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 **RDR BUILDERS, INC., a California corporation, DOS REIS, RONALD, and BARBIERI, MARK, d/b/a/ RDR BUILDERS, LP; and RDR PRODUCTION BUILDERS, INC., a California corporation** Appellants, From the Decision of the **CALIFORNIA INSURANCE COMPANY and APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.** Respondents.	File AHB-WCA-17-52 **ORDER ADOPTING PROPOSED DECISION**

This matter came for hearing before the Department's Administrative Hearing Bureau in San Francisco on November 17, 2018, and the hearing record closed on January 29, 2019. Administrative Law Judge Clarke de Maigret signed his Proposed Decision on April 2, 2019, and recommended its adoption as the decision of the Insurance Commissioner. The Commissioner received the Proposed Decision on April 4, 2019 and duly considered the findings and conclusions set forth within the Proposed Decision.

Now, therefore, pursuant to the provisions of California Insurance Code section 11737(f),

and California Code of Regulations, Title 10, section 2509.69, IT IS SO ORDERED that the attached Proposed Decision is hereby adopted by the Insurance Commissioner as his Decision in the above-entitled matter.

This Decision shall become effective 30 days after it is served on the parties unless reconsideration is ordered within that time.

DATED: May 13, 2019

RICARDO LARA
Insurance Commissioner

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

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 PRODUCTION BUILDERS, INC., a California corporation** Appellants, From the Decision of the **CALIFORNIA INSURANCE COMPANY and APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.,** Respondents.	) FILE AHB-WCA-17-52

PROPOSED DECISION

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.

---

[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 ALJ 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.

---

[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.

Findings of Fact

The ALJ makes the following factual findings based on a preponderance of the evidence

[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."

in the record:

I. Appellants' Business

Appellants are based in Lodi, California and provide construction contracting services in California and Nevada.[10] RDR Builders, Inc., a corporation, is the general partner of RDR Builders, LP, a limited partnership.[11] Ron Dos Reis and Mark Barbieri are RDR Builders, LP's limited partners.[12] At all relevant times, RDR Production Builders, Inc. was a corporation with the same executive leadership as RDR Builders, Inc.[13]

II. Appellants' Purchase of EquityComp

In the years before 2014, Appellants purchased workers' compensation insurance from insurers other than Respondents.[14] 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.[15] 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").[16] The Request to Bind provides in relevant part:

> The applicant(s) identified below, whether one or more (collectively the "Applicant")[17] 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

---

[10] Transcript of proceedings of November 17, 2018 ("Tr."), p. 31:13-15; Evidentiary hearing exhibit ("Exh.") 201 at p. 201.4.
[11] Exh. 201.
[12] *Ibid.*
[13] Tr. at p. 31:7-12.
[14] Tr. at p. 33:15-17.
[15] Exhs. 100, 101.
[16] Exh. 200 at p. 200-14.
[17] I.e., Appellants.

> 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. . . .[18]

Appellants' EquityComp program began on December 27, 2014.[19] Before the end of the program's second year, Appellants became dissatisfied with the program charges' fluctuation and lack of transparency.[20] As a result, the parties agreed to terminate the program a year early, effective December 26, 2016.[21] The Policies and RPA referenced in the Request to Bind are discussed below.

III. Respondents' Business and Organization[22]

Respondents' organizational structure is extensively described in the *Shasta Linen* decision, and that description is adopted here.[23] In short, CIC is a licensed property and casualty company, domiciled in California and licensed to transact business in multiple states.[24] CIC is wholly-owned by North American Casualty Company, a non-insurer owned by Applied Underwriters, Inc. ("AU"), a Nebraska corporation.[25]

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

---

[18] Exh 200 at p. 200-14.
[19] Exhs. 103 at p. 103-1, 104 at p. 104-1.
[20] Tr. at p. 73:3-12.
[21] Tr. at p. 73:18-21; Exhs. 231, 232.
[22] Use of the present tense in this part III means as of the date of the *Shasta Linen* decision, June 20, 2016.
[23] 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.
[24] *Shasta Linen, supra,* at p. 9.
[25] *Ibid.*
[26] *Ibid.*
[27] *Id.* at pp. 10-11.

