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February 10, 2017

Via Electronic Filing/Serve by ECF

Hon. Carol R. Edmead
60 Centre Street, Room 532
New York, New York 10007

Re: In the Matter of the Liquidation of Health Republic Insurance of New York, Inc.
Index No. 450500/2016
Direct Payments to Health Care Providers and Anti-Assignment Provisions in Policies
Order to Show Cause Returnable on Friday, February 17, 2017

Dear Justice Edmead:

I write with respect to the Liquidator's motion, brought on by order to show cause returnable on February 17, 2017. The Liquidator's motion seeks an order that would allow the Superintendent of the Department of Financial Services, in her capacity as the Liquidator of Health Republic Insurance Company of New York, Inc. (Liquidator; Health Republic), to make allowed claims payments directly to health providers "notwithstanding the existence of an anti-assignment provision in a Health Republic insurance policy."

This motion should be denied on several different grounds:

- (1) the subject policies clearly allow the Liquidator to make allowed payments directly to Provider or Non-Participating Providers (Providers) (and thus avoid any duplicate payments);
- (2) any anti-assignment issues should have been resolved in conjunction with an earlier order to show cause that established a claims adjudication procedure; and
- (3) the motion seeks a hypothetical ruling that would address the possibility that a member/policyholders might be paid directly and not forward payment to

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the health provider, a risk that is, at best, speculative and, at worst, a slap at Health Republic's 206,000 policyholders.

1. Liquidator Can Avoid Duplicate Payments and Direct Payments to Providers. During an October 11, 2016 conference this Court directed that the Liquidator's outside counsel prepare a memo that would address the risk that duplicate claims might arise involving both health providers and Health Republic members/policyholders and whether the Court might be required to "override" provisions in Health Republic policies (Oct. 11, 2016 Trans., pp. 39, 41.)

Weeks passed and counsel's failure to produce this memorandum came up during argument of my motion for leave to appear as a friend of the Court. Nov. 21 Trans., p. 17. Your Honor directed that a memorandum of law for the Court on this issue be submitted within sixty (60) days. Nov. 21 Trans., p. 37. Then on January 11, 2017 in-house counsel for the New York Liquidation Bureau (Bureau) and counsel for Northwell, Inc., (formerly Long Island Jewish Hospital), appeared and asked that the memorandum be incorporated in a motion. January 11, 2017 Trans. pp. 44-45.

Counsel for the Liquidator described the application as addressing a potential conflict between policyholder claimants and health provider, but also described these potential conflicts as "not likely to be an actual significant issue in the case . . ." Jan. 11, 2017 Trans., p. 45. Until then, copies of Health Republic's group and individual policies had not, to my knowledge, been introduced.

We now have the Weil, Gotshal & Manges Memorandum, dated January 20, 2017 (Memo), as well as copies of a sample group policy and a sample individual policy, both of which "expressly afford [Health Republic] the discretion to either pay Members for the costs of covered services received from out-of-network providers, or pay providers directly on behalf of Members who received such services." Memo, p. 1. The Memo concedes in its "Short Answers" that the "Liquidator thus may, in her discretion, pay non-participating providers directly for the covered services they have rendered to members." Memo, p. 2

Indeed, both the group and individual policies issued by Health Republic clearly state that Health Republic may directly pay the Participating Providers for the services they have rendered. And with respect to Non-Participating Providers, both policies state that Health Republic "reserve[s] the right to pay either [the Member/Policyholder] or the Provider regardless of whether an assignment has been made." Memo, p. 3, quoting Individual Policy § 25.33 and Group Policy § 13.29.

The Memo then conjures up the "possibility" that a Member/Policyholder and a Non-Participating Provider or a Provider, might submit "duplicative claims." Memo, p. 2. The Memo states that the Liquidator can "resolve duplicative" claims by simply paying the Provider (or the Non-Participating Provider). Memo, p. 3. And the memo states that "[n]either the Policies themselves or Benefits under those Policies need to be assigned by the member in order for payment to be made to the provider." Memo, p. 4

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Not satisfied with this clear answer, the Memo goes on to cite cases, some of which precede the Civil War, that address anti-assignment provisions. These cases deal with distinctions between the assignment of policy proceeds before as opposed to after an insured loss. The cases discuss underwriting and moral hazard, but do not deal with the liquidation of a health insurer, much less a policy that explicitly allows Health Republic to pay the Provider regardless of whether the Health Republic policy also contains an anti-assignment provision.

