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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In Re: THE ROMAN CATHOLIC BISHOP OF OAKLAND, a California corporation sole Debtor, THE ROMAN CATHOLIC BISHOP OF OAKLAND, a California corporation sole Plaintiff v. PACIFIC INDEMNITY INSURANCE COMPANY OF AMERICA, AETNA INSURANCE COMPANY, TRAVELERS INSURANCE COMPANYM CERTAIN UNDERWRITERS OF LLOYDS OF LONDON SUBSCRIBING TO SYNDICATES 2623 (AFB)) AND 632 (AFB), INSURANCE COMPANY OF NORTH AMERICA, ACE LIMITED, UNITEDE STATES FIRE INSURANCE, EMPLOYERS REINSURANCE, CAN INSURANCE COMPANY, PACIFIC EMPLOYERS INSURANCE, WESTCHESTER FIRE INSURANCE COMPANY AND CALIFORNIA INSURANCE GUARANTEE ASSOCIATION Defendants.	**Chapter 11** **Case No.: 23-40523 WJL** **Adversary Case No.: 23-04028 WJL** **NOTICE OF MOTION AND MOTION OF DEFENDANT CALIFORNIA INSURANCE GUARANTEE ASSOCIATION TO DISMISS ADVERSARIAL COMPLAINT OR ALTERNATIVELY FOR A MORE DEFINITE STATEMENT** **REQUEST FOR JUDICIAL NOTICE PURSUANT TO FEDERAL RULES OF EVIDENCE RULE 201, filed and served as a separate document.** Hearing Judge: Hon. William J Lafferty, III Objections Due: October 25, 2023 Hearing Date: November 8, 2023 Courtroom: 220 Time: 10:30 a.m Location: 1300 Clay Street, Oakland, CA 94612

TO THE COURT IN THE ABOVE-ENTITLED MATTER AND TO ALL PARTIES AND TO THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendant California Insurance Guarantee Association, a California statutory entity, (hereinafter referred to as "CIGA"), defendant in the above-captioned adversary proceeding, respectfully move to dismiss the First Amended Adversarial Complaint [Docket no. 2] ("Adversarial Complaint") under Federal Bankruptcy Rule of Procedure, Rule 7102 and Federal Rules of Civil Procedure Rule 12(b)(6) on the ground that the Adversarial Complaint fails to state facts constituting a claim against CIGA or, in the alternative, for a more definite statement pursuant to Federal Rule of Civil Procedure, Rule 12(e) also under Federal Bankruptcy Rules of Procedure, Rule 7102. The Rule 12(b)(6) Motion will be made on the following grounds:

1. The First Cause of Action of the Adversarial Complaint fails to state a viable claim for Declaratory Relief against CIGA.

2. The Second Cause of Action of the Adversarial Complaint fails to state a viable claim for Breach of Contract against CIGA.

Alternatively, CIGA moves this Court for an Order for a more definitive statement under Federal Rule of Civil Procedure Rule 12(e) as the Adversarial Complaint in both the First and Second Causes of Action is vague as to the basis of the claims asserted against CIGA.

This Motion and alternative Motion shall be based upon the accompanying Notice of Motion, this Memorandum of Points and Authorities and the separately filed and served Request for Judicial Notice.

Dated: September 26, 2023

BLACK, COMPEAN & HALL, L.L.P.

By: */s/ Frederick Hall*

By: Michael D. Compean
Frederick G. Hall

Attorneys for Defendant CALIFORNIA INSURANCE GUARANTEE ASSOCIATION

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MEMORANDUM OF POINT AND AUTHORITES

1. INTRODUCTION

This Adversary Proceeding under case number 23-04028 has been brought by Plaintiff, the Roman Catholic Bishop of Oakland (hereinafter referred to as "Plaintiff" or "RCBO") via a First Amended Adversarial Complaint [Docket no. 2] (hereinafter referred to as "Adversarial Complaint") against various insurance companies[1] which had insured RCBO over various years. RCBO alleges that this matter is within the jurisdiction of the District and Bankruptcy Courts under 28 USC Sections 157 and 1334. (Adversarial Complaint, Paragraph 1.) RCBO also contends that this matter is a "core" matter under 28 USC Section 157(b). (*Id*., Paragraph 2.) All of the insurers are apparently liability insurers of various levels, primary, excess and umbrella.

