

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of

Index No.: 450500/16

the Liquidation of

(The Hon. Carol R. Edmead)

HEALTH REPUBLIC INSURANCE OF  
NEW YORK, CORP.

**AFFIRMATION**

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John Pearson Kelly, an attorney at law duly admitted to practice before the courts of the State of New York, affirms the following:

1. I am the General Counsel of the New York Liquidation Bureau (“NYLB”), which serves as the staff of Linda A. Lacewell, the Superintendent of Financial Services of the State of New York in her capacity as Liquidator of Health Republic Insurance of New York, Corp. (“Liquidator”). I make this affirmation, based on the Liquidator’s books and records and all the prior proceedings herein, in support of the Liquidator’s application by Order to Show Cause for an order (a) approving a Stipulation For Entry of Final Judgment (“Stipulation”) between the Liquidator and the United States of America (the “United States”) resolving the Liquidator’s claims against the United States in a lawsuit brought in the United States Court of Federal Claims; (b) allowing, as agreed in the Stipulation, the claim of the United States for a Solvency Loan made to Health Republic Insurance of New York, Corp. (“Health Republic”) under the Patient Protection and Affordable Care Act (“ACA”) as a Class Eight claim under Section 7434 of the New York Insurance Law (“Insurance Law”); (c) permitting, as contemplated by the Health Republic order of liquidation (“Liquidation Order”), the submission of claims to the Liquidator other than Policy Claims, as defined in the Liquidation Order, for a period of four months from the date of entry of such order, and thereafter barring all further claims against Health Republic; and (d) for such other relief as the Court may deem just and proper.

## BACKGROUND

2. The Liquidation Order placing Health Republic into liquidation was entered on May 11, 2016. Because it then appeared that the assets of the company were insufficient to pay claims other than Class One administrative expense claims and, in part, Class Two claims arising under Health Republic's health insurance policies, as defined in the claims classification priorities of Insurance Law Section 7434, the Liquidation Order provided that the deadline for asserting lower priority claims would be deferred until further order of the Court. The relevant language is contained in paragraph 19 of the Liquidation Order:

With respect to all claims other than Policy Claims referenced in Paragraph 18, the deadline set forth in Section 7432(b) of the [Insurance Law] for all persons who may have claims against [Health Republic] to present such claims to the Liquidator shall be deferred until further order of the Court. The Liquidator is authorized at her discretion to refrain from adjudicating claims other than Administrative Expense and Policy Claims.

3. The purpose of this provision was to avoid expending assets of the estate to receive and administer claims that were unlikely to be paid. However, the Liquidator recognized that certain lower priority claims against the estate, including claims of the United States (Class Three), New York State (Class Five), general creditors (Class Six), and a Solvency Loan claim of the United States in the form of a surplus note (Class Eight), were recorded in the books and records of the company when it was placed in liquidation (Insurance Law Section 7433(b)(1)). These claims, as adjusted over the course of the proceeding, have been shown each year in the annual financial statements of Heath Republic in liquidation.

4. During the course of the liquidation, all Policy Claims against the Health Republic estate have been fully adjudicated and allowed by the Court. A total of 881,903 Policy Claims were received, reviewed and determined by the Liquidator in accordance with the Adjudication Procedures established by the Court for the determination of claims. The Liquidator's Policy

Claim determinations were batched into 190,369 Explanation of Benefits (“EOB”) forms and delivered to the claimants in accordance with the Adjudication Procedures. All appeals of the EOBs were resolved in accordance with the Adjudication Procedures. Thereafter, the Liquidator made an application to the Court, dated March 6, 2019, seeking approval of the Liquidator’s Policy Claim determinations as “allowed” Class Two claims in the Health Republic liquidation.

5. On March 29, 2019, the Court granted the Liquidator’s application and entered an order allowing the claims set forth in the 190,369 EOBs as Class Two claims in the liquidation, in the total amount of \$217,955,319.63, pursuant to Section 7434 of the Insurance Law.

6. While the administration of Policy Claims was in progress, the Liquidator was also working to maximize the recovery of assets to the estate for the benefit of creditors. To a substantial extent, this involved an analysis of Health Republic’s respective benefits and obligations under the ACA.

7. Health Republic was created as a non-profit health Consumer Operated and Oriented Plan (“CO-OP”) under the terms of the ACA and it participated in various programs of the ACA, including the Risk Corridors, Risk Adjustment, Reinsurance, Advanced Premium Tax, and Cost Sharing Reduction programs. In addition, as part of the incentives provided to new CO-OP insurers, Health Republic received from the United States a Solvency Loan in the form of a surplus note and a Start-up Loan. The Liquidator’s review of Health Republic’s balances under the ACA concluded that substantial balances were due Health Republic from the United States, in particular, under the Risk Corridors program. The United States, however, withheld payment on these balances.

