SUMMONS
(CITACION JUDICIAL)

SUM-100

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE TO DEFENDANT: Ricardo Lara, in his capacity as
(AVISO AL DEMANDADO): Insurance Commissioner of the State of California, California Insurance Company and Applied Underwriters Captive Risk Assurance Company, Inc.

YOU ARE BEING SUED BY PLAINTIFF: Oceanside Laundry, LLC,
(LO ESTÁ DEMANDANDO EL DEMANDANTE): a California limited liability company, dba Campus Laundry, and RDR Builders, Inc., a California corporation,
[See additional page for additional Petitioners]

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (*www.lawhelpcalifornia.org*), the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of $10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case.
¡AVISO! *Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a* continuación

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), *en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.*

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), *en el Centro de Ayuda de las Cortes de California,* (www.sucorte.ca.gov) *o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de $10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.*

The name and address of the court is:
(El nombre y dirección de la corte es):
Superior Court of the State of California
400 McAllister Street

San Francisco, California 94102

CASE NUMBER:
(Número del Caso): CPF-19-516790

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):
Larry J. Lichtenegger, Esq. [SBN 048206] (831) 626-2801 (831)886-1639
Lichtenegger Law Office
3850 Rio Road, #58
Carmel, California 93923

DATE: *(Fecha)* AUG 05 2019 Clerk of the Court Clerk, by *(Secretario)* _____, Deputy *(Adjunto)*

(For proof of service of this summons, use Proof of Service of Summons *(form POS-010).)*
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, *(POS-010)).*

NEYL WEBB

[SEAL] SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN FRANCISCO EUREKA

NOTICE TO THE PERSON SERVED: You are served
1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of *(specify):*
3. ☐ on behalf of *(specify):*

under: ☐ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)
☐ other *(specify):*

4. ☐ by personal delivery on *(date):*

Form Adopted for Mandatory Use
Judicial Council of California
SUM-100 [Rev. July 1, 2009]

SUMMONS

Legal Solutions Plus

Code of Civil Procedure §§ 412.20, 465

SHORT TITLE: Oceanside Laundry, LLC and RDR Builders, Inc., et. al.	CASE NUMBER:

INSTRUCTIONS FOR USE

- This form may be used as an attachment to any summons if space does not permit the listing of all parties on the summons.
- If this attachment is used, insert the following statement in the plaintiff or defendant box on the summons: "Additional Parties Attachment form is attached."

List additional parties *(Check only one box. Use a separate page for each type of party.)*:

[x] Plaintiff [ ] Defendant [ ] Cross-Complainant [ ] Cross-Defendant

DOS REIS, RONALD AND BARBIERI, MARK, d/b/a RDR BUILDERS, INC. and RDR PRODUCTION BUILDERS, INC., a California corporation,

Form Adopted for Mandatory Use
Judicial Council of California
SUM-200(A) [Rev. January 1, 2007]

ADDITIONAL PARTIES ATTACHMENT
Attachment to Summons

Larry J. Lichtenegger, Esq. [CSB #048206]
The Lichtenegger Law Office
3850 Rio Road, #58
Carmel, CA 93923
Telephone: (831) 626-2801
Facsimile: (831) 886-1639
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Attorneys for Petitioners Oceanside Laundry, LLC and RDR Builders, Inc., et. al.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

OCEANSIDE LAUNDRY, LLC, a California limited liability company, dba CAMPUS LAUNDRY, and RDR BUILDERS, INC., a California corporation, DOS REIS, RONALD AND BARBIERI, MARK, d/b/a RDR BUILDERS, INC. and RDR PRODUCTION BUILDERS, INC., a California corporation,

Petitioners and Plaintiffs,

v.

RICARDO LARA, in his capacity as Insurance Commissioner of the State of California,

Respondent and Defendant,

CALIFORNIA INSURANCE COMPANY and APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.,

Real Parties in Interest.

Case No. CPF-19-516790

VERIFIED PETITION FOR WRIT OF ADMINSTRATIVE MANDAMUS

[California Code of Civil Procedure §1094.5; 10 C.C.R §2509.76]

Petitioners Oceanside Laundry, LLC and RDR Builders, Inc., et. al. (herein collectively "Petitioners") petition this Court for a writ of administrative mandamus to seek judicial review of the California Insurance Commissioner's ("Commissioner") actions in two cases in which both Petitioners claim Commissioner violated their rights on the same basis.

Petitioner Oceanside Laundry ("Oceanside") seeks review of the Commissioner's

Amended Order Following Petition for Reconsideration dated July 11, 2019 ("Oceanside Order") in the administrative appeal initiated by Oceanside Laundry against California Insurance Company ("CIC"), entitled *In the Matter of the Appeal of Oceanside Laundry, dba Campus Laundry From the Decision of the California Insurance Company,* File AHB-WCA-17-41 ("Oceanside Appeal"). A true and correct copy of the Order is attached hereto as **Exhibit A.**

Petitioner RDR Builders, Inc., et. al. ("RDR") seeks review of the Commissioner's Amended Order Following Reconsideration dated July 22, 2019 ("RDR Order") in the administrative appeal initiated by RDR against California Insurance Company ("CIC"), entitled *In the Matter of the Appeal of RDR Builders, Inc., et. al. From the Decision of the California Insurance Company,* File AHB-WCA-17-52 ("RDR Appeal"). A true and correct copy of the Order is attached hereto as **Exhibit B.**

Petitioners seek a determination that the Commissioner exceeded his authority when he issued Orders of Stay in each of these matters beyond the regulatory time limit allowing him to do so, then issuing amended orders that were beyond his jurisdiction to make as well as contrary to the admitted evidence. By this verified petition for writ of administrative mandamus ("Petition"), Petitioners request the Court to strike the Amended Orders in their entirety.

I. PARTIES AND REAL PARTY IN INTEREST

1. Petitioner Oceanside is a California limited liability company with its principal place of business in Santa Cruz County, California.

2. Petitioner RDR is a California corporation with its principal place of business in San Juaquin County, California.

3. Respondent Commissioner, Ricardo Lara, is named in his official capacity as Insurance Commissioner of the State of California. The Commissioner is required to follow and apply California Insurance Code and the implementing regulations in a consistent and reasonable manner, to abide by the California Government Code, and to otherwise discharge his duties according to applicable state and federal law.

4. CIC is a real party in interest and an affiliate of Applied Underwriters, Inc. ("Applied") and Applied Underwriters Captive Risk Assurance Co., Inc. ("AUCRA"). CIC is a

California insurance company with its principal place of business in Nebraska and statutory home office in Foster City, California. At all relevant times, CIC has been authorized to transact insurance in California by the California Department of Insurance ("CDI"), including workers' compensation insurance.

5. Applied Underwriters Captive Risk Assurance Co., Inc. ("AUCRA") is a real party in interest and an affiliate of Applied Underwriters, Inc. ("Applied") and CIC. AUCRA is an Iowa corporation with its principal place of business in Nebraska. At all relevant times, AUCRA has been authorized to transact insurance in California by the California Department of Insurance ("CDI"), including workers' compensation insurance.

II. JURISDICTION AND VENUE

6. Petitioners have a right to judicial review of the Orders pursuant to Section 1094.5 of the California Code of Civil Procedure and Section 2509.76 of Title 10 of the California Code of Regulations.

7. Petitioners have exhausted all administrative remedies. This Court has jurisdiction over this action seeking a Writ of Administrative Mandamus pursuant to Section 1094.5 of the California Code of Civil Procedure and Section 2509.76 of Title 10 of the California Code of Regulations.

8. Venue is proper in this Court pursuant to Section 401 of the California Code of Civil Procedure in that this case in being prosecuted against a department of the State of California and the Attorney General of California maintains an office in the County of San Francisco. Venue is also proper in this Court pursuant to Insurance Code Section 12905 in that the Commissioner maintains an office in the County of San Francisco although the Order was issued from the Commissioner's office in the County of Sacramento.

III. FACTUAL BACKGROUND

9. Petitioners were participants in the EquityComp workers' compensation insurance program ("EquityComp"), Oceanside from June 1, 2012 to June 1, 2015 and RDR from December 27, 2014 to December 26, 2016.

10. EquityComp was a three-year program offered by Applied and its affiliates, CIC

and AUCRA. An insured is solicited into EquityComp by Applied Underwriters' Program Proposal and Rate Quotation, and if an employer wants to purchase the insurance, it signs a "Request to Bind" and sends in a check to Applied which binds it into the insurance. When the insured signs on, he has never seen the next documents that are delivered. First, Applied has AUCRA send a Reinsurance Participation Agreement (the "RPA") for the employer to sign. The RPA contains all the payment formula requirements for the insurance payment to AUCRA, but which are fundamentally different from those represented in the Proposal. After the employer signs the RPA, Applied has CIC send a guaranteed cost worker's compensation insurance policy to the employer which has rates that the employer has never seen nor approved and which are also different from the formula for payment requirements under the RPA.

11. As stated, the CIC policies premium calculations are different from the payment requirement under the RPA. However, the CIC policies do not have premium which the employer has to pay because the payment requirements are controlled by the RPA, where in Schedule 1 it says "[t]his Schedule 1 applies as of the Effective Date to all payroll, premium and losses occurring under the Policies ..." which sets forth payment calculations substantially different than those called for in the policies. Thus, the employer never directly pays the CIC policy premiums but only the amounts called for in Schedule 1 of the RPA. In effect, the CIC policies are there only for the benefit of Applied in order to present to the California Insurance Commissioner the appearance of a program that is legal because the CIC policies are the only part of the EquityComp program that are filed for approval.

12. In June 2016, the Commissioner issued a lengthy administrative decision concluding that EquityComp and the RPA violated California insurance laws and was void as a matter of law because Respondents failed to file the RPA with the Commissioner pursuant to Ins. Code §11658. *(Matter of Shasta Linen Supply, Inc.,* Decision & Order (June 20,2016) File No. AHB-WCA-14-31 *("Shasta Linen").)* The First and Fourth District Courts of Appeal have issued decisions finding the arbitration terms in the RPA are also void as a matter of law for the same reasons the Commissioner declared the entire RPA void. *(Luxor Cabs, Inc.* v. *Applied Underwriters Captive Risk Assurance Co.* (December 4, 2018) 30 Cal.App.5th 970 and *Nielsen*

Contracting, Inc. v. *Applied Underwriters, Inc.* (May 3, 2018) 22 Cal.App.5th 1096 and the Sixth District has followed with a determination that the arbitration provision in the Request to Bind was also void as a matter of law, again for the same reason. *(Jackpot Harvesting, Inc.* v. *Applied Underwriters, Inc.* (March 28, 2019) 33 Cal.App.5th 719.

13. Both Petitioners eventually terminated their participation in the EquityComp program and initiated state court proceedings a ruling that the payment formulas in the RPA were not only unconscionable, but the RPA itself was illegal for the same reasons the Commissioner declared the RPA in *Shasta Linen* was illegal. Both Petitioners are seeking the remedy of restitution for the unconscionable and illegal RPA's payment formulas that required them to overpay for the reasonable cost of the insurance.

14. In both state court proceedings, Applied, AUCRA and CIC contend that the ability to declare an insurance program illegal rested solely within the jurisdiction of the Commissioner and filed cross-complaints seeking enforcement of the RPA.

15. In response, both Petitioners brought an administrative appeal under Ins. Code §11737(f) seeking a declaration from the Commissioner that the EquityComp program and its RPA were unlawfully sold to them and consequently then void and unenforceable based on Respondents' failure to file the RPA as a form under Ins. Code 11568 but requested the Commissioner to not comment on available remedies but to leave that to the state courts who had the jurisdiction to provide a proper remedy.

16. Eventually, the RDR appeal was heard on November 16, 2018 and the Oceanside appeal was heard on December 20, 2018. At each of the hearings, the administrative law judge (the "ALJ") announced that two issues would be determined at the hearing:

> "1. Did Respondents misapply their Insurance Code §11735 filings to Appellant by entering into and applying the Reinsurance Participation Agreement?
> 2. If so, what is the appropriate remedy?

17. Both Petitioners objected to the appeal going beyond the issue of the enforceability of the RPA because of the limited nature of the Commissioner's authority to adjudicate common law issues. They contended that the issue of a remedy was more appropriately done before a court of law. [e.g., RDR TR 96:23-97:21] However in an excess of caution, both Petitioners submitted

uncontroverted evidence that they intended to solely purchase a loss sensitive form of workers compensation insurance that would allow them a return of payments if they kept their losses low, that they had no intention of purchasing a guaranteed cost policy, that they never had an opportunity to approve of the rates used in the CIC policies and were never required to nor did they directly pay any of the premiums under the CIC policies. Both Petitioners also presented uncontroverted evidence that they had kept their losses sufficiently low so as to entitle them, under any form of loss sensitive plan, to receive a refund of payments and objected to any order requiring them to pay the CIC policies, claiming that the policies lacked mutuality.

18. Respondents, however, presented evidence that if the RPA was declared void and if the Commissioner ordered the guaranteed cost policies to be enforced, each Petitioner would be required to forfeit the premium return and would also be required to pay substantial additional premium to Respondents. In neither case, however, did Respondents attempt to show that the CIC policies represented the reasonable value of the loss sensitive form of insurance Petitioners purchased and never made a claim for these guaranteed cost premiums as such a substitute.

19. In the Oceanside appeal, the ALJ signed his proposed decision and forwarded it to the Commissioner on March 8, 2019. The Proposed Decision simply ordered:

> "To the extent Appellants have remitted to any of Respondents funds in excess of the total amount that may be validly charged under Appellants' guaranteed cost policies,213 crc shall refund the excess to Appellants within 30 days after the date this proposed decision is adopted."

20. In the RDR appeal, the ALJ signed his proposed decision and forwarded it to the Commissioner on April 4, 2019. The order in the Proposed Decision for RDR was identical to that issued in Oceanside.

21. On information and belief, Petitioners allege that on or about April 17, 2019, the Commissioner received campaign contributions totaling $53,000 from associates of Respondents intended to influence his decisions in matters effecting Respondents ongoing litigation before the Commissioner. On information and belief, Petitioners are also informed and believe that at or about May 6, 2019 the Commissioner met with Steve Menzies, the President of Applied Underwriters, Inc, AUCRA and CIC. Mr. Menzies has a dual reason to attempt to influence the

Commissioner in that Mr. Menzies is attempting to influence the Commissioner's actions in these administrative appeals but also is in the process of buying the Applied Underwriters' family of companies back from Berkshire-Hathaway so he can move them to the Cayman Islands and needs the approval of the Commissioner to do that. It is feared that approval of such a move will result in Petitioners here, and many others, will be left with a judgment proof debtor if the Commissioner approves that deal.

22. In the Oceanside appeal, on May 6, 2019, the Commissioner adopted the ALJ's proposed Decision and mailed it on May 9, 2019. On June 7, 2019 and more than 13 days late, Respondents filed an untimely Petition for Reconsideration.[1] In spite of the legal tardiness of the Petition by Applied and five days later, on June 13, 2019, the Commissioner issued an Order of Stay based on Applied's Petition for Reconsideration and invited the parties to brief whether he should reconsider the already approved Decision.[2] On June 22, 2019, Oceanside filed its response to the invitation of the Commissioner recommending that the Commissioner refrain from rendering an opinion on a remedy and to leave that for the courts. On July 11, 2019, the Commissioner issued his Amended Decision, modifying the recommendation of the ALJ and literally adopting the request of Respondents.[3]

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[1] 10 C.C.R. 2509.70 provides that a Petition for Reconsideration shall be made within 15 days of service of the Decision. Applied's Petition was clearly late as the last day to file it was May 24, 2019. It was filed June 7, more than 13 days late.

[2] In both appeals, the Commissioner's Orders to Stay were issued outside the 30-day deadline provided for in 10 C.C.R. 2509.72. However, the Commissioner contends that he also benefits from the 5-day extension provided for in 10 C.C.R. 2509.42(q). However, this section is limited to "'Service' or 'Serve' with regard to correspondence and action prior to the filing of an appeal ...". It is inapplicable to excuse the Commissioner from complying with the strict wording of 10 C.C.R. 2509.72 outside of the pre-appeal filing period which proscribes a later priod in which "[t]he power [of the Commissioner] to order a reconsideration shall expire 30 days after service of a decision on the parties." Nothing here shows the Commissioner acted within the scope of his authority in ordering the Stays.

[3] 10 C.C.R. 2509.69(c) and (d) define two distinct lines of action for the Commissioner, which he also violated in these appeals. Subsection (c) provides for the authority of the Commissioner to "adopt the proposed decision in its entirety or he may make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the Commissioner under this subsection is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision." Alternatively, the Commissioner may refuse to adopt the proposed decision under subsection (d), which authorizes him to reassess the recommendation of the ALJ, review the record, and come up with his own conclusions. In both of these cases, the Commissioner did not act under subsection (d) as he never announced he was

23. In the RDR appeal, on May 13, 2019, the Commissioner adopted the ALJ's proposed Decision and mailed it on May 17, 2019. On June 21, 2019, also 5 days after the 30-day jurisdictional period had expired and without a request from Respondents, the Commissioner unilaterally issued an Order of Stay and again invited the parties to brief whether he should reconsider the already approved Decision. On June 26, 2019, RDR filed its response to the invitation of the Commissioner recommending that the Commissioner refrain from rendering an opinion on a remedy and to leave that for the courts. On July 22, 2019, the Commissioner issued his Amended Decision, modifying the recommendation of the ALJ and literally adopting the request of Respondents that Petitioners be ordered to pay the CIC policies.

24. In both Amended Decisions, the Commissioner made the same Order:

> "Respondents shall recalculate Appellants' premium owed for the policy periods at issue in this appeal, using the filed rates for Appellants' guaranteed cost policies. This Order shall become effective immediately."

25. For both Petitioners, this Order, if eventually effective, would require Petitioners to disgorge hundreds of thousands of dollars they expected as a profit return from the loss sensitive policy of workers' compensation insurance they purchased. As well, such an order would require them to pay hundreds of thousands of more dollars than they have already paid for a guaranteed cost policy they did not want, did not agree to, nor had previously been required to pay for and have declared they were not obligated to pay.

26. In the inverse, this Order, if eventually effective, the Commissioner's Amended Decisions greatly reward Respondents by permitting Respondents to refuse to return to Appellants the "return" benefits that Appellants had bargained for in the loss sensitive policy. Additionally, Respondents would receive another windfall as a consequence of their illegal activity by receiving payment on the guaranteed cost policy premiums, amounting to, again, hundreds of thousands of dollars - times two – all to benefit the illegal participant here.

27. And, these are not the only appeals in the Commissioner's pipeline.

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refusing to adopt the recommended decision. Instead, the Commissioner went straight to modifying the result proposed by the ALJ without first rejecting its adoption. Technical but true.

IV. PETITION FOR WRIT OF ADMINSTRATIVE MANDAMUS

(Writ of Mandamus; C.C.P §1094.5; 10 C.C.R. §2509.76)

28. Petitioners reallege and incorporate paragraphs 1 through 27 herein by reference.

29. Pursuant to California Code of Civil Procedure Section 1094.5(b), a Writ of mandate lies where in an administrative decision "the respondent agency has proceeded without, or in excess of jurisdiction" and where "there was any prejudicial abuse of discretion." Code of Civil Procedure § 1094.5, subd. (b). "Abuse of discretion is established if the respondent has not proceeded in the matter required by law, the order or the decision is not supported by the findings, or the findings are not supported by the evidence."

30. In *RDR Builders, Inc.*, by example, the Insurance Commissioner concluded that (1) CICI and AUCRA had (1) violated Insurance Code section 11658 [See, RDR, p. 17, fn. 89] and (2) applied unfiled rates and supplementary rating information in violation of Insurance Code section 11735 with respect to Applied's RPA and their EquityComp workers' compensation program.

31. While at no time during the process of the appeal to the Insurance Commissioner did RDR, Oceanside or Applied contend that the CIC guaranteed cost underlying workers' compensation insurance policies, or the rates stated therein were unlawful, as indeed, the rates were filed and approved. But having lawful rates does not automatically mean the policies are enforceable against another that did not agree to pay those rates. At the hearing, both Oceanside and RDR introduced uncontroverted evidence that establishes that neither Oceanside nor RDR *ever agreed to the price terms set forth in the guaranteed-cost policies*, nor was it ever contemplated that Oceanside nor RDR would pay the rates quoted on the guaranteed-cost policies that were issued and, on that basis, objected to any order requiring them to pay the guaranteed cost policies.

32. In fact, by way of example and without limitation, Mr. Mello testified on behalf of RDR that the insurance that was purchased was a loss sensitive program and not a guaranteed cost policy [TR 39:25-43:09; 63:14-64:1]. Indeed, at no time during the 2015 renewal process did CIC or any other Applied entity quote a guaranteed-cost policy to RDR. [TR 81:04-08; 92:15-

24]. Mr. Mello never spoke to a representative of California Insurance Company. [*Id.*]. The Proposal, Exhibit 202, did not provide any class code rates to RDR during the negotiations [TR 82:21-86:24]. RDR was not provided with the guaranteed-cost policies that were issued unilaterally by CIC, the first approximately 30 days after the beginning of the insurance program and for the subsequent year only after the year began [*Id.*]. CIC never quoted the rates stated in the CIC policies prior to their late delivery [*Id.*; 92:15-24] and RDR was never interested in being insured by a guaranteed cost policy [TR 87:25-86:03].

33. Indeed, in the RDR Decision, the Commissioner concluded that this evidence *persuasively demonstrate(s) that there was never any agreement between the parties to pay the guaranteed cost rates, there was a lack of mutuality between the parties to enforce the guaranteed cost policies and Appellants had no intention of purchasing a guaranteed cost policy*." [RDR, at 39].

34. Similar testimony was presented in the Oceanside appeal hearing. Mr. Anderson testified that he never signed a contract with CIC and never even knew that CIC had issued policies as part of the insurance program [TR 19:2-15]. As well, Mr. Anderson testified that he never had an opportunity to negotiate the class code rates in the CIC policies [TR 20:16-21:1; 23:2-24:5] but was also purchasing a loss sensitive plan of insurance which would give back a refund with low losses [TR 31:8-25]

35. Indeed, the only issue that should have been resolved was whether the RPA was an illegal and void contract under the Insurance Commissioner's prior precedential decision in *Shasta Linen*. That should have been the limit of the Commissioner's rulings, but for the illicit campaign contribution of Applied and the inappropriate visit of Mr. Mendez allowed by the Commissioner that is not what happened here. Instead, the Commissioner decided to not only ignored the persuasive evidence presented by the Petitioners that the policies lacked mutuality, but exceeded his authority by adjudicating the breach of contract claim in favor of Respondents.

V. LEGAL ISSUES

36. While it is clear that the Insurance Commissioner has the authority to declare insurance policies, endorsements, and/or collateral agreements to be void for violating the Insurance

Code [*see* Insurance Code § 12928.5] and may declare rates charged by an insurance company unlawful [*see* Insurance Code § 11737], it is the longstanding policy of the Department of Insurance to recognize that under existing common law, as well as statutory law, it does not have any authority to pass judgment on breach of contract or *quantum meruit* claims that might be asserted by an insurance company in court after the Insurance Commissioner has declared a policy or part of a policy to be unlawful. Commissioner Lara, apparently in order to live up to the obligation created by the donation from Applied, has recently decided not to follow that standard and act in a way contrary to established law that ordinary contract disputes are not within the scope of the Commissioner's jurisdiction.

37. *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194 is directly on point:

> "When an administrative agency's function is regulatory in nature, an award of compensatory damages or punitive tort damages cannot be made by the agency without express or implied regulatory or statutory authority. (Youst v. Longo (1987) 43 Cal. 3d 64, 82-83 [233 Cal. Rptr. 294, 729 P.2d 728, 85 A.L.R.4th 1025] .) Nor can administrative authority to award contract damages be created by judicial fiat. (Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn., supra, 4 Cal.App.4th at p. 1554 .)
>
> The Commissioner's supervisory and regulatory power over the insurance industry does not give him power to adjudicate all insurance disputes—such as this one, which involves an alleged breach of contract with a demand for monetary damages—unless persuasive legislative intent to grant this authority can be identified.
>
> No legislative intent to have the Department of Insurance or other regulatory agency adjudicate breach of insurance contract cases can be divined from the briefs of the Insurer or its supporters. Nor do the Insurer and its supporters reveal any authority giving the Commissioner power to make a monetary award to redress past misconduct by a workers' compensation insurer. Finally, the Insurer and amici curiae fail to identify any existing administrative process for reviewing the type of claim the Insured makes here." [pp. 199-200]

As the court in *Lance Camper* and the two cases it relies on declare, unless a statute or a regulation under which a state agency is authorized to act specifically gives the agency the power to award resolve common law issues, such as breaches of contract, and then award damages, the agency is without that power. No such statute or regulation exists in favor of such a power in the Insurance Commissioner, so *ipso facto*, he does not have that power.