The Chapter 11 Bankruptcy case, number 23-40523 WJL, and the Adversarial Complaint under Case no. 23-04028, deals with a multitude of Clergy Abuse claims that have been filed against the RCBO due to legislation of the State of California lifting certain statutes of limitations that would have otherwise barred the prosecution of said claims. (Adversarial Complaint, ¶ 28.)

Plaintiff is seeking declaratory relief from the Bankruptcy Court as to the scope of insurance coverage that it may have available to it under the various insurance policies, and as to which it is seeking defense and indemnity for the various underlying liability lawsuits (hereinafter "Underlying Actions") being asserted against it as noted in Exhibit A to the Adversarial Complaint.

Among the various defendants named in the Adversarial Complaint is the California Insurance Guarantee Association (hereinafter referred to as "CIGA"), a statutory entity, created and existing pursuant to Article 14.2 of the California Insurance Code.[2] As noted by the California Supreme Court, "CIGA is not in the 'business' of insurance …. CIGA issues no policies, collects no premiums, makes no profits, and assumes no contractual obligations to the insureds. (*Isaacson v. California Ins. Guarantee Assn.,* 44 Cal.3d 775, 787, 244 Cal.Rptr. 655, 663, 750 P.2d 297, 305 (1988).) Given CIGA's narrowly circumscribed obligations and the scant factual allegations of the Adversarial Complaint, the Adversarial Complaint fails to state a claim against CIGA.

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[1] Albeit presumably being primary, excess and umbrella liability policies though of different effective policy periods, policy limits and terms and provisions.

[2] While the Adversarial Complaint has not named the plaintiffs suing it in the various underlying actions (Hereinafter referred to as "Underlying Plaintiffs"), the Committee for the Underlying Plaintiffs have intervened in this matter.

While CIGA contends that the Adversarial Proceeding does not fall within the jurisdiction of this District Court as it is not: (1). A direct bankruptcy related matter under 28 USC 1334 (a); (2) Is a not "related matter" under 28 USC §1334(b); and (3) there is a complete lack of diversity of citizenship for the District Court to exercise jurisdiction over the proceedings under 28 USC §1332, it brings this Motion without waiving such objections.[3] Further, even assuming that the District Court and Bankruptcy Courts have jurisdiction, CIGA contends that the Adversarial Complaint is not a related matter for jurisdiction under 28 USC §1334 (b), is a non-core matter under 26 USC §157. CIGA is objecting to the Bankruptcy Court's ruling on the merits of that matter as it is a "non-core" matter. (See *In Re: GACN, Inc.*, 555 B.R. 684 (9th Cir. BAP 2016).)

The Court is requested, under Federal Rules of Evidence Rules 201, to take Judicial Notice that Commercial Union was a Pennsylvania domiciled company that was ordered liquidated on March 21, 2021, as part of Bedivere Insurance Company (hereinafter "Bedivere"), the then existing corporate entity responsible for the obligations of Commercial Union under the policies it is alleged to have issued to Plaintiff. A copy of the Liquidation Order (hereinafter "Liquidation Order") is attached to the Request for Judicial Notice as Exhibit 1. A true and correct copy of the Notice of Compliance hereinafter "Notice of Compliance") is attached to the Request as Exhibit 2 and the Proof of Claim form (hereinafter "Proof of Claim") as Exhibit 3. As discussed hereinafter, the Liquidation Order triggered the involvement of CIGA under Article 14.2 of the California Insurance Code (sometimes referred to as "Article 14.2").

2. STANDARDS FOR RULE 12(b)(6) AND 12(e) MOTIONS

A. Rule 12(b)(6) Motions

"A motion to dismiss in an adversary bankruptcy proceeding is governed by Federal Rule of Bankruptcy Procedure 7012(b), which incorporates Federal Rule of Civil Procedure 12(b)-(i)." Under Rule 12(b)(6), "a court must dismiss a complaint if it fails to state a claim upon which relief can be granted." (*Kasolas v. Brower (In re Brower)*, 644 B.R. 187, 191-92 (Bankr. N.D. Cal. 2022). The standard requires a Debtor to do more than provide a formulaic recitation of the

[3] While the Adversarial Complaint contains no allegations regarding the domicile of any of the named insurers, much less Commercial Union, contrary to FRCP Rule 8(a)(1), the allegations of Paragraph 1 and Paragraph 11 shows that both RCBO and CIGA are in essence both California residents thus defeating complete diversity of citizenship for the District Court to exercise jurisdiction over the non-core Adversarial Complaint.