8. The Risk Corridors program was one of the so-called “3Rs” programs (Risk Corridors, Risk Adjustment and Reinsurance) created to stabilize the insurance market in the first

years of the ACA. At the end of 2014, Congress passed an appropriations law for 2015 that contained a provision limiting the funding sources from which Risk Corridors payments could be made, resulting in significant nonpayment of balances due to participating ACA insurers, including to Health Republic.<sup>1</sup> The shortfall in payments to Health Republic was initially determined to be approximately \$445 million. In order to preserve Health Republic's rights to Risk Corridors payments and other payments under the ACA, the Liquidator filed a lawsuit against the United States in the United States Court of Federal Claims.

9. The lawsuit, now captioned *Linda A. Lacewell, in her capacity as Liquidator of Health Republic Insurance of New York, Corp. v. United States of America*, No. 17-1185C, was filed on September 1, 2017, and asserted Health Republic's rights to monies due under the ACA.

10. Soon after it was filed, the Liquidator's lawsuit was stayed pending the outcome of appeals in other ACA-related cases on the primary question of whether Congress properly limited its obligation to make payments owed to insurers by the United States under the Risk Corridors program, or whether all the monies due insurers under the program were required to be paid. On April 27, 2020, the United States Supreme Court decided the issue in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), and two consolidated cases, holding that the United States' obligation to pay balances due under the Risk Corridors program had not been abrogated or otherwise limited by the Appropriations Laws.

11. Following the Supreme Court decision, the Liquidator and the United States, through counsel, agreed to resolve the Liquidator's lawsuit on the terms set out in the Stipulation, subject to approval of this Court. The Stipulation is attached hereto as Exhibit 1.

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<sup>1</sup> Following the 2015 Appropriations Law, Congress included the same language in appropriation laws for 2016 and 2017 (collectively the "Appropriations Laws").

### THE STIPULATION FOR ENTRY OF FINAL JUDGMENT

12. The first branch of relief sought in this application is the Court's approval of the Stipulation. The Stipulation benefits the Health Republic estate in several important respects. *First*, it provides for a net payment to Health Republic by the United States of \$220,838,583.33. *Second*, it provides for the resolution of all claims of the United States under the ACA with the exception of certain balances due the Internal Revenue Service ("IRS"), which will be required to be paid separately. *Third*, it will eliminate the costs and exigencies of pursuing a complex litigation against the United States. *Fourth*, it permits the remaining business of the Health Republic liquidation to move forward expeditiously rather than awaiting the outcome of the lawsuit in the Court of Federal Claims.

13. The balances owed to and by Health Republic, as set forth in the Stipulation, have been carefully reviewed and reconciled by the Liquidator and the United States. The net payment to Health Republic of \$220,838,583.33, represents the agreed amount owed Health Republic under the terms of the ACA – \$438,368,502.32 – less set-off of the agreed amount owed by Health Republic to the United States – \$217,529,918.99. The United States has asserted a right to set-off under federal law, including under 31 U.S.C. § 3716 and 45 C.F.R. § 156.1215, and the Liquidator believes that set-off is permissible under Insurance Law § 7427. The Stipulation also includes a set off for interest on unpaid balances under federal law, including under 31 U.S.C. § 3717 and 45 C.F.R. § 30.18. The outcome of any litigation on this issue in the Court of Federal Claims would be uncertain, and could jeopardize the terms of the Stipulation. Litigation would also result in further expense and delay in the resolution of the Health Republic estate.

14. Except for certain IRS claims, which will remain as Class Three claims in the liquidation, all claims of the United States under the ACA, including the Solvency Loan claim

(discussed in more detail below), are resolved by the Stipulation.<sup>2</sup> Further, the Stipulation will permit the Court to establish an additional four-month claims submission period, so that previously deferred claims (“Deferred Claims”) may be presented to the Liquidator for review and adjudication. This is feasible only because, in the Liquidator’s judgment, approval of the Stipulation is likely to make assets available to pay creditors below Class Two Policy Claims, including, in whole or in part, Class Six general creditor claims.

15. The NYLB has prepared an unaudited balance sheet as of December 31, 2020 (“Balance Sheet”)<sup>3</sup>, reflecting the current financial position of Health Republic and the pro forma financial position following approval and payment of monies due under the Stipulation. (*See* Exhibit A to the supporting affidavit of Ronald H. Labenski, dated February 8, 2021.) As shown in the Balance Sheet, Health Republic is projecting approximately \$264 million in assets after receipt of payment due under the Stipulation, which, based on current projections, is sufficient to pay allowed claims in Classes Two through Five in their entirety and make full or partial payments of allowed claims in Class Six. Thus, approval of the Stipulation will benefit all the creditors of the Health Republic estate.