38. From this it is clear that the Commissioner abused his discretion by erroneously concluding that he had the jurisdiction to rule on common law issues such as disputes over

contracts as they are, as a matter of law, outside of the jurisdiction of the Department of Insurance.

39. In addition, the Commissioner, to the detriment and prejudice of Petitioners, disregarded undisputed evidence in each of the hearings which established that neither Petitioner agreed to any of the rates or terms of the guaranteed costs policies, that the CIC policies lacked mutuality and that Petitioners never had any intention of purchasing a guaranteed cost policy. Further, the evidence showed that Petitioners had never been required to pay the premiums under the guaranteed cost policies and that Respondents had agreed to keep the guaranteed cost policies in force without Petitioners fully paying the premiums thereon. Indeed, the Commissioner found "Appellants *persuasively demonstrate that there was never any agreement between the parties to pay the guaranteed cost rates, there was a lack of mutuality between the parties to enforce the guaranteed cost policies and Appellants had no intention of purchasing a guaranteed cost policy.*" [RDR, at 39].

40. Despite the Insurance Commissioner finding facts which decisively determined there was never a contract for either Oceanside or RDR to pay the rates stated in the guaranteed cost policies, the Insurance Commissioner disregarded this evidence and began making decisions contrary to his own findings in the evidence. The Commissioner then went on to opine that "[t]he guaranteed cost policies were entered into between CIC and Appellants...." [RDR, p. 9] and then went on to ask "what workers' compensation policy is left to enforce." *Id.* From this, the Commissioner concluded "the most appropriate modification to the actions of Respondents in this case is to render the RPA void and to direct Respondents to apply the filed rates associated with the Department-approved guaranteed cost policies." Thus, at the end of the decision, the Commissioner ordered Applied to "recalculate Appellants' premium owed for the policy period at issue in this appeal, using the filed rates for Appellants' guaranteed cost policies." [RDR at 44].

41. However, it was not necessary for the Commissioner to order the payment of the CIC policies in order to keep Petitioners in a lawful position with respect to their workers' compensation insurance, as Ins. Code 11658(c) keeps the insurance in force when any part of the insurance is declared unlawful. It says:

//

> "**(c)** The withdrawal of a policy form or endorsement by the commissioner pursuant to this section shall not affect the status of the policyholder as having secured payment for compensation or affect the substitution of the insurer for the policyholder in workers' compensation proceedings as set forth in the provisions of Chapter 4 (commencing with Section 3700) of Part 1 of Division 4 of the Labor Code during the period of time in which the policy form or endorsement was in effect."

42. Thus, even the pretense that these Amended Decisions were necessary to preserve the legal status of Petitioners as being properly insured is ill founded.

43. Not only do the ALJs that write the proposed decisions think the Commissioner is out of line, but so does perhaps the most recognized and authoratative attorney in private party insurance appeals, Nicholas Roxborough, Esq., believes the Commissioner is out of line. Attached hereto are the objections of Mr. Roxborough to the present actions of the Commissioner filed another appeal, *Steve Wills Trucking and Logging, LLC v. California Insurance Company, et. al.,* File No. AHB-WCA-17-44 (attached hereto as Exhibit C) but the response of ALJ de Maigret in another action, *Van De Pol Enterprises, Inc., et. al. v. California Insurance Company, et. al.,* AHB-WCA-17-42 (attached hereto as Exhibit D) the obvious sum of which is that each believe the Commissioner has erred in deviating from the long held practice of the Department not to attempt to resolve common law disputes in the Department's appellate process.

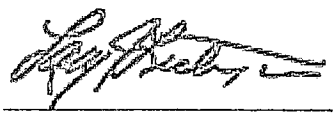
43. Unfortunately, the bottom line is that the wording of the new Decision by the Commissioner is such that it appears that the Commissioner has ordered Petitioners to pay the legal rates for the policies *regardless of the fact that it was conclusively demonstrated that neither Oceanside nor RDR ever agreed to do so.* If this reading of the Insurance Commissioner's decision is the correct view, the decision is not only not supported by the facts, but directly contrary to the facts specifically found ***and*** vastly in excess of the Insurance Commissioner's authority, because he has no authority whatsoever to decide whether Petitioners breached any contract, even an insurance contract.

44. For the reasons alleged above and those to be discussed in further briefing to the Court, Petitioners petition this Court for a writ of administrative mandate seeking judicial review and striking from the Order all statements by the Commissioner regarding a remedy as errors of

law in that the rulings exceeded the Commissioner's authority and were not supported by the evidence.

Dated: July 28, 2019

Respectfully submitted,



Larry J. Lichtenegger

VERIFICATION

I, Greg Anderson, am the President of Oceanside Laundry, LLC. I have read the above Verified Petition for Writ of Administrative Mandamus. The facts alleged in the above petition are true to the best of my own knowledge. This verification does not address the legal conclusions.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification is executed on July 30, 2019 at Santa Cruz County, California.

Greg Anderson

VERIFICATION

I, Ron Dos Reis, am President of RDR Builders, Inc. I have read the above Verified Petition for Writ of Administrative Mandamus. The facts alleged in the above petition are true to the best of my own knowledge. This verification does not address the legal conclusions.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification is executed on July 30, 2019 at San Joaquin County, California.

Ron Dos Reis

EXHIBIT A

DEPARTMENT OF INSURANCE
EXECUTIVE OFFICE
300 Capitol Mall, 17th Floor
Sacramento, CA 95814
Tel. (916) 492-3500 Fax (916) 445-5280

BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of **OCEANSIDE LAUNDRY, LLC, DBA CAMPUS LAUNDRY,** Appellant, From the Decision of the **CALIFORNIA INSURANCE COMPANY; APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.** Respondents.	File AHB-WCA-17-41 **AMENDED ORDER FOLLOWING PETITION FOR RECONSIDERATION**

Statement of the Case

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

Because workers' compensation insurance is usually mandatory for California employers, the Legislature charged the Insurance Commissioner ("Commissioner") with closely scrutinizing all insurance plans to protect both workers and their employers.[2] To assist the Commissioner in

[1] See 2 Witkin, Summary Cal. Law 11th, Workers' Compensation, § 1 (2018).
[2] *Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1118.

carrying out this responsibility and to support employers seeking affordable coverage, the Insurance Code mandates that insurers publicly file with the Commissioner all rates and related information used to set workers' compensation insurance premiums.[3]

This proceeding, as well as dozens like it, arises out California Insurance Company ("CIC") and Applied Underwriters Captive Risk Assurance Company, Inc.'s ("AUCRA" and, together with CIC, "Respondents") decision to circumvent California's filing requirements and directly sell an unfiled insurance plan to unwitting employers. Oceanside Laundry, LLC dba Campus Laundry ("Appellant") asserts this unfiled plan, titled EquityComp, and its accompanying Reinsurance Participation Agreement ("RPA") unlawfully modified CIC's filed rates. Appellant's argument substantially relies upon the Commissioner's precedential decision *In the Matter of the Appeal of Shasta Linen Supply, Inc.*,[4] in which the Commissioner determined that Respondents' unfiled RPA was unlawful and void.

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

For the reasons discussed below, the Commissioner concludes as follows: First, the Commissioner has exclusive jurisdiction to hear and decide this case. Second, AUCRA and CIC must be treated as a single enterprise. Third, the RPA unlawfully misapplied CIC's rate filings

[3] See Ins. Code, §§ 11730-11742.
[4] *In the Matter of the Appeal of Shasta Linen Supply, Inc.* (Cal. Ins. Comm'r, Jun. 20, 2016, AHB-WCA-14-31) (*Shasta Linen*). *Shasta Linen* was designated precedential under Government Code section 11425.60, subdivision (b).

and is unenforceable. Finally, Respondents were not deprived of due process in this appeal and may not relitigate *Shasta Linen's* findings and conclusions.

Issues Presented

1. Did Respondents misapply their Insurance Code section 11735 filings to Appellant by entering into and applying the RPA?

2. If so, what is the appropriate remedy?

Procedural Background

This appeal arises under Insurance Code section 11737, subdivision (f).[5] Appellant initiated the proceedings on December 20, 2017, by filing an appeal from Respondents' December 1, 2017, rejection of Appellant's complaint concerning its workers' compensation insurance and the RPA. The California Department of Insurance ("CDI") Administrative Hearing Bureau issued an Appeal Inception Notice on December 21, 2017. Respondents filed a response on January 3, 2018.[6]

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

Under that Order, the CALJ also took official notice of the following materials: (i) the *Shasta Linen* decision and the entire evidentiary record before the CDI's Administrative Hearing Bureau in *Shasta Linen*; (ii) the Stipulated Consent and Desist Order *In the Matter of the*

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

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

Certificates of Authority of the California Insurance Company and Applied Underwriters Captive Risk Assurance Company, Inc., MI-2015-00064, adopted by the Commissioner on September 6, 2016; and (iii) the Settlement Agreement among the CDI, CIC and AUCRA, executed in June of 2017.

On July 20, 2018, the CALJ reassigned the appeal to Administrative Law Judge Clarke de Maigret. On August 1, 2018, CIC filed a discovery request. The ALJ denied the request the same day. On December 20, 2018, the ALJ conducted an evidentiary hearing in CDI's San Francisco hearing room. Larry J. Lichtenegger, Esq. represented Appellant. Travis R. Wall, Esq. and Joanna L. Storey, Esq. of Hinshaw & Culbertson LLP represented Respondents.

At the evidentiary hearing, Greg Anderson, Appellant's president, testified on behalf of Appellant. Ellen Gardiner, actuary at Applied Underwriters, Inc., testified on behalf of Respondents.[7] Appellant also called Ms. Gardiner as a hostile witness. The evidentiary record includes the foregoing testimony and the documents admitted into evidence, as identified on the parties' exhibit lists.[8] In addition, Exhibits 14 through 16 were introduced and admitted in evidence at the hearing.

On December 20, 2018, the ALJ issued a Post Hearing Order requiring, among other things, that Respondents submit a certain rate filing as Exhibit 17. Respondents did so, and Exhibit 17 was admitted to the evidentiary record on January 11, 2019.

On February 20, 2019, the ALJ took official notice of the document identified by Respondents as Exhibit 256: a Decision and Order signed by Commissioner Dave Jones and

[7] In their pre-hearing witness list, Respondents listed two potential witnesses: Ellen Gardiner and Gary Osborne. Appellant submitted written objections, dated December 6, 2018, to portions of Ms. Gardiner's proposed testimony and all of Mr. Osborne's testimony. The ALJ sustained those objections on December 11, 2018, limiting Ms. Gardiner's testimony and excluding Mr. Osborne as a witness, on the grounds that their testimony would be irrelevant, unduly time consuming relative to its probative value, or improper for an expert witness.

[8] The following exhibits were admitted in evidence: Exhibits 1 through 17, 200, 205 through 227, 230, 249, 252, 253, and 255. Official notice was taken of the document marked as Exhibit 256.

entitled January 1, 2018 Workers' Compensation Claims Cost Benchmark and Advisory Pure Premium Rates.

On February 21, 2019, the ALJ issued a Notice of Intent to Take Official Notice of CIC's workers' compensation rate filings with the CDI. The ALJ issued an Order Taking Official Notice of those documents on March 8, 2019.

Following post-hearing briefing, the ALJ closed the evidentiary record and signed his proposed decision on March 8, 2019.

On May 6, 2019, the Commissioner issued an Order adopting the ALJ's proposed decision. Respondents timely filed a petition for reconsideration of the Order on June 7, 2019 and the Commissioner issued an order to stay the effective date of his Order for the purpose of reviewing the petition for reconsideration. On June 22, 2019, the Commissioner and Respondents received an email from Appellant with Appellant's attached response to Respondents' petition for reconsideration. Appellant later delivered a hard copy of Appellant's response, which the Commissioner received on June 25, 2019.

Findings of Fact

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

I. Appellant's Business

Appellant is a limited liability company that is headquartered near Watsonville, California.[9] The company was organized in 2008, but Appellant has been in business as Campus Laundry since the 1960s.[10] It provides laundry services to hospitals.[11]

[9] Evidentiary hearing exhibit ("Exh.") 200.
[10] Transcript of Proceedings of December 20, 2018 ("Tr."), p. 17:10-13.
[11] Tr. at p. 16:18-22.

II. Appellant's Purchase of EquityComp

Before 2012, Appellant purchased workers' compensation insurance from insurers other than Respondents.[12] In May 2012, Appellant's insurance broker presented it with a written program summary, as well as a proposal and quote (the "Proposal"), for Respondents' EquityComp insurance program.[13] Appellant found the EquityComp program to be "exciting."[14] Appellant was attracted to the program, in part, because the EquityComp program, as advertised, led Appellant to believe it would have a chance to get premiums back after three years if Appellant successfully managed claims and maintained safe business operations during the three years that the policy was in force.[15] Shortly thereafter, following discussions with Appellant's broker and at least one conversation with Respondents about the Proposal,[16] Appellant decided to purchase a three-year EquityComp program and signed Respondents' Request to Bind Coverage & Services on May 29, 2012 (the "Request to Bind").[17] The Request to Bind provides in relevant part:

[12] Exh. 200 at p. 200-5. Exhibit page number references omit preceding "0s." For example, "p. 200-5" refers to the page of Exhibit 200 marked "200-05."
[13] Exhs. 1, 2.
[14] Tr. at p. 31:16-21.
[15] Tr. at p. 31:16-21.
[16] Tr. at p. 28: 10-19.
[17] Exh. 3.

> The applicant(s) identified below, whether one or more (collectively the "Applicant")[18] request that Applied Underwriters, Inc. through its affiliates and/or subsidiaries (collectively "Applied") pursuant to the Workers' Compensation Program Proposal and Rate Quotation ("Proposal") cause to be issued to Applicant one or more workers' compensation insurance policies and such other insurance coverages identified in the Proposal (collectively the "Policies") subject to Applicant executing the following agreements (collectively the "Agreements"): (1) Reinsurance Participation Agreement; and where available, (2) Premium Finance Agreement.
>
> . . .
>
> This acknowledgment and disclosure is intended to confirm receipt of the Proposal and Applicant's acceptance of the Proposal along with certain additional terms and conditions. Only the Agreements and Policies contain the actual operative provisions. . . .[19]

Appellant's EquityComp program began on June 1, 2012, and ended on June 1, 2015.[20] The Policies and RPA referenced in the Request to Bind are discussed below.

III. Respondents' Business and Organization[21]

Respondents' organizational structure is extensively described in the *Shasta Linen* decision, and that description is adopted here.[22] In short, CIC is a licensed property and casualty company, domiciled in California and licensed to transact business in multiple states.[23] CIC is wholly-owned by North American Casualty Company, a non-insurer owned by Applied Underwriters, Inc. ("AU"), a Nebraska corporation.[24]

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[18] I.e., Appellant.
[19] Exh.3.
[20] Exhs. 5 at p. 5-1, 7 at p. 7-19.
[21] Use of the present tense in this part III means as of the date of the *Shasta Linen* decision, June 20, 2016, and applies to all times relevant to this proceeding.
[22] Specifically, the Commissioner's findings of fact in part V(B) of *Shasta Linen* are incorporated in this Proposed Decision. As noted below, Respondents are precluded from challenging the *Shasta Linen* findings in these proceedings.
[23] *Shasta Linen, supra,* at p. 9.
[24] *Ibid.*

AUCRA is an insurance company domiciled in Iowa.[25] Its sole purpose is to serve as CIC's reinsurance arm.[26] It does not reinsure any other entities or perform any other functions.[27] AUCRA is also an indirect subsidiary of AU.[28]

AU is a financial services company that provides payroll processing services and underwrites workers' compensation insurance through its affiliated insurers to small and medium-sized employers.[29] AU manages all of CIC's underwriting, investment, administrative, actuarial and claim services through a management services agreement. It also administers the EquityComp program on behalf of CIC. For this reason, the EquityComp documents presented to Appellant bear AU's name and/or logo.[30]

The boards of directors of CIC, AUCRA and AU are identical in composition.[31]

IV. EquityComp's Purpose and Program Mechanics

EquityComp's purpose and structure is described at length in *Shasta Linen* and that description is adopted here.[32] In brief, the underlying purpose of EquityComp was to circumvent California's workers' compensation policy aims by providing a type of loss-sensitive insurance to employers who were too small to qualify for that kind of coverage under California law.[33] In loss-sensitive programs, the employer's cost for a given policy year is impacted by the workers' compensation claims incurred that year.[34] In contrast, a guaranteed cost policy's price is unaffected by claims incurred during the policy year.[35]

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[25] *Ibid.*
[26] *Id.* at pp. 10-11.
[27] *Id.* at p. 11.
[28] *Id.* at p. 10.
[29] *Ibid.*
[30] Exhs. 1 through 4.
[31] *Shasta Linen, supra,* at p. 10.
[32] The Commissioner's findings of fact in *Shasta Linen* starting at page 15, subpart (c), through page 30 are incorporated in this Proposed Decision, excluding the first two full sentences on page 30.
[33] *Shasta Linen, supra,* at pp. 23-24, 66.
[34] *Id.* at p. 15.
[35] *Id.* at p. 22.

Generally, carriers market loss-sensitive programs to large employers. Many jurisdictions, including California, restrict the sale of loss-sensitive programs to employers whose annual premium exceeds $500,000. Large employers are typically better able to cope with loss variations and are in a better position to control claims costs.[36] Given their sophistication, larger companies are often better positioned to evaluate the cost effectiveness of different types of insurance.[37] Appellant's estimated annual premiums during the policy years at issue in this appeal did not meet the $500,000 threshold.[38]

EquityComp is a specific form of loss-sensitive insurance known as a "retrospective rating plan."[39] Respondents' EquityComp patent describes the scheme as follows:

> The reinsurance company can now provide funds to implement a non-linear retrospective rating plan as a "participation plan." The reinsurance company does this by entering into a separate contractual arrangement with the insured. If the insured has lower than average losses in the next year, then the reinsurance company can provide a premium reduction according to the participation plan. If the insured has higher than average losses in a given year, then the reinsurance company will assess additional premium accordingly. The insured can now, in effect, have a retrospective rating plan because of the arrangement among the insurance carrier, the reinsurance company and the insured even though, in fact, the insured has Guaranteed Cost insurance coverage with the insurance carrier[40]

AU acknowledged that one of the challenges of a "fundamentally new premium structure" is that "the structure must be approved by the respective insurance departments regulating the sale of insurance."[41] As noted above, California and other states prohibit the sale of retrospective plans to small and mid-sized employers. AU attempted to skirt that regulatory environment by implementing "a reinsurance based approach to providing non-linear

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[36] *Id.* at p. 15.
[37] *Id.* at pp. 15-16.
[38] Exhs. 5 through 7.
[39] *Shasta Linen, supra,* at p. 23.
[40] *Id.* at p. 24.
[41] *Id.* at p. 23.

retrospective plans to insureds that may not have the option of such a plan directly."[42]

Following the framework outlined in Respondents' patent, the EquityComp program sold to Appellant was effectuated under separate annual guaranteed cost policies, combined with a three-year Reinsurance Participation Agreement.[43] The RPA superseded the guaranteed cost policies.[44] Premium owed under the policies was replaced by amounts paid under the RPA.[45] The contracts are discussed in more detail below.

A. The Guaranteed Cost Policies

The guaranteed cost policies were entered into between CIC and Appellant, with annual terms commencing June 1, 2012, June 1, 2013, and June 1, 2014.[46] The policies contain standard language approved by the Commissioner, consistent with the applicable requirements of the Insurance Code and its implementing regulations. For example, each policy states that CIC's rates, rating plans and related information are filed with the Commissioner and open to public inspection.[47]

Each policy sets out the rates that CIC may charge Appellant.[48] CIC filed those rates with the Commissioner before the policies' commencement.[49] In addition, as required by law,[50] CIC warrants in each policy that it adheres to a single uniform loss experience rating plan and applies that experience rating to each policy.[51]

CIC's guaranteed cost policies also include a cancellation provision and a "short rate"

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[42] *Ibid.*
[43] Exhs. 4 through 7.
[44] *Shasta Linen, supra,* at pp. 24, 55.
[45] *Ibid.*
[46] Exhs. 5 through 7.
[47] E.g., Exh. 5 at 5-19.
[48] E.g., Exh. 5 at p. 5-3.
[49] Order Taking Official Notice, dated March 8, 2019 ("March 2019 Official Notice Order"), Exhs. A through C.
[50] Ins. Code, § 11752.8.
[51] E.g., Exh. 5 at p. 5-19; see also *Shasta Linen, supra,* at p. 12.

cancellation notice, as required by the Insurance Code.[52] The policies provide that after cancellation, the final premium will be determined as follows:

> a. If we [CIC] cancel, final premium will be calculated pro rata based on the time the policy was in force. Final premium will not be less than the pro rata share of the minimum premium.
>
> b. If you cancel, the final premium may be more than pro rata; it will be based on the time this policy was in force, and may be increased by our short rate calculation table and procedure. Final premium will not be less than the minimum premium.[53]

The short rate penalty, which discourages employers from changing insurers mid-year, is a percentage of the full-term premium based on the number of days of coverage in the canceled policy.[54] CIC's short rate calculation table provides a formula for determining the early cancellation penalty.[55]

CIC's policies also set a minimum and estimated premium based on an employer's payroll estimates and loss experience modification factor.[56] After estimated taxes and fees, the guaranteed cost policies provide the employer with an annual premium estimate.[57] The final premium due is calculated using actual payroll amounts assigned to a specific classification of the policy and the employer's experience modification factor.[58] Under the policy documents in the absence of the RPA, the final premium for a given policy period would not be impacted by the losses incurred during that period.[59] Appellant acknowledges that in the absence of the RPA, if required to pay the full premium amounts for the guaranteed cost policies, Appellant would still owe Respondent an additional $207,000 for the insurance.[60] Respondents agree that this is

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[52] E.g., Exh. 5 at p. 5-22; see also *Shasta Linen, supra,* at p. 12.
[53] E.g., Exh. 14 at p. 14-31.
[54] *Shasta Linen, supra,* at p. 14.
[55] E.g., Exh. 5 at pp. 5-22 through 5-24; see also *Shasta Linen, supra,* at p. 14.
[56] E.g., Exh. 14 at p. 14-1; see also *Shasta Linen, supra,* at p. 14.
[57] *Ibid.*
[58] *Shasta Linen, supra,* at p. 14.
[59] *Ibid.*
[60] Appellant's Post Hearing Brief, filed January 18, 2019 ("App. Post-Hearing Br."), p. 16.

the approximate amount Appellants still owe for the guaranteed cost policies, in the absence of the RPA.[61]

The policies' dispute resolution provisions do not provide for binding arbitration or any other alternative dispute resolution methods.[62]

B. The RPA and Proposal

The RPA is materially identical to the Reinsurance Participation Agreement at issue in *Shasta Linen*, with the exception of the insureds' names, account numbers and dates, and the specific rates and other numbers set forth on Schedule 1 of those agreements.[63] The RPA and Proposal modify a number of the guaranteed cost policy provisions.[64] Where the RPA and the policies differ, the RPA's terms control.[65]

For example, the RPA contains workers' compensation rates, termed "loss pick containment rates" that supplant the rates set forth in the guaranteed cost policies.[66] The same loss pick containment rates were used to calculate Appellant's projected EquityComp costs set out in the monthly plan analyses provided by Respondents.[67] Additionally, the Proposal states that Appellant would be billed at the RPA's loss pick containment rates.[68] The Proposal makes no reference to the guaranteed cost policies' rates.[69]

The RPA and Proposal are largely comprised of financial terms that affect the amounts Appellant must remit.[70] Most significantly, the RPA establishes a mechanism for assessing

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[61] Tr. p. 53: 10-13.
[62] Exhs. 5 through 7, 14 through 16.
[63] Exh. 4; *Shasta Linen* Exh. 207. Accordingly, all of the Commissioner's findings of fact in part V(D) of *Shasta Linen* are incorporated in this Proposed Decision, with the exception of the second full sentence on page 33.
[64] Exhs. 1, 3, 4; *Shasta Linen, supra,* at p. 55.
[65] *Ibid.*
[66] Exh. 4 at p. 4-10; *Shasta Linen, supra,* at p. 55.
[67] E.g., Exh. 9 at pp. 9-3, 9-6.
[68] Exh. 1 at p. 1-4.
[69] *Ibid.*
[70] Exh. 4.

additional premium if the insureds incur higher than expected losses.[71] That mechanism, set out in RPA sections 1, 2 and 4, establishes a "segregated cell" account that Appellant must pay into, as well as a "run-off term" during which additional premium may be assessed.[72] The mechanism is further described in sections 1 through 4 of RPA Schedule 1, which detail how Appellant's premium is calculated and allocated based in large part on "loss pick containment amounts," "loss development factors," and "exposure group adjustment factors" or "EGAFs."[73] The Proposal sets forth a simplified overview of that mechanism.[74]

RPA section 4 and RPA Schedule 1, section 6 impose early cancellation fees that modify the guaranteed cost policies' cancellation terms and filed rates.[75] Also, the RPA removes Appellant's loss experience modification factor from the premium calculations.[76] Finally, the RPA's terms potentially require the insured to wait a minimum of three years or longer after the RPA's expiration to receive a refund of any excess payments.[77]

Respondents did not file the Proposal or RPA's rates or other financial terms described in this subpart with the Commissioner before or during the RPA's term.[78] Nevertheless, Respondents charged Appellant in accordance with the Proposal and RPA's rates and terms rather than those of the guaranteed cost policies.[79]

V. Post-*Shasta Linen* Proceedings

On June 20, 2016, the Commissioner issued the *Shasta Linen* decision and order. On July 1, 2016, CIC and AUCRA filed a Verified Petition for a Peremptory Writ of Mandate and

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[71] Exh. 4; *Shasta Linen, supra,* at p. 24.
[72] Exh. 4 at pp. 4-1, 4-2.
[73] *Id.* at pp. 4-7, 4-8.
[74] Exh. 1.
[75] Exh. 4. The early cancellation fees are described on *Shasta Linen* pages 32-35.
[76] Exh. 4; *Shasta Linen, supra,* at p. 56.
[77] Exh. 4 at p. 4-8; *Shasta Linen, supra,* at pp. 34-35. The RPA also overrides the guaranteed cost policies' dispute resolution provisions. (Exh. 4 at pp. 4-3 through 4-5; Exh. 5 at pp. 5-25, 5-26.)
[78] See *Shasta Linen* Exh. 19. 20, 21, 23, 24; March 2019 Official Notice Order, Exhs. A through C.
[79] Exh. 9 at p. 9-3, Exh. 11 at p. 11-3, Exh. 13 at p. 13-3.