AUCRA is also an indirect subsidiary of AU.[29]

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.[30] 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.[31]

The boards of directors of CIC, AUCRA and AU are identical in composition.[32]

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.[33] 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.[34] In loss-sensitive programs, the employer's cost for a given policy year is impacted by the workers' compensation claims incurred that year.[35] In contrast, a guaranteed cost policy's price is unaffected by claims incurred during the policy year.[36]

EquityComp is a specific form of loss-sensitive insurance known as a "retrospective rating plan."[37] Respondents' EquityComp patent describes the scheme as follows:

---

[28] *Id.* at p. 11.
[29] *Id.* at p. 10.
[30] *Ibid.*
[31] Exhs. 100 through 103.
[32] *Ibid.*
[33] 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.
[34] *Shasta Linen, supra,* at pp. 23-24, 66.
[35] *Id.* at p. 15.
[36] *Id.* at p. 22.
[37] *Shasta Linen, supra,* at p. 23.

> 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[38]

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."[39] 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 retrospective plans to insureds that may not have the option of such a plan directly."[40]

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).[41] The RPA superseded the guaranteed cost policies.[42] Premium owed under the policies was replaced by amounts paid under the RPA.[43] 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

---

[38] *Id.* at p. 24.
[39] *Id.* at p. 23.
[40] *Ibid.*
[41] Exhs. 103 through 105.
[42] *Shasta Linen, supra,* at pp. 24, 55.
[43] *Ibid.*

terms commencing December 27, 2014, and December 27, 2015.[44] 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.[45]

Each policy sets out the rates that CIC may charge Appellants.[46] CIC filed those rates with the Commissioner before the policies' commencement.[47] In addition, as required by law,[48] CIC warrants in each policy that it adheres to a single uniform loss experience rating plan and applies that experience rating to each policy.[49]

CIC's guaranteed cost policies also include a cancellation provision and a "short rate" cancellation notice, as required by the Insurance Code.[50] 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.[51]

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

---

[44] Exhs. 104, 105.
[45] Exhs. 104 at p. 104-32, 105 at p. 105-40.
[46] Exhs. 104 at p.104-5, 105 at p. 105-6.
[47] Exhs. 14 at p. 14-10, 15 at p. 15-10.
[48] Ins. Code, § 11752.8.
[49] Exhs. 104 at p. 104-32, 105 at p. 105-40; see also *Shasta Linen, supra,* at p. 12.
[50] Exhs. 104 at p. 104-35, 105 at p. 105-43; see also *Shasta Linen, supra,* at p. 12.
[51] Exhs. 104 at p. 104-15, 105 at p. 105-14.

policy.[52] CIC's short rate calculation table provides a formula for determining the early cancellation penalty.[53]

CIC's policies also set a minimum and estimated premium based on an employer's payroll estimates and loss experience modification factor.[54] After estimated taxes and fees, the guaranteed cost policies provide the employer with an annual premium estimate.[55] 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.[56] 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.[57]

The policies' dispute resolution provisions do not provide for binding arbitration or any other alternative dispute resolution methods.[58]

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.[59] The RPA and Proposal modify a number of the guaranteed cost policy provisions.[60] Where the RPA and the policies differ, the RPA's terms control.[61]

For example, the RPA contains workers' compensation rates, termed "loss pick

---

[52] Exhs. 104 at p. 104-16, 105 at p. 105-15; see also *Shasta Linen, supra,* at p. 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. 104-1, 105 at p. 105-1; see also *Shasta Linen, supra,* at p. 14.
[55] Exhs. 104 at p. 104-8, 105 at p. 105-8; see also *Shasta Linen, supra,* at p. 14.
[56] Exhs. 104, 105; see also *Shasta Linen, supra,* at p. 14.
[57] Exhs. 104, 105; *Shasta Linen, supra,* at p. 14.
[58] Exhs. 104, 105.
[59] 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.
[60] Exhs. 103 through 105; *Shasta Linen, supra,* at p. 55.
[61] Exhs. 103 through 105; *Shasta Linen, supra,* at p. 55.

containment rates" that supplant the rates set forth in the guaranteed cost policies.[62] The same loss pick containment rates were used to calculate Appellants' projected EquityComp costs set out in the monthly plan analyses provided by Respondents.[63] Additionally, the Proposal states that Appellants would be billed at the RPA's loss pick containment rates.[64] That proposal makes no reference to the guaranteed cost policies' rates.[65]

The RPA and Proposal are largely comprised of financial terms that affect the amounts Appellants must remit.[66] Most significantly, the RPA establishes a mechanism for assessing additional premium if the insureds incur higher than expected losses.[67] 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 assessed.[68] 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."[69] The Proposal sets forth a simplified overview of the RPA's mechanism.[70]

