

DISTRICT COURT, DENVER COUNTY, COLORADO		
Court Address: 1437 Bannock Street, Rm 256, Denver, CO, 80202		
<b>Petitioner(s)</b> MARGUERITE SALAZAR INS COM et al. v. <b>Respondent(s)</b> COLO HEALTH CO OP		<b>DATE FILED:</b> November 22, 2019 9:30 AM <b>CASE NUMBER:</b> 2015CV33680
		<b>△ COURT USE ONLY △</b>
		Case Number: 2015CV33680 Division: 269                  Courtroom:
<b>Order: Petitioners Notice to Interested Parties of Liquidator's Intent to Sell the Co-Op's Net Risk Corridor  Receivable and Motion for Court Approval for Fourth Disbursement of Health Op Assets Pursuant to  C.R.S. Section 10-3-533 (w/attach)</b>		

The motion/proposed order attached hereto: SO ORDERED.

Objections to this motion shall be filed no later than fourteen (14) days from the date of this Order.

Issue Date: 11/22/2019



DAVID H GOLDBERG  
District Court Judge

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p>	<p style="text-align: right;">▲ COURT USE ONLY ▲</p>
<p><b>PETITIONER</b> MICHAEL CONWAY, in his official capacity as the Commissioner of Insurance of the State of Colorado,</p> <p>v.</p> <p><b>RESPONDENT</b> COLORADO HEALTH CO-OP, a Colorado Domestic Insurance Company.</p>	<p>Case No. 2015CV33680</p>
<p>PHILLIP J. WEISER, Attorney General Peter W. Frigo, Senior Assistant Attorney General *38621 Karl D. Kaesemeyer, First Assistant Attorney General *38993 Ralph L. Carr Colorado Judicial Center 1300 Broadway, 8<sup>th</sup> Floor Denver, CO 80203 Telephone: 720-508-6428 (Frigo) 720-508-6402 (Kaesemeyer) E-Mail: peter.frigo@coag.gov karl.kaesemeyer@coag.gov *Counsel of Record</p>	<p style="text-align: center;"><b>PETITIONER'S NOTICE TO INTERESTED PARTIES OF THE LIQUIDATOR'S INTENT TO SELL THE CO-OP'S NET RISK CORRIDOR RECEIVABLE and MOTION FOR COURT APPROVAL FOR FOURTH DISBURSEMENT OF HEALTH OP ASSETS PURSUANT TO C.R.S. § 10-3-533.</b></p>

Petitioner Michael Conway, Commissioner of Insurance for the State of Colorado (“Commissioner”), pursuant to this Court’s Liquidation Order of January 4, 2016 and C.R.S. § 10-3-520, *et seq.*, hereby provides notice to this Court and interested parties of the Liquidator’s intent to sell the Colorado Health Insurance Cooperative, Inc.’s (“CO-OP”) interest in its net risk corridor receivable, and hereby moves this Court to approve a fourth disbursement of the CO-OP’s

assets to the Life and Health Insurance Protection Association. As grounds therefor, the Liquidator states as follows:

### **BACKGROUND**

In March 2010, the Federal Government enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (March 23, 2010), 124 Stat. 119, and the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, (March 30, 2010), 124 Stat. 1029 (“ACA”). The ACA ushered in a host of market-wide reforms and requirements affecting the private health insurance industry. Among other things, it addressed the scope of covered services, availability of coverage, renewability of coverage, out-of-pocket costs for consumers, pricing, and other coverage determinants, as well as limited health insurance product variation and restricted pricing and underwriting practices.

The ACA established three risk sharing programs intended to mitigate the risk to insurers inherent in this new marketplace. Known as the “Three Rs,” these programs included a permanent risk adjustment program, a transitional reinsurance program designed to run from 2014-2016, and a temporary risk corridors program (“risk corridor”) that was also to run from 2014-2016 benefit years<sup>1</sup>.

The risk corridor program mandated payments to insurance companies such as the CO-OP to mitigate risk and entice companies into a marketplace that was untested in crucial respects. The CO-OP relied on that mandate when reviewing proposed rates to ensure that the citizens of Colorado would receive access to affordable health insurance. However, on December 13, 2014, Congress adopted the Consolidated and Further Continuing Appropriations Act of 2015 (the “CAA of 2015”). A provision of the CAA of 2015 placed in jeopardy projected risk corridor funding.

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<sup>1</sup> A “benefit year” is the calendar year for which a health plan provides coverage for health benefits

The CO-OP is owed \$12,728,178.00 for the 2014 benefit year and \$96,472,522.00 for the 2015 benefit year.

