detailed analysis of his rationale. (AA 494, 495, 514.)[12] "[T]he Court conclude[d] that all of [Plaintiffs'] claims, with the exception of the breach of contract claim against the TruPS Issuers[13], violate the terms of this Court's injunctions and court-approved releases, and may not be pursued by [Plaintiffs]."[14] (AA 555.)

In so ruling, the Superior Court found the holding of the *Avikian* case to be "particularly persuasive" and, as to the arguments made by Plaintiffs to distinguish *Avikian*, opined that "[n]one, however, is persuasive." The Court observed that "[j]ust as in *Avikian,* the gist of [Plaintiffs'] claims in the New York Action is that Interested Parties looted the assets of CastlePoint, the liquidated entity, and their alleged injuries therefore are incidental to CastlePoint's injury." (AA 553, Order Denying Motion, at 5:15-17.) The Court found persuasive the Commissioner's observation from his briefing that "'while [Plaintiffs] frame their tort claims

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[12] "At the hearing, the Parties agreed that the Court's orders should address two issues: (1) the applicability to the causes of action asserted in the New York Action of the releases contained in the Release Agreement, which this Court approved, among other agreements, in the [Plan Order], and (2) the applicability to the New York Action of the injunctions contained in the [Plan Order] and in the Liquidation Order . . . ." (AA 550, Order Denying Motion, at 2:2-11.)

[13] The TruPS were issued through statutory trusts by four holding companies (the "TruPS Issuers").

[14] The Defendants agreed with Plaintiffs that their cause of action for breach of contract could be brought against certain Defendants as neither released nor enjoined because the claim arose from a contractual obligation directly between the issuers of the TruPS and the Plaintiffs, and therefore did not belong to the estate. (AA 550, Order Denying Motion, at fn. 1.)

under different legal theories, they originate from the lack of funds available to pay the TruPS obligations as a direct result of the purportedly improper removal of assets from CastlePoint and the Constituent Companies around 2014 allegedly resulting in their insolvency.'" (AA 553, Order Denying Motion, at 5:17-20.) The Superior Court further agreed with the Commissioner's observation that the Plaintiffs' "'tort claims appear either to have been released by the Commissioner, or to be unreleased claims that still belong to the Commissioner, as conservator and then liquidator of the CastlePoint estate, and are enjoined by the Court's prior orders. Any loss in investment value thereafter suffered by Movants, apart from direct breach of contract claims against Issuers, appears to be 'merely incidental' to claims belonging to the Commissioner for loss of assets belonging to the estate.'" (AA 554, quoting Supplemental Statement, at 3-4.)

The Court found the Commissioner's position to be "significant because of his position as the conservator and liquidator of CastlePoint," recognizing the Commissioner's exclusive authority over claims and assets of CastlePoint pursuant to the Liquidation Order and California Insurance Code. (AA 554, Order Denying Motion, at 6:5-6.) The Court held that "the Commissioner's understanding as to the scope and effect of outstanding injunctions and releases intended to protect the CastlePoint estate (and thereby its policyholders and creditors) is entitled to substantial deference." (AA 554, Order Denying Motion, at 6:19-21.) However, the Superior Court expressly *did not* give dispositive weight to the Commissioner's position. (AA 550, Order Denying Motion, at 2:19-20 ["In reaching this conclusion, the Court also gives considerable (but not dispositive) weight to the Commissioner's current position"].) The Court

conducted its own independent and extensive analysis of the papers and arguments, as well as the *Avikian* case, in reaching its decision.[15]

Following the Superior Court's Order Denying Motion, Plaintiffs filed a motion for reconsideration. (AA 570, 573.) After additional briefing and a hearing, the Superior Court denied Plaintiffs' request for reconsideration on August 13, 2019 (Order Denying Reconsideration). (AA 693.)