Complaint for Declaratory and Injunctive Relief in Los Angeles County Superior Court (the "Writ Petition and Complaint").[80] The writ petition portion sought judicial review of the *Shasta Linen* decision and order.

On June 28, 2016, the CDI issued a Notice of Hearing and Order to Cease and Desist from Issuance or Renewal of Workers' Compensation Insurance Policies and Collateral/Ancillary Agreements in Violation of Insurance Code Sections 11658 and 11735 and California Code of Regulations, Title 10, Sections 2251 and 2268.[81] On July 13, 2016, the CDI issued an amended version of that notice and order. In connection with the proceedings initiated by the notice, CIC, AUCRA and the CDI entered into a stipulated Consent Cease and Desist Order that was adopted by the Commissioner on September 6, 2016 (the "Consent Order").[82] Section IV of the Consent Order provides, in part:

> A. CIC and AUCRA will cease and desist from issuing any new RPAs or renewing existing RPAs with respect to a California Policy until such time as the RPA has been submitted to the WCIRB and the CDI in compliance with the requirements of Insurance Code § 11658 and 11735 and all other applicable statutes and regulations, and the RPA has not been disapproved.
>
> B. Notwithstanding Paragraph IV(A) above, CIC may renew a Policy issued in connection with an RPA in force as of July 1, 2016.
> ...
>
> N. [Subject to certain exceptions not pertinent to this appeal,] nothing in this Stipulated Agreement affects or limits the powers or rights of the Insurance Commissioner to contend or declare that RPAs (other than RPAs that are filed with the WCIRB and the CDI and that are not disapproved) are unenforceable, void, voidable, or illegal and nothing limits the powers or rights of the Insurance Commissioner to initiate or make any investigation, to institute any legal or administrative proceeding, to take any action permitted by law, and to seek and obtain all relief and remedies (including any fines or penalties), or to adjudicate the rights of others, as otherwise permitted by law.

[80] Exh. 253 at p. 253-1.
[81] Exh. 249 at p. 249-1.
[82] Exh. 249.

On June 2, 2017, CIC, AUCRA and the CDI entered into a Settlement Agreement settling the judicial proceedings initiated by the Writ Petition and Complaint.[83] On June 21, 2017, a request for dismissal was entered on the Writ Petition and Complaint, with prejudice as to the writ petition portion.

Sections 2 and 3 of the Settlement Agreement provide:

> 2. Resolution of the Dispute. The Shasta Order[84] applies to Shasta Linen Supply, Inc. and is based upon the facts and circumstances of the Shasta Action. The designation of the Shasta Order as precedential pursuant to California Government Code § 11425.60, subdivision (b) applies to administrative proceedings before the CDI in cases involving facts and circumstances substantially similar to those in the Shasta Action.
>
> 3. Amended RPA. CDI and AUCRA have met and discussed the Shasta Order and modification to the RPA and have agreed that the RPA, as modified (the "Amended RPA") is an agreement between a third party and the insured, and attached in form and substance as Exhibit 1, Form Number AUCRA—CAL 102 (3/17). The Amended RPA will be issued after execution of an Accredited Participant Acknowledgment and Disclosure (the "Acknowledgment") Form Number AUCRA—CAL 101 (5/17). The CDI by execution of this Agreement hereby approves the Amended RPA and Acknowledgment. AUCRA further agrees that it will not make any changes to the Amended RPA or Acknowledgment in the State of California without first submitting it to the CDI for review and approval. CIC and AUCRA agree to provide the AUCRA—CAL 101 and AUCRA—CAL 102 forms to any prospective insured prior to the inception date of the coverage.

The Amended RPA attached to the Settlement Agreement contains a number of changes to the RPA form at issue in *Shasta Linen* and the present appeal.[85] For example, the Amended RPA sets out post-expiration accounting and liquidation provisions that are significantly more favorable to the insured than those of the RPAs in *Shasta Linen* and here.[86] In addition, the Acknowledgment clarifies that Respondents may not sell EquityComp to companies with annual

[83] Exh. 253.
[84] I.e., the Commissioner's Decision and Order in *Shasta Linen*.
[85] Exh. 253 at pp. 253-6 through 253-19.
[86] Exh. 4 at p. 4-8 [¶ 5], 253 at p. 253-16 [¶5].

workers' compensation premiums of less than $500,000.[87]

Analysis

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

I. The Commissioner Has Exclusive Jurisdiction Over This Appeal.

A. Applicable Law

1. The Statutory Rate Filing Scheme

California has an "open rating" workers' compensation regulatory system, in which each insurer sets its own rates and files them with the Commissioner. This framework is intended to curtail monopolistic and discriminatory pricing practices, ensure carriers charge rates adequate to cover their losses and expenses, and provide public access to rate information so that employers may find coverage at the best competitive rates.[88]

Insurance Code section 11735 lays out the statutory filing requirements. Subdivision (a) provides in part that "[e]very insurer shall file with the commissioner all rates and supplementary rate information that are to be used in this state. The rates and supplementary rate information shall be filed not later than 30 days prior to the effective date." The term "rate" means "the cost

[87] Exh. 253 at p. 253-21.
[88] See, generally, Ins. Code, §§ 11730-11742.

of insurance per exposure base unit," subject to certain limitations.[89] And "supplementary rate information" means "any manual or plan of rates, classification system, rating schedule, minimum premium, policy fee, rating rule, rating plan, and any other similar information needed to determine the applicable premium for an insured."[90]

2. Insurance Code Section 11737, Subdivision (f)

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

> Every insurer ... shall provide within this state reasonable means whereby any person aggrieved by the application of its filings may be heard by the insurer ... on written request to review the manner in which the rating system has been applied in connection with the insurance afforded or offered. ... Any party affected by the action of the insurer ... on the request may appeal ... to the commissioner, who after a hearing ... may affirm, modify, or reverse that action.

This jurisdiction is exclusive to the Commissioner. As explained in *Farmers Ins. Exchange v. Superior Court*:

> Particularly when regulatory statutes provide a comprehensive scheme for enforcement by an administrative agency, the courts ordinarily conclude that the Legislature intended the administrative remedy to be exclusive unless the statutory language or legislative history clearly indicates an intent to create a private right of action [in court].[91]

B. Analysis and Conclusions of Law

Appellant asserts Respondents charged rates under the RPA that were not filed under Insurance Code section 11735 and that modified the filed rates in CIC's guaranteed cost

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[89] Ins. Code § 11730, subd. (g). Rates exclude the application of individual risk variations based on loss or expense considerations, as well as minimum premiums.
[90] Ins. Code § 11730, subd. (j).
[91] *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 850.

policies.[92] Because the appeal concerns the manner in which Respondents applied the rating system described in their section 11735 filings, the Commissioner has jurisdiction to hear and decide this case under Insurance Code section 11737, subdivision (f).[93]

Moreover, section 11737 sets out "a comprehensive scheme" to address workers' compensation rate filing violations. As discussed below, section 11737 grants the Commissioner broad authority not only to hear private party appeals, but also to disapprove unfiled rates on his own initiative. Nothing in the statutory language or history indicates the Legislature intended to create a private right to bring civil court actions concerning unfiled rates. Therefore, the Commissioner's jurisdiction under section 11737, subdivision (f), is exclusive.

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

Respondents argue that AUCRA is not an appropriate party to this appeal because it did not provide workers' compensation insurance to Appellant.[94] Respondents further argue the RPA did not modify the guaranteed cost policies because the agreements are between different parties.[95] Specifically, Respondents assert the guaranteed cost policies are between Appellant and CIC, while the RPA is between Appellant and AUCRA. These arguments are not persuasive.

A. Applicable Law

Distinctions between related corporations may be disregarded under the "single enterprise" doctrine.[96] "Two conditions are generally required for the application of the doctrine to two related corporations: (1) such a unity of interest and ownership that the separate corporate

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[92] Appeal, filed Dec. 20, 2017 ("Appeal"), pp. 3:4-9, 5:15-24.

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

[94] Respondent's Post-Hearing Opening Brief, filed January 22, 2019 ("Resp. Post-Hearing Br."), pp. 19-20.

[95] *Ibid.*

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

personalities are merged, so that one corporation is a mere adjunct of another or the two companies form a single enterprise; and (2) an inequitable result if the acts in question are treated as those of one corporation alone."[97]

B. Analysis and Conclusions of Law

In *Nielsen Contracting v. Applied Underwriters, Inc.*,[98] the Court of Appeal agreed with the Commissioner's finding in *Shasta Linen* that AUCRA and CIC are so "enmeshed" and "intertwined" that they should be considered together in determining whether an RPA modified CIC's policies. As the Commissioner determined in *Shasta Linen*:

> AUCRA is not an independent party[.] ... AUCRA is a wholly-owned subsidiary of Applied Underwriters, Inc.; the same corporation that owns CIC. The Boards of Directors for CIC, AU, and AUCRA are identical in composition[.] ... In addition, AUCRA's sole purpose is to serve as supposed reinsurer to CIC. As such, it is inextricably intertwined with CIC and AU. Indeed, the affiliated entities are so enmeshed that each of CIC's financial examinations discuses EquityComp as a CIC product, and there is no evidence CIC sought to distinguish itself from EquityComp.[99]

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

The Commissioner further found as follows:

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

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[97] *Id.* at p. 1219.
[98] *Nielsen Contracting v. Applied Underwriters, Inc., supra,* 22 Cal.App.5th at p. 1116.
[99] *Shasta Linen, supra,* at pp. 49-51.

...

> Lastly, the Commissioner must determine whether the rates and rating plan sold to [the appellant] adhere to the Insurance Code and the approved rating plan. If [the appellant's] rates differ from those quoted by CIC and approved by the Commissioner, [the appellant] may challenge those rates under section 11737, subdivision (f), regardless of whether CIC or AUCRA sold [the appellant] the RPA.[100]

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

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

Appellant argues the RPA unlawfully employed unfiled rates and supplementary rate information.[101] Appellant further contends Respondents' use of the unfiled information misapplied the guaranteed cost policies' rating plan.[102] Respondents assert that a finding of unlawfulness by the Commissioner equates to rate disapproval, which would be invalid because the Commissioner did not comply with the statutory notice and hearing requirements for rate disapproval. Respondents alternatively argue the use of unfiled rates is not unlawful unless the Commissioner first disapproves them, which he did not do. The Commissioner finds Appellant's arguments persuasive and is not convinced by Respondents' arguments.

A. Applicable Law

As previously indicated, Insurance Code section 11735, subdivision (a), requires insurers to file all rates and supplementary rate information, without exception, before using them in California. The term "supplementary rate information" includes any "minimum premium, policy

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[100] *Ibid.*

[101] Appeal at p. 3:4-9.

[102] *Id.* at p. 5:15-24; Appellant's Post Hearing Brief, filed January 18, 2019 ("App. Post-Hearing Br."), pp. 4-15.

fee, rating rule, rating plan, and any other similar *information needed to determine the applicable premium for an insured.*"[103] The Commissioner and courts construe "premium" broadly to include any amounts paid to insurers for coverage.[104] Thus, any information necessary to determine amounts owed by an insured to its insurer is supplementary rate information. As such, it must be filed and open to public inspection under section 11735.

In addition, insurers may charge premium only in accordance with their filed rates and supplementary rate information.[105] As the Commissioner determined in *Shasta Linen*, an insurer's use of unfiled rates or supplementary rate information is unlawful.[106] That is true regardless of whether the Commissioner disapproved the unfiled rates under Insurance Code section 11737.[107]

B. Analysis and Conclusions of Law

The rates set forth in the guaranteed cost policies comport with Respondents' rate filings under Insurance Code section 11735.[108] In contrast, the RPA unlawfully imposes unfiled rates and supplementary rate information that substantially modify and misapply the guaranteed cost policies' rates.

1. Respondents Charged Appellant Unfiled Rates.

Starting in policy year 2012,[109] the Proposal and RPA imposed "loss pick containment

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[103] Ins. Code, § 11730, subd. (j), emphasis added.
[104] *Shasta Linen, supra,* at pp. 48-49 ["[M]oney paid by an insured to an insurer for coverage constitutes premium regardless of its name."]; *Troyk v. Farmers Group Inc.* (2009) 171 Cal.App.4th 1305, 1325 ["[I]nsurance premium includes not only the 'net premium,' or actuarial cost of the risk covered (i.e., expected amount of claims payments), but also the direct and indirect costs associated with providing that insurance coverage and any profit or additional assessment charged."].
[105] *Shasta Linen, supra,* at p. 49.
[106] *Id.* at p. 52.
[107] See *Ibid.*
[108] Exhs. 5 through 7; March 2019 Official Notice Order, Exhs. A through C.
[109] I.e., the annual period beginning June 1, 2012.

rates" of $16.73 for classification code 2585, and $0.70 for classification code 8810.[110] Those rates were not filed in accordance with section 11735.[111] In contrast, the filed rates for those classification codes set out in the 2012 guaranteed cost policy were $19.59 and $0.83, respectively.[112] Similar discrepancies can be seen in all three policy years, as shown in the following table:[113]

Classification Code	Rates (dollars per $100 of payroll)			
	2012 Policy	2013 Policy	2014 Policy	RPA and Proposal
2585	$19.59	$17.06	$20.37	$16.73
8810	$0.70	$0.80	$0.84	$0.70

Simply put, Respondents charged Appellant based on the unfiled loss pick containment rates in the Proposal and RPA, not the guaranteed cost policies' filed rates.[114] It is beyond doubt that the rates Appellant paid departed from those in the guaranteed cost policies. Indeed, Respondents' EquityComp Proposal notes that rates applicable to Appellant are the RPA's loss pick containment rates and not the policies' rates.[115] The monthly EquityComp plan analyses sent by Respondents also confirm that Appellant's program cost was based on the RPA's rates rather than those in the policies.[116] Moreover, the Commissioner found in *Shasta Linen* that the RPA rates and payment terms supplanted those of CIC's policies, and Respondents are precluded from arguing otherwise.[117] Because Respondents charged Appellant based on the unfiled Proposal and RPA rates, they unlawfully changed and misapplied the filed rates in the guaranteed cost policies.

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[110] Exh. 4 at p. 4-10. The classification codes are set out in the California Workers' Compensation Uniform Statistical Reporting Plan—1995, Cal. Code Regs., tit. 10, § 2318.6.
[111] See March 2019 Official Notice Order, Exhs. A through C.
[112] Exh. 5 at p. 5-3.
[113] Exhs. 4 at p. 4-10, 5 at p. 5-3, 6 at p. 6-4, 7 at p. 7-4.
[114] See *Shasta Linen, supra,* at p. 55; Exh. 11 at pp. 11-03, 11-06.
[115] Exh. 1 at p. 1-4.
[116] E.g., Exh. 9 at p. 9-3.
[117] *Shasta Linen, supra,* at p. 56. See discussion in part V(C) below.

2. Respondents Applied Unfiled Supplementary Rate Information.

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

Most significantly, the RPA lays out a framework for altering Appellant's premium based on losses. Respondents' EquityComp patent describes the premium alteration as follows:

> If the insured has lower than average losses in the next year, then the reinsurance company can provide a *premium reduction* according to the participation plan. If the insured has higher than average losses in a given year, then the reinsurance company will assess *additional premium* accordingly.[118]

The contractual mechanism for assessing additional premium is described in RPA sections 1, 2 and 4, which establish the "segregated cell" account that Appellant must pay into and the "run-off term" during which additional premium may be assessed. The mechanism is further described in sections 1 through 4 of RPA Schedule 1, which detail the calculation and allocation of Appellant's premium based in large part on "loss pick containment amounts," "loss development factors" and "exposure group adjustment factors" or "EGAFs."[119]

In addition, RPA section 4 and RPA Schedule 1, section 6 impose early cancellation fees not set out in Respondents' rate filings, and modify the guaranteed cost policies' cancellation terms and filed rates.[120] Finally, the RPA removes Appellant's loss experience modification factor in calculating premium.[121] That factor, which is detailed in Respondents' rate filings and

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[118] *Shasta Linen, supra,* at p. 24, emphasis added.
[119] Exh. 4 at pp. 4-1, 4-2, 4-7, 4-8.
[120] *Id.* at p. 4-8.
[121] See Exh. 4.

the guaranteed cost policies, is required by law.[122]

In sum, all of the RPA's economic terms purport to change Appellant's premium obligations. Those terms therefore constitute "rates" or "supplementary rate information" as defined in Insurance Code section 11730. Because Respondents included none of that information in its rate filings, as required by Insurance Code section 11735,[123] the RPA is unlawful and misapplied Respondents' rate filings.[124]

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

Respondents' failure to file the RPA's rate information contravenes public policy, and is not merely a technical violation. The main goal of California's workers' compensation framework is to protect the state's workforce by ensuring benefits are available to those injured or sickened in the course of their employment.[125] Insurance Code section 11735's filing and public inspection requirement furthers that goal in two ways. First, the filing requirement ensures the Commissioner has the rate information necessary to determine that insurers charge amounts that are not discriminatory, not monopolistic, cover their losses and expenses, and do not threaten their solvency.[126] By withholding the RPA's rate information from their rate filings, Respondents prevented the Commissioner from exercising those oversight duties.

Second, section 11735's public inspection requirement provides broad access to filed rate information allowing employers to find coverage at the best competitive rates.[127] When rate information is transparent, policyholders are better able to compare coverage and reduce their costs. And insurers are less likely to gain a monopolistic advantage when all carriers' pricing

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[122] Cal. Code Regs., tit. 10, § 2351.1; *Shasta Linen, supra,* at p. 56.
[123] See *Shasta Linen* Exh. 19, 20, 21, 23, 24; March 2019 Official Notice Order, Exh. A through C.
[124] See *Shasta Linen, supra,* at p. 52.
[125] *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1065.
[126] See Ins. Code, §§ 11732-11737.
[127] Ins. Code, § 11735, subd. (b); see also Ins. Code, § 11742, subd. (a).

information is public.

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

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

When insurers use unfiled rates and supplementary rate information to modify their filed rates and information, they frustrate the Legislature's intent behind the comparison guide and section 11735's public inspection provisions. Respondents' failure to file the RPA's rates and supplementary rate information directly undermined these policy aims by preventing the public from comparing Respondents' filed rates to those actually charged under EquityComp.[128]

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

Respondents argue that use of unfiled rate information is not unlawful unless the Commissioner follows the rate disapproval procedures laid out in Insurance Code section 11737, subdivisions (a) and (d).[129] But *Shasta Linen* determined that use of unfiled rates is unlawful regardless of any rate disapproval action.[130] Respondents are bound by that determination and are precluded from rearguing it here.[131] In any event, their argument is incorrect. Finding the use of unfiled rate information unlawful under subdivision (f) is neither equivalent to, nor predicated

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[128] In addition, by marketing and selling EquityComp to companies with less than $500,000 in annual premiums, like Appellant, Respondents frustrated the policy aim of protecting small and mid-sized employers from the risks of loss-sensitive insurance plans. (See *Shasta Linen, supra,* at pp. 15-16.)
[129] Resp. Post-Hearing Br. at p. 23.
[130] *Shasta Linen, supra,* at pp. 45, 52.
[131] See part V(C) below regarding *Shasta Linen*'s preclusive effect.

on, rate disapproval.[132]

Section 11737 delineates two separate roles for the Commissioner. Subdivision (f) authorizes the Commissioner to hear private party appeals concerning the application of rate filings. In contrast, subdivisions (a) though (e) permit the Commissioner to bring his own actions to disapprove unfiled or otherwise improper rates. When the Commissioner finds an unfiled rate or supplementary rating information unlawful under subdivision (f), he performs an *adjudicatory* function. When the Commissioner disapproves an unfiled rate under subdivisions (a) and (d), he acts in an *enforcement* capacity. Indeed, subdivision (f) makes no reference to disapproval. Thus, contrary to Respondents' assertions, determinations of unlawfulness and rate disapprovals are not equivalent.

Respondents further argue that use of unfiled rate information remains lawful unless the rates are first disapproved.[133] Their argument implies that if use of unfiled rates were *per se* unlawful, the Commissioner's authority to disapprove those rates would be superfluous. According to that argument, disapproval must be a prerequisite to finding unfiled rates unlawful.[134] But the argument overlooks statutory language and relevant case law.

First, rate disapproval allows the Commissioner to forestall the use of unlawful rates prior to private party appeals. If the Commissioner learns an insurer is using an unfiled rate, he may stop the unlawful activity by disapproving the rate on his own initiative, rather than waiting until a private party appeal.[135] Thus, rather than being superfluous, the rate disapproval mechanism serves an important policy aim.

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[132] See *Shasta Linen, supra,* at p. 45 ["The authority to hear grievances of employers for misapplication of rates ... is separate from the Commissioner's authority to disapprove rates."]
[133] Resp. Post-Hearing Br. at p. 23.
[134] See, e.g., *Shasta Linen Supply, Inc. v. Applied Underwriters, Inc.* (E.D.Cal. Jun. 20, 2016, Civ. No. 2:16-158 WBS AC) 2016 WL 3407797 at p. *4.
[135] Of course, the fact the rates are unfiled makes it likely the Commissioner will not learn of their unlawful use until an aggrieved private party raises an appeal, in which case rate disapproval would be too late to benefit the appellant.

Second, California courts have not accepted Respondents' argument. In *South Tahoe Gas Co. v. Hofmann Land Improvement Co.*,[136] the plaintiff public utility sought to enforce a higher contractual rate than the rate it had filed with the Public Utilities Commission ("PUC"). The defendant countered that the contract was illegal and violated state law and PUC regulations since it charged an unfiled rate. Much like Insurance Code section 11735, the Public Utilities Code section 489 requires the utility to file its rates and rating information. And similar to Insurance Code section 11737, Public Utilities Code section 728 permits the PUC to disapprove a utility's rates. Although there was no indication the PUC acted under section 728, the Court of Appeal agreed that a charge in excess of the filed rate was illegal.[137] In essence, the Court's ruling confirms that rate disapproval proceedings are not a prerequisite to finding the use of unfiled rates unlawful.