RPA section 4 and RPA Schedule 1, section 6 impose early cancellation fees that modify the guaranteed cost policies' cancellation terms and filed rates.[71] Also, the RPA removes Appellants' loss experience modification factor from the premium calculations.[72] Finally, the RPA's terms potentially require the insured to wait a minimum of three years or longer after the

---

[62] Exh. 103 at p. 103-10; *Shasta Linen, supra,* at p. 55.
[63] E.g., Exh. 109 at p. 109-3.
[64] 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.*)
[65] Exh. 100.
[66] Exhs. 100, 103.
[67] Exh. 103; see also *Shasta Linen, supra,* at p. 24.
[68] Exh. 103.
[69] *Ibid.*
[70] Exh. 100.
[71] Exh. 103 at pp 103-2, 103-7. The early cancellation fees are described on *Shasta Linen* pages 32-35.
[72] Exh. 103; *Shasta Linen, supra,* at p. 56.

RPA's expiration to receive a refund of any excess payments.[73]

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.[74] Nevertheless, Respondents charged Appellants in accordance with the RPA's rates and terms rather than those of the guaranteed cost policies.[75]

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").[76] 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.[77] 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").[78] 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

[73] 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.)
[74] Exhs. 14, 15; see also *Shasta Linen* Exhs. 19. 20, 21, 23, 24.
[75] Exhs. 103, 108, 109.
[76] Exh. 230 at p. 230-1.
[77] Exh. 228 at pp. 228-1, 228-2.
[78] Exh. 228.

> 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.

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.[79] 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[80] 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

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

> 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.[81] 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.[82]

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 ALJ 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

[81] Exh. 230.
[82] *Ibid.*

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.[83]

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.[84] 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."[85]

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.*

---

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

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].[86]

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.[87] 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).[88]

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

---

[86] *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 850.

[87] Appeal, filed Dec. 20, 2017 ("Appeal"), pp. 3:7-12, 5:18-27.

[88] 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.

not provide workers' compensation insurance to Appellants.[89] Respondents further argue the RPA did not modify the guaranteed cost policies because the agreements are between different parties.[90] 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.[91] "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 companies form a single enterprise; and (2) an inequitable result if the acts in question are treated as those of one corporation alone."[92]

B. Analysis and Conclusions of Law

In *Nielsen Contracting v. Applied Underwriters, Inc.*,[93] 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

---

[89] Respondents' Post-Hearing Brief, filed December 14, 2018 ("Resp. Post-Hearing Br."), p. 22:17-19.
[90] *Id.* at p. 22:19-21.
[91] *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, 1218.
[92] *Id.* at p. 1219.
[93] *Nielsen Contracting v. Applied Underwriters, Inc., supra,* 22 Cal.App.5th at p. 1116.

> examinations discuses EquityComp as a CIC product, and there is no evidence CIC sought to distinguish itself from EquityComp.[94]

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.
>
> ...
>
> 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.[95]

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.[96] Appellants further contend Respondents' use of the unfiled information

---

[94] *Shasta Linen, supra,* at pp. 49-51.
[95] *Ibid.*
[96] Appeal at p. 3:7-12.

misapplied the guaranteed cost policies' rating plan.[97] 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 ALJ 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 premium for an insured.*"[98] The Commissioner and courts construe "premium" broadly to include any amounts paid to insurers for coverage.[99] 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.[100] As the Commissioner determined in *Shasta Linen*, an insurer's use of unfiled rates or supplementary rate information is unlawful.[101] That is true regardless of whether the Commissioner disapproved the unfiled rates under Insurance Code

---

[97] *Id.* at p. 5:18-27; Appellant's Post Hearing Brief, filed December 17, 2018 ("App. Post-Hearing Br."), pp. 4-15.
[98] Ins. Code, § 11730, subd. (j), emphasis added.
[99] *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."].
[100] *Shasta Linen, supra,* at p. 49.
[101] *Id.* at p. 52.

section 11737.[102]

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.[103] 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,[104] 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 5432, and $1.35 for classification code 5606.[105] Those rates were not filed in accordance with section 11735.[106] 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.[107] Similar discrepancies can be seen with respect to those and other classification codes in both policy years, as shown in the following table:[108]

	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

[102] See *Ibid.*
[103] Exhs. 14, 15, 104, 105.
[104] I.e., the annual period beginning December 27, 2014.
[105] 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.
[106] See Exhs. 14, 15.
[107] Exhs. 14 at p. 14-10, 104 at p.104-5.
[108] Exhs. 100 at p. 100-4, 104 at p. 104-5, 105 at p. 105-6.