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[15] The Superior Court commented in its Order that "the Commissioner's position has evolved somewhat during the course of briefing and hearing on this motion," ultimately taking a "more definitive position." (AA 552-53.) At no point, however, has the Commissioner represented that the Plaintiffs' claims in New York were clear to proceed, and throughout the course of the briefing and argument on this matter has always emphasized that the claims brought by Plaintiffs appeared to be ones that are owned by, or have been released by, CastlePoint. In his original Statement of Position, (AA 369), the Commissioner set forth the high-level, guiding principles upon which the Motion should be resolved, leaving it to the Plaintiffs and Defendants to assist the Court in determining how those principles would be applied to the specific allegations contained in the Plaintiffs' voluminous complaint in New York, involving no less than 52 parties, (AA 75, Complaint), and an extensive volume of allegations and exhibits. As the matter evolved, the Court requested supplemental post-hearing briefing and analysis on the New York claims and the impact of the injunctions and releases. The Commissioner undertook to provide such an analysis in his Supplemental Statement of Position in Response to Motion for Order Clarifying the CastlePoint Stay does not Apply to New York Action ("Supplemental Statement"), which the Court invited, but did not demand, the Commissioner to submit if he desired to do so. (AA 514-521.) In his Supplemental Statement, the Commissioner then limited his discussion to the key points on which the Court sought additional input. (AA 669-75.) The guiding principles enunciated by the Commissioner throughout remained the same, and at the request of the Court, the Commissioner applied those principles to the lengthy Complaint in his Supplemental Statement. The Court in response gave deference to the informed position of the Commissioner in his ruling, granting it weight, but not dispositive weight.

D. Plaintiffs File an Appeal

On August 27, 2019, Plaintiffs filed a notice of appeal, appealing the Superior Court's May 16, 2019 Order Denying Motion and August 13, 2019 Order Denying Reconsideration.[16] Plaintiffs argue that their claims in the New York Action are not subject to any injunctions or releases entered by the Superior Court, and that the Superior Court's Orders should therefore be reversed and the Superior Court be directed to order that the New York Action may proceed.[17]

III. DISCUSSION

A. Standard of Review

The Commissioner's management of insurance insolvencies is subject to an abuse of discretion standard. (See *In re Executive Life Ins. Co. v. Aurora Nat'l Life Assurance Co.* (1995) 32 Cal.App.4th 344, 358 ["*Aurora*"].) Under this standard, the Superior Court evaluates whether the Commissioner's actions were "arbitrary, i.e., unsupported by a rational basis, or [if it is] contrary to specific statute, a breach of the fiduciary duty of the conservator as trustee, or improperly discriminatory." (*Ibid.*; see also

[16] While Plaintiffs' include both the Order Denying Motion and Order Denying Reconsideration within their Notice of Appeal, (AA 696), they concede that the Order Denying Reconsideration is not separately appealable. (AOB 32.) Accordingly, the Commissioner's Reply focuses primarily on Plaintiffs' contentions concerning the Superior Court's Order Denying Motion.

[17] The Commissioner notes that while this appeal has been pending, Plaintiffs have proceeded with their New York Action, filing an amended complaint in New York as to which motions to dismiss are currently pending and beginning discovery. (AOB 13, at fn. 1.) At oral argument on the Motion for Clarification, Judge Schulman indicated that Plaintiffs would be permitted to amend any barred causes of action. (See AA 521-22, March 11, 2019 R.T., at 49:17-50:6 [Superior Court instructing Plaintiffs they could "do whatever [they] need to do in New York," including amending the complaint, pursuant to the New York court's direction].)

Carpenter v. Pac. Mut. Life Ins. Co. of Cal. (1937) 10 Cal.2d 307, 329 ["The only restriction on the exercise of this [police] power is that the state's action shall be reasonably related to the public interest and shall not be arbitrary or improperly discriminatory"].) Trial court decisions are likewise reviewed under the abuse of discretion standard, (see *Baggett v. Gates* (1982) 32 Cal.3d 128, 142-43), by employing the equivalent of the substantial evidence test: accepting the trial court's resolution of credibility and conflicting substantial evidence, and its choice of possible reasonable inferences. (See *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-79.)