Finally, Respondents rely upon an unpublished opinion of the Court of Appeal and interlocutory orders in another case to argue that use of unfiled rates remains lawful unless disapproved by the Commissioner.[138] Those cases are easily distinguished. In both, the plaintiffs attempted to base Unfair Competition Law ("UCL")[139] claims on violations of section 11735's filing requirements. The courts held that such a violation could not form the basis for a claim *in court* when the Commissioner had not disapproved the unfiled rates. In reaching this result, the Court of Appeal relied on *Samura v. Kaiser Foundation Health Plan, Inc.*[140] The *Samura* court held that a UCL claim may not be based on violations of a statute whose enforcement "has been

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[136] *South Tahoe Gas Co. v. Hofmann Land Improvement Co.* (1972) 25 Cal.App.3d 750 (*South Tahoe Gas*).
[137] *Id.* at p. 755.
[138] Resp. Post-Hearing Br. at pp. 23-24 [citing *Bristol Hotels & Resorts v. Nat. Council on Compensation Ins., Inc.* (Mar. 13, 2002, E027037) [nonpub. opn.]; *Shasta Linen Supply, Inc. v. Applied Underwriters, Inc., supra,* 2016 WL 6094446 at pp. *3-*6].
[139] Bus. & Prof. Code, § 17200 et seq.
[140] *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284 (*Samura*).

entrusted exclusively" to a regulatory agency.[141] Such a claim, if allowed, would result in the court improperly invading the agency's exclusive purview.[142] But nothing in *Samura* suggests the agency charged with enforcing the statute may not remedy its violation. While courts may not have original jurisdiction to remedy a violation of section 11735 in a private party action, the Commissioner does.[143]

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

Having found the RPA void, the Commissioner must consider the appropriate remedy. Respondents argue the Commissioner has no authority to order retrospective remedies under Insurance Code section 11737, subdivision (f). Specifically, Respondents assert the Commissioner may not find a contract void or unenforceable in private party appeals.[144] Appellant argues that the illegal RPA should be enforced except for its EGAF charge multiplier provisions.[145] The Commissioner finds both parties' arguments unpersuasive.[146]

A. Applicable Law

1. Insurance Code Section 11737, Subdivision (f)

Section 11737, subdivision (f), grants the Commissioner broad authority to award remedies in workers' compensation appeals. As previously noted, the statute authorizes him to "affirm, modify, or reverse" an insurer's action concerning the application of its rating system. The statute contains no language restricting remedies the Commissioner may order. Indeed, the breadth of the Commissioner's authority is consistent with his comprehensive role to "require from every insurer a full compliance with all the provisions of [the Insurance Code]."[147]

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[141] *Id.* at p. 1299.
[142] *Ibid.*
[143] See the discussions on jurisdiction in part I above and remedies in part IV below.
[144] Resp. Post-Hearing Br. at pp. 21-22.
[145] App. Post-Hearing Br. at pp. 4-18.
[146] As a preliminary matter, the ALJ notes the Commissioner determined in *Shasta Linen* that he has authority to find a contract void in a private party appeal. (*Shasta Linen, supra,* at pp. 65-68.)
[147] Ins. Code, § 12936.

While Respondents argue that remedies under rate disapprovals may only be applied prospectively,[148] remedies for findings of unlawfulness under subdivision (f) may either be prospective or retrospective.[149] In fact, nothing in subdivision (f) suggests the Commissioner's decision to modify or reverse an insurer's action may apply only on a going-forward basis. That subdivision principally concerns past harm, in that it authorizes a private party "aggrieved" (past) to request action by an insurer to review the manner in which its rating system "has been applied" (past) in connection with the "insurance afforded or offered" (past). Since a prospective remedy would do nothing to address past harm, logically remedies under subdivision (f) may be retrospective.

Finally, because subdivision (f) does not limit the available remedies, the Commissioner may void contracts that are based on unlawful rates and sever unlawful provisions, as appropriate.[150] The California Supreme Court's holding in *Marathon Entertainment, Inc. v. Blasi*[151] clarifies this authority. There, an actress brought a claim a before the California Labor Commissioner, seeking to void a contract with her manager on the grounds the agreement violated the Talent Agency Act. The Labor Commissioner found a violation and declared the contract void even though the statute specified no remedy. The Court explained that since "the Legislature has not seen fit to specify the remedy for violations" of the act, "the full voiding of the parties' contract is available, but not mandatory; likewise, severance is available, but not mandatory."[152] The Court further stated those remedies could be imposed at the administrative level, as well as by the courts.[153]

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[148] Resp. Post-Hearing Br. at p. 24. This Proposed Decision need not, and does not, decide whether there may be circumstances in which rate disapproval remedies may be applied retrospectively.
[149] *Shasta Linen, supra,* at p. 53.
[150] *Id.* at pp. 65-66.
[151] *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 996.
[152] *Ibid.*
[153] *Id.* at pp. 996, 998.

2. Civil Code Sections 1598 and 1608

Civil Code sections 1598 and 1608 render a contract "void" if its object or consideration are unlawful.[154] And the California Supreme Court has held that a contract made in violation of a regulatory statute is generally void.[155] Indeed, courts will not normally enforce an illegal agreement or one against public policy, as the public importance of discouraging prohibited transactions outweighs equitable considerations of possible injustice between the parties.[156]

This is especially true where regulated entities fail to file their rates as required by law. In such cases, California courts have held contractual provisions based on the unfiled rates unlawful and void.[157] Similarly, the Commissioner determined in *Shasta Linen* that insurance contracts based on unfiled rates in violation of Insurance Code section 11735, subdivision (a), are unlawful and void.[158]

In compelling cases, the courts will enforce illegal contracts in order to avoid unjust enrichment to a defendant and a disproportionately harsh penalty upon the plaintiff.[159] "[T]he extent of enforceability and the kind of remedy granted depend upon a variety of factors, including the policy of the transgressed law, the kind of illegality and the particular facts."[160] A contract is absolutely void where the illegality involves *malum in se*—acts "of an immoral character, those which are inequities in themselves, and those opposed to sound public policy or designed to further a crime or obstruct justice."[161] On the other hand, where the illegality involves *malum prohibitum*, the contract will be voidable "depending on the factual context and

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[154] *R. M. Sherman Co. v. W. R. Thomason, Inc.* (1987) 191 Cal.App.3d 559, 563.
[155] *Asdourian v. Araj* (1985) 38 Cal.3d 276, 291.
[156] *Ibid.*
[157] *South Tahoe Gas Co. v. Hofmann Land Improvement Co., supra,* 25 Cal.App.3d at p. 752.
[158] *Shasta Linen, supra,* at pp. 52, 65-66.
[159] *Asdourian v. Araj, supra,* 38 Cal.3d at p. 292.
[160] *South Tahoe Gas Co. v. Hofmann Land Improvement Co., supra,* 25 Cal.App.3d at p. 759.
[161] *Vitek, Inc. v. Alvarado Ice Palace, Inc.* (1973) 34 Cal.App.3d 586, 593.

the public policies involved."[162] In deciding whether to enforce an illegal contract, courts may also consider whether the parties are *in pari delicto* and whether the statute's purpose would best be served by enforcement of the contract.[163]

In addition, a contract made in violation of statute will be enforced "where the penalties imposed by the Legislature exclude by implication the additional penalty of holding the contract void."[164] In determining whether to enforce such a contract, "the courts should strive to deal with the transaction so as to give effect to the fundamental purpose of the Legislature and to a wise public policy."[165]

3. Civil Code Section 1599

The California Civil Code permits severing unlawful provisions from an otherwise lawful contract. Civil Code section 1599 states that "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." Section 1599 applies "when the parties have contracted, in part, for something illegal. Notwithstanding any such illegality, it preserves and enforces any lawful portion of a parties' contract that feasibly may be severed."[166]

Severing illegal terms prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of a voided contract.[167] And it further conserves a contractual relationship where doing so would not condone an illegal scheme.[168]

The doctrine of severability is equitable and fact specific.[169] The overarching inquiry is

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[162] *Asdourian v. Araj, supra*, 38 Cal.3d at p. 293.
[163] *Homestead Supplies, Inc. v. Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 990-991.
[164] *Asdourian v. Araj, supra*, 38 Cal.3d at p. 291.
[165] *Vitek, Inc. v. Alvarado Ice Palace, Inc., supra*, 34 Cal.App. at p. 593.
[166] *Marathon Entertainment, Inc. v. Blasi, supra*, 42 Cal.4th at p. 991.
[167] *Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1230.
[168] *Ibid.*
[169] *Marathon Entertainment, Inc. v. Blasi, supra*, 42 Cal.4th at p. 998.

whether severance would further the interests of justice.[170] As explained in *Baeza v. Superior Court*:[171]

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

B. Analysis and Conclusions of Law

1. The RPA Is Void and Its Terms Cannot Be Severed.

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

Consider *South Tahoe Gas Co. v. Hofmann Land Improvement Co.*,[174] discussed above. There, the plaintiff public utility sought to enforce a higher contractual rate than was set out in the plaintiff's regulatory rate filings. The court found the unlawful contractual rate void and unenforceable.[175] The court severed the unlawful rate and enforced the remainder of the contract in that case because "there is no law against contracting for the extension of a gas main. It is only the amount that can be charged which is regulated."[176] That contrasts with this appeal, where the

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[170] *Ibid.*
[171] *Baeza v. Superior Court, supra,* 201 Cal.App.4th at p. 1230.
[172] *Shasta Linen, supra,* at pp. 52, 65-66.
[173] See *South Tahoe Gas Co. v. Hofmann Land Improvement Co., supra,* 25 Cal.App.3d at p. 752 [public utility's unfiled rate held void]; *Shasta Linen, supra,* at pp. 52, 65-66.
[174] *South Tahoe Gas Co. v. Hofmann Land Improvement Co., supra,* 25 Cal.App.3d at p. 752.
[175] *Ibid.*
[176] *Id.* at p. 757.

RPA's central purpose was to illegally modify Respondents' filed rates and override the legal rate scheme set out in the guaranteed cost policies. As earlier discussed, the RPA's economic terms consist of unfiled rates and supplementary rate information whose use is illegal. The remainder of the RPA is boilerplate that serves only to implement the economic provisions.[177] Accordingly, the RPA "has but a single object"[178] making it impossible to sever only those provisions relating to rates and supplementary rate information. In addition, no interest of justice or public policy would be furthered by enforcing any of the boilerplate terms. The Commissioner therefore finds the entire RPA void and unenforceable. And to the extent the RPA's terms are contained in the Proposal, such terms are void and unenforceable under that document as well.

The California Supreme Court's holding in *Marathon Entertainment* also supports the Commissioner's authority to find the RPA void.[179] Nevertheless, Respondents argue an agency may not impose a remedy upon an insurer for noncompliance with the law "unless expressly permitted by statute."[180] In support of this contention, Respondents rely on three pre-*Marathon Entertainment* cases. These cases are inapplicable and unpersuasive.[181] First, Respondents mischaracterize the holding in *American Federation of Labor v. Unemployment Insurance Appeals Board*, in which the Supreme Court stated that statutory remedies may be authorized either expressly *or by implication*.[182] Neither of the other two cases suggest otherwise. Second, the statutes at issue in all three cases define and limit the available remedies, unlike the statute.

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[177] See, generally, Exh. 4.
[178] Civil Code, §1598.
[179] *Marathon Entertainment, Inc. v. Blasi, supra,* 42 Cal.4th at p. 996.
[180] Resp. Post-Hearing Br. at pp. 21-22.
[181] *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1042-1043 (*AFL*); *Peralta Comm. College Dist. v. FEHA* (1990) 52 Cal.3d 40, 60 (*Peralta*); *Shernoff v. Superior Court* (1975) 44 Cal.App3d 406, 409 (*Shernoff*)..
[182] *AFL,* at p. 1039 ["[W]e should not necessarily limit an agency's powers to those expressly granted, because the statutory scheme may 'necessarily imply' those powers."].

discussed in *Marathon Entertainment* and unlike section 11737, subdivision (f).[183] Where statutory remedies are defined, an agency may not exceed their scope. But when remedies remain undefined, as here, *Marathon Entertainment* is clear that voiding and severance are available.

Finally, Appellant argues that only the terms relating to exposure group adjustment factors should be severed from the RPA.[184] But those provisions are not the RPA's (or the Proposal's) only illegal terms, as discussed above. This tribunal cannot sever unlawful terms that disadvantage Appellant but enforce those that Appellant finds favorable. As Appellant rightly pointed out,[185] adjudicators must refuse to enforce *all* unlawful contract terms that violate public policy once the illegality is apparent.[186]

2. No Compelling Reason Exists to Enforce the RPA.

Even assuming the illegal RPA were merely voidable rather than void *per se*, no valid reason exists to enforce it.[187] Failure to enforce the agreement would neither result in unjust enrichment nor an unduly harsh penalty. Additionally, there is no indication the Legislature intended to exclude the administrative remedy of finding the RPA void.

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

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

First, there is no risk of *unjust* enrichment to Appellant, because "an insurer's issuance of

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[183] *Id.* at p. 1025 [remedy limited to payment of unemployment benefits]; *Peralta* at p. 46 [enumerated remedies "related to matters which serve to make the aggrieved employee whole in the context of employment"]; *Shernoff,* at p. 409 [remedies "limited to restraint of future illegal conduct"].
[184] App. Post-Hearing Br. at pp. 4-18.
[185] *Id.* at pp. 10-11.
[186] See *Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 147-148 ["Whatever the state of the pleadings, when the evidence shows that the plaintiff in substance seeks to enforce an illegal contract or recover compensation for an illegal act, the court has both the power and duty to ascertain the true facts in order that it may not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids. [Citations.] It is immaterial that the parties, whether by inadvertence or consent, even at the trial do not raise the issue. The court may do so of its own motion when the testimony produces evidence of illegality."].
[187] See *Shasta Linen, supra,* at pp. 67-68.

an illegal contract, even if it results in enrichment to the insured, does not result in *unjust* enrichment, since the insured did nothing wrong and the insurer should have known of its own legal duties."[188]

Second, denying enforcement of the illegal RPA is not unduly harsh, because Respondents knew of California's filing requirements. In fact, their EquityComp patent makes it clear that Respondents not only knew of the filing requirements but used the RPA to evade their regulatory obligations.[189] Additionally, enforcing the RPAs would encourage illegal activity—i.e., the use of unfiled rates and supplementary rate information.[190]

Third, the parties are not *in pari delicto*. Appellant had no reason to know the RPA's rates and supplementary rate information was unfiled. Respondents are the sole parties at fault, since it used the RPA to circumvent California's filing requirements. "[I]t would not be equitable to allow the party who created the illegality to enforce the illegal contract."[191]

Finally, an important purpose behind section 11735's filing and public inspection requirements is to ensure the protection of California's workforce.[192] Insurers who unlawfully use unfiled rate information frustrate that policy.[193] Except in narrow circumstances not applicable here, "[i]t is a settled rule that a contract will not be enforced if the contract is in violation of the provisions of a statute enacted for the protection of the public."[194]

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[188] *American Zurich Ins. Co. v. Country Villa Service Corp.* (C.D.Cal. Jul. 9, 2015, No. 2:14-cv-03779-RSWL-AS) 2015 WL 4163008 at p. *16; accord *Shasta Linen, supra,* at pp. 67-68.
[189] See *Shasta Linen, supra,* at pp. 23-24, 61-62.
[190] *American Zurich Ins. Co. v. Country Villa Service Corp., supra,* at p. *17; accord *Shasta Linen, supra,* at p. 68.
[191] *American Zurich Ins. Co. v. Country Villa Service Corp., supra,* at p. *17; *Shasta Linen, supra,* at p. 68.
[192] See the discussion in part III(B)(3) above.
[193] See discussion in part III(B)(3) above. See also *Shasta Linen, supra,* at p. 67.
[194] *Napa Valley Elec. Co. v. Calistoga Elec. Company* (1918) 38 Cal.App. 477, 478-479; accord *American Zurich Ins. Co. v. Country Villa Service Corp., supra,* at p. *17. The exception involves licensing laws enacted solely "for the protection of private economic interests (such as the interest of property owners in competent construction)" by licensed contractors. (*R. M. Sherman Co. v. W. R. Thomason, Inc., supra,* 191 Cal.App.3d at 566.) Since the workers' compensation statutes were enacted in large part to protect California's workforce, and not merely the economic interests of employers, any "analogy with the licensing cases fails entirely." (*Id.* at p. 568.)

Respondents nevertheless argue under *Medina v. Safe-Guard Products*[195] that the RPA should be enforced because Appellant suffered no harm or loss due to its unfiled rates.[196] But Respondents' reliance on *Medina* is misplaced. There, the statute specifically required the plaintiff to have "'suffered injury in fact and ha[ve] lost money or property'" in order to assert a claim.[197] In contrast, Insurance Code section 11737, subdivision (f), requires no such injury or loss.[198]

Accordingly, the illegal RPA should not be enforced.

b. The Insurance Code Permits Finding the RPA Void.

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

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[195] *Medina v. Safe-Guard Products* (2008) 164 Cal.App.4th 105, 115 (*Medina*).
[196] Resp. Post-Hearing Br. at p. 37.
[197] *Medina, supra,* at p. 115.
[198] In a similar context, the court in *South Tahoe Gas* found an unfiled rate unenforceable even though the buyer apparently suffered no harm from the rate's unfiled status. (*South Tahoe Gas Co. v. Hofmann Land Investment Co., supra,* 25 Cal.App.3d at p. 755.)

process in section 11737.

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

Given that the RPA is void and unenforceable, we turn to the question of whether to sever the RPA from the guaranteed cost policies, or whether instead to find the parties' entire contractual arrangement void. The Commissioner finds the RPA must be severed.

While the main purpose of the RPA was illegal— *i.e.*, to use unfiled rate information to modify and misapply Respondents' filed rates—the central purpose of the parties' overall arrangement was valid; to provide Appellant with workers' compensation insurance. The RPA, with its focus on unlawful rates and supplementary rate information, was collateral to that central purpose. Additionally, there has been no allegation in this appeal that any portion of the guaranteed cost policies is unlawful. Moreover, "the interest of justice or the policy of the law would be furthered"[199] by severing the RPA. Finding the entire arrangement void, including the policies, would leave Appellant uninsured for the period in question. That would be neither lawful, since the law requires Appellant to have workers' compensation insurance, nor would it be in the best interest of the workers left without coverage for any injuries occurring during that period. Accordingly, the RPA should be severed from the guaranteed cost policies.

4. Limited Scope of this Order.

Respondents contend that once the RPA is severed from the guaranteed cost policies, it necessarily follows that Appellant must pay the full price of the guaranteed cost policies.[200] Appellant counters that there was never any agreement between the parties to pay the guaranteed cost rates and to the extent Appellant should be required to pay the reasonable value of insurance provided as *quantum meruit*, "this issue is best left for the courts."[201] Respondents go so far as to

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[199] *Baeza v. Superior Court, supra,* 201 Cal.App.4th at p. 1230.
[200] Resp. Post-Hearing Br. at p.38-39; Respondents' Petition for Reconsideration, filed June 7, 2019, at pp. 3-4.
[201] Appellant's Response to Respondent's Petition for Reconsideration, filed June 25, 2019, at pp. 2-4.

contend that the Commissioner has "no jurisdiction...to resolve those types of private contractual disputes."[202]

The Commissioner disagrees with Respondents' restrictive characterization of the scope of his authority to "affirm, modify or reverse" the action of Respondents. Nevertheless, the scope of the Commissioner's jurisdiction is not unlimited.[203] The most appropriate modification to the action of Respondents in this case is to render the RPA void. Because the RPA in this case is severed from the guaranteed cost policies, Respondents must apply the filed rates associated with the Department-approved guaranteed cost policies to determine Appellant's premium obligations. Should either party elect to pursue further remedies before another tribunal, or otherwise continue to dispute the amounts owed in light of the voidance of the RPA in this case, they are of course free to do so.[204]

V. Respondents Received Due Process and a Fair Hearing.

Respondents argue that limitations on their ability to conduct discovery and to present witness testimony deprived them of due process and a fair hearing. The Commissioner disagrees.

A. Discovery Limits Did Not Deprive Respondents of Due Process.

Respondents rely on *Petrus v. Department of Motor Vehicles*[205] to argue that they were improperly denied a right to discovery.[206] However, *Petrus* involved a hearing under the *formal*

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[202] Respondents' Petition for Reconsideration, filed June 7, 2019, at p. 6.

[203] See, e.g., *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194.

[204] Another tribunal of competent jurisdiction empowered with a broader set of remedies may conclude that the guaranteed cost policies are not enforceable contracts. Such a tribunal, of course, might note that Appellant never intended to purchase a guaranteed cost policy, the parties were not *in pari delicto* when Respondents deliberately chose not to file the now-void RPA, and that "[i]n some cases,...effective deterrence is best realized by enforcing the plaintiff's claim rather than leaving the defendant in possession of the benefit..." (*Maudlin v. Pacific Decision Sciences Corp.* (2006) 137 Cal.App.4th 1001, 1013.) On the other hand, it is reasonable to assume another tribunal will note the Department of Insurance approved the filed guaranteed cost policies, Respondents' guaranteed cost policy rates were properly filed with the Department and the guaranteed cost policies provided Appellant with legally-required workers' compensation insurance. Principles of *quantum meruit*, of course, recognize that Respondents are entitled to the reasonable value for providing Appellant with workers' compensation insurance coverage during the policy years in dispute.

[205] *Petrus v. Department of Motor Vehicles* (2011) 194 Cal.App.4th 1240, 1242-1245 (*Petrus*).

[206] Resp. Post-Hearing Br. at pp. 26-27.

hearing procedures of Chapter 5 of the California Administrative Procedures Act (the "APA").[207] In contrast, this appeal is conducted in accordance with the *informal* procedures of APA Chapter 4.5.[208] Unlike Chapter 5,[209] there is no general right to formal discovery under Chapter 4.5. Nor is such a right specified in Insurance Code section 11737, subdivision (f), or its implementing regulations. Instead, Regulations section 2509.59 provides: "Formal discovery by the parties will be permitted by the hearing officer only upon written notice and a showing of good cause." As discussed in the August 6, 2018, Order Denying Respondent CIC's Request for Discovery, Respondents failed to demonstrate good cause.

Moreover, Respondents' contention that CIC was not "apprised of the documents and witnesses that would be used against it at the hearing" is simply false.[210] All documentary evidence in this proceeding was filed by Respondents. Appellant's witness list was served on or before November 29, 2018, as evidenced by the proofs of service attached to those documents. The evidentiary hearing was conducted three weeks later on December 20, 2018. At the hearing, Appellant called only a witness identified on its witness list. And it introduced no documentary evidence other than the exhibits that Respondents pre-filed at Appellant's request. Respondents thus had ample opportunity to review the evidence that would be used at the hearing.

B. Witness Limitations Did Not Deprive Respondents of Due Process.

Respondents argue they were deprived of due process and fair hearing rights because they were not permitted to present testimony of a proposed witness and the ALJ limited the testimony of their other witness.[211] This argument is unconvincing. As discussed in the ALJ's December 11, 2018 Order Limiting Testimony, the excluded testimony of the proposed

[207] *Petrus* at p. 1244 [License suspension hearing was conducted pursuant to Vehicle Code section 14112, which invokes APA chapter 5.].
[208] Cal. Code Regs., tit. 10, § 2509.57.
[209] See Gov. Code, § 11507.6.
[210] Resp. Post-Hearing Br. at p. 26.
[211] *Id.* at pp. 27-28.

witnesses would have been irrelevant or otherwise inadmissible. In particular, most of the proposed testimony concerned issues decided in *Shasta Linen* that Respondents were estopped from rearguing in this appeal.[212] Respondents had ample opportunity to elicit similar expert witness testimony in *Shasta Linen* and did so. Because they decided to settle and terminate judicial review of that case, Respondents are now bound by its findings.

Respondents also argue that the ALJ improperly elicited testimony from their witness Ellen Gardiner concerning proprietary algorithms underlying the RPA after the ALJ ordered that her testimony be limited to other matters.[213] Respondents contend that eliciting such testimony violated their right to a fair and impartial hearing.[214] But the ALJ did not rely on Ms. Gardiner's testimony concerning the algorithms to make any factual findings or legal conclusions. Accordingly, that testimony could not impact Respondents' due process rights.

C. Respondents May Not Relitigate *Shasta Linen's* Findings and Conclusions.

Respondents contend they may reargue various issues decided in *Shasta Linen*.[215] That is incorrect. As discussed at length in the Notice Regarding the Preclusive Effect of the *Shasta Linen* Decision ("Preclusive Effect Notice"),[216] Respondents are precluded from further litigating those issues by the doctrines of collateral estoppel and failure to exhaust judicial remedies.

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

Respondents argue this appeal must be dismissed because the Consent Order among the CDI, CIC and AUCRA requires the RPA to be enforced and strips Appellant of standing under

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[212] See discussion in subpart C below.
[213] Resp. Post-Hearing Br. at p.28.
[214] Ibid.
[215] Resp. Post-Hearing Br. at p. 26.
[216] Order Taking Official Notice; Notice Regarding Preclusive Effect of the *Shasta Linen* Decision, dated July 20, 2018.

Insurance Code section 11737, subdivision (f).[217] That argument is incorrect for several reasons.

First, nothing in the Consent Order suggests that it binds third parties such as Appellant.[218] Second, the Consent Order provides that the *Shasta Linen* decision is precedential and applies to "any form of RPA that is substantially similar to the RPA issued in Shasta Linen Supply, Inc."[219] Third, the Consent Order expressly states that it neither prevents the Commissioner from declaring unfiled RPAs "unenforceable, void, voidable, or illegal" nor from "adjudicat[ing] the rights of others."[220] As discussed above, the RPA in this case is substantially similar to the RPA in *Shasta Linen*, which the Commissioner determined was unlawful and unenforceable.[221] Accordingly, the Consent Order does not prevent the Commissioner from adjudicating this appeal and finding the RPA void.

Conclusions of Law

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

1. Pursuant to Insurance Code section 11737, subdivision (f), the Commissioner has exclusive jurisdiction to adjudicate Appellant's claim that Respondent misapplied their Insurance Code section 11735 filings.

2. Respondents' RPA contained rates and supplementary rate information that must be filed pursuant to Insurance Code section 11735. Respondents violated section 11735 by failing to file the RPA's rates and supplementary rate information.