rates in the Proposal and RPA, not the guaranteed cost policies' filed rates.[109] 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.[110] 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.[111] 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.[112] Because Respondents charged Appellants based on the unfiled 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.[113]

---

[109] See *Shasta Linen, supra,* at p. 55.
[110] Exh. 100 at p. 100-4.
[111] E.g., Exh. 109 at p. 109-3.
[112] *Shasta Linen, supra,* at p. 56. See discussion in part V(B) below.
[113] *Shasta Linen, supra,* at p. 24, emphasis added.

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.[114] 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."[115]

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

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,[119] the RPA is unlawful and misapplied Respondents' rate filings.[120]

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

[114] Exh. 103.
[115] *Ibid.*
[116] *Ibid.*
[117] See *ibid.*
[118] Cal. Code Regs., tit. 10, § 2351.1; *Shasta Linen, supra,* at p. 56.
[119] See Exhs. 14, 15.
[120] See *Shasta Linen, supra,* at p. 52.

or sickened in the course of their employment.[121] 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.[122] 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.[123] 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

---

[121] *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1065.
[122] See Ins. Code, §§ 11732-11737.
[123] Ins. Code, § 11735, subd. (b); see also Ins. Code, § 11742, subd. (a).

supplementary rate information directly undermined these policy aims by preventing the public from comparing Respondents' filed rates to those actually charged under EquityComp.[124]

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).[125] But *Shasta Linen* determined that use of unfiled rates is unlawful regardless of any rate disapproval action.[126] Respondents are bound by that determination and are precluded from rearguing it here.[127] 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.[128]

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

---

[124] 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.)

[125] Resp. Post-Hearing Br. at pp. 25-26.

[126] *Shasta Linen, supra,* at pp. 45, 52.

[127] See part V(B) below regarding *Shasta Linen*'s preclusive effect.

[128] 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."]

rates are first disapproved.[129] 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.[130] 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.[131] 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.*,[132] 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.[133] In essence, the Court's ruling confirms that rate disapproval proceedings are not a prerequisite to finding the use of unfiled rates unlawful.

---

[129] Resp. Post-Hearing Br. at pp. 25-26.
[130] 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.
[131] 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.
[132] *South Tahoe Gas Co. v. Hofmann Land Improvement Co.* (1972) 25 Cal.App.3d 750 (*South Tahoe Gas*).
[133] *Id.* at p. 755.

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.[134] Those cases are easily distinguished. In both, the plaintiffs attempted to base Unfair Competition Law ("UCL")[135] 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.*[136] 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.[137] Such a claim, if allowed, would result in the court improperly invading the agency's exclusive purview.[138] 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.[139]

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

Having found the RPA void, the ALJ 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.[140] Appellants argue that this tribunal should sever the RPA's EGAF charge multiplier provisions and order Respondents to pay

---

[134] 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].
[135] Bus. & Prof. Code § 17200 et seq.
[136] *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284 (*Samura*).
[137] *Id.* at p. 1299.
[138] *Ibid.*
[139] See the discussions on jurisdiction in part I above and remedies in part IV below.
[140] Resp. Post-Hearing Br. at pp. 24-25.

"restitution" of all amounts attributable to those provisions.[141] Appellants further argue that Respondents should retain only an amount equivalent to "claims paid and a reasonable overhead and profit."[142] The ALJ finds both parties' arguments unpersuasive.[143]

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. 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]."[144]

While Respondents argue that remedies under rate disapprovals may only be applied prospectively,[145] remedies for findings of unlawfulness under subdivision (f) may either be prospective or retrospective.[146] 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

---

[141] App. Post-Hearing Br. at pp. 4-15; Appellant's Post-Hearing Reply Brief, filed January 18, 2019 ("App. Reply Br."), pp. 1-12.
[142] App. Reply Br. at p. 11:21-22.
[143] 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.)
[144] Ins. Code, § 12936.
[145] 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.
[146] *Shasta Linen, supra,* at p. 53.