Consistent with this standard, granting or denying a motion to "dissolve an injunction is reviewed under the abuse of discretion standard." (*Garamendi v. Executive Life Ins. Co.* (1993) 17 Cal.App.4th 504, 512 ["*Executive Life*"], citing *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286].) An appellate court is required to give "appropriate deference to the [Commissioner's] interpretation of the insurance statutes . . . ." (*Adhav v. Midway Rent A Car, Inc.* (2019) 37 Cal.App.5th 954, 978 ["*Adhav*"]; see also *California Fair Plan Assn. v. Garnes* (2017) 11 Cal.App.5th 1276, 1299 ["*Garnes*"] [affording Commissioner's statutory interpretation "significant deference"].) Where, as here, the trial court determines whether an action against an insolvent insurer's estate should be stayed, that issue is reviewed under an abuse of discretion. (*Webster*, *supra*, 46 Cal.3d at pp. 341, 345.)

B. The Superior Court's Order Denying the Requested Clarification Should be Affirmed

1. In the New York Action, Plaintiffs Seek Recovery Against Persons and Entities Affiliated with CastlePoint for Damages Based on Alleged Looting and Mismanagement of CastlePoint

Plaintiffs are holders of subordinated debt instruments referred to as TruPS. The TruPS were issued by one or more companies that were

previously upstream, non-insurance company affiliates of CastlePoint that were members of a group of companies referred to as "Tower Group." As acknowledged by Plaintiffs in their Complaint in the New York Action, "[t]he Tower TruPS Issuers rely on cash flow generated through their insurance subsidiaries' operations to pay them dividends and have no substantial operations or assets themselves." (AA 146, Complaint ¶ 280.)[18] In the New York Action, Plaintiffs are seeking damages related to payment defaults on the TruPS.

Plaintiffs' claims all fundamentally arise from their allegations that Defendants mismanaged and looted the assets of CastlePoint (which includes the Constituent Companies). While Plaintiffs frame their tort claims under different legal theories, they originate from the lack of funds available to pay the TruPS obligations as a direct result of the purportedly improper removal of assets from CastlePoint around 2014, which allegedly resulted in its insolvency. Plaintiffs' Complaint is overflowing with language and causes of action claiming alleged losses arising from mismanagement and looting. Indeed, as described by Plaintiffs in the very first paragraph of their Complaint, "[t]his action concerns an unlawful scheme . . . [t]he essence of the scheme was to take over an insolvent insurance group, Tower Group, and transfer its valuable business assets to insurance groups controlled by the Karfunkels without the acquiring groups paying or assuming Tower Group's debt obligations." (AA 78, Complaint ¶ 1.) In his Supplemental Statement, the Commissioner further highlighted language from the nine causes of action at issue that make clear this alleged

[18] As Judge Schulman observed at the March 11, 2019 oral argument, "I think its undisputed that these are just holding companies, they don't have any independent assets or operations other than what we're talking about." (AA 499, March 11, 2019 R.T., at 27:13-16.)

looting scheme is the underlying basis of the Plaintiffs' complaints. (AA 532-33, Supplemental Statement at pp. 3-4.)

2. Claims for Damages to CastlePoint Caused by Looting and Mismanagement are (a) Assets of the Estate and (b) Enjoined by the Existing Orders of the Superior Court

(a) Claims for Damages Caused by Looting and Mismanagement are Assets of the Estate

To escape the injunctions applicable to the CastlePoint estate, Plaintiffs attempt to distinguish *Avikian*, contending that their status as creditors of "upstream" companies was improperly considered by the Superior Court. (AOB 51.) Yet, the Superior Court's application of *Avikian* is far from novel; it followed long-standing precedent on derivative actions by creditors of insolvent companies. And *Avikian's* holding applies equally to derivative or "double derivative" actions. Ultimately, Plaintiffs' status as creditors of CastlePoint's former upstream parents offers no relief from the Superior Court's proper application of *Avikian*.