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

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[217] Resp. Post-Hearing Br. at p. 29.
[218] See Exh. 249.
[219] *Id.* at pp. 249-3.
[220] *Id.* at pp. 249-6.
[221] *Shasta Linen, supra,* at p. 69.

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

ORDER

IT IS ORDERED:

Respondents shall recalculate Appellant's premium owed for the policy periods at issue in this appeal, using the filed rates for Appellant's guaranteed cost policies. This Order shall become effective immediately.

DATED: July 11, 2019

RICARDO LARA
Insurance Commissioner

By: _____
BRYANT W. HENLEY
Deputy Commissioner & Special Counsel

DECLARATION OF SERVICE BY MAIL

Case Name/No.: In the Matter of the Appeal of:
OCEANSIDE LAUNDRY, LLC,
DBA CAMPUS LAUNDRY
File No. AHB-WCA-17-41

I, CANDACE GOODALE, declare that:

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

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

☒ On July 12, 2019 following ordinary business practices, I caused a true and correct copy of the following document(s):

AMENDED ORDER FOLLOWING PETITION FOR RECONSIDERATION; NOTICE OF TIME LIMITS FOR JUDICIAL REVIEW

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

(SEE ATTACHED SERVICE LIST)

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California, on July 12, 2019.

CANDACE GOODALE

NOTICE OF TIME LIMITS FOR JUDICIAL REVIEW
In the Matter of OCEANSIDE LAUNDRY, LLC, DBA CAMPUS LAUNDRY
Case No. AHB-WCA-17-41

Judicial review of the Insurance Commissioner's Decision may be had pursuant to California Code of Regulations, Title 10, section 2509.76, by filing a petition for a writ of mandate against the Insurance Commissioner or the Department of Insurance, in accordance with the provisions of section 1094.5 of the California Code of Civil Procedure. A petition for a writ of mandamus (writ petition) shall be filed with the Court, and served on the Insurance Commissioner as follows:

Agent for Service of Process
Government Law Bureau
California Department of Insurance
300 Capitol Mall, 17th Floor
Sacramento, California 95814

Since the Administrative Hearing Bureau is a division of the Department of Insurance, and not a separate legal entity, the writ petition should ***not*** name the Administrative Hearing Bureau or the Administrative Law Judge who presided over the matter as respondents. However, a courtesy copy of any writ petition should be delivered to the Administrative Hearing Bureau of the California Department of Insurance as follows:

Department of Insurance
Administrative Hearing Bureau
45 Fremont Street, 22nd Floor
San Francisco, California 94105

A request to the Commissioner or the Hearing Officer for a copy of the administrative record for a writ petition pursuant to California Code of Regulations, Title 10, section 2509.76, subdivision (d) should be made to:

Agent for Service of Process
Government Law Bureau
California Department of Insurance
300 Capitol Mall, 17th Floor
Sacramento, California 95814

The request should include the Matter name and Case Number specified above.

EXHIBIT B

DEPARTMENT OF INSURANCE
ADMINISTRATIVE HEARING BUREAU
45 Fremont Street, 22nd Floor
San Francisco, CA 94105
Telephone: (415) 538-4243
FAX: (415) 904-5854

BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of **RDR BUILDERS, INC., a California corporation, DOS REIS, RONALD, and BARBIERI, MARK, d/b/a/ RDR BUILDERS, LP; and RDR PRODUCT BUILDERS, INC., a California Corporation,** Appellants, From the Decision of the **CALIFORNIA INSURANCE COMPANY; APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.** Respondents.	File AHB-WCA-17-52 **AMENDED ORDER FOLLOWING RECONSIDERATION**

Statement of the Case

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

Because workers' compensation insurance is usually mandatory for California employers,

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

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

This proceeding, as well as dozens like it, arises out California Insurance Company ("CIC"), and Applied Underwriters Captive Risk Assurance Company, Inc.'s ("AUCRA") decision to circumvent California's filing requirements and directly sell an unfiled insurance plan to unwitting employers. Appellants[4] assert this unfiled plan, titled EquityComp, and its accompanying Reinsurance Participation Agreement ("RPA"), unlawfully modified CIC's filed rates. Appellants' argument substantially relies upon the Commissioner's precedential decision *In the Matter of the Appeal of Shasta Linen Supply, Inc.*,[5] in which the Commissioner determined that Respondents' unfiled RPA was unlawful and void.

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

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[2] *Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1118.
[3] See Ins. Code, §§ 11730-11742.
[4] "Appellants" means, collectively, RDR Builders, Inc., Ronald Dos Reis and Mark Barbieri d/b/a RDR Builders, LP, and RDR Production Builders, Inc. "Respondents" means, collectively, CIC and AUCRA.
[5] *In the Matter of the Appeal of Shasta Linen Supply, Inc.* (Cal. Ins. Comm'r, Jun. 20, 2016, AHB-WCA-14-31) (*Shasta Linen*). *Shasta Linen* was designated precedential under Government Code section 11425.60, subdivision (b).

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

Issues Presented

1. Did Respondents misapply their Insurance Code section 11735 filings to Appellants by entering into and applying the RPA?

2. If so, what is the appropriate remedy?

Procedural Background

This appeal arises under Insurance Code section 11737, subdivision (f).[6] Appellants initiated the proceedings on December 20, 2017, by filing an appeal from Respondents' December 1, 2017, rejection of Appellants' complaint concerning its workers' compensation insurance and the RPA. The California Department of Insurance ("CDI") Administrative Hearing Bureau issued an Appeal Inception Notice on December 21, 2017. CIC filed a response on January 11, 2018.[7] At that time CIC was the sole Respondent.

On March 14, 2018, the CALJ ordered the parties to brief the question of whether the Commissioner's *Shasta Linen* decision precluded Respondents from rearguing issues decided in that case. On July 19, 2018, the CALJ issued an Order barring Respondents from rearguing the issues decided in *Shasta Linen* under the doctrines of collateral estoppel and failure to exhaust judicial remedies.

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

[7] The Workers Compensation Insurance Rating Bureau of California ("WCIRB") also filed a response on January 4, 2018, electing not to actively participate in this appeal.

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

On July 20, 2018, the CALJ reassigned the appeal to Administrative Law Judge Clarke de Maigret.

On November 17, 2018, the ALJ conducted an evidentiary hearing in CDI's San Francisco hearing room. Larry J. Lichtenegger, Esq. of the Lichtenegger Law Office represented Appellants. Amanda L. Morgan, Esq., Jeanette T. Barzelay, Esq. and July M. Brighton, Esq. of DLA Piper LLP (US) represented Respondents.

At the evidentiary hearing, Appellants called no witnesses. Respondents called Daniel Mello as an adverse witness.[8] The evidentiary record includes Mr. Mello's testimony and the documents admitted into evidence, as identified on the parties' exhibit lists.[9]

Following post-hearing briefing, the ALJ closed the record on January 29, 2019 and issued his Proposed Decision on April 4, 2019. The Commissioner adopted the Proposed

[8] In their pre-hearing witness list, Respondents designated four potential witnesses: Ellen Gardiner, Travis J. Koch, William D. Hager, and Gary Osborne. Appellant submitted written objections, dated October 22, 2018, to the proposed testimony of Ms. Gardiner, Mr. Hager, and Mr. Osborne. The ALJ sustained those objections on October 24, 2018, and excluded Ms. Gardiner, Mr. Hager, and Mr. Osborne as witnesses on the grounds that their testimony would be irrelevant, unduly time consuming relative to its probative value, or improper for expert witnesses. The ALJ permitted Respondents to call Mr. Koch to testify, but Respondents declined to do so.

[9] The following exhibits were admitted: Exhibits 14 through 16, 103 through 109, 200 (pages 14 and 15 only), 201, 202, 204, 205, 209 (pages 209-3 through 209-68 only), 210 through 217, 226, 228, 229 through 232, 294, and 307 through 310. All preceding "0s" are omitted from exhibit page number references. For example "209-3" refers to the page of Exhibit 209 marked "209-03."

Decision on May 13, 2019, but ordered a stay of that decision on June 21st, 2019,[10] so that the parties could brief page 37, footnote 203 of that decision, in light of the precedent decision *In the Matter of the Appeal of Shasta Linen Supply, Inc.* (Cal. Ins. Comm'r, Jun. 20, 2016, AHB-WCA-14-31). The parties timely filed briefs in response to the Commissioner's Order of Stay and Invitation to Brief Reconsideration, as well as responses to those briefs.

Findings of Fact

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

I. Appellants' Business

Appellants are based in Lodi, California and provide construction contracting services in California and Nevada.[11] RDR Builders, Inc., a corporation, is the general partner of RDR Builders, LP, a limited partnership.[12] Ron Dos Reis and Mark Barbieri are RDR Builders, LP's limited partners.[13] At all relevant times, RDR Production Builders, Inc. was a corporation with the same executive leadership as RDR Builders, Inc.[14]

II. Appellants' Purchase of EquityComp

In the years before 2014, Appellants purchased workers' compensation insurance from

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[10] Appellants e-mailed Objections to the Commissioner's Order of Stay on July 19, 2019. Appellants contend that the Commissioner's Order of Stay exceeded his jurisdiction because it was issued on June 21, 2019. Appellants contend the last day to order a reconsideration was June 16, 2019. Because the Order of Stay directed the parties to file petitions for reconsideration by July 1 and responses by July 16, Appellants objection is untimely. It is also denied on its merits. The power to order reconsideration expires 30 days after service of a decision on the parties. Tit. 10, Cal. Code Regs. section 2509.72. "Service" as defined in relation to the hearing extends any right or duty to do any act for a period of five days from the date of mailing. Tit. 10, Cal. Code Regs. section 2509.42, subd. (p). In this case, the Order Adopting the Proposed Decision was mailed on May 17, 2019. Applying the rules regarding service, the 30 day expiration extended for a period of five days from June 16, 2019 to June 21, 2019. Accordingly, Appellants' Objections to the Stay are denied.

[11] Transcript of proceedings of November 17, 2018 ("Tr."), p. 31:13-15; Evidentiary hearing exhibit ("Exh.") 201 at p. 201.4.

[12] Exh. 201.

[13] *Ibid.*

[14] Tr. at p. 31:7-12.

insurers other than Respondents.[15] In December 2014, Appellants' insurance broker presented them with a written program summary, as well as a proposal and quote ("Proposal"), for Respondents' EquityComp insurance program.[16] Shortly thereafter, Appellants decided to purchase a three-year EquityComp program, and signed Respondents' Request to Bind Coverage & Services on December 17, 2014 (the "Request to Bind").[17] The Request to Bind provides in relevant part:

> The applicant(s) identified below, whether one or more (collectively the "Applicant")[18] request that Applied Underwriters, Inc. through its affiliates and/or subsidiaries (collectively, "Applied") pursuant to the Workers' Compensation Program Proposal and Rate Quotation ("Proposal") cause to be issued to Applicant one or more workers' compensation insurance policies and such other insurance coverages identified in the Proposal (collectively the "Policies") subject to Applicant executing the following agreements (collectively the "Agreements"): (1) Reinsurance Participation Agreement; and where available, (2) Premium Finance Agreement.
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> . . .
>
> This acknowledgment and disclosure is intended to confirm receipt of the Proposal and Applicant's acceptance of the Proposal along with certain additional terms and conditions. Only the Agreements and Policies contain the actual operative provisions. . . .[19]

Appellants' EquityComp program began on December 27, 2014.[20] Before the end of the program's second year, Appellants became dissatisfied with the program charges' fluctuation and lack of transparency.[21] As a result, the parties agreed to terminate the program a year early, effective December 26, 2016.[22] The Policies and RPA referenced in the Request to Bind are discussed below.

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[15] Tr. at p. 33:15-17.
[16] Exhs. 100, 101.
[17] Exh. 200 at p. 200-14.
[18] I.e., Appellants.
[19] Exh 200 at p. 200-14.
[20] Exhs. 103 at p. 103-1, 104 at p. 104-1.
[21] Tr. at p. 73:3-12.
[22] Tr. at p. 73:18-21; Exhs. 231, 232.

III. Respondents' Business and Organization[23]

Respondents' organizational structure is extensively described in the *Shasta Linen* decision, and that description is adopted here.[24] In short, CIC is a licensed property and casualty company, domiciled in California and licensed to transact business in multiple states.[25] CIC is wholly-owned by North American Casualty Company, a non-insurer owned by Applied Underwriters, Inc. ("AU"), a Nebraska corporation.[26]

AUCRA is an insurance company domiciled in Iowa.[27] Its sole purpose is to serve as CIC's reinsurance arm.[28] It does not reinsure any other entities or perform any other functions.[29] AUCRA is also an indirect subsidiary of AU.[30]

AU is a financial services company that provides payroll processing services and underwrites workers' compensation insurance through its affiliated insurers to small and medium-sized employers.[31] AU manages all of CIC's underwriting, investment, administrative, actuarial and claim services through a management services agreement. It also administers the EquityComp program on behalf of CIC. For this reason, the EquityComp documents presented to Appellants bore AU's name and/or logo.[32]

The boards of directors of CIC, AUCRA and AU are identical in composition.[33]

IV. EquityComp's Purpose and Program Mechanics

EquityComp's purpose and structure is described at length in *Shasta Linen* and that

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[23] Use of the present tense in this part III means as of the date of the *Shasta Linen* decision, June 20, 2016.
[24] Specifically, the Commissioner's findings of fact in part V(B) of *Shasta Linen* are incorporated in this Proposed Decision. As noted below, Respondents are precluded from challenging the *Shasta Linen* findings in these proceedings.
[25] *Shasta Linen, supra,* at p. 9.
[26] *Ibid.*
[27] *Ibid.*
[28] *Id.* at pp. 10-11.
[29] *Id.* at p. 11.
[30] *Id.* at p. 10.
[31] *Ibid.*
[32] Exhs. 100 through 103.
[33] *Ibid.*

description is adopted here.[34] In brief, the underlying purpose of EquityComp was to circumvent California's workers' compensation policy aims by providing a type of loss-sensitive insurance to employers who were too small to qualify for that kind of coverage under California law.[35] In loss-sensitive programs, the employer's cost for a given policy year is impacted by the workers' compensation claims incurred that year.[36] In contrast, a guaranteed cost policy's price is unaffected by claims incurred during the policy year.[37]

EquityComp is a specific form of loss-sensitive insurance known as a "retrospective rating plan."[38] Respondents' EquityComp patent describes the scheme as follows:

> The reinsurance company can now provide funds to implement a non-linear retrospective rating plan as a "participation plan." The reinsurance company does this by entering into a separate contractual arrangement with the insured. If the insured has lower than average losses in the next year, then the reinsurance company can provide a premium reduction according to the participation plan. If the insured has higher than average losses in a given year, then the reinsurance company will assess additional premium accordingly. The insured can now, in effect, have a retrospective rating plan because of the arrangement among the insurance carrier, the reinsurance company and the insured even though, in fact, the insured has Guaranteed Cost insurance coverage with the insurance carrier[39]

AU acknowledged that one of the challenges of a "fundamentally new premium structure" is that "the structure must be approved by the respective insurance departments regulating the sale of insurance."[40] In addition, California and other states prohibit the sale of retrospective plans to small and mid-sized employers. AU attempted to skirt that regulatory environment by implementing "a reinsurance based approach to providing non-linear

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[34] The Commissioner's findings of fact in *Shasta Linen* starting at page 15, subpart (c), through page 30 are incorporated in this Proposed Decision, excluding the first two full sentences on page 30.
[35] *Shasta Linen, supra,* at pp. 23-24, 66.
[36] *Id.* at p. 15.
[37] *Id.* at p. 22.
[38] *Shasta Linen, supra,* at p. 23.
[39] *Id.* at p. 24.
[40] *Id.* at p. 23.

retrospective plans to insureds that may not have the option of such a plan directly."[41]

Following the framework outlined in Respondents' patent, the EquityComp program sold to Appellants was effectuated under separate annual guaranteed cost policies, combined with a three-year Reinsurance Participation Agreement (which was terminated early).[42] The RPA superseded the guaranteed cost policies.[43] Premium owed under the policies was replaced by amounts paid under the RPA.[44] The contracts are discussed in more detail below.

A. The Guaranteed Cost Policies

The guaranteed cost policies were entered into between CIC and Appellants, with annual terms commencing December 27, 2014, and December 27, 2015.[45] The policies contain standard language approved by the Commissioner, consistent with the applicable requirements of the Insurance Code and its implementing regulations. For example, each policy states that CIC's rates, rating plans and related information are filed with the Commissioner and open to public inspection.[46]

Each policy sets out the rates that CIC may charge Appellants.[47] CIC filed those rates with the Commissioner before the policies' commencement.[48] In addition, as required by law,[49] CIC warrants in each policy that it adheres to a single uniform loss experience rating plan and applies that experience rating to each policy.[50]

CIC's guaranteed cost policies also include a cancellation provision and a "short rate"

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[41] *Ibid.*
[42] Exhs. 103 through 105.
[43] *Shasta Linen, supra,* at pp. 24, 55.
[44] *Ibid.*
[45] Exhs. 104, 105.
[46] Exhs. 104 at p. 104-32, 105 at p. 105-40.
[47] Exhs. 104 at p.104-5, 105 at p. 105-6.
[48] Exhs. 14 at p. 14-10, 15 at p. 15-10.
[49] Ins. Code, § 11752.8.
[50] Exhs. 104 at p. 104-32, 105 at p. 105-40; see also *Shasta Linen, supra,* at p. 12.

cancellation notice, as required by the Insurance Code.[51] The policies provide that after cancellation, the final premium will be determined as follows:

> a. If we [CIC] cancel, final premium will be calculated pro rata based on the time the policy was in force. Final premium will not be less than the pro rata share of the minimum premium.
>
> b. If you cancel, the final premium may be more than pro rata; it will be based on the time this policy was in force, and may be increased by our short rate calculation table and procedure. Final premium will not be less than the minimum premium.[52]

The short rate penalty, which discourages employers from changing insurers mid-year, is a percentage of the full-term premium based on the number of days of coverage in the canceled policy.[53] CIC's short rate calculation table provides a formula for determining the early cancellation penalty.[54]

CIC's policies also set a minimum and estimated premium based on an employer's payroll estimates and loss experience modification factor.[55] After estimated taxes and fees, the guaranteed cost policies provide the employer with an annual premium estimate.[56] The final premium due is calculated using actual payroll amounts assigned to a specific classification of the policy and the employer's experience modification factor.[57] Under the policy documents in the absence of the RPA, the final premium for a given policy period would not be impacted by the losses incurred during that period.[58]

The policies' dispute resolution provisions do not provide for binding arbitration or any

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[51] Exhs. 104 at p. 104-35, 105 at p. 105-43; see also *Shasta Linen, supra,* at p. 12.
[52] Exhs. 104 at p. 104-15, 105 at p. 105-14.
[53] Exhs. 104 at p. 104-16, 105 at p. 105-15; see also *Shasta Linen, supra,* at p. 14.
[54] Exhs. 104 at p. 104-16, 105 at p. 105-15; see also *Shasta Linen, supra,* at p. 14.
[55] Exhs. 104 at p. 104-1, 105 at p. 105-1; see also *Shasta Linen, supra,* at p. 14.
[56] Exhs. 104 at p. 104-8, 105 at p. 105-8; see also *Shasta Linen, supra,* at p. 14.
[57] Exhs. 104, 105; see also *Shasta Linen, supra,* at p. 14.
[58] Exhs. 104, 105; *Shasta Linen, supra,* at p. 14.

other alternative dispute resolution methods.[59]

B. The RPA and Proposal

The RPA is materially identical to the Reinsurance Participation Agreement at issue in *Shasta Linen*, with the exception of the insureds' names, account numbers and dates, and the specific rates and other numbers set forth on Schedule 1 of those agreements.[60] The RPA and Proposal modify a number of the guaranteed cost policy provisions.[61] Where the RPA and the policies differ, the RPA's terms control.[62]

For example, the RPA contains workers' compensation rates, termed "loss pick containment rates" that supplant the rates set forth in the guaranteed cost policies.[63] The same loss pick containment rates were used to calculate Appellants' projected EquityComp costs set out in the monthly plan analyses provided by Respondents.[64] Additionally, the Proposal states that Appellants would be billed at the RPA's loss pick containment rates.[65] That proposal makes no reference to the guaranteed cost policies' rates.[66]

The RPA and Proposal are largely comprised of financial terms that affect the amounts Appellants must remit.[67] Most significantly, the RPA establishes a mechanism for assessing additional premium if the insureds incur higher than expected losses.[68] That mechanism, set out in RPA sections 1, 2 and 4 and RPA Schedule 1, establishes a "segregated cell" account that Appellants must pay into, as well as a "run-off term" during which additional premium may be

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[59] Exhs. 104, 105.
[60] Exh. 103; *Shasta Linen* Exh. 207. Accordingly, all of the Commissioner's findings of fact in part V(D) of *Shasta Linen* are incorporated in this Proposed Decision, with the exception of the second full sentence on page 33.
[61] Exhs. 103 through 105; *Shasta Linen, supra,* at p. 55.
[62] Exhs. 103 through 105; *Shasta Linen, supra,* at p. 55.
[63] Exh. 103 at p. 103-10; *Shasta Linen, supra,* at p. 55.
[64] E.g., Exh. 109 at p. 109-3.
[65] Exh 100 at p. 100-4. One of the Proposal's California loss pick containment rates varies from its RPA counterpart by one cent. (*Ibid.*)
[66] Exh. 100.
[67] Exhs. 100, 103.
[68] Exh. 103; see also *Shasta Linen, supra,* at p. 24.

assessed.[69] Sections 1 through 4 of RPA Schedule 1 further detail how Appellants' premium is calculated and allocated based in large part on "loss pick containment amounts," "loss development factors," and "exposure group adjustment factors" or "EGAFs."[70] The Proposal sets forth a simplified overview of the RPA's mechanism.[71]

RPA section 4 and RPA Schedule 1, section 6 impose early cancellation fees that modify the guaranteed cost policies' cancellation terms and filed rates.[72] Also, the RPA removes Appellants' loss experience modification factor from the premium calculations.[73] Finally, the RPA's terms potentially require the insured to wait a minimum of three years or longer after the RPA's expiration to receive a refund of any excess payments.[74]

Respondents did not file the RPA's rates or other financial terms described in this subpart with the Commissioner before or during the RPA's term.[75] Nevertheless, Respondents charged Appellants in accordance with the RPA's rates and terms rather than those of the guaranteed cost policies.[76]

V. Post-*Shasta Linen* Proceedings

On June 20, 2016, the Commissioner issued the *Shasta Linen* decision and order. On July 1, 2016, CIC and AUCRA filed a Verified Petition for a Peremptory Writ of Mandate and Complaint for Declaratory and Injunctive Relief in Los Angeles County Superior Court (the "Writ Petition and Complaint").[77] The writ petition portion sought judicial review of the *Shasta Linen* decision and order.

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[69] Exh. 103.
[70] *Ibid.*
[71] Exh. 100.
[72] Exh. 103 at pp 103-2, 103-7. The early cancellation fees are described on *Shasta Linen* pages 32-35.
[73] Exh. 103; *Shasta Linen, supra,* at p. 56.
[74] Exh. 103 at p. 103-7; *Shasta Linen, supra,* at pp. 34-35. The RPA also overrides the guaranteed cost policies' dispute resolution provisions. (Exh. 103 at pp.103-3 through 103-4; Exh. 104 at pp. 104-30, 104-31.)
[75] Exhs. 14, 15; see also *Shasta Linen* Exhs. 19. 20, 21, 23, 24.
[76] Exhs. 103, 108, 109.
[77] Exh. 230 at p. 230-1.

On June 28, 2016, the CDI issued a Notice of Hearing and Order to Cease and Desist from Issuance or Renewal of Workers' Compensation Insurance Policies and Collateral/Ancillary Agreements in Violation of Insurance Code Sections 11658 and 11735 and California Code of Regulations, Title 10, Sections 2251 and 2268.[78] On July 13, 2016, the CDI issued an amended version of that notice and order. In connection with the proceedings initiated by the notice, CIC, AUCRA and the CDI entered into a stipulated Consent Cease and Desist Order that was adopted by the Commissioner on September 6, 2016 (the "Consent Order").[79] Section IV of the Consent Order provides, in part:

> A. CIC and AUCRA will cease and desist from issuing any new RPAs or renewing existing RPAs with respect to a California Policy until such time as the RPA has been submitted to the WCIRB and the CDI in compliance with the requirements of Insurance Code § 11658 and 11735 and all other applicable statutes and regulations, and the RPA has not been disapproved.
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> B. Notwithstanding Paragraph IV(A) above, CIC may renew a Policy issued in connection with an RPA in force as of July 1, 2016.
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> ...
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> N. [Subject to certain exceptions not pertinent to this appeal,] nothing in this Stipulated Agreement affects or limits the powers or rights of the Insurance Commissioner to contend or declare that RPAs (other than RPAs that are filed with the WCIRB and the CDI and that are not disapproved) are unenforceable, void, voidable, or illegal and nothing limits the powers or rights of the Insurance Commissioner to initiate or make any investigation, to institute any legal or administrative proceeding, to take any action permitted by law, and to seek and obtain all relief and remedies (including any fines or penalties), or to adjudicate the rights of others, as otherwise permitted by law.