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.[147] The California Supreme Court's holding in *Marathon Entertainment, Inc. v. Blasi*[148] 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."[149] The Court further stated those remedies could be imposed at the administrative level, as well as by the courts.[150]

2. Civil Code Sections 1598 and 1608

Civil Code sections 1598 and 1608 render a contract "void" if its object or consideration are unlawful.[151] And the California Supreme Court has held that a contract made in violation of a regulatory statute is generally void.[152] 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.[153]

This is especially true where regulated entities fail to file their rates as required by law. In

---

[147] *Id.* at pp. 65-66.
[148] *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 996.
[149] *Ibid.*
[150] *Id.* at pp. 996, 998.
[151] *R. M. Sherman Co. v. W. R. Thomason, Inc.* (1987) 191 Cal.App.3d 559, 563.
[152] *Asdourian v. Araj* (1985) 38 Cal.3d 276, 291.
[153] *Ibid.*

such cases, California courts have held contractual provisions based on the unfiled rates unlawful and void.[154] 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.[155]

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.[156] "[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."[157] 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."[158] 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."[159] 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.[160]

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."[161] 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

---

[154] *South Tahoe Gas Co. v. Hofmann Land Improvement Co., supra,* 25 Cal.App.3d at p. 752.
[155] *Shasta Linen, supra,* at pp. 52, 65-66.
[156] *Asdourian v. Araj, supra,* 38 Cal.3d at p. 292.
[157] *South Tahoe Gas Co. v. Hofmann Land Improvement Co., supra,* 25 Cal.App.3d at p. 759.
[158] *Vitek, Inc. v. Alvarado Ice Palace, Inc.* (1973) 34 Cal.App.3d 586, 593.
[159] *Asdourian v. Araj, supra,* 38 Cal.3d at p. 293.
[160] *Homestead Supplies, Inc. v. Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 990-991.
[161] *Asdourian v. Araj, supra,* 38 Cal.3d at p. 291.

public policy."[162]

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."[163]

Severing illegal terms prevent parties from gaining undeserved benefit or suffering undeserved detriment as a result of a voided contract.[164] And it further conserves a contractual relationship where doing so would not condone an illegal scheme.[165]

The doctrine of severability is equitable and fact specific.[166] The overarching inquiry is whether severance would further the interests of justice.[167] As explained in *Baeza v. Superior Court*:[168]

> 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.

---

[162] *Vitek, Inc. v. Alvarado Ice Palace, Inc., supra,* 34 Cal.App. at p. 593.
[163] *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 991.
[164] *Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1230.
[165] *Ibid.*
[166] *Marathon Entertainment, Inc. v. Blasi, supra,* 42 Cal.4th at p. 998.
[167] *Ibid.*
[168] *Baeza v. Superior Court, supra,* 201 Cal.App.4th at p. 1230.

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.[169] Absent those circumstances, however, adjudicators may not reform a contract unless specifically authorized by statute.[170] "Generally, courts reform contracts only where the parties have made a mistake [citation] and not for the purpose of saving an illegal contract."[171]

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

---

[169] *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."

[170] *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."].

[171] *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 407-408.

[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.*

the amount that can be charged which is regulated."[176] 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 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 ALJ 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.[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

---

[176] *Id.* at p. 757.
[177] See, generally, Exh. 103.
[178] Civil Code, §1598.
[179] *Marathon Entertainment, Inc. v. Blasi, supra,* 42 Cal.4th at p. 996.
[180] Resp. Post-Hearing Br. at p. 24:9-10.
[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, Appellants argue that the RPA's terms relating to exposure group adjustment factors should be specifically declared unlawful and severed, while the majority of the RPA's terms should be enforced.[184] 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.[185]

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.[186] 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.

---

[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. 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.)

[185] 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."].

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

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."[187]

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.[188] Additionally, enforcing the RPAs would encourage illegal activity—i.e., the use of unfiled rates and supplementary rate information.[189]

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."[190]

Finally, an important purpose behind section 11735's filing and public inspection requirements is to ensure the protection of California's workforce.[191] Insurers who unlawfully use unfiled rate information frustrate that policy.[192] 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."[193]

---

[187] *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.
[188] See *Shasta Linen, supra,* at pp. 23-24, 61-62.
[189] *American Zurich Ins. Co. v. Country Villa Service Corp., supra,* at p. *17; accord *Shasta Linen, supra,* at p. 68.
[190] *American Zurich Ins. Co. v. Country Villa Service Corp., supra,* at p. *17; *Shasta Linen, supra,* at p. 68.
[191] See the discussion in part III(B)(3) above.
[192] See discussion in part III(B)(3) above. See also *Shasta Linen, supra,* at p. 67.
[193] *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

Respondents nevertheless argue under *Medina v. Safe-Guard Products*[194] that the RPA should be enforced because Appellants suffered no loss due to its unfiled rates.[195] 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.[196] In contrast, Insurance Code section 11737, subdivision (f), requires no such injury or loss.[197]

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

---

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.)