Avikian addresses whether claims brought by shareholders to recover for injury caused to the corporation (an insolvent insurer) are precluded by orders vesting all claims and causes of action of the corporation in the Insurance Commissioner as conservator and liquidator. (*Avikian*, *supra*, 98 Cal. App. 4th at p. 1108.) In *Avikian*, "the gravamen of [plaintiffs] complaints [was] the assertion that defendants mismanaged or looted the assets of [insurer], culminating in its involuntary liquidation." (Id. at p. 1111.) Plaintiffs' argued that they were asserting individual claims against officers of the insurer for the loss in value of their investments, which did not affect the insolvent insurer itself. The *Avikian* court rejected this argument, holding that all of the shareholder plaintiffs' claims were derivative in nature and constituted claims made on behalf of the insolvent insurer, ordering the complaints dismissed. (Id.) The loss in investment

value raised by the individual shareholders in *Avikian* was deemed "merely incidental to the alleged harm inflicted upon [the insurer] and all its shareholders." (*Avikian*, *supra*, 98 Cal. App. 4th p. 1116, emphasis in original.) The trial court's dismissal of the complaints in *Avikian* was affirmed. When the core claim is that defendants mismanaged the insurer and entered into self-serving deals, "those damages are nothing other than a claim of damages to the corporation generally." (Id.)

Plaintiffs acknowledge in their Complaint their status as creditors of direct and indirect shareholders. (AA 143, Complaint ¶ 264.) However, from this status Plaintiffs incorrectly conclude that "upstream entities committed the wrongdoing, and claims by creditors against those upstream entities for torts committed against those creditors cannot be derivative of claims owned by the subsidiary insurance companies." (AOB 52.) Plaintiffs' reasoning contains at least two fundamental errors.

First, Plaintiffs' status as creditors of shareholders, rather than as shareholders as in *Avikian*, provides no logical basis to reject the Superior Court's holding. Plaintiffs overlook caselaw directly linking *Avikian's* premise to shareholders and creditors alike in derivative actions. A corporation's insolvency triggers an expansion of derivative standing, permitting creditors to pursue derivative claims on the same basis as shareholders. (See *Lightsway Litig. Servs., LLC v. Yung (In re Tropicana Entm't, LLC)* (Bankr.D.Del. 2014) 520 B.R. 455, 471 ["[t]he solvency or insolvency of the corporation determines which constituency has the right to pursue a derivative claim . . ."].)[19] The very basis of Plaintiffs' New

[19] The Delaware Supreme Court provided that, "directors owe fiduciary duties to the corporation. When a corporation is *solvent*, those duties may be enforced by its shareholders, who have standing to bring *derivative* actions . . . . When a corporation is *insolvent*, however, its creditors take the place of the shareholders . . . ." (*N. Am. Catholic Educ. Programming*

(continued)

York claims invokes such derivative standing.[20] Accordingly, Plaintiffs' attempt to distinguish *Avikian's* substantially similar factual basis by asserting they "are not shareholders of CastlePoint" is misplaced. (AOB 45.) However characterized, Plaintiffs' causes of action articulate derivative standing arising from harms done to CastlePoint. Once it is determined that Plaintiffs plead derivative claims, regardless of whether pursued by shareholders or creditors, the various fiduciary and tort rights of action for the harms underlying the suit become vested with the Commissioner, as Liquidator of CastlePoint.[21]

Found., Inc. v. Gheewalla (Del. 2007) 930 A.2d 92, 101, emphasis in original]; see also id. at pp. 101-02 ["Consequently, the creditors of an *insolvent* corporation have standing to maintain derivative claims against directors on behalf of the corporation for breaches of fiduciary duties," emphasis in original].)

[20] While Plaintiffs contend their causes of action "are not derivative claims in any legal sense," (AOB 47), their own arguments belie this bare assertion. Indeed, the Superior Court did not err in determining the New York claims are derivative, (AOB 44), but rather reached the *same* conclusion as Plaintiffs. (See AA 143, Complaint ¶ 264 [asserting claims "individually and derivatively"]; id., ¶ 264 [pleading demand futility in support of derivative claims]; AA 148, ¶ 293 [seeking damages "individually and derivatively"]; see also AA 440, Opp. to Mot. to Dis. [contending that "[t]he claims for breach of fiduciary duty are derivative claims of the companies, including the Issuers . . ."]; AA 446 [argument subheading, "Plaintiffs Have Standing to Sue Defendants Derivatively," emphasis omitted]; AA 147, Complaint ¶¶ 286-87 ["Plaintiffs assert their derivative claims as creditors of the Issuers and TGIL . . . Plaintiffs' claims as creditors of the Issuers are asserted as creditors of Delaware companies and Delaware recognizes creditor derivative actions similar to New York"].)