This loss of promised risk corridor payments led to the failure of the CO-OP, which created a substantial burden borne by Colorado consumers. The Life and Health Insurance Protection Association (“Association”), which has a vested interest in the loss of the risk corridor payments, is considered a priority creditor of the CO-OP. The Association was created by the Colorado legislature to protect Colorado residents up to certain limits in the event their life, health, or annuity insurance company became insolvent. *See* C.R.S. § 10-20-101 *et seq.* Pursuant to the State’s priority scheme detailed in C.R.S. § 10-3-541, the Association is a class 2 creditor. To date, the Association has funded approximately \$100,000,000 in claims owed by the CO-OP to providers on behalf of Colorado policyholders.<sup>2</sup> When the CO-OP became insolvent, the Association assessed each member health insurer proportional amounts to fund claims owed by the CO-OP. Section 10-20-114, C.R.S., requires the member insurers to recoup their respective assessments through the filing of increased rates. As a class 2 creditor, the Association has claim priority over any other creditors to any receivable attained by the CO-OP. As such, any risk corridor payment received will be distributed to the Association, which in turn will refund recoveries to member insurers, thus eliminating the statutory requirement that member insurers recoup assessments from Colorado ratepayers through increased rates for amounts refunded.

### **RECEIVERSHIP AND LIQUIDATION**

On November 10, 2015, the Commissioner filed a Petition for Rehabilitation with this Court, stating in part, that the CO-OP was in such a condition that the further transaction of its

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<sup>2</sup> Pursuant to C.R.S. § 10-20-103, “Member insurer” means any insurer licensed or who holds a certificate of authority in this state to write any kind of insurance for which coverage is provided pursuant to section 10-20-104.

business would be financially hazardous to its policy holders or creditors or to the public.<sup>3</sup> On the same date, this Court entered an Order for rehabilitation and appointed the Commissioner as rehabilitator.

On January 4, 2016, the Commissioner filed a Petition for Liquidation, stating in part, that any further attempts to rehabilitate the CO-OP would substantially increase the risk of loss to creditors, policyholders, or the public, and would be futile.<sup>4</sup> On the same date, this Court granted the Petition for Liquidation and appointed the Commissioner to serve as Liquidator of the CO-OP pursuant to C.R.S. § 10-3-517(1).

Pursuant to this Court's January 4, 2016 Order, and more specifically, Part 5 of Article 3 of Title 10, the Liquidator was granted authority to, "institute, prosecute and defend, compromise, adjust, intervene in or become a party to such suits, actions, proceedings in law, or in equity, in state or federal courts or before any administrative agency as may in the Commissioner's opinion be necessary for the proper protection, maintenance, preservation or liquidation of the assets of the CO-OP." Additionally, the Liquidator was granted all the powers and authority specified in § 10-3-520, C.R.S., including, the authority to collect all debts and moneys due to the HealthOP, and "may do such other acts as are necessary or expedient to collect, conserve, or protect its assets or property, including the power to sell, compound, compromise, or assign debts for purposes of collection upon such terms and conditions as the liquidator deems best." C.R.S. § 10-3-520(1)(h)(II). Further, C.R.S. § 10-3-520(1)(m), grants the Liquidator the authority to enter into such contracts as are necessary to carry out the Liquidation Order.

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<sup>3</sup> Verified Petition for Consented to Order of Rehabilitation of Colorado Health CO-OP and for the Appointment of Rehabilitator, 2015CV33680.

<sup>4</sup> Petition for Expedited Order of Liquidation and Finding of Insolvency, 2015CV33680.

## RISK CORRIDOR LITIGATION

The Commissioner, acting as Liquidator of the CO-OP, has been forced to take significant actions to protect policy holders, creditors, and the public as a result of the shortfall resulting from the non-payment of the risk corridor balances. In February of 2016, Health Republic Insurance Company filed a class action lawsuit (“*Heath Republic*”) in the U.S. Court of Federal Claims (“Claims Court”) alleging that a class consisting of similarly situated insurers is entitled to relief under the Tucker Act.<sup>5</sup> The Tucker Act provides the Claims Court with jurisdiction to award money judgments against the federal government where a statute is money-mandating and requires payment. On January 3, 2017, the Claims Court entered an order granting class certification and appointed Quinn Emanuel Urquhart and Sullivan as lead counsel for the class. With the support of the Association, the CO-OP joined the class on May 10, 2017. *Health Republic* has been stayed on the merits by the Claims Court pending the resolution of two previously filed actions by health insurers litigating the same issues.<sup>6</sup> In *Land of Lincoln* the presiding judge in the Claims Court held, in pertinent part, that the risk corridor amounts claimed are not yet due and owing from the United States and dismissed the case. However, in *Moda*, a second presiding judge in the Claims Court ruled that the federal government owed \$214 million to *Moda* as part of its participation in the ACA’s risk corridor program and entered summary judgment against the United States. Appeals in both cases were consolidated before the Federal Circuit Court of Appeals which ultimately, in a divided decision, ruled against *Moda* and in favor of the United States. Thereafter, a Petition for Writ of Certiorari was filed with the United States Supreme Court. The Petition was