elements of a cause of action or off naked assertions devoid of further factual enhancement. Under Fed. R. Civ. P. 12(e) a complaint must state clearly how each and every defendant is alleged to have violated the Debtor's legal rights in order to provide defendants a fair opportunity to frame a responsive pleading. A complaint that fails to provide adequate factual detail, as this one does, must be dismissed. (See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). See also *Tracht Gut, LLC v. Los Angeles Cty. Treasurer & Tax Collector (In re Tracht Gut, LLC)*, 836 F.3d 1146, 1150 (9th Cir. 2016).) Although the trial court, at the motion to dismiss phase, "must accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff," the court "does not have to accept as true conclusory allegations in a complaint or legal claims asserted in the form of factual allegations." (*Id*.)

"To survive a Rule 12(b)(6) motion to dismiss, plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face'" and to "support a cognizable legal theory." (*Id*. at 191-92 (Bankr. N.D. Cal. 2022), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and *Shroyer v. New Cingular Wireless Services, Inc*., 622 F.3d 1035, 1041 (9th Cir. 2010).) "This standard requires the plaintiff allege facts that add up to 'more than a sheer possibility that a defendant has acted unlawfully.'" (*Id*., quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).) "A plaintiff must provide 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" (*Id*., quoting *Iqbal*, 556 U.S. at 662.) "A claim has facial plausibility when the plaintiff pleads sufficient factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." **(***In re Theos Fedro Holdings*, LLC, 2022 WL 10685907, at 1 (Bankr. N.D. Cal. Oct. 18, 2022).)

B. Rule 12(e) Motions

As to the alternative motion for more definitive statement, under Fed. R. Civ. P. 12(e) a complaint must "state[] clearly how each and every defendant is alleged to have violated plaintiff['s] legal rights" in order to provide defendants "a fair opportunity to frame a responsive pleading." (*McHenry v. Renne*, 84 F.3d 1172, 1176 (9th 4 Cir. 1996); see also 5C Fed. Prac. & Proc. Civ. § 1376 (3D ED.) Rule 12(e) applies in adversary proceedings under Bankruptcy Rule 7012(b).)

A complaint that fails to meet this standard must be amended to provide sufficient detail as

to the allegations. (*Gregory Vll. Partners, L.P. v. Chevron U.S.A., Inc*., 805 F. Supp. 2d 888, 896 (N.D. Cal. 2011) ("A Rule 12(e) motion is proper . . . where the complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted"); see also, e.g., *In re Joe Gibson's Auto World, Inc*., No. 09–80052, 2010 WL 5136154 at *2 (D. S.C. Aug. 3, 2010) (granting motion for a more definite statement where the allegations were not "detailed and informative enough to enable the defendant to respond").)

3. FACTUAL BACKGROUND

As noted above, this matter involves various insurance disputes alleged to be existing between RBCO and, for simplicity's sake, 13 different insurers.[4] There are several primary carriers and various excess carriers and umbrella carriers. All appear to be liability carriers as RCBO seems to be complaining mainly of a failure of said carriers to indemnify it as against the underlying claims though there are no allegations that any of the underlying matters have gone to judgment.

" RCBO sets forth blanket allegations as to liability insurance coverage disputes relating to the Underlying Actions, but wholly fails to allege any supporting facts as to such coverage disputes.[5] The Adversarial Complaint fails to attach any of the alleged policies of insurance, does not quote or even refer to any policy language underlying such coverage disputes, fails to allege the basis for any of the defendants' coverage positions, or even the RCBO's position as to why there would be coverage under any of the policies, only making the general allegation that the various defendants "improperly denied or failed to confirm coverage." (Adversarial Complaint, ¶¶ 32, 33 and 34.)

As to Defendant CIGA, the only charging allegations are that one of the various primary insurers, Commercial Union Insurance Company (which is also alleged to be "Armour Insurance Company") (hereinafter referred to as "Commercial Union"), "…accepted the defense of some of the underlying cases but then reported that they had become insolvent" and that CIGA "assumed the responsibilities of" Commercial Union. (Adversarial Complaint, ¶ 11.) The Adversarial Complaint does not even attempt address CIGA's statutory role under its creating statute, Article

[4] As various underwriters of the Llyod's Underwriting group are named, CIGA for the purpose of this motion only lumps them together as a single entity.