[21] Just as in *Avikian*, any diminution in the value of Plaintiffs' investments due to mismanagement and looting of CastlePoint and the Constituent Companies was incidental to the harm caused to CastlePoint itself by the diminution of its value. (See *Yudell v. Gilbert* (App.Div. 2012) 99 A.D.3d 108, 113-14 ["*Yudell*"] [providing "where shareholders suffer

(continued)

Second, Plaintiffs' contention that "a harm to the shareholders and creditors of one corporation cannot be derivative of claims held by *another* corporation, even if the claims arise from the same fact pattern" is similarly misguided. (AOB 50, emphasis in original.) Plaintiffs ignore that *Avikian's* holding applies equally whether the action is derivative or "doubly derivative." In cases where, as Plaintiffs contend here, the parent corporation "is shown to be incapable of making an impartial business judgment regarding whether to assert the subsidiary's claim . . . a shareholder of the parent will be permitted to enforce that claim on the parent corporation's behalf, that is, double derivatively." (*Villari v. Mozilo* (2012) 208 Cal.App.4th 1470, 1478; see also *Lambrecht v. O'Neal* (Del. 2010) 3 A.3d 277, 281-82 ["[i]n a double derivative suit . . . a stockholder of a parent corporation seeks recovery for a cause of action belonging to a subsidiary corporation . . ."].)

Accordingly, the Superior Court correctly determined that the "result should be no different [from *Avikian*] . . . where, as here, the parties seeking to assert such claims are creditors of shareholders (the Issuers), rather than direct shareholders of the insolvent insurer." (AA 553, Order Denying Motion at 5:11-14.) This holding was in accordance with caselaw establishing that creditor derivative actions, whether or not doubly derivative, are held to the same requirements as shareholder actions generally. (See *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.* (Del. 2011) 34 A.3d 1074, 1079 [noting that in tiered derivative actions, "[a]lthough the terminology used to describe these kinds

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solely through depreciation in the value of their stock, the claim is derivative [ ], even if the diminution in value derives from a breach of fiduciary duty. [ ] Allegations of mismanagement or diversion of corporate assets also plead a wrong to the corporation," citations omitted].)

of multi-tier derivative actions may change . . . the applicable principles of derivative standing remain constant"].)

(b) Claims for Damages Caused by Looting and Mismanagement of CastlePoint are Enjoined by Existing Orders of the Superior Court

Pursuant to Insurance Code section 1020, the reach of the Superior Court's injunctions, which are designed to protect the CastlePoint estate for the benefit of its policyholders and creditors, is extremely broad, at times reaching third-party entities that share only remote identities of interest with the liquidated estate. (See *Executive Life*, *supra*, 17 Cal.App.4th at p. 523 [explaining that liquidation courts have exercised in rem "jurisdiction over . . . contested assets, although they are formally held by an entity that would not be subject to state insolvency proceedings but for its identity of interest with [the insolvent insurer]"; see also id. at pp. 518-19 ["considering the reach of federal bankruptcy jurisdiction . . . bankruptcy courts have jurisdiction over the property of nondebtor third parties . . ."].)[22] To protect estate assets under section 1020, the Superior Court may "properly assert[ ] in rem jurisdiction over the assets of" third parties "to enjoin actions affecting such assets, if such actions would frustrate the ability of the reorganization court to reorganize the debtor or make it impossible to proceed with the plan of reorganization." (*Executive Life Ins. Co.*, *supra*, 17 Cal.App.4th at p. 523.)

Fundamentally, the Plaintiffs' tort claims against the Defendants arise from the underlying allegations of looting of CastlePoint. Plaintiffs

[22] When facing difficult insurance insolvency issues, liquidation courts may consult bankruptcy law for guidance. (*Executive Life Ins. Co.*, *supra*, 17 Cal.App.4th at p. 516 [finding "insolvency proceedings . . . analogous to proceedings in bankruptcy. We thus look to federal bankruptcy law for guidance," citing *Webster*, *supra*, 46 Cal.3d at p. 349, fn. 8].)

asserted in their Motion for Clarification before the Superior Court that the alleged harms they suffered resulted from payment defaults by the Issuers of the TruPS after "Issuers, and related people and entities, participated in a scheme to systematically loot the Issuers of valuable assets and to cause them to default on their indenture obligations." (AA 57, Motion, at 1.) Indeed, while Plaintiffs frame their tort claims under different legal theories, they originate from the lack of funds available to pay the TruPS obligations as a direct result of the purportedly improper removal of assets from CastlePoint and the Constituent Companies around 2014, allegedly resulting in their insolvency.