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<sup>5</sup> *Health Republic Insurance Company v. United States*, 129 Fed.Cl. 757 (Fed. Cl. 2017)

<sup>6</sup> The consolidated cases currently before the United States Supreme Court are: *Moda Health Plan, Inc. v. United States*, 130 Fed.Cl. 436 (Fed. Cl. 2017), (“*Moda*”), and *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81 (Fed.Cl. 2016) (“*Land of Lincoln*.”)

granted in June 2019 and the matters were consolidated for oral arguments scheduled on December 10, 2019.

### **SALE OF RISK CORRIDOR RECEIVABLE**

In an effort to mitigate the risk and uncertainty of the pending risk corridor litigation before the U.S. Supreme Court, the Liquidator solicited bids to purchase the CO-OP's 2014 and 2015 benefit year risk corridor receivables. Numerous bidders from throughout the country submitted bids which were carefully analyzed and compared by the Commissioner, the Division of Insurance and the Association. The bidders with the most favorable bids were asked to improve their bids and did so. The Liquidator has determined that it is in the best interest of the CO-OP, its creditors and the public, to objectively establish the fair market value of the risk corridor receivable asset through a sale. As previously stated, the Association as the CO-OP's largest creditor and a class 2 creditor, will be the primary benefactor of any amount received through this sale. For the purposes of these negotiations, the CO-OP has utilized the conservative assumption that no recovery will be realized from the *Health Republic* litigation.

The offers received by the CO-OP are for the purchase of a portion of the net proceeds, if any, of any final judgment (or settlement) in the *Health Republic* litigation amount less any lawful rights of offset asserted by the United States against the judgment amount (hereafter the "Net Proceeds"). The Liquidator is currently negotiating a purchase agreement with Juris Capital, LLC ("Juris"), the successful bidder. Pursuant to the purchase agreement, Juris will pay a net purchase price of \$20,000,000.00 (non-recourse) to the CO-OP in consideration for the right to receive a portion of any recovery arising the *Health Republic* litigation. The exact amount to be realized by Juris under the purchase contract is dependent upon a recovery in the *Health Republic* litigation. As such, Juris will realize nothing on its investment of \$20,000,000.00 unless the CO-OP obtains

a recovery. In the event of a recovery in the *Health Republic* litigation, the net proceeds recovered will be paid as designated pursuant to the purchase agreement, summarized as follows:

- First \$61,000,000.00 of proceeds recovered shall be paid to Juris; then
- The next \$26,460,000.00 of proceeds shall be equally divided between the CO-OP and Juris; then
- The remainder of all proceeds recovered shall be paid to the CO-OP.

The Liquidator represents that the negotiated bid amount received from Juris remains the most competitive offer to date. Although the purchase agreement is not attached as an exhibit to this Notice in order to protect the proprietary information contained in the Juris contract form, upon the Court's request, the Liquidator will provide a copy of the purchase agreement for its review *in camera*.

#### **NOTICE TO INTERESTED PARTIES**

The Commissioner as Liquidator of the CO-OP hereby provides notice to all interested parties of its intent to sell a portion of the net proceeds of the CO-OP's risk corridor receivable to Juris. As previously stated, the Liquidator is authorized pursuant to this Court's Liquidation Order and C.R.S. § 10-3-520, to take necessary and appropriate acts to collect and to protect assets of the CO-OP. Given the uncertainty of the impending resolution of *Moda* and *Land of Lincoln*, the Liquidator has determined that the purchase agreement is in the best interest of the CO-OP, its creditors, and the public, as it will guarantee that an amount certain will be collected to offset at least a portion of the CO-OP's outstanding creditor liabilities.