[194] *Medina v. Safe-Guard Products* (2008) 164 Cal.App.4th 105, 115 (*Medina*).

[195] Resp. Post-Hearing Br. at p. 21.

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

[197] 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.)

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 to [Respondents] for operating the plan" calculated without application of the EGAFs.[198] 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."[199] The ALJ agrees. The remedy Appellants seek would reform the parties' contractual arrangement. But absent fraud or mistake, which were not asserted in this proceeding,[200] reformation is not available to "save" an unlawful contract unless specifically authorized by statute.[201] Appellants have pointed to no such statutory authority, nor is the ALJ 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 ALJ 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 ALJ 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 ALJ finds the RPA must be severed.

---

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

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 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"[202] 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.[203]

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 ALJ 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.[204] 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

---

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

[203] For avoidance of doubt, the ALJ makes no finding as to whether the guaranteed cost policies are valid or enforceable. There has been no allegation in this proceeding that the policies are unenforceable on any grounds within the Commissioner's jurisdiction under Insurance Code section 11737, subdivision (f).

[204] Resp. Post-Hearing Br. at pp. 29:18-30:10.

Respondents were estopped from rearguing in this appeal.[205] 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*.[206] That is incorrect. As discussed at length in the Notice Regarding the Preclusive Effect of the *Shasta Linen* Decision ("Preclusive Effect Notice"),[207] 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).[208] That argument is incorrect for several reasons.

First, nothing in the Consent Order suggests that it binds third parties such as Appellants.[209] 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."[210] 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."[211] As discussed above, the RPA in this case is substantially

---

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

similar to the RPA in *Shasta Linen*, which the Commissioner determined was unlawful and unenforceable.[212] 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 ALJ 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.

ORDER

IT IS 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] CIC shall

[212] *Shasta Linen, supra,* at p. 69.
[213] See footnote 203, *supra.*

refund the excess to Appellants within 30 days after the date this proposed decision is adopted.

* * *

I submit this proposed decision based on the evidentiary hearing, records and files in this matter, and recommend its adoption as the decision of the Insurance Commissioner of the State of California.

Dated: April 2, 2019

CLARKE de MAIGRET
Administrative Law Judge
Administrative Hearing Bureau

DECLARATION OF SERVICE BY MAIL

Case Name/No.: In the Matter of the Appeal of:
RDR BUILDERS, INC.
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 May 17, 2019 following ordinary business practices, I caused a true and correct copy of the following document(s):

ORDER ADOPTING PROPOSED DECISION; PROPOSED DECISION; NOTICE OF TIME LIMITS FOR RECONSIDERATION & 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 May 17, 2019.

CANDACE GOODALE

NOTICE OF TIME LIMITS FOR RECONSIDERATION & JUDICIAL REVIEW
In the Matter of RDR BUILDERS, INC.
Case No. AHB-WCA-17-52

Petitions for reconsideration may be made pursuant to California Code of Regulations, Title 10, section 2509.72. To be considered, a petition for reconsideration must be made timely, and shall be based solely upon, and shall set forth specifically, the grounds upon which the decision of the Commissioner allegedly is contrary to law or is erroneous. A petition for reconsideration shall not refer to, or introduce, any evidence which was not part of the record of the evidentiary hearing. Any such evidence nonetheless provided shall be accorded no weight. Copies of documents received in evidence or already part of the records shall be referenced and attached as exhibits. A Petition for Reconsideration must be served on all parties and should be directed to:

Bryant Henley
Deputy Commissioner & Special Counsel
California Department of Insurance – Executive Office
300 Capitol Mall, 17th Floor
Sacramento, California 95814

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. The right to petition shall not be affected by the failure to seek reconsideration before the Commissioner. 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.

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
Shand S. Stephens, Esq. Amanda L. Morgan, Esq. Jeanette T. Barzelay, Esq. **DLA PIPER LLP (US)** 555 Mission Street, Suite 2400 San Francisco, CA 94105-2933 Tel. No.: (415) 836-2500 FAX No.: (415) 836-2501 jeanette.barzelay@dlapiper.com shand.stephens@dlapiper.com	Attorney for California Insurance Company Applied Underwriters Captive Risk Assurance Company, Inc.
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)