Apart from the breach of contract claim, which the Superior Court expressly excluded from the injunctions, Plaintiffs identify no harm that they suffered directly that is distinct from the harm suffered by the "whole body" of CastlePoint. (See *In re Syncor Int'l Corp. S'holders Litig.* (Del.Ch. 2004) 857 A.2d 994, 997 ["under *Tooley*,[23] the duty of the court is to look at the nature of the wrong alleged, not merely at the form of words used in the complaint"]; *Dieterich v. Harrer* (2004) 857 A.2d 1017, 1030 ["a claim is not 'direct' simply because it is pleaded that way . . ."].) As a result, any losses in investment value thereafter suffered by Plaintiffs, are "merely incidental" to claims belonging to the Commissioner for loss of

[23] (See *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.* (Del. 2004) 845 A.2d 1031, 1033 [articulating Delaware's test for "determining whether a stockholder's claim is derivative or direct. That issue must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"]; see also *Yudell, supra*, 99 A.D.3d at p. 110 [adopting *Tooley* test in New York]; *Villari v. Mozilo* (2012) 208 Cal.App.4th 1470, 1478 [applying *Tooley* test].)

assets belonging to the estate. (*Avikian, supra,* 98 Cal. App. 4th at p. 1116.)

Just as in bankruptcy proceedings, creditor actions arising out of an insolvency are often owned by the estate as derivative claims, regardless of the specific harm alleged. For example, the *In re Tronox Inc.* bankruptcy court recognized that, even when an underlying harm caused specific injury to a creditor, it "did not put the claims automatically outside the estate," because "every creditor in bankruptcy has an individual claim . . . against the debtor, whether it be in tort, contract, or otherwise." (*In re Tronox Inc.* (2d Cir. 2017) 855 F.3d 84, 103.) *In re Tronox Inc.* recognized that, "often there are claims against third parties that wrongfully deplete the debtor's assets," and because of this, creditors wish to pursue "claims against those third parties to seek compensation for harms done to them by the debtor and secondary harms done to them by the third parties in wrongfully diverting assets of the debtor that would be used to pay the claims of the individual creditor." (Id.) However, classifying such claims as particular to the creditor "overlooks the obvious," namely that "[e]very creditor has a similar claim for the diversion of assets of the debtor's estate. Those claims are general—they are not tied to the harm done to the creditor by the debtor, but rather are based on an injury to the debtor's estate . . . ." (Id. at p. 103-04.) The same holds true for Plaintiffs' claims here.

As the Commissioner noted in his Superior Court briefing, the claims and liability theories asserted by Plaintiffs in the New York Action encroach on claims that are (or were) owned by CastlePoint, including those that were released in exchange for the significant value received by the CastlePoint estate under the Plan. (AA 371, Statement, at 2.) Thus, Plaintiffs' fiduciary and tort claims are either released by the Commissioner or are unreleased claims that still belong to the Commissioner, as Conservator and then Liquidator of the CastlePoint estate, and are enjoined

by the Superior Court's prior orders. Either way, Plaintiffs are prohibited by applicable injunctions and law, including the Plan and Liquidation Orders, (1) from bringing claims that have been released by the Commissioner pursuant to the Release Agreement and (2) from bringing claims against any individual or entity that are still owned by the CastlePoint estate and have not been released.