The Liquidator now stands in Health Republic's shoes and is bound by the terms of the insolvent insurer's contracts. In the Matter of the Liquidation of Union Indemnity Ins. Co. of New York, 89 N.Y.2d 94, 109, 651 N.Y.S.2d 383, 674 N.E.2d 313 (1996) ("liquidator of an insurance company 'stands in the shoes' of the insolvent, gaining no greater rights than the insolvent had"); *see also* Stephens v. American Home Assurance Co., 811 F. Supp. 937, 947 (S.D.N.Y. 1993), *vacated and remanded on other grounds*, 70 F.3d 10 (2d Cir.1995)); Bohlinger v. Zanger, 306 N.Y. 228, 234, 117 N.E.2d 338 (1954). Given that the Liquidator has the right to identify and avoid duplicate claim payments and that all payments must be approved by the Court before payment can be made, any attempt to circumvent these policy provisions should be addressed *when the claim is presented for Court approval*.

This belt, suspender, AND a parachute approach to securing payment to a Provider that has rendered services and not been paid, jumps out when placed in the context of literally millions of dollars that have been paid to Alvarez & Marsal, POMCO, Inc., and Truven Analytics *to identify all duplicate payments*. All of these expensive and purportedly competent outside administrators are being compensated to identify duplicate payments and avoid their payment, including an elaborate system that tags potential duplicate payments. The Liquidator, as Health Republic's successor, may then pay either to the policyholder or the provider. Why is the estate wasting even more money assuring one Provider that a duplicate allowed claim might somehow slip by disguised inside an anti-assignment clause?

2. Untimely Application. Northwell's counsel attended the May 10, 2016 hearing on the Superintendent's application to liquidate Health Republic. Northwell's Counsel appeared during the October proceeding. A transcript of every subsequent conference or argument or appearance has been posted on the Health Republic website.

The anti-assignment issue was raised and should have been *resolved* in conjunction with the Liquidator's motion for an approved claims adjudication process. The Memo addressing potential double payments is dated January 20, 2017, or more than three months after the Court directed that a memorandum addressing these issues be prepared. This leisurely pace and the expense associated with the subject motion costs the policyholders, reduces the estate's assets, and addresses theoretical risks that may never arise.

3. Hypothetical Ruling. The Liquidator does not cite a single instance in which a Policyholder/Member has submitted a duplicate claim. Nor is there any evidence that Truven, Alvarez & Marsal, and POMCO, Inc. could not easily identify such duplicate claim (and avoid

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its payment.) The Liquidator has inherited insurance policies that explicitly address the possibility of a duplicate payment and the Liquidator should honor the policies' terms.

Put differently: "The Liquidator of the company is in the same position as the company and would be entitled to enforce the terms of the contract between the company [and any other party to that contract, *i.e.*, the Member/Policyholder.] Bohlinger, Liquidator of the Preferred Accident Insurance Company of New York v. Mayville Realty Company, 135 N.Y.S. 2d 865 (Sup. Ct., N.Y.County 1954, *aff'd* 285 A.D. 1045, *appeal denied* 286 A.D. 832 [agent required to "conform to the terms of the [agency] contract" and return premium to the Liquidator). There is no need to start tampering with or rewriting Health Republic's contracts/policies.

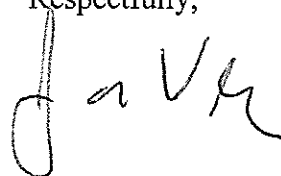
Finally, this motion highlights the need for creditors' committees. A committee of policyholders and a committee of providers could have addressed and resolved this issue months ago.

Website

With respect to the Health Republic website, I note that the Paid Expenses summary is now as of November 30, 2016 and the Health Republic Balance Sheet remains as of September 30, 2016. The Court Docket on the Health Republic website does not contain a copy of my February 1, 2017 letter to the Court addressing Deputy Superintendent Axinn's January 25, 2017 letter to the Court.

Deputy Superintendent Axinn's letter contains a time line that does not contain any references to hearings on the estate's expenses. My February 1st letter, a copy of which was filed with the Court on February 1, 2017, addressed the lack of any provision for expense hearings and other matters in the time line. To what extent may the Liquidator pick and choose items to incorporate on the Health Republic docket and still call it a "docket"?

Respectfully,



cc: David Axinn, Esq.
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Senator James L. Seward (via e-mail to assistant)
Senator Kemp Hannon (via e-mail to assistant)