[5] Presumably as RCBO is contending this is a "core" mater and thus within the Bankruptcy and the District Courts jurisdiction under 28 USC §1334, it felt not need to alleged citizenship of the other defendant carriers.

14.2 of the California Insurance Code or explain the basis of CIGA's alleged liability.

4. CIGA'S ROLE AND WHAT IS NEEDED TO BE ALLEGED STATE A CLAIM AGAINST CIGA

CIGA is a statutory entity created by the California Legislature by way of the enactment of Article 14.2 of the Insurance Code. CIGA is not an insurance company. Its obligations are created, defined, and limited by Article 14.2, California Insurance Code Section 1063, et seq.

CIGA's statutory obligations include some, but not all, claims within the coverage of policies issued by insolvent carriers, such as Commercial Union. CIGA's duties are not co-extensive with the duties owed by the insolvent insurer under its policy. (*California Ins. Guar. Assn. v. Workers' Comp. Appeals Bd.,* 128 Cal.App.4th 307, 312 (2005).) CIGA does not stand in the shoes of the insolvent insurer. (See *Saylin v. California Ins. Guar. Assn.,* 179 Cal.App.3rd 256, 262, 224 Cal.Rptr. 493, 497 (1986); *Clark v. California Ins. Guar. Assn.,* 200 Cal.App.4th 391, 397, 133 Cal.Rptr.3rd 1, 4 (2011) and *Biggs v. California Ins. Guarantee Assn.,* 126 Cal.App.3d 641, 179 Cal.Rptr. 16 (1981).)

CIGA's statutory obligation under policies issued by insolvent carriers is strictly limited to only those claims that qualify as "covered claims" as that term is statutorily defined. CIGA "…shall under no circumstances be liable for any sum in excess of…" the amount of statutorily defined "covered claims." (Cal. Ins. Code §1063.12(a).) Not all claims submitted to CIGA qualify as a "covered claim." Generally, in evaluating whether a particular claim is a "covered claim," it must be kept in mind that CIGA does not:

1. Assume the contractual obligations of the insolvent insurer, see Section 6 herein.
2. "Covered claims" require that the claim be presented to CIGA or the liquidator before the last date fixed in the liquidation proceeding, see Section 7 herein.
3. Even those claims that otherwise may be "covered claims" also do not include claims where there are other insurance is available to pay those same claims, see Section 9 herein.

In *Isaacson v. California Insurance Guarantee Association,* 44 Cal. 3rd at 784, , the California Supreme Court noted that:

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> ""CIGA was created by legislation in 1969 (§ 1063 et seq.) to establish a fund from which insureds could obtain financial and legal assistance in the event their insurers become insolvent, i.e. to provide insurance against 'loss arising from the failure of an insolvent insurer to discharge its obligations under its insurance policies.' (Ins. Code, § 119.5.) (*Biggs v. California Ins. Guarantee Assn.* (1981) 126 Cal.App.3d 641, 644 [179 Cal.Rptr. 16]; see § 1063, subd. (a).) …"

The *Isaacson* court also noted: "…CIGA is not, and was not created to act as, an ordinary insurance company. (e.g., *Biggs,* 126 Cal.App.3d at 645.) It is a statutory entity that depends on the Guarantee Act for its existence and for a definition of the scope of its powers, duties, and protections." (*Isaacson*, 44 Cal. 3rd at 785)

Thus, CIGA's duties are not co-extensive with the duties owed by the insolvent insurer under its policy. (*California Ins. Guar. Assn. v. Workers' Comp. Appeals Bd.,* 128 Cal.App.4th 307, 312, 26 Cal.Rptr.3d 845 (2005).)

As noted in *Snyder v. California Ins. Guarantee Assn.,* 229 Cal.App.4th 1196, 1209, 177 Cal.Rptr.3d 853, 861–862 (2014), a cause of action accrues against CIGA when all of the events necessary to create a "covered claim" have occurred. Thus, at a minimum, RCBO must allege that all of the requirements for a "covered claim" as to CIGA have been satisfied. California Insurance Code §1063.1(c) defines "covered claim", in pertinent part, as:

> "…the obligations of an insolvent insurer, …, that satisfy all of the following requirements:
> (A) Imposed by law and within the coverage of an insurance policy of the insolvent insurer.
> (B) Which were unpaid by the insolvent insurer.
> (C) Which are presented as a claim to the liquidator in the state of domicile of the insolvent insurer or to the association on or before the last date fixed for the filing of claims in the domiciliary liquidating proceedings.
> (D) Which were incurred before the date coverage under the policy terminated and before, on, or within 30 days after the date the liquidator was appointed.
> (E) For which the assets of the insolvent insurer are insufficient to discharge in full.
> …
> (G) In the case of other classes of insurance if the claimant or insured is a resident of this state at the time of the insured occurrence, or the property from which the claim arises is permanently located in this state.