#### **ALLOWANCE OF THE SOLVENCY LOAN AS A CLASS EIGHT CLAIM IN THE HEALTH REPUBLIC LIQUIDATION**

16. The Liquidator requests the Court to allow the Solvency Loan to Health Republic as a Class Eight claim in the liquidation proceeding. The agreed amount of the Solvency Loan due as of December 31, 2020, is \$246,975,417.52, inclusive of interest, and the Liquidator recommends that the Court allow this amount as a Class Eight claim of the United States under

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<sup>2</sup> It will, however, remain necessary to obtain the standard federal waiver of any other claims against Health Republic under the federal priority statute, 31 U.S.C. § 3713.

<sup>3</sup> The Liquidator’s projections are best estimates that are subject to change and may be affected by, among other things, the timing of payment, administrative costs, return on invested assets, and the submission and resolution of claims under Classes Three through Six.

Insurance Law Section 7434(a)(1)<sup>4</sup>, as provided in the Stipulation. This advantages both the Health Republic estate and the United States by fixing and allowing the Solvency Loan claim of the United States, while establishing that it is a subordinate claim, payable only if additional assets of the estate remain after the payment of all other creditors in full.

**ESTABLISHMENT OF A FOUR-MONTH PERIOD FOR  
THE SUBMISSION OF CLAIMS OTHER THAN POLICY CLAIMS**

17. The Liquidator also requests that the Court establish a four-month period for the submission of Deferred Claims (that is, claims, other than Policy Claims, not already shown on the books and records of the company). The purpose of this request is to permit creditors who have not, up to now, been able to participate in the liquidation proceeding to file claims. It was contemplated by the Court in paragraph 19 of the Liquidation Order that the Liquidator would make such a motion if it became cost-effective to do so.

18. The requested four-month period derives from Insurance Law Section 7432(b), which sets a four-month period from the entry of a liquidation order for the presentation of claims to the Liquidator unless the superintendent requests and the Court prescribes a different period. In the Liquidator's judgment, it is now in the best interests of creditors of the Health Republic estate to permit Deferred Claims to be submitted for a four-month period, after which all further claims against Health Republic are barred ("Final Bar Date").

19. Deferred Claims do not include additional Policy Claims, as defined in the Liquidation Order, all of which were required under paragraph 18 of the Liquidation Order to be "submitted in accordance with the deadlines and procedures set forth in the contracts governing Providers' provision of services to Members. . . or the Members' insurance policies, as applicable."

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<sup>4</sup> Insurance Law Section 7434(a)(1)(viii) defines Class Eight claims as "Claims for advanced or borrowed funds made pursuant to section one thousand three hundred seven of this chapter."

Nor does the Liquidator think it likely that there will be additional Class Three or Class Five claims, beyond those already shown on the books of the company, by the United States or any state and local government. It is likely that any additional claims will be general creditor claims that were not filed in the initial stages of Health Republic's liquidation. Those claims will be Class Six claims under Insurance Law Section 7434.

### **THE PROPOSED ORDER**

20. The Liquidator is submitting a proposed order granting the three branches of relief, a copy of which is attached hereto as Exhibit 2. The Order to Show Cause in support of the application provides for notice of the requested relief, including the four-month claim submission period and Final Bar Date, by posting the Order to Show to Cause and its supporting papers on the Health Republic and the New York Liquidation Bureau websites maintained by the Liquidator within ten (10) days of the date of issuance of the Order to Show Cause, and by publication of notice in the form attached hereto as Exhibit 3 in the *New York Post* and the *New York Daily News* within twenty (20) days following issuance of the Order to Show Cause.

### **CONCLUSION**

21. Should this Court approve the Stipulation, the Liquidator and United States would then sign the Stipulation and submit it to the United States Court of Federal Claims, which is expected to enter a final judgment, resulting in a net payment to Health Republic of \$220,838,583.33. The requested allowance of the United States' Solvency Loan claim as a Class Eight claim in the Health Republic liquidation is a term of the Stipulation that will fix the Solvency Loan claim as subordinate to general creditors. Finally, the Court's establishment of a four-month period for the submission of Deferred Claims to the Liquidator will permit additional creditors, previously excluded, to participate in the Health Republic liquidation, and the establishment of a

Final Bar Date will enable the Liquidator to take substantial steps toward completing the administration of the estate.

For all of the foregoing reasons, it is respectfully requested that the Court grant the requested relief requested by the Liquidator herein, along with such other and further relief as the Court may find just and proper.

New York, New York  
February 8, 2021

  
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John Pearson Kelly  
General Counsel  
New York Liquidation Bureau