On June 2, 2017, CIC, AUCRA and the CDI entered into a Settlement Agreement settling

[78] Exh. 228 at pp. 228-1, 228-2.
[79] Exh. 228.

the judicial proceedings initiated by the Writ Petition and Complaint.[80] On June 21, 2017, a request for dismissal was entered on the Writ Petition and Complaint, with prejudice as to the writ petition portion.

Sections 2 and 3 of the Settlement Agreement provide:

> 2. Resolution of the Dispute. The Shasta Order[81] applies to Shasta Linen Supply, Inc. and is based upon the facts and circumstances of the Shasta Action. The designation of the Shasta Order as precedential pursuant to California Government Code § 11425.60, subdivision (b) applies to administrative proceedings before the CDI in cases involving facts and circumstances substantially similar to those in the Shasta Action.
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> 3. Amended RPA. CDI and AUCRA have met and discussed the Shasta Order and modification to the RPA and have agreed that the RPA, as modified (the "Amended RPA") is an agreement between a third party and the insured, and attached in form and substance as Exhibit 1, Form Number AUCRA—CAL 102 (3/17). The Amended RPA will be issued after execution of an Accredited Participant Acknowledgment and Disclosure (the "Acknowledgment") Form Number AUCRA—CAL 101 (5/17). The CDI by execution of this Agreement hereby approves the Amended RPA and Acknowledgment. AUCRA further agrees that it will not make any changes to the Amended RPA or Acknowledgment in the State of California without first submitting it to the CDI for review and approval. CIC and AUCRA agree to provide the AUCRA—CAL 101 and AUCRA—CAL 102 forms to any prospective insured prior to the inception date of the coverage.

The Amended RPA attached to the Settlement Agreement contains a number of changes to the RPA form at issue in *Shasta Linen* and the present appeal.[82] For example, the Amended RPA sets out post-expiration accounting and liquidation provisions that are significantly more favorable to the insured than those of the RPAs in *Shasta Linen* and here.[83]

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[80] Exh. 230.
[81] I.e., the Commissioner's Decision and Order in *Shasta Linen*.
[82] Exh. 230.
[83] *Ibid.*

Discussion

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

I. The Commissioner Has Exclusive Jurisdiction Over This Appeal.

A. Applicable Law

1. The Statutory Rate Filing Scheme

California has an "open rating" workers' compensation regulatory system, in which each insurer sets its own rates and files them with the Commissioner. This framework is intended to curtail monopolistic and discriminatory pricing practices, ensure carriers charge rates adequate to cover their losses and expenses, and provide public access to rate information so that employers may find coverage at the best competitive rates.[84]

Insurance Code section 11735 lays out the statutory filing requirements. Subdivision (a) provides in part that "[e]very insurer shall file with the commissioner all rates and supplementary rate information that are to be used in this state. The rates and supplementary rate information shall be filed not later than 30 days prior to the effective date." The term "rate" means "the cost of insurance per exposure base unit," subject to certain limitations.[85] And "supplementary rate information" means "any manual or plan of rates, classification system, rating schedule,

[84] See, generally, Ins. Code, §§ 11730-11742.
[85] Ins. Code § 11730, subd. (g). Rates exclude the application of individual risk variations based on loss or expense considerations, as well as minimum premiums.

minimum premium, policy fee, rating rule, rating plan, and any other similar information needed to determine the applicable premium for an insured."[86]

2. Insurance Code Section 11737, Subdivision (f)

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

> Every insurer ... shall provide within this state reasonable means whereby any person aggrieved by the application of its filings may be heard by the insurer ... on written request to review the manner in which the rating system has been applied in connection with the insurance afforded or offered. ... Any party affected by the action of the insurer ... on the request may appeal ... to the commissioner, who after a hearing ... may affirm, modify, or reverse that action.

This jurisdiction is exclusive to the Commissioner. As explained in *Farmers Ins. Exchange v. Superior Court*:

> Particularly when regulatory statutes provide a comprehensive scheme for enforcement by an administrative agency, the courts ordinarily conclude that the Legislature intended the administrative remedy to be exclusive unless the statutory language or legislative history clearly indicates an intent to create a private right of action [in court].[87]

B. Analysis and Conclusions of Law

Appellants assert Respondents charged rates under the RPA that were not filed under Insurance Code section 11735 and that modified the filed rates in CIC's guaranteed cost policies.[88] Because the appeal concerns the manner in which Respondents applied the rating system described in their section 11735 filings, the Commissioner has jurisdiction to hear and

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[86] Ins. Code § 11730, subd. (j).
[87] *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 850.
[88] Appeal, filed Dec. 20, 2017 ("Appeal"), pp. 3:7-12, 5:18-27.

decide this case under Insurance Code section 11737, subdivision (f).[89]

Moreover, section 11737 sets out "a comprehensive scheme" to address workers' compensation rate filing violations. As discussed below, section 11737 grants the Commissioner broad authority not only to hear private party appeals, but also to disapprove unfiled rates on his own initiative. Nothing in the statutory language or history indicates the Legislature intended to create a private right to bring civil court actions concerning unfiled rates. Therefore, the Commissioner's jurisdiction under section 11737, subdivision (f), is exclusive.

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

Respondents argue that AUCRA is not an appropriate party to this appeal because it did not provide workers' compensation insurance to Appellants.[90] Respondents further argue the RPA did not modify the guaranteed cost policies because the agreements are between different parties.[91] Specifically, Respondents assert the guaranteed cost policies are between Appellants and CIC, while the RPA is between Appellants and AUCRA. These arguments are not persuasive.

A. Applicable Law

Distinctions between related corporations may be disregarded under the "single enterprise" doctrine.[92] "Two conditions are generally required for the application of the doctrine to two related corporations: (1) such a unity of interest and ownership that the separate corporate personalities are merged, so that one corporation is a mere adjunct of another or the two

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

[90] Respondents' Post-Hearing Brief, filed December 14, 2018 ("Resp. Post-Hearing Br."), p. 22:17-19.

[91] *Id.* at p. 22:19-21.

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

companies form a single enterprise; and (2) an inequitable result if the acts in question are treated as those of one corporation alone."[93]

B. Analysis and Conclusions of Law

In *Nielsen Contracting v. Applied Underwriters, Inc.*,[94] the Court of Appeal agreed with the Commissioner's finding in *Shasta Linen* that AUCRA and CIC are so "enmeshed" and "intertwined" that they should be considered together in determining whether an RPA modified CIC's policies. As the Commissioner determined in *Shasta Linen*:

> AUCRA is not an independent party[.] ... AUCRA is a wholly-owned subsidiary of Applied Underwriters, Inc.; the same corporation that owns CIC. The Boards of Directors for CIC, AU, and AUCRA are identical in composition[.] ... In addition, AUCRA's sole purpose is to serve as supposed reinsurer to CIC. As such, it is inextricably intertwined with CIC and AU. Indeed, the affiliated entities are so enmeshed that each of CIC's financial examinations discuses EquityComp as a CIC product, and there is no evidence CIC sought to distinguish itself from EquityComp.[95]

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

The Commissioner further found as follows:

> While CIC may not be a signatory to the RPA, CIC represented that the rates filed and approved by the Commissioner would be the rates charged to California consumers. That CIC contracted with an affiliated corporation to alter or modify those rates does not absolve the carrier from liability in this proceeding, nor does it protect the RPA from analysis. This is especially true given that AU structured EquityComp and the RPA to circumvent state regulators.
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> ...
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> Lastly, the Commissioner must determine whether the rates and rating plan sold to [the appellant] adhere to the Insurance Code and the approved rating plan. If [the appellant's] rates differ from those quoted by CIC and approved by the Commissioner, [the appellant]

[93] *Id.* at p. 1219.
[94] *Nielsen Contracting v. Applied Underwriters, Inc., supra,* 22 Cal.App.5th at p. 1116.
[95] *Shasta Linen, supra,* at pp. 49-51.

> may challenge those rates under section 11737, subdivision (f), regardless of whether CIC or AUCRA sold [the appellant] the RPA.[96]

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

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

Appellants argue the RPA unlawfully employed unfiled rates and supplementary rate information.[97] Appellants further contend Respondents' use of the unfiled information misapplied the guaranteed cost policies' rating plan.[98] Respondents assert that a finding of unlawfulness by the Commissioner equates to rate disapproval, which would be invalid because the Commissioner did not comply with the statutory notice and hearing requirements for rate disapproval. Respondents alternatively argue the use of unfiled rates is not unlawful unless the Commissioner first disapproves them, which he did not do. The Commissioner finds Appellants' arguments persuasive and is not convinced by Respondents' arguments.

A. Applicable Law

As previously indicated, Insurance Code section 11735, subdivision (a), requires insurers to file all rates and supplementary rate information, without exception, before using them in California. The term "supplementary rate information" includes any "minimum premium, policy fee, rating rule, rating plan, and any other similar *information needed to determine the applicable*

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[96] *Ibid.*
[97] Appeal at p. 3:7-12.
[98] *Id.* at p. 5:18-27; Appellant's Post Hearing Brief, filed December 17, 2018 ("App. Post-Hearing Br."), pp. 4-15.

premium for an insured."[99] The Commissioner and courts construe "premium" broadly to include any amounts paid to insurers for coverage.[100] Thus, any information necessary to determine amounts owed by an insured to its insurer is supplementary rate information. As such, it must be filed and open to public inspection under section 11735.

In addition, insurers may charge premium only in accordance with their filed rates and supplementary rate information.[101] As the Commissioner determined in *Shasta Linen*, an insurer's use of unfiled rates or supplementary rate information is unlawful.[102] That is true regardless of whether the Commissioner disapproved the unfiled rates under Insurance Code section 11737.[103]

B. Analysis and Conclusions of Law

The rates set forth in the guaranteed cost policies comport with Respondents' rate filings under Insurance Code section 11735.[104] In contrast, the RPA unlawfully imposes unfiled rates and supplementary rate information that substantially modify and misapply the guaranteed cost policies' rates.

1. Respondents Charged Appellants Unfiled Rates.

Starting in policy year 2014,[105] the Proposal and RPA imposed "loss pick containment rates" of $21.97 or $21.98 for California classification code 5403, $8.62 for classification code

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[99] Ins. Code, § 11730, subd. (j), emphasis added.
[100] *Shasta Linen, supra,* at pp. 48-49 ["[M]oney paid by an insured to an insurer for coverage constitutes premium regardless of its name."]; *Troyk v. Farmers Group Inc.* (2009) 171 Cal.App.4th 1305, 1325 ["[I]nsurance premium includes not only the 'net premium,' or actuarial cost of the risk covered (i.e., expected amount of claims payments), but also the direct and indirect costs associated with providing that insurance coverage and any profit or additional assessment charged."].
[101] *Shasta Linen, supra,* at p. 49.
[102] *Id.* at p. 52.
[103] See *Ibid.*
[104] Exhs. 14, 15, 104, 105.
[105] I.e., the annual period beginning December 27, 2014.

5432, and $1.35 for classification code 5606.[106] Those rates were not filed in accordance with section 11735.[107] In contrast, the filed rates for those classification codes set out in the 2014 guaranteed cost policy were $29.74, $11.67, and $1.83, respectively.[108] Similar discrepancies can be seen with respect to those and other classification codes in both policy years, as shown in the following table:[109]

	Rates (dollars per $100 of payroll)		
California Classification Code	2014 Policy	2015 Policy	RPA and Proposal
5403	$29.74	$34.13	$21.97 (RPA) $21.98 (Proposal)
5432	$11.67	$11.79	$8.62
5606	$1.83	$2.33	$1.35
8810	$0.84	$0.79	$0.62

Simply put, Respondents charged Appellants based on the unfiled loss pick containment rates in the Proposal and RPA, not the guaranteed cost policies' filed rates.[110] It is beyond doubt that the rates Appellants paid departed from those in the guaranteed cost policies. Indeed, Respondents' EquityComp Proposal notes that rates applicable to Appellants are the RPA's loss pick containment rates and not the policies' rates.[111] The monthly EquityComp plan analyses sent by Respondents also confirm that Appellants' program cost was based on the RPA's rates rather than those in the policies.[112] Moreover, the Commissioner found in *Shasta Linen* that the RPA rates and payment terms supplanted those of CIC's policies, and Respondents are precluded from arguing otherwise.[113] Because Respondents charged Appellants based on the unfiled

[106] Exhs. 100, 103. The classification codes are set out in the California Workers' Compensation Uniform Statistical Reporting Plan—1995, Cal. Code Regs., tit. 10, § 2318.6.
[107] See Exhs. 14, 15.
[108] Exhs. 14 at p. 14-10, 104 at p.104-5.
[109] Exhs. 100 at p. 100-4, 104 at p. 104-5, 105 at p. 105-6.
[110] See *Shasta Linen, supra,* at p. 55.
[111] Exh. 100 at p. 100-4.
[112] E.g., Exh. 109 at p. 109-3.
[113] *Shasta Linen, supra,* at p. 56. See discussion in part V(B) below.

Proposal and RPA rates, they unlawfully changed and misapplied the filed rates in the guaranteed cost policies.

2. Respondents Applied Unfiled Supplementary Rate Information.

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

Most significantly, the RPA lays out a framework for altering Appellants' premium based on losses. Respondents' EquityComp patent describes the premium alteration as follows:

> If the insured has lower than average losses in the next year, then the reinsurance company can provide a *premium reduction* according to the participation plan. If the insured has higher than average losses in a given year, then the reinsurance company will assess *additional premium* accordingly.[114]

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

In addition, RPA section 4 and RPA Schedule 1, section 6 impose early cancellation fees not set out in Respondents' rate filings, and modify the guaranteed cost policies' cancellation

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[114] *Shasta Linen, supra,* at p. 24, emphasis added.
[115] Exh. 103.
[116] *Ibid.*

terms and filed rates.[117] Finally, the RPA removes Appellants' loss experience modification factor in calculating premium.[118] That factor, which is detailed in Respondents' rate filings and the guaranteed cost policies, is required by law.[119]

In sum, all of the RPA's economic terms purport to change Appellants' premium obligations. Those terms therefore constitute "rates" or "supplementary rate information" as defined in Insurance Code section 11730. Because Respondents included none of that information in its rate filings, as required by Insurance Code section 11735,[120] the RPA is unlawful and misapplied Respondents' rate filings.[121]

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

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

Second, section 11735's public inspection requirement provides broad access to filed rate

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[117] *Ibid.*
[118] See *ibid.*
[119] Cal. Code Regs., tit. 10, § 2351.1; *Shasta Linen, supra,* at p. 56.
[120] See Exhs. 14, 15.
[121] See *Shasta Linen, supra,* at p. 52.
[122] *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1065.
[123] See Ins. Code, §§ 11732-11737.

information allowing employers to find coverage at the best competitive rates.[124] When rate information is transparent, policyholders are better able to compare coverage and reduce their costs. And insurers are less likely to gain a monopolistic advantage when all carriers' pricing information is public.

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

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

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

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

Respondents argue that use of unfiled rate information is not unlawful unless the Commissioner follows the rate disapproval procedures laid out in Insurance Code section 11737, subdivisions (a) and (d).[126] But *Shasta Linen* determined that use of unfiled rates is unlawful

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[124] Ins. Code, § 11735, subd. (b); see also Ins. Code, § 11742, subd. (a).
[125] In addition, by marketing and selling EquityComp to companies with less than $500,000 in annual premiums, Respondents frustrated the policy aim of protecting small and mid-sized employers from the risks of loss-sensitive insurance plans. (See *Shasta Linen, supra,* at pp. 15-16.)
[126] Resp. Post-Hearing Br. at pp. 25-26.

regardless of any rate disapproval action.[127] Respondents are bound by that determination and are precluded from rearguing it here.[128] In any event, their argument is incorrect. Finding the use of unfiled rate information unlawful under subdivision (f) is neither equivalent to, nor predicated on, rate disapproval.[129]

Section 11737 delineates two separate roles for the Commissioner. Subdivision (f) authorizes the Commissioner to hear private party appeals concerning the application of rate filings. In contrast, subdivisions (a) though (e) permit the Commissioner to bring his own actions to disapprove unfiled or otherwise improper rates. When the Commissioner finds an unfiled rate or supplementary rating information unlawful under subdivision (f), he performs an *adjudicatory* function. When the Commissioner disapproves an unfiled rate under subdivisions (a) and (d), he acts in an *enforcement* capacity. Indeed, subdivision (f) makes no reference to disapproval. Thus, contrary to Respondents' assertions, determinations of unlawfulness and rate disapprovals are not equivalent.

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

First, rate disapproval allows the Commissioner to forestall the use of unlawful rates prior to private party appeals. If the Commissioner learns an insurer is using an unfiled rate, he may

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[127] *Shasta Linen, supra,* at pp. 45, 52.
[128] See part V(B) below regarding *Shasta Linen*'s preclusive effect.
[129] See *Shasta Linen, supra,* at p. 45 ["The authority to hear grievances of employers for misapplication of rates ... is separate from the Commissioner's authority to disapprove rates."]
[130] Resp. Post-Hearing Br. at pp. 25-26.
[131] See, e.g., *Shasta Linen Supply, Inc. v. Applied Underwriters, Inc.* (E.D.Cal. Jun. 20, 2016, Civ. No. 2:16-158 WBS AC) 2016 WL 3407797 at p. *4.

stop the unlawful activity by disapproving the rate on his own initiative, rather than waiting until a private party appeal.[132] Thus, rather than being superfluous, the rate disapproval mechanism serves an important policy aim.

Second, California courts have not accepted Respondents' argument. In *South Tahoe Gas Co. v. Hofmann Land Improvement Co.*,[133] the plaintiff public utility sought to enforce a higher contractual rate than the rate it had filed with the Public Utilities Commission ("PUC"). The defendant countered that the contract was illegal and violated state law and PUC regulations since it charged an unfiled rate. Much like Insurance Code section 11735, the Public Utilities Code section 489 requires the utility to file its rates and rating information. And similar to Insurance Code section 11737, Public Utilities Code section 728 permits the PUC to disapprove a utility's rates. Although there was no indication the PUC acted under section 728, the Court of Appeal agreed that a charge in excess of the filed rate was illegal.[134] In essence, the Court's ruling confirms that rate disapproval proceedings are not a prerequisite to finding the use of unfiled rates unlawful.

Finally, Respondents rely upon an unpublished opinion of the Court of Appeal and interlocutory orders in another case to argue that use of unfiled rates remains lawful unless disapproved by the Commissioner.[135] Those cases are easily distinguished. In both, the plaintiffs attempted to base Unfair Competition Law ("UCL")[136] claims on violations of section 11735's filing requirements. The courts held that such a violation could not form the basis for a claim *in court* when the Commissioner had not disapproved the unfiled rates. In reaching this result, the

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[132] Of course, the fact the rates are unfiled makes it likely the Commissioner will not learn of their unlawful use until an aggrieved private party raises an appeal, in which case rate disapproval would be too late to benefit the appellant.
[133] *South Tahoe Gas Co. v. Hofmann Land Improvement Co.* (1972) 25 Cal.App.3d 750 (*South Tahoe Gas*).
[134] *Id.* at p. 755.
[135] Resp. Post-Hearing Br. at p. 26. [citing *Bristol Hotels & Resorts v. Nat. Council on Compensation Ins., Inc.* (Mar. 13, 2002, E027037) [nonpub. opn.]; *Shasta Linen Supply, Inc. v. Applied Underwriters, Inc., supra,* 2016 WL 6094446 at pp. *3-*6].
[136] Bus. & Prof. Code § 17200 et seq.

Court of Appeal relied on *Samura v. Kaiser Foundation Health Plan, Inc.*[137] The *Samura* court held that a UCL claim may not be based on violations of a statute whose enforcement "has been entrusted exclusively" to a regulatory agency.[138] Such a claim, if allowed, would result in the court improperly invading the agency's exclusive purview.[139] But nothing in *Samura* suggests the agency charged with enforcing the statute may not remedy its violation. While courts may not have original jurisdiction to remedy a violation of section 11735 in a private party action, the Commissioner does.[140]

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

Having found the RPA void, the Commissioner must consider the appropriate remedy. Respondents argue the Commissioner has no authority to order retrospective remedies under Insurance Code section 11737, subdivision (f). Specifically, Respondents assert the Commissioner may not find a contract void or unenforceable in private party appeals.[141] Appellants argue that this tribunal should sever the RPA's EGAF charge multiplier provisions and order Respondents to pay "restitution" of all amounts attributable to those provisions.[142] Appellants further argue that Respondents should retain only an amount equivalent to "claims paid and a reasonable overhead and profit."[143] The Commissioner finds both parties' arguments unpersuasive.[144]

A. Applicable Law

1. Insurance Code Section 11737, Subdivision (f)

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[137] *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284 (*Samura*).
[138] *Id.* at p. 1299.
[139] *Ibid.*
[140] See the discussions on jurisdiction in part I above and remedies in part IV below.
[141] Resp. Post-Hearing Br. at pp. 24-25.
[142] App. Post-Hearing Br. at pp. 4-15; Appellant's Post-Hearing Reply Brief, filed January 18, 2019 ("App. Reply Br."), pp. 1-12.
[143] App. Reply Br. at p. 11:21-22.
[144] As a preliminary matter, the Commissioner determined in *Shasta Linen* that he has authority to find a contract void in a private party appeal. (*Shasta Linen, supra,* at pp. 65-68.)

Section 11737, subdivision (f), grants the Commissioner broad authority to award remedies in workers' compensation appeals. As previously noted, the statute authorizes him to "affirm, modify, or reverse" an insurer's action concerning the application of its rating system. The statute contains no language restricting remedies the Commissioner may order. Nor has any California court inferred such restrictions from the statute. Indeed, the breadth of the Commissioner's authority is consistent with his comprehensive role to "require from every insurer a full compliance with all the provisions of [the Insurance Code]."[145]

While Respondents argue that remedies under rate disapprovals may only be applied prospectively,[146] remedies for findings of unlawfulness under subdivision (f) may either be prospective or retrospective.[147] In fact, nothing in subdivision (f) suggests the Commissioner's decision to modify or reverse an insurer's action may apply only on a going-forward basis. That subdivision principally concerns past harm, in that it authorizes a private party "aggrieved" (past) to request action by an insurer to review the manner in which its rating system "has been applied" (past) in connection with the "insurance afforded or offered" (past). Since a prospective remedy would do nothing to address past harm, logically remedies under subdivision (f) may be retrospective.

Finally, because subdivision (f) does not limit the available remedies, the Commissioner may void contracts that are based on unlawful rates and sever unlawful provisions, as appropriate.[148] The California Supreme Court's holding in *Marathon Entertainment, Inc. v. Blasi*[149] clarifies this authority. There, an actress brought a claim a before the California Labor

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[145] Ins. Code, § 12936.
[146] Resp. Post-Hearing Br. at pp. 26-27. This Proposed Decision need not, and does not, decide whether there may be circumstances in which rate disapproval remedies may be applied retrospectively.
[147] *Shasta Linen, supra,* at p. 53.
[148] *Id.* at pp. 65-66.
[149] *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 996.