Thus, the Plaintiffs' predicament is that, to maintain the New York Action, they must assert derivative standing as creditors of an insolvent company. (*N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla* (Del. 2007) 930 A.2d 92, 103 ["*N. Am. Catholic*"] ["we hold that individual *creditors* of an *insolvent* corporation have *no right to assert direct* claims for breach of fiduciary duty against corporate directors. Creditors may nonetheless protect their interest by bringing derivative claims on behalf of the insolvent corporation . . . ," emphasis in original].) Yet in doing so, Plaintiffs necessarily must prove harm first to CastlePoint, ensuring that the asserted claims "belong" to the CastlePoint estate. (*Villari v. Mozilo* (2012) 208 Cal.App.4th 1470, 1477-78 [a "derivative action and any recovery in such an action belong to the corporation"]; see also *N. Am. Catholic*, *supra*, 930 A.2d at p. 102, fn. 43 ["our holding today precludes a direct claim arising out of a purported breach of a fiduciary duty owed to that creditor by the directors of an insolvent corporation"]; *Quadrant Structured Prods. Co. v. Vertin* (Del.Ch. 2014) 102 A.3d 155, 176 [explaining that "the Delaware Supreme Court settled the debate over whether directors of an insolvent corporation owe fiduciary duties directly to creditors . . . creditors of an insolvent corporation may sue derivatively, but they have *no right to assert direct* claims for breach of fiduciary duty against corporate directors," emphasis in original].)

The gravamen of Plaintiffs' complaint is mismanagement that, first and foremost, injured CastlePoint. Because these are by definition

derivative claims, they cannot belong to Plaintiffs. Accordingly, the mechanisms that would confer standing are derivative claims necessarily owned by the Commissioner, in his capacity as Liquidator of CastlePoint. This fact precludes all but Plaintiffs' breach of contract claim in the New York Action.

3. The Superior Court Properly Exercised Its Discretion in Denying the Clarification Sought by Plaintiffs and Did Not Erroneously Defer to the Commissioner

By asserting that the Superior Court engaged in "erroneous deference" to the Commissioner, Plaintiffs hope to cast doubt on the well-founded determination that *Avikian's* holding applies to the New York Action. (AOB 35-36.) In doing so, Plaintiffs falsely depict the Superior Court as having been disengaged from its respective judicial role, repeatedly asserting its supposed failure to undertake "any analysis" on the underlying claims. (AOB 11, 21, 29, 32, 36, 50, 53.) However, Plaintiffs' characterizations of the proceedings below are without basis in fact. While free to disagree with the *outcome* of the Superior Court's analysis, Plaintiffs are flatly wrong to represent that no analysis occurred. Instead, the record clearly shows the Superior Court engaged in a thorough, independent consideration of Plaintiffs' contentions while affording the Commissioner's positions "appropriate deference." (*Adhav*, *supra*, 37 Cal.App.5th at p. 978); see also AA 550, Order Denying Motion, at 2:19-20.)

The Superior Court reached its decision on Plaintiffs' Motion for Clarification only after extensive consideration, including an extra round of briefing requiring a claim-by-claim analysis. During the nearly two-hour hearing on Plaintiffs' Motion for Clarification, the trial judge, having confirmed reading the papers "very carefully," (AA 494, March 11, 2019 R.T., at 22:1), displayed a robust understanding of the multifaceted factual issues arising within Plaintiffs' voluminous Complaint—so much so that

Plaintiffs' counsel found the court's knowledge of the facts "[i]mpressive." (AA 495-96, March 11, 2019 R.T. at 23:16-24:3.) Yet now, Plaintiffs argue that the Superior Court's deference to the opinions of the Commissioner "led directly to the erroneous ruling." (AOB 35.) Specifically, Plaintiffs contend that the "Commissioner's positions changed over time," (AOB 35), thus making the Superior Court's deference improper. Not true.

In truth, at various points during the briefing on their Motion for Clarification, Plaintiffs took substantial liberty with the Commissioner's position, repeatedly spinning it in their favor and out of full context, all while emphasizing the Commissioner's purported agreement with their position.[24] Only upon denial of their motion did Plaintiffs seek to discredit the opinion of the Commissioner. Yet, the Commissioner's preliminary "reticence in expressing a [ ] wholehearted endorsement of one side or the other," (AA 494, March 11, 2019 R.T., at 22:22-25), speaks not to a "vacillat[ing]" position, (AOB 35), but instead supports his initial role in providing guiding principles to the Court and parties, followed by his comprehensive consideration following the Court's invitation.