#### **MOTION FOR FOURTH DISBURSEMENT OF CO-OP ASSETS**

In addition to the other enumerated powers granted to the Liquidator as stated above, the Court's January 4, 2016 Liquidation Order granted the Liquidator the authority to employ Joseph



B. Holloway of INS Consultants, Inc., acting as Receivership Supervisor, to assist in the Liquidation with all the powers of the Liquidator.<sup>7</sup> The Court's Order granted the Liquidator the authority to assemble and take possession of all the assets of the CO-OP, including any funds or securities held by the Division of Insurance pursuant to C.R.S. § 10-3-201, and to administer them under the general supervision of this Court. As stated above, C.R.S. § 10-3-520(1)(m), grants the Liquidator the authority to enter into such contracts as are necessary to carry out the Liquidation Order.

As previously stated, the CO-OP is a member insurer of the Association. The Association provides protection against failure of member insurers to perform their contractual obligations due to insolvency. C.R.S. § 10-20-102(1). Member insurers of the Association are subject to assessments to provide funds to carry out the purpose of Title 10, Article 20. C.R.S. § 10-20-102(2). Member insurers are assessed for the purpose of providing the funds necessary to carry out the duties of the Association with regard to an impaired or insolvent insurer. C.R.S. § 10-20-109.

To date, member insurers have been assessed \$110,740,686.00, to cover the liabilities of the CO-OP. Each member insurer is required to recoup the assessments it pays through a surcharge on health insurance policy premiums. C.R.S. § 10-20-113. On December 30, 2015, Joseph B. Holloway, as Liquidator, and Lori Gadelmann, as Chair of the Association, entered into an Early Access Agreement ("Agreement"). *See* Early Access Agreement attached hereto as **Exhibit 1**. The Agreement allows the Association to file proof of claims with the Liquidator for CO-OP assets, to the extent such assets are available. Pursuant to the Agreement, the Liquidator will

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<sup>7</sup> The term "Liquidator" is used herein to reference the Commissioner and Joseph B. Holloway.

review the proofs of claim provided by the Association and calculate and pay early access distributions in accordance with § 10-5-533, C.R.S.

As of September 30, 2019, the CO-OP has \$2,520,000.00 in cash assets. *See* CO-OP Balance Spreadsheet attached hereto as **Exhibit 2**. On May 16, 2016, this Court approved the Liquidator's request to disburse up to \$10,000,000.00 in cash assets to the Association in accordance with the Agreement. *See* Order Granting Petitioner's Motion for Court Approval to Disburse CO-OP Assets attached hereto as **Exhibit 3**. On December 23, 2016, this Court approved the Liquidator's request to disburse up to an additional \$3,000,000.00 in cash assets to the Association in accordance with the Agreement. *See* Order Granting Petitioner's Motion for Court Approval for Second Disbursement CO-OP Assets attached hereto as **Exhibit 4**. On October 31, 2017, this Court approved the Liquidator's request to disburse up to an additional \$8,500,000.00 in cash assets to the Association in accordance with the Agreement. *See* Order Granting Petitioner's Motion for Court Approval for Third Disbursement CO-OP Assets attached hereto as **Exhibit 5**.

Pursuant to C.R.S. § 10-3-533, The Liquidator now requests that this Court approve an early disbursement of an additional \$20,000,000.00 in cash assets to the Association, which will serve to limit future assessments levied upon the member insurers and ultimately the public. This fourth disbursement consists of the net purchase price received as part of the purchase agreement with Juris for a portion of the CO-OP risk corridor receivable. Subject to section 3.1 of the Agreement, should the Liquidator require any of the assets disbursed in order to fulfill any obligation of the CO-OP, the Association will return them to the Liquidator.

WHEREFORE, pursuant to C.R.S. § 10-3-533, the Liquidator respectfully requests that this Court enter an order granting the Liquidator's request to approve an additional \$20,000,000.00

in early disbursement of CO-OP assets, bringing the total approved early disbursement up to \$41,500,000.00.

Dated this 18<sup>th</sup> day of November, 2019.

PHILLIP J. WEISER  
Attorney General

/s/Peter W. Frigo

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 18<sup>th</sup> day of November 2019, I served a true and correct copy of the foregoing **PETITIONER'S NOTICE TO INTERESTED PARTIES OF THE LIQUIDATOR'S INTENT TO SELL THE CO-OP'S NET RISK CORRIDOR RECEIVABLE AND MOTION FOR COURT APPROVAL FOR FOURTH DISBURSEMENT OF HEALTH OP ASSETS PURSUANT TO § 10-3-533, C.R.S.**, by placing a copy in the United States mail, first class postage prepaid in an envelope property addressed to:

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