Commissioner, seeking to void a contract with her manager on the grounds the agreement violated the Talent Agency Act. The Labor Commissioner found a violation and declared the contract void even though the statute specified no remedy. The Court explained that since "the Legislature has not seen fit to specify the remedy for violations" of the act, "the full voiding of the parties' contract is available, but not mandatory; likewise, severance is available, but not mandatory."[150] The Court further stated those remedies could be imposed at the administrative level, as well as by the courts.[151]

2. Civil Code Sections 1598 and 1608

Civil Code sections 1598 and 1608 render a contract "void" if its object or consideration are unlawful.[152] And the California Supreme Court has held that a contract made in violation of a regulatory statute is generally void.[153] Indeed, courts will not normally enforce an illegal agreement or one against public policy, as the public importance of discouraging prohibited transactions outweighs equitable considerations of possible injustice between the parties.[154]

This is especially true where regulated entities fail to file their rates as required by law. In such cases, California courts have held contractual provisions based on the unfiled rates unlawful and void.[155] Similarly, the Commissioner determined in *Shasta Linen* that insurance contracts based on unfiled rates in violation of Insurance Code section 11735, subdivision (a), are unlawful and void.[156]

In compelling cases, the courts will enforce illegal contracts in order to avoid unjust

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[150] *Ibid.*
[151] *Id.* at pp. 996, 998.
[152] *R. M. Sherman Co. v. W. R. Thomason, Inc.* (1987) 191 Cal.App.3d 559, 563.
[153] *Asdourian v. Araj* (1985) 38 Cal.3d 276, 291.
[154] *Ibid.*
[155] *South Tahoe Gas Co. v. Hofmann Land Improvement Co., supra,* 25 Cal.App.3d at p. 752.
[156] *Shasta Linen, supra,* at pp. 52, 65-66.

enrichment to a defendant and a disproportionately harsh penalty upon the plaintiff.[157] "[T]he extent of enforceability and the kind of remedy granted depend upon a variety of factors, including the policy of the transgressed law, the kind of illegality and the particular facts."[158] A contract is absolutely void where the illegality involves *malum in se*—acts "of an immoral character, those which are inequities in themselves, and those opposed to sound public policy or designed to further a crime or obstruct justice."[159] On the other hand, where the illegality involves *malum prohibitum*, the contract will be voidable "depending on the factual context and the public policies involved."[160] In deciding whether to enforce an illegal contract, courts may also consider whether the parties are *in pari delicto* and whether the statute's purpose would best be served by enforcement of the contract.[161]

In addition, a contract made in violation of statute will be enforced "where the penalties imposed by the Legislature exclude by implication the additional penalty of holding the contract void."[162] In determining whether to enforce such a contract, "the courts should strive to deal with the transaction so as to give effect to the fundamental purpose of the Legislature and to a wise public policy."[163]

3. Civil Code Section 1599

The California Civil Code permits severing unlawful provisions from an otherwise lawful contract. Civil Code section 1599 states that "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." Section 1599 applies "when the parties have contracted,

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[157] *Asdourian v. Araj, supra*, 38 Cal.3d at p. 292.
[158] *South Tahoe Gas Co. v. Hofmann Land Improvement Co., supra*, 25 Cal.App.3d at p. 759.
[159] *Vitek, Inc. v. Alvarado Ice Palace, Inc.* (1973) 34 Cal.App.3d 586, 593.
[160] *Asdourian v. Araj, supra*, 38 Cal.3d at p. 293.
[161] *Homestead Supplies, Inc. v. Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 990-991.
[162] *Asdourian v. Araj, supra*, 38 Cal.3d at p. 291.
[163] *Vitek, Inc. v. Alvarado Ice Palace, Inc., supra*, 34 Cal.App. at p. 593.

in part, for something illegal. Notwithstanding any such illegality, it preserves and enforces any lawful portion of a parties' contract that feasibly may be severed."[164]

Severing illegal terms prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of a voided contract.[165] And it further conserves a contractual relationship where doing so would not condone an illegal scheme.[166]

The doctrine of severability is equitable and fact specific.[167] The overarching inquiry is whether severance would further the interests of justice.[168] As explained in *Baeza v. Superior Court*:[169]

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

4. Civil Code Section 3399

Civil Code section 3399 authorizes courts to reform—i.e., revise—a contract that "does not truly express the intention of the parties" as a result of fraud or mistake.[170] Absent those circumstances, however, adjudicators may not reform a contract unless specifically authorized by

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[164] *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 991.
[165] *Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1230.
[166] *Ibid.*
[167] *Marathon Entertainment, Inc. v. Blasi, supra,* 42 Cal.4th at p. 998.
[168] *Ibid.*
[169] *Baeza v. Superior Court, supra,* 201 Cal.App.4th at p. 1230.
[170] *American Home Ins. Co. v. Travelers Indemnity Co.* (1981) 122 Cal.App.3d 951, 961. Section 3399 provides: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

statute.[171] "Generally, courts reform contracts only where the parties have made a mistake [citation] and not for the purpose of saving an illegal contract."[172]

B. Analysis and Conclusions of Law

1. The RPA Is Void and Its Terms Cannot Be Severed.

Because the RPA is based on unfiled rates and supplementary rate information in violation of Insurance Code section 11735, the agreement is unlawful and void.[173] This determination is consistent with California case law concerning unfiled rates and the Commissioner's determination in *Shasta Linen*.[174] And because the RPA's sole objective is to circumvent lawfully filed rates, its terms cannot be severed.

Consider *South Tahoe Gas Co. v. Hofmann Land Improvement Co.*,[175] discussed above. There, the plaintiff public utility sought to enforce a higher contractual rate than was set out in the plaintiff's regulatory rate filings. The court found the unlawful contractual rate void and unenforceable.[176] The court severed the unlawful rate and enforced the remainder of the contract in that case because "there is no law against contracting for the extension of a gas main. It is only the amount that can be charged which is regulated."[177] That contrasts with this appeal, where the RPA's central purpose was to illegally modify Respondents' filed rates and override the legal rate scheme set out in the guaranteed cost policies. As earlier discussed, the RPA's economic terms consist of unfiled rates and supplementary rate information whose use is illegal. The

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[171] *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 125 [Courts have no power "under their inherent limited authority to reform contracts."].
[172] *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 407-408.
[173] *Shasta Linen, supra,* at pp. 52, 65-66.
[174] See *South Tahoe Gas Co. v. Hofmann Land Improvement Co., supra,* 25 Cal.App.3d at p. 752 [public utility's unfiled rate held void]; *Shasta Linen, supra,* at pp. 52, 65-66.
[175] *South Tahoe Gas Co. v. Hofmann Land Improvement Co., supra,* 25 Cal.App.3d at p. 752.
[176] *Ibid.*
[177] *Id.* at p. 757.

remainder of the RPA is boilerplate that serves only to implement the economic provisions.[178] Accordingly, the RPA "has but a single object"[179] making it impossible to sever only those provisions relating to rates and supplementary rate information. In addition, no interest of justice or public policy would be furthered by enforcing any of the boilerplate terms. The Commissioner therefore finds the entire RPA void and unenforceable.

The California Supreme Court's holding in *Marathon Entertainment* also supports the Commissioner's authority to find the RPA void.[180] Nevertheless, Respondents argue an agency may not impose a remedy upon an insurer for noncompliance with the law "unless expressly permitted by statute."[181] In support of this contention, Respondents rely on three pre-*Marathon Entertainment* cases. These cases are inapplicable and unpersuasive.[182] First, Respondents mischaracterize the holding in *American Federation of Labor v. Unemployment Insurance Appeals Board*, in which the Supreme Court stated that statutory remedies may be authorized either expressly *or by implication*.[183] Neither of the other two cases suggest otherwise. Second, the statutes at issue in all three cases define and limit the available remedies, unlike the statute discussed in *Marathon Entertainment* and unlike section 11737, subdivision (f).[184] Where statutory remedies are defined, an agency may not exceed their scope. But when remedies remain undefined, as here, *Marathon Entertainment* is clear that voiding and severance are available.

Finally, Appellants argue that the RPA's terms relating to exposure group adjustment

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[178] See, generally, Exh. 103.
[179] Civil Code, §1598.
[180] *Marathon Entertainment, Inc. v. Blasi, supra,* 42 Cal.4th at p. 996.
[181] Resp. Post-Hearing Br. at p. 24:9-10.
[182] *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1042-1043 (*AFL*); *Peralta Comm. College Dist. v. FEHA* (1990) 52 Cal.3d 40, 60 (*Peralta*); *Shernoff v. Superior Court* (1975) 44 Cal.App3d 406, 409 (*Shernoff*).
[183] *AFL,* at p. 1039 ["[W]e should not necessarily limit an agency's powers to those expressly granted, because the statutory scheme may 'necessarily imply' those powers."].
[184] *Id.* at p. 1025 [remedy limited to payment of unemployment benefits]; *Peralta* at p. 46.[enumerated remedies "related to matters which serve to make the aggrieved employee whole in the context of employment"]; *Shernoff,* at p. 409 [remedies "limited to restraint of future illegal conduct"].

factors should be specifically declared unlawful and severed, while the majority of the RPA's terms should be enforced.[185] But the EGAF provisions are not the RPA's (or the Proposal's) only illegal terms, as discussed above. This tribunal cannot sever unlawful terms that disadvantage Appellants but enforce those that Appellants find favorable. Adjudicators must refuse to enforce *all* unlawful contract terms that violate public policy once the illegality is apparent.[186]

2. No Compelling Reason Exists to Enforce the RPA.

Even assuming the illegal RPA were merely voidable rather than void *per se*, no valid reason exists to enforce it.[187] Failure to enforce the agreement would neither result in unjust enrichment nor an unduly harsh penalty. Additionally, there is no indication the Legislature intended to exclude the administrative remedy of finding the RPA void.

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

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

First, there is no risk of *unjust* enrichment to Appellants, because "an insurer's issuance of an illegal contract, even if it results in enrichment to the insured, does not result in *unjust* enrichment, since the insured did nothing wrong and the insurer should have known of its own legal duties."[188]

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[185] App. Post-Hearing Br. at pp. 5-8; App. Reply Br. at pp. 1-12. In particular, Appellants conclude that their "request is quite simple. Declare CIC's use of the EGAFs to be unenforceable, that CIC and AUCRA calculate the Base Fee without use of the EGAFs, determine the cost of claims paid, and return the balance to RDR within thirty (30) days of the Order." (App. Reply Br. at p. 11:16-18.)

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

[187] See *Shasta Linen, supra,* at pp. 67-68.

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

Second, denying enforcement of the illegal RPA is not unduly harsh, because Respondents knew of California's filing requirements. In fact, their EquityComp patent makes it clear that Respondents not only knew of the filing requirements but used the RPA to evade their regulatory obligations.[189] Additionally, enforcing the RPAs would encourage illegal activity—i.e., the use of unfiled rates and supplementary rate information.[190]

Third, the parties are not *in pari delicto*. Appellants had no reason to know the RPA's rates and supplementary rate information was unfiled. Respondents are the sole parties at fault, since it used the RPA to circumvent California's filing requirements. "[I]t would not be equitable to allow the party who created the illegality to enforce the illegal contract."[191]

Finally, an important purpose behind section 11735's filing and public inspection requirements is to ensure the protection of California's workforce.[192] Insurers who unlawfully use unfiled rate information frustrate that policy.[193] Except in narrow circumstances not applicable here, "[i]t is a settled rule that a contract will not be enforced if the contract is in violation of the provisions of a statute enacted for the protection of the public."[194]

Respondents nevertheless argue under *Medina v. Safe-Guard Products*[195] that the RPA should be enforced because Appellants suffered no loss due to its unfiled rates.[196] But Respondents' reliance on *Medina* is misplaced. There, the statute specifically required the plaintiff to have "'suffered injury in fact and ha[ve] lost money or property'" in order to assert a

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[189] See *Shasta Linen, supra,* at pp. 23-24, 61-62.
[190] *American Zurich Ins. Co. v. Country Villa Service Corp., supra,* at p. *17; accord *Shasta Linen, supra,* at p. 68.
[191] *American Zurich Ins. Co. v. Country Villa Service Corp., supra,* at p. *17; *Shasta Linen, supra,* at p. 68.
[192] See the discussion in part III(B)(3) above.
[193] See discussion in part III(B)(3) above. See also *Shasta Linen, supra,* at p. 67.
[194] *Napa Valley Elec. Co. v. Calistoga Elec. Company* (1918) 38 Cal.App. 477, 478-479; accord *American Zurich Ins. Co. v. Country Villa Service Corp., supra,* at p. *17. The exception involves licensing laws enacted solely "for the protection of private economic interests (such as the interest of property owners in competent construction)" by licensed contractors. (*R. M. Sherman Co. v. W. R. Thomason, Inc., supra,* 191 Cal.App.3d at 566.) Since the workers' compensation statutes were enacted in large part to protect California's workforce, and not merely the economic interests of employers, any "analogy with the licensing cases fails entirely." (*Id.* at p. 568.)
[195] *Medina v. Safe-Guard Products* (2008) 164 Cal.App.4th 105, 115 (*Medina*).
[196] Resp. Post-Hearing Br. at p. 21.

claim.[197] In contrast, Insurance Code section 11737, subdivision (f), requires no such injury or loss.[198]

Accordingly, the illegal RPA should not be enforced.

b. The Insurance Code Permits Finding the RPA Void.

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

c. The Contracts Cannot Be Reformed, and the Restitution Appellant Seeks Is Inappropriate.

Appellants seek "restitution" based on "claims paid and a reasonable overhead and profit

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[197] *Medina, supra,* at p. 115.

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

to [Respondents] for operating the plan" calculated without application of the EGAFs.[199] Respondents argue that such a remedy would amount to "cobbl[ing] together a hybrid contract with terms that RDR has cherry-picked from both the RPA and CIC Policies, while simultaneously rejecting the application of either in its entirety."[200] The Commissioner agrees. The remedy Appellants seek would reform the parties' contractual arrangement. But absent fraud or mistake, which were not asserted in this proceeding,[201] reformation is not available to "save" an unlawful contract unless specifically authorized by statute.[202] Appellants have pointed to no such statutory authority, nor is the Commissioner aware of any.

Moreover, there is no evidence that "claims paid and a reasonable overhead and profit" would bear any relation to premiums calculated under Respondents' lawfully filed rates. Accordingly, imposing such "restitution" would not further the correct application of Respondents' filed rating plan. The Commissioner therefore finds Appellants' requested remedy inappropriate.

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

Given that the RPA is void and unenforceable, the Commissioner turns to the question of whether to sever the RPA from the guaranteed cost policies, or whether instead to find the parties' entire contractual arrangement void. The Commissioner finds the RPA must be severed.

While the main purpose of the RPA was illegal— *i.e.*, to use unfiled rate information to modify and misapply Respondents' filed rates—the central purpose of the parties' overall arrangement was valid; to provide Appellants with workers' compensation insurance. The RPA, with its focus on unlawful rates and supplementary rate information, was collateral to that central

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[199] App. Reply Br. at p. 11.
[200] Respondents' Post-Hearing Reply Brief, filed January 18, 2019 ("Resp. Reply Br."), p. 22:17-18.
[201] In any event, such issues likely lie beyond the jurisdictional scope of section 11737, subdivision (f).
[202] *Armendariz v. Foundation Health Psychcare Services, Inc., supra,* 24 Cal.4th at p. 125.

purpose. Additionally, there has been no allegation in this appeal that any portion of the guaranteed cost policies is unlawful. Moreover, "the interest of justice or the policy of the law would be furthered"[203] by severing the RPA. Finding the entire arrangement void, including the policies, would leave Appellants uninsured for the period in question. That would be neither lawful, since the law requires Appellants to have workers' compensation insurance, nor would it be in the best interest of the workers left without coverage for any injuries occurring during that period. Accordingly, the RPA should be severed from the guaranteed cost policies.

4. Limited Scope of this Order.

Because the RPA must be severed from the guaranteed cost policies, this agency must now decide the appropriate remedy. The Commissioner's paramount concern, within the limitations of his jurisdictional power, is consumer protection. As the court in *Neilsen Contracting* explained:

> In California, workers' compensation insurance (or an adequate substitute) is mandatory, and the Insurance Commissioner is charged with closely scrutinizing insurance plans to protect both workers and their employers. [Citation] To accomplish this objective, the Legislature mandated that the Commissioner have full access to insurance information through mandatory filing requirements. (Regs., § 2268.) It follows that a violation of these requirements prevents crucial regulatory oversight and thus renders the unfiled agreement unlawful and void as a matter of law.
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> (*Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1118, as modified on denial of reh'g (May 23, 2018), review denied (Aug. 15, 2018); *accord Jackpot Harvesting, Inc. v. Applied Underwriters, Inc.* (2019) 33 Cal.App.5th 719, 738, review denied (July 10, 2019).)

The mandatory filing requirements also serve another critical function: transparency. Indeed, through the adoption of Insurance Code section 11742, subdivision (a), the Legislature

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

contemplated that "[a] central information source would help employers find the required coverage at the best competitive rates." The mandatory filing requirements ensure a level playing field in which insurers' contractual agreements are filed with the Department to ensure proper regulatory oversight, and then presented to the public so employers may select the coverage they seek through an open, transparent process. The guaranteed cost policy meets these consumer-protective requirements; the unfiled RPA does not.

As noted, above, the Order was stayed in this matter so the parties could reconsider page 37, footnote 203 of the Proposed Decision. Of concern, the Proposed Decision in footnote 203 provided that "the ALJ makes no finding as to whether the guaranteed cost policies are valid or enforceable." Yet, the Proposed Decision also notes that there has been no allegation in this case that any portion of the guaranteed cost policies is unlawful. Given the evidence presented, the statement in footnote 203 only serves to obfuscate the answer to a central question presented in this case. Specifically, if the RPA is void and unenforceable, in light of the scope of this agency's authority and the mandatory filing requirements, what workers' compensation policy is left to enforce?

Appellants persuasively demonstrate that there was never any agreement between the parties to pay the guaranteed cost rates, there was a lack of mutuality between the parties to enforce the guaranteed cost policies and Appellants had no intention of purchasing a guaranteed cost policy.[204] Appellants further argue that "unless the Commissioner believes that it has the full power to grant restitutionary relief to Appellant just as a court of law would do, he should stay away from commenting on appropriate remedies and leave that to the courts."[205]

This agency must consider the facts in this case and consistently issue decisions that give

[204] Appellant's Response to Respondent's Petition for Reconsideration, filed June 25, 2019, at pp. 2-4.
[205] Appellants' Response to Invitation of the Commissioner for Limited Reconsideration at p. 7.

meaning to the mandatory filing requirements while also protecting consumers by preserving workers' compensation coverage for workers and employers. In light of the limits of the Department's powers when compared to other tribunals, the agency must choose from a more limited set of options when deciding upon an appropriate remedy. Under the facts of this case this agency must uphold the transparency and enforceability of the properly-filed guaranteed cost policies.

Rendering the properly-filed guaranteed cost policies void, as explained above, would have left the Appellants without workers' compensation coverage for the period in question. Three fundamental considerations lead this agency to find the guaranteed cost policies to be enforceable: 1) there was no factual basis on this record to declare the guaranteed cost policies unlawful, 2) the agency must modify Respondents' unlawful actions in a manner that will preserve workers' compensation coverage for Appellants, and 3) the agency's modification to the insurer's action must give meaning to the mandatory filing requirements to ensure a transparent, consistent process that protects consumers.

Based on the facts in this case, and in light of the limits of this tribunal's jurisdiction, the most appropriate modification to the action of Respondents in this case is to render the RPA void and to direct Respondents to apply the filed rates associated with the Department-approved guaranteed cost policies. Not only is this outcome appropriate in light of the agency's authority, it is also ensures consistency with the well-established precedent decision in *Shasta Linen.*[206]

5. Other Remedies Are Beyond the Scope of this Order.

Appellants are not without further recourse. The scope of this agency's authority does

[206] *Shasta Linen, supra,* at p. 69. As the *Shasta Linen* precedent decision specifically directs: "Shasta Linen is responsible only for the premium and costs associated with the three guaranteed cost policies issued on January 1, 2010, January 1, 2011 and January 1, 2012 and the rates applicable to those policies."

not encompass the power to adjudicate *all* insurance disputes.[207] Indeed, remedies available before other tribunals may prove to be more appropriate depending upon the facts of a particular case.

The guaranteed cost policies in this case preserve all of Appellants' standard remedies that may be considered as part of any judicial review. Indeed, as the First District Court of Appeal recently observed:

> With respect to dispute resolution, the CIC Policy provides: 'If you are aggrieved by our decision adopting a change in classification assignment that results in increased premium, or by the application of our rating system to your worker's compensation insurance, you may dispute these matters with us.... If you are dissatisfied ... you may appeal to the insurance commissioner.' Such an appeal is to be made pursuant to sections 11737 and 11753.1. Other than this right to administrative review under specified circumstances, the CIC Policy is silent as to the resolution of disputes, leaving intact all of the insured standard rights to judicial review.
>
> (*Luxor Cabs, Inc. v. Applied Underwriters Captive Risk Assurance Co.* (2018) 30 Cal.App.5th 970, 983 [242 Cal.Rptr.3d 87, 97–98], *review denied (Mar. 13, 2019).*)

V. Respondents Received Due Process and a Fair Hearing.

Respondents argue that limitations on their ability to present witness testimony deprived them of due process and a fair hearing. The Commissioner disagrees.

A. Witness Limitations Did Not Deprive Respondents of Due Process.

Respondents argue they were deprived of due process and fair hearing rights because they were not permitted to present testimony of three proposed witnesses.[208] This argument is unconvincing. As discussed in the ALJ's October 24, 2018 Order Excluding Testimony, the testimony of the proposed witnesses would have been irrelevant or otherwise inadmissible. In particular, most of the proposed testimony concerned issues decided in *Shasta Linen* that

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[207] See, e.g., *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 199.
[208] Resp. Post-Hearing Br. at pp. 29:18-30:10.

Respondents were estopped from rearguing in this appeal.[209] Respondents had ample opportunity to elicit similar expert witness testimony in *Shasta Linen* and did so. Because they decided to settle and terminate judicial review of that case, Respondents are now bound by its findings.

B. Respondents May Not Relitigate *Shasta Linen's* Findings and Conclusions.

Respondents contend they may reargue various issues decided in *Shasta Linen*.[210] That is incorrect. As discussed at length in the Notice Regarding the Preclusive Effect of the *Shasta Linen* Decision ("Preclusive Effect Notice"),[211] Respondents are precluded from further litigating those issues by the doctrines of collateral estoppel and failure to exhaust judicial remedies.

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

Respondents argue this appeal must be dismissed because the Consent Order among the CDI, CIC and AUCRA requires the RPA to be enforced and strips Appellants of standing under Insurance Code section 11737, subdivision (f).[212] That argument is incorrect for several reasons.

First, nothing in the Consent Order suggests that it binds third parties such as Appellants.[213] Second, the Consent Order provides that the *Shasta Linen* decision is precedential and applies to "any form of RPA that is substantially similar to the RPA issued in Shasta Linen Supply, Inc."[214] Third, the Consent Order expressly states that it neither prevents the Commissioner from declaring unfiled RPAs "unenforceable, void, voidable, or illegal" nor from "adjudicat[ing] the rights of others."[215] As discussed above, the RPA in this case is substantially

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[209] See discussion in subpart C below.
[210] Resp. Post-Hearing Br., at p. 29:1-2; Respondents' Offer of Proof, filed October 16, 2018 ("Resp. Offer of Proof"), pp. 7-12.
[211] Order Taking Official Notice; Notice Regarding Preclusive Effect of the *Shasta Linen* Decision, dated July 19, 2018.
[212] Resp. Post-Hearing Br. at pp. 30:11-31:14.
[213] See Exh. 228.
[214] *Id.* at pp. 228-2, 228-3.
[215] *Id.* at pp. 228-6.

similar to the RPA in *Shasta Linen*, which the Commissioner determined was unlawful and unenforceable.[216] Accordingly, the Consent Order does not prevent the Commissioner from adjudicating this appeal and finding the RPA void.

Conclusions of Law

Based on the foregoing facts and analysis, this agency hereby amends the Proposed Decision as set forth within this Amended Order Following Reconsideration and makes the following legal conclusions:

1. Pursuant to Insurance Code section 11737, subdivision (f), the Commissioner has exclusive jurisdiction to adjudicate Appellants' claim that Respondent misapplied their Insurance Code section 11735 filings.

2. Respondents' RPA contained rates and supplementary rate information that must be filed pursuant to Insurance Code section 11735. Respondents violated section 11735 by failing to file the RPA's rates and supplementary rate information.

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

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

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[216] *Shasta Linen, supra,* at p. 69.

ORDER

IT IS ORDERED:

Respondents shall recalculate Appellants' premium owed for the policy periods at issue in this appeal, using the filed rates for Appellants' guaranteed cost policies. This Order shall become effective immediately.

DATED: July 22, 2019

RICARDO LARA
Insurance Commissioner

By: _____
BRYANT W. HENLEY
Deputy Commissioner & Special Counsel

DECLARATION OF SERVICE BY MAIL

Case Name/No.: In the Matter of the Appeal of:
RDR BUILDERS INC., a California corporation, DOS REIS, RONALD, and BARBIERI, MARK, d/b/a RDR BUILDERS, LP; and RDR PRODUCT BUILDERS, INC., a California Corporation,
File No. AHB-WCA-17-52

I, CANDACE GOODALE, declare that:

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

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

☒ On July 22, 2019 following ordinary business practices, I caused a true and correct copy of the following document(s):

AMENDED ORDER FOLLOWING RECONSIDERATION; NOTICE OF TIME LIMITS FOR JUDICIAL REVIEW

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

(SEE ATTACHED SERVICE LIST)

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California, on July 22, 2019.

CANDACE GOODALE

NOTICE OF TIME LIMITS FOR JUDICIAL REVIEW
In the Matter of RDR BUILDERS, INC., a California corporation, DOS REIS, RONALD, and BARBIERI, MARK, d/b/a/ RDR BUILDERS, LP; and RDR PRODUCT BUILDERS, INC., a California Corporation,

Case No. AHB-WCA-17-52

Judicial review of this Decision may be had pursuant to California Code of Regulations, Title 10, section 2509.76, by filing a petition for a writ of mandate against the Insurance Commissioner or the Department of Insurance, in accordance with the provisions of section 1094.5 of the California Code of Civil Procedure. A petition for a writ of mandamus (writ petition) shall be filed with the Court, and served on the Insurance Commissioner as follows:

Agent for Service of Process
Government Law Bureau
California Department of Insurance
300 Capitol Mall, 17th Floor
Sacramento, California 95814

Since the Administrative Hearing Bureau is a division of the Department of Insurance, and not a separate legal entity, the writ petition should ***not*** name the Administrative Hearing Bureau or the Administrative Law Judge who presided over the matter as respondents. However, a courtesy copy of any writ petition should be delivered to the Administrative Hearing Bureau of the California Department of Insurance as follows:

Department of Insurance
Administrative Hearing Bureau
45 Fremont Street, 22nd Floor
San Francisco, California 94105

A request for a copy of the administrative record for a writ petition pursuant to California Code of Regulations, Title 10, section 2509.76, subdivision (d) should be made to:

Agent for Service of Process
Government Law Bureau
California Department of Insurance
300 Capitol Mall, 17th Floor
Sacramento, California 95814

The request should include the Matter name and Case Number specified above.