Additionally, the Commissioner's reticence to take on an advocacy role was warranted in the proceedings below because, as the "party desiring relief," Plaintiffs were charged with carrying the initial burden of showing

[24] (See, e.g., AA 579, Motion for Reconsideration, at 3 (citing to the Commissioner's Rely Brief [AA 270] with no mention of the caveat that the Commissioner "cannot speak . . . to a hypothetical"); AA 383, *Reply Memorandum of Law in Support of Motion for Order Clarifying the CastlePoint Stay Does Not Apply to New York Action*, at 1-2 [improperly claiming "The Commissioner is correct that the New York Action should be permitted to proceed, and the New York Defendants are wrong," "But the Commissioner is right: The New York Action is not barred by the release or any order of this Court, and should be permitted to proceed"].)

entitlement to relief from the Superior Court's injunctions. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 861 ["As a general rule, the 'party desiring relief' bears the burden of proof . . ."]; (*Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1504 [same].)

That the Commissioner arrived at his ultimate position cautiously and deliberately supports the "thoroughness evident in [his] consideration, [and] the validity of [his] reasoning . . . ." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 14.) Accordingly, the Superior Court granted appropriate weight to the Commissioner's position. (AA 554, Order Denying Motion, at 6.) As the Superior Court correctly observed in its Order Denying Motion, "the Commissioner has exclusive authority over claims and other assets of an insolvent insurer's estate," and cited to applicable Insurance Code provisions, including Section 1037(f), which grants the Commissioner the *exclusive* right to "prosecute and defend any and all suits or other legal proceedings . . . ." (AA 554, Order Denying Motion, at 6; Ins. Code §1037(f).) The Superior Court further pointed to the "broad discretion" of the Commissioner to "exercise[] the state's police power to carry forward the public interest and to protect policyholders and creditors of the insolvent insurer." (AA 554, Order Denying Motion, at 6 [quoting *Aurora*, *supra*, 32 Cal.App.4th at p. 356]; see also *State of California v. Altus Finance* (2005) 36 Cal.4th 1284, 1307 ["In the present case, the Commissioner is acting primarily not as regulator but as conservator and trustee, and is given, as discussed, the exclusive authority to act on behalf of the insolvent insurer's policyholders and creditors in civil actions"].) The Superior Court confirmed that the Commissioner is in the best position to opine as to the scope and intentions of his own injunctions and releases, especially in the interest of preserving his exclusive authority over claims belonging to the estate. Thus, and contrary to the contentions of Plaintiffs, these matters fall directly within the

Commissioner's expertise. (*Garnes, supra*, 11 Cal.App.5th at p. 1299 [affording the Commissioner's interpretation on the application of the Insurance Code "significant deference"].)

In sum, the Superior Court's Order Denying Motion was expressly based on full consideration of "the papers filed in support of and in opposition to the Motion, and the arguments of counsel at the hearing . . . ." (AA 550, Order Denying Motion, at 2:12-13.) The Superior Court's Orders interpreting the effect of its injunctions and the releases contained in the Plan were fully supported by applicable law and an appropriate exercise of discretion.

IV. CONCLUSION

For the reasons set forth above, the Commissioner respectfully requests that the Court affirm the Order Denying Motion and the Order Denying Reconsideration entered by the Superior Court.

Dated: August 27, 2020

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the California Insurance Commissioner, pursuant to Rule 8.204(c)(1) of the California Rules of Court, certifies that the Commissioner's Responding Brief contains 6,965 words, as counted by the word count of the computer program used to prepare the brief.

Dated:
August 27, 2020

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Cynthia J. Larsen

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Attorney for California Insurance Commissioner in his capacity as Liquidator of CastlePoint National Insurance Company

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2. a. My [ ] residence [x] business address is *(specify)*:
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   b. My electronic service address is *(specify)*: wpeters@orrick.com
3. I electronically served the following documents *(exact titles)*:
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4. I electronically served the documents listed in 3. as follows:
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   On behalf of *(name or names of parties represented, if person served is an attorney)*:
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Date: August 27, 2020

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APP-009E [New January 1, 2017]

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(Court of Appeal)

APP-009E, Item 4

Dave Jones v. CastlePoint National Insurance Company
Court of Appeal Case No.: A158646
Superior Court Case Number: CPF1651583

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