PARTY SERVICE LIST
RDR BUILDERS, INC.
FILE NO.: AHB-WCA-17-52

Larry J. Lichtenegger, Esq., **THE LICHTENEGGER LAW OFFICE** 3850 Rio Road, #58 Carmel, CA 93923 Tel. No.: (831) 626-2801 FAX No.: (831) 886-1639 lawyer@mbay.net	Attorney for Appellant
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EXHIBIT C

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BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of: STEVE WILLS TRUCKING AND LOGGING, LLC Appellant, From the Decision of the CALIFORNIA INSURANCE COMPANY; APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.; and APPLIED UNDERWRITERS, INC., Respondents	**File No. AHB-WCA-17-44** **RESPONSE TO THE INSURANCE COMMISSIONER'S NOTICE OF NON-ADOPTION OF PROPOSED DECISION; and ORDER OF REFERRAL** **(Title 10 Cal. Code Regs., section 2509.69, subds. (d) & (e).)**

I. INTRODUCTION

Platinum Security Inc. ("Platinum") and Moss Management Services, Inc. ("Moss"), submit the following pleading in response to the Insurance Commissioner's Notice of Non-Adoption of Proposed Decision, in the above-referenced case.

By way of background, on or about April 9, 2019, Platinum had a hearing in front of Administrative Law Judge, John H. Larsen, who is also the Administrative Law Judge in the above-referenced case. Attached, as Exhibit "A", is a true and correct copy of Judge Larsen's Order, adopting proposed Decision of October 11, 2018, in the Platinum case. Subsequent to this Ruling, Applied Underwriters filed a Complaint against Platinum in Los Angeles Superior Court. This filing occurred on or about May 1, 2019. A true and correct copy of Applied's Complaint is also attached hereto as Exhibit "B". Moss, on the other hand, is set to have a conference call with Administrative Law Judge Rosi, on July 30, 2019. We anticipate that a hearing date will be set for Moss's case challenging the validity of the Reinsurance Participation Agreement issued by Applied Underwriters.

Both Platinum and Moss have a material interest in the Deputy Commissioner and Special Counsel's June 27, 2019 Notice of Non-Adoption, in which five questions were posed to Judge Larsen. Moss and Platinum, through their counsel, Roxborough, Pomerance, Nye & Adreani, submit the following legal brief concerning the Insurance Commissioner's request of the Administrative Law Judge regarding what the Insurance Commissioner refers to as the "Guaranteed Cost Policy Premium" at page 2, line 21, of its Notice.

II. THE DEPARTMENT OF INSURANCE HAS NEVER HAD JURISDICTION OVER PREMIUM DISPUTES

While it is clear that the Insurance Commissioner has the authority to declare insurance policies, endorsements, and/or collateral agreements to be void for violating the Insurance Code

[*see* Insurance Code § 12928.5] and may declare rates charged by an insurance company unlawful [*see* Insurance Code § 11737], it is the longstanding policy of the Department of Insurance to recognize that under existing common law, as well as statutory law, it does not have any authority to pass judgment on breach of contract or *quantum meruit* claims that might be asserted by an insurance company in court after the Insurance Commissioner has declared a policy or part of a policy to be unlawful. To wit: "The Commissioner's supervisory and regulatory power over the insurance industry does not give him power to adjudicate all insurance disputes-such as this one, which involves an alleged breach of contract with a demand for monetary damages-unless persuasive legislative intent to grant this authority can be identified." *Lance Camper Mfg. Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 199-200. "No legislative intent to have the Department of Insurance or any other regulatory agency adjudicate breach of insurance contract cases can be divined from the briefs of the Insurer or its supporters. Nor do the Insurer and its supporters reveal any authority giving the Commissioner power to make a monetary award to redress past misconduct by a workers' compensation insurer. Finally, the Insurer and amici curiae fail to identify any existing administrative process for reviewing the type of claim the Insured makes here." *Id.* Indeed, this well-known and long-established rule of law has existed and been repeatedly referred to in numerous appellate cases.

Thus, the herein request by the Commissioner, regarding "premium" coverage and "remedies" questions, from the Administrative Law Judge, are, as a matter of law, outside of the jurisdiction of the Department of Insurance. Additionally, there are no further available administrative remedies that any of the policyholders of Applied Underwriters could get from the DOI.

In the fifth question from the Deputy Commissioner and Special Counsel, Special Counsel asks the Administrative Law Judge to advise whether there is "any other guidance on the question

of available administrative remedies that the parties or the Commissioner should expressly seek from a court of law that may review the Commissioner's ultimate decision in this case", and in the second question, Judge Larsen is asked to determine questions regarding payment of "premium" under the Guaranteed Cost Policy. Moss and Platinum provide guidance on those two questions as follows.

In the late 1980's and early 1990's, policyholders questioned the manner in which insurance companies were administering their workers compensation programs in California. "Premium" disputes arose, whereby policyholders sought to sue in-state court workers' compensation insurance carriers for breach of contract and on tort theories, for the manner in which they defended, investigated, and administrated workers compensation claims, their reserving practices, as well as their seeking additional remedies under the policies. In response, a litany of appellate decisions arose. These cases are: *Courtesy Ambulance Service v. Superior Court* 5 (1992) 8 Cal.App.4th 1504; *Maxon Industries, Inc. v. State Compensation Ins. Fund* (1993) 16 Cal.App.4th 1387; *Security Officers Service, Inc. v. State Compensation Insurance Fund* (1993) 17 Cal.App.4th 887; *Tricor California, Inc. v. State Compensation Insurance Fund* (1994) 30 Cal.App.4th 230; *MacGregor Yacht Corp v. SCIF* (1998) 63 Cal.App.4th 448; *Notrica v. SCIF* (1999) 70 Cal.App.4th 911. In *Tricor*, the court concluded that breach of contract claims seeking damages were **not** subject to administrative jurisdiction and **must be submitted to courts**. *Tricor* at 242.

III. CONCLUSION

Moss and Platinum respectfully submit this response to the Deputy Commissioner and Special Counsel's "Order of Referral" in which the Administrative Law Judge is requested to answer questions involving "premium", "coverage" and "remedies". In short, the Administrative Law Judge here, has acted appropriately and within his jurisdiction by voiding the Reinsurance

Participation because it violates the Insurance Code, but reserving for further litigation in court the question of the amount the insured is obligated to pay under a potential breach of contract or *quantum meruit* claim by the insurer. The Insurance Commissioner should not proceed to resolve the reasonable value of the insurance provided now that the Reinsurance Participation Agreement is void. Questions regarding whether the insured ever entered into the associated policies; whether the insured ever agreed to pay the rates stated in the associated policies; or, if the insured did not ever agree to pay the rates stated in the associated policies, the reasonable value of the insurance provided, are all exclusively within the jurisdiction of the courts.

DATED: July 23, 2019

Respectfully submitted,

ROXBOROUGH, POMERANCE & NYE LLP

By: _____
NICHOLAS P. ROXBOROUGH
VINCE GANNUSCIO
RYAN R. SALSIG
Attorneys for Defendant/Cross-Complainant
Moss Management Services, Inc., and Platinum Security, Inc.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5820 Canoga Avenue, Suite 250, Woodland Hills, California 91367.

On July ___, 2019 I served the foregoing document described as:

RESPONSE TO THE INSURANCE COMMISSIONER'S NOTICE OF NON-ADOPTION OF PROPOSED DECISION; and ORDER OF REFERRAL

on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Larry J. Lichtenneger, Esq. The Lichtenneger Law Office 3850 Rio Road, #58 Carmel, CA 93923 Tel: 831-626-2801 Fax: 831-886-1639 EM: lawver@mbay.com	Attorney for Appellant
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Bryant W. Henley Deputy Commissioner & Special Counsel Department of Insurance Executive Office 300 Capitol Mall, 17th Floor Sacramento, CA 95814 Tel: 916-492-3500 Fax: 916-445-5280	
Judge John H. Larsen DEPARTMENT OF INSURANCE ADMINISTRATIVE HEARING BUREAU 45 Fremont Street, 22nd Floor San Francisco, CA 94105 Telephone: (415) 538-4251 FAX No.: (415) 904-5854 www.insnrance.ca.gov	

☒ **BY U.S. MAIL:** As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Woodland Hills, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY OVERNIGHT MAIL (OVERNITE EXPRESS OVERNIGHT DELIVERY):** I caused such envelope(s) to be delivered by overnight mail, with next business day service to the addresses listed above.

☐ **BY PERSONAL SERVICE:** I caused such envelope to be hand delivered to the addressee listed above.

☐ **BY FACSIMILE:** I caused such documents listed above to be transmitted via facsimile to the number(s) set forth above.

☒ **STATE:** I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct.

☐ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 23, 2019 at Woodland Hills, California.

Lucy Gutierrez

EXHIBIT D

DEPARTMENT OF INSURANCE
ADMINISTRATIVE HEARING BUREAU
45 Fremont Street, 22nd Floor
San Francisco, CA 94105
Telephone: (415) 538-4243
FAX: (415) 904-5854

BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

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

ALJ'S RESPONSE TO NOTICE OF NON-ADOPTION OF PROPOSED DECISION AND ORDER OF REFERRAL

On June 27, 2019, the Commissioner issued a Notice of Non-Adoption of Proposed Decision; and Order of Referral (the "June 2019 Order"), in which the Commissioner declined to adopt Administrative Law Judge ("ALJ") Clarke de Maigret's June 6, 2019 Proposed Decision in the above matter. The June 2019 Order referred the matter to the ALJ to take additional evidence as follows:

1. The Proposed Decision includes findings that the rates set forth in the guaranteed cost policies comport with Respondents' rate filings under Insurance Code section 11735, and that there has been no allegation in this appeal that any portion of the guaranteed cost policies is unlawful. Given the above, does the precedent decision *In the Matter of the Appeal of Shasta Linen Supply, Inc.* (Cal. Ins. Comm'r, Jun. 20, 2016, AHB-

WCA-14-31)[1] compel the conclusion that Appellants[2] are obligated to pay the full guaranteed cost policy premium?

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

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

(June 2019 Order at pp. 2-3.)

Applicable Law

These proceedings are governed by California Code of Regulations, title 10, sections 2509.40 through 2509.78. Section 2509.69, subdivision (g) provides, in relevant part, that the Commissioner may refer a matter to an ALJ to take additional evidence after the ALJ has submitted a proposed decision.

The rules of evidence in administrative appeals are considerably relaxed compared to the rules generally applicable in court proceedings. (See Cal. Code Regs., tit. 10, § 2509.62.) However, as in court, evidence is admissible here only if it is relevant. (See Cal. Code Regs., tit. 10, § 2509.62, subd. (d); *Coburn v. State Personnel Bd.* (1978) 83 Cal.App.3d 801, 812.) Evidence is relevant if it has a "tendency in reason to prove or disprove any disputed *fact* that is of consequence to the determination of the action." (Evid. Code, § 210, italics added.)

Analysis and Conclusions

None of the issues on which the June 2019 Order directs the ALJ to take additional evidence are questions of *fact*. Instead, whether *Shasta Linen* compels a particular conclusion given that the guaranteed cost policy rates were filed, what remedies the Commissioner may

[1] Hereafter, "*Shasta Linen*."
[2] I.e., Van De Pol Enterprises, Inc. and Fuel Delivery Services, Inc.

implement, and whether further judicial guidance may be applicable are all questions of *law*. As such, there can be no relevant evidence on those issues. Instead, the Commissioner or his designee must refer to legal authority if they believe the Proposed Decision insufficiently addresses those issues.

The ALJ will submit an Amended Proposed Decision to the Deputy Commissioner and Special Counsel. Other than updating the procedural history and correcting non-substantive drafting errors, the Amended Proposed Decision will be identical to the June 6, 2019 Proposed Decision.

Dated: July 18, 2019

CLARKE de MAIGRET
Administrative Law Judge
Administrative Hearing Bureau

DECLARATION OF SERVICE BY MAIL (AND FAX)

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

I, **CAMILLE E. JOHNSON**, declare that:

I am employed in the County of San Francisco, California. I am over the age of 18 years and not a party to this action. My business address is State of California, Department of Insurance, Administrative Hearing Bureau, 45 Fremont Street, 22nd Floor, San Francisco, California, 94105.

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

[X] On July 18, 2019, following ordinary business practices, I caused a true and correct copy of the following document(s):

ALJ'S RESPONSE TO NOTICE OF NON-ADOPTION OF PROPOSED DECISION AND ORDER OF REFERRAL

to be placed for collection and mailing at the office of the California Department of Insurance at 45 Fremont Street, San Francisco, California, with proper postage prepaid, in a sealed envelope(s) addressed as follows:

(SEE ATTACHED PARTY SERVICE LIST)

[X] In addition, on July 18, 2019, I also faxed a copy of said document to all parties where indicated to the FAX number which is printed under each address on this Declaration.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California, on July 18, 2019.

July 18, 2019
DATE

C. E. JOHNSON

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

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Travis Wall, Esq. **HINSHAW & CULBERTSON LLP** One California Street, 18th Floor San Francisco, CA 94111 Telephone: (415)362-6000 Facsimile: (415)834-9070 twall@hinshawlaw.com	Attorney for Insurer California Insurance Company
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Brenda J. Keys, Esq. Senior Vice President – Legal **WORKERS' COMPENSATION INSURANCE RATING BUREAU** 1221 Broadway, Suite 900 Oakland, CA 94612 Tel. No.: (415) 778-7000 FAX No.: (415) 371-5202 legal@wcirb.com	Attorney(s) for Workers' Compensation Insurance Rating Bureau (not actively participating)

CM-010

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Larry J. Lichtenegger, Esq. [SBN 048206]
Lichtenegger Law Office
3850 Rio Road, #58

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TELEPHONE NO.: (831) 626-2801 FAX NO.: (831)886-1639
ATTORNEY FOR (Name): Oceanside Laundry & RDR Builders

FOR COURT USE ONLY

FILED
San Francisco County Superior Court
AUG 05 2019
CLERK OF THE COURT
BY: Deputy Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco
STREET ADDRESS: 400 McAllister Street
MAILING ADDRESS:
CITY AND ZIP CODE: San Francisco, California 94102
BRANCH NAME: Civic Center Courthouse

CASE NAME: Oceanside Laundry, LLC and RDR Builers, Inc., et. al v Richardo Lara, et. al.

CASE NUMBER: CPF 19-516790

JUDGE:
DEPT:

CIVIL CASE COVER SHEET

[x] **Unlimited** (Amount demanded exceeds $25,000) [ ] **Limited** (Amount demanded is $25,000 or less)

Complex Case Designation

[ ] **Counter** [ ] **Joinder**

Filed with first appearance by defendant (Cal. Rules of Court, rule 3.402)

Items 1-6 below must be completed (see instructions on page 2).

1. Check **one** box below for the case type that best describes this case:

Auto Tort
- [ ] Auto (22)
- [ ] Uninsured motorist (46)

Other PI/PD/WD (Personal Injury/Property Damage/Wrongful Death) Tort
- [ ] Asbestos (04)
- [ ] Product liability (24)
- [ ] Medical malpractice (45)
- [ ] Other PI/PD/WD (23)

Non-PI/PD/WD (Other) Tort
- [ ] Business tort/unfair business practice (07)
- [ ] Civil rights (08)
- [ ] Defamation (13)
- [ ] Fraud (16)
- [ ] Intellectual property (19)
- [ ] Professional negligence (25)
- [ ] Other non-PI/PD/WD tort (35)

Employment
- [ ] Wrongful termination (36)
- [ ] Other employment (15)

Contract
- [ ] Breach of contract/warranty (06)
- [ ] Rule 3.740 collections (09)
- [ ] Other collections (09)
- [ ] Insurance coverage (18)
- [ ] Other contract (37)

Real Property
- [ ] Eminent domain/Inverse condemnation (14)
- [ ] Wrongful eviction (33)
- [ ] Other real property (26)

Unlawful Detainer
- [ ] Commercial (31)
- [ ] Residential (32)
- [ ] Drugs (38)

Judicial Review
- [ ] Asset forfeiture (05)
- [ ] Petition re: arbitration award (11)
- [x] Writ of mandate (02)
- [ ] Other judicial review (39)

Provisionally Complex Civil Litigation (Cal. Rules of Court, rules 3.400-3.403)
- [ ] Antitrust/Trade regulation (03)
- [ ] Construction defect (10)
- [ ] Mass tort (40)
- [ ] Securities litigation (28)
- [ ] Environmental/Toxic tort (30)
- [ ] Insurance coverage claims arising from the above listed provisionally complex case types (41)

Enforcement of Judgment
- [ ] Enforcement of judgment (20)

Miscellaneous Civil Complaint
- [ ] RICO (27)
- [ ] Other complaint *(not specified above)* (42)

Miscellaneous Civil Petition
- [ ] Partnership and corporate governance (21)
- [ ] Other petition *(not specified above)* (43)

2. This case [ ] is [x] is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:
   a. [ ] Large number of separately represented parties
   b. [ ] Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve
   c. [ ] Substantial amount of documentary evidence
   d. [ ] Large number of witnesses
   e. [ ] Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
   f. [ ] Substantial postjudgment judicial supervision
3. Remedies sought *(check all that apply)*: a. [ ] monetary b. [x] nonmonetary; declaratory or injunctive relief c. [ ] punitive
4. Number of causes of action *(specify)*: One
5. This case [ ] is [x] is not a class action suit.
6. If there are any known related cases, file and serve a notice of related case. *(You may use form CM-015.)*

Date: July 30, 2019
Larry J. Lichtenegger, Esq. [SBN 048206]
(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

NOTICE
- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on **all** other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Form Adopted for Mandatory Use
Judicial Council of California
CM-010 [Rev. July 1, 2007]

CIVIL CASE COVER SHEET Legal Solutions Plus

Cal. Rules of Court, rules 2.30, 3.220, 3.400–3.403, 3.740; Cal. Standards of Judicial Administration, std. 3.10

FILE BY FAX

INSTRUCTIONS ON HOW TO COMPLETE THE COVER SHEET

CM-010

To Plaintiffs and Others Filing First Papers. If you are filing a first paper (for example, a complaint) in a civil case, you **must** complete and file, along with your first paper, the *Civil Case Cover Sheet* contained on page 1. This information will be used to compile statistics about the types and numbers of cases filed. You must complete items 1 through 6 on the sheet. In item 1, you must check **one** box for the case type that best describes the case. If the case fits both a general and a more specific type of case listed in item 1, check the more specific one. If the case has multiple causes of action, check the box that best indicates the **primary** cause of action. To assist you in completing the sheet, examples of the cases that belong under each case type in item 1 are provided below. A cover sheet must be filed only with your initial paper. Failure to file a cover sheet with the first paper filed in a civil case may subject a party, its counsel, or both to sanctions under rules 2.30 and 3.220 of the California Rules of Court.

To Parties in Rule 3.740 Collections Cases. A "collections case" under rule 3.740 is defined as an action for recovery of money owed in a sum stated to be certain that is not more than $25,000, exclusive of interest and attorney's fees, arising from a transaction in which property, services, or money was acquired on credit. A collections case does not include an action seeking the following: (1) tort damages, (2) punitive damages, (3) recovery of real property, (4) recovery of personal property, or (5) a prejudgment writ of attachment. The identification of a case as a rule 3.740 collections case on this form means that it will be exempt from the general time-for-service requirements and case management rules, unless a defendant files a responsive pleading. A rule 3.740 collections case will be subject to the requirements for service and obtaining a judgment in rule 3.740.

To Parties in Complex Cases. In complex cases only, parties must also use the *Civil Case Cover Sheet* to designate whether the case is complex. If a plaintiff believes the case is complex under rule 3.400 of the California Rules of Court, this must be indicated by completing the appropriate boxes in items 1 and 2. If a plaintiff designates a case as complex, the cover sheet must be served with the complaint on all parties to the action. A defendant may file and serve no later than the time of its first appearance a joinder in the plaintiff's designation, a counter-designation that the case is not complex, or, if the plaintiff has made no designation, a designation that the case is complex.

CASE TYPES AND EXAMPLES

Auto Tort
- Auto (22)—Personal Injury/Property Damage/Wrongful Death
- Uninsured Motorist (46) *(if the case involves an uninsured motorist claim subject to arbitration, check this item instead of Auto)*

Other PI/PD/WD (Personal Injury/ Property Damage/Wrongful Death) Tort
- Asbestos (04)
  - Asbestos Property Damage
  - Asbestos Personal Injury/ Wrongful Death
- Product Liability *(not asbestos or toxic/environmental)* (24)
- Medical Malpractice (45)
  - Medical Malpractice–Physicians & Surgeons
  - Other Professional Health Care Malpractice
- Other PI/PD/WD (23)
  - Premises Liability (e.g., slip and fall)
  - Intentional Bodily Injury/PD/WD (e.g., assault, vandalism)
  - Intentional Infliction of Emotional Distress
  - Negligent Infliction of Emotional Distress
  - Other PI/PD/WD

Non-PI/PD/WD (Other) Tort
- Business Tort/Unfair Business Practice (07)
- Civil Rights (e.g., discrimination, false arrest) *(not civil harassment)* (08)
- Defamation (e.g., slander, libel) (13)
- Fraud (16)
- Intellectual Property (19)
- Professional Negligence (25)
  - Legal Malpractice
  - Other Professional Malpractice *(not medical or legal)*
- Other Non-PI/PD/WD Tort (35)

Employment
- Wrongful Termination (36)
- Other Employment (15)

Contract
- Breach of Contract/Warranty (06)
  - Breach of Rental/Lease Contract *(not unlawful detainer or wrongful eviction)*
  - Contract/Warranty Breach—Seller Plaintiff *(not fraud or negligence)*
  - Negligent Breach of Contract/ Warranty
  - Other Breach of Contract/Warranty
- Collections (e.g., money owed, open book accounts) (09)
  - Collection Case—Seller Plaintiff
  - Other Promissory Note/Collections Case
- Insurance Coverage *(not provisionally complex)* (18)
  - Auto Subrogation
  - Other Coverage
- Other Contract (37)
  - Contractual Fraud
  - Other Contract Dispute

Real Property
- Eminent Domain/Inverse Condemnation (14)
- Wrongful Eviction (33)
- Other Real Property (e.g., quiet title) (26)
  - Writ of Possession of Real Property
  - Mortgage Foreclosure
  - Quiet Title
  - Other Real Property *(not eminent domain, landlord/tenant, or foreclosure)*

Unlawful Detainer
- Commercial (31)
- Residential (32)
- Drugs (38) *(if the case involves illegal drugs, check this item; otherwise, report as Commercial or Residential)*

Judicial Review
- Asset Forfeiture (05)
- Petition Re: Arbitration Award (11)
- Writ of Mandate (02)
  - Writ–Administrative Mandamus
  - Writ–Mandamus on Limited Court Case Matter
  - Writ–Other Limited Court Case Review
- Other Judicial Review (39)
  - Review of Health Officer Order
  - Notice of Appeal–Labor Commissioner Appeals

Provisionally Complex Civil Litigation (Cal. Rules of Court Rules 3.400–3.403)
- Antitrust/Trade Regulation (03)
- Construction Defect (10)
- Claims Involving Mass Tort (40)
- Securities Litigation (28)
- Environmental/Toxic Tort (30)
- Insurance Coverage Claims *(arising from provisionally complex case type listed above)* (41)

Enforcement of Judgment
- Enforcement of Judgment (20)
  - Abstract of Judgment (Out of County)
  - Confession of Judgment *(non-domestic relations)*
  - Sister State Judgment
  - Administrative Agency Award *(not unpaid taxes)*
  - Petition/Certification of Entry of Judgment on Unpaid Taxes
  - Other Enforcement of Judgment Case

Miscellaneous Civil Complaint
- RICO (27)
- Other Complaint *(not specified above)* (42)
  - Declaratory Relief Only
  - Injunctive Relief Only *(non-harassment)*
  - Mechanics Lien
  - Other Commercial Complaint Case *(non-tort/non-complex)*
  - Other Civil Complaint *(non-tort/non-complex)*

Miscellaneous Civil Petition
- Partnership and Corporate Governance (21)
- Other Petition *(not specified above)* (43)
  - Civil Harassment
  - Workplace Violence
  - Elder/Dependent Adult Abuse
  - Election Contest
  - Petition for Name Change
  - Petition for Relief from Late Claim
  - Other Civil Petition