The remainder of Insurance Code §1063.1(c) sets forth numerous additional exclusions and limitations, among them the provision that " 'Covered claims' does not include ... a claim to the

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extent it is covered by any other insurance of a class covered by this article available to the claimant or insured." (Ins. Code, § 1063.1, subd. (c)(9)(A).)

Nonetheless, the Adversarial Complaint is completely devoid of any reference to Insurance Code §1063.1(c), or any of the statutory requirements for a "covered claim." Since CIGA's liability is strictly limited to "covered claims" as defined in Insurance Code §1063.1(c) (see Cal. Ins. Code §1063.12(a)), the Adversarial Complaint cannot state a claim against defendant CIGA.

5. THE ADVERSARIAL COMPLAINT FAILS TO ALLEGE FACTS SHOWING A BASIS FOR DECARATORY RELIEF AS TO CIGA

In this case, insofar as RCBO seeks coverage under the Commercial Union policies alleged in Paragraph 11 of the Adversarial Complaint, even where the other defendant insurers might have coverage, CIGA can have no liability based on the few facts alleged, which even if true, are insufficient to show Plaintiffs claims qualify as "covered claims" the only claims for which CIGA can be liable. (Cal. Ins. Code §1063.12(a).)

Conclusory allegations such as those set forth in the Adversarial Complaint are insufficient to state a claim for declaratory relief. (*Patel v. Am. Nat'l Prop. and Cas. Co.*, 367 F.Supp.3d 1186, 1190-91 (D. Nev. 2019) (granting motion to dismiss where the "formulaic recitation of a cause of action" by an insured failed to state a claim against an insurer).) An insured's complaint fails where, as here, it "lumps all of the defendants together" and does not "state the express terms of the contract or policy that were allegedly breached, the relevant policy limits, or even the parties to the contract." (*Heidingsfelder v. Ameriprise Auto & Home Ins.*, No. 19-CV-08255, 2020 WL 5702111, at *3 (N.D. Cal. Sept. 11 2020) (granting motion to dismiss filed by insurer and observing that "[i]n the absence of this basic information, a plausible breach of contract claim cannot be found").) A claim for insurance coverage is only sufficient if it "allege[s] what form the claims took or how or when they were tendered." (*Mitchell Eng'g/Obayashi Corp. Joint Venture v. St. Paul Fire & Marine Ins. Co.*, No. 19-CV-08120, 2020 WL 6947894, at *3 (N.D. Cal. July 2, 2020) (granting motion to dismiss).)

The only allegation as to Commercial Union is that it had accepted the defense of some (though unspecified) underlying cases, presumably prior to its liquidation. (Adversarial Complaint,

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¶ 11.) However, even if true, an insolvent insurer's pre-liquidation decision to accept the defense of a claim does not render it a "covered claim" under California Insurance Code section 1063.1(c). Indeed, whether or not the insolvent insurer accepts the defense prior to its insolvency is not even a requirement of the "covered claim". It simply has no bearing on CIGA's statutory obligation. (*Saylin v. Cal. Ins. Guarantee Assn.,* 179 Cal.App.3d 256, 262, 224 Cal.Rptr.493, 497 (1986) noting that the determination of the insolvent carrier that a duty to defend existed and its agreement to defend was not binding on CIGA.)

The only allegation as to CIGA is that it "assumed the responsibilities of" Commercial Union, which is a conclusory allegation that is wrong as a matter of law. (*Isaacson*, 44 Cal. 3rd at 787 ("CIGA … assumes no contractual obligations to the insureds [of the insolvent insurer].") As such, there is simply no allegations to support a claim against CIGA.

6. AS A MATTER OF LAW CIGA CANNOT BE LIABLE FOR BREACH OF CONTRACT TO PLAINTIFF.

The second cause of action of the Adversarial Complaint attempts to allege breach of contract against CIGA based on the "failure to provide defense and indemnity to RCBO" under the various insurance policies as "a breach of those policies." (Adversarial Complaint, ¶ 45.) However, CIGA is not alleged to have entered into any contract with RCBO, and could not have been a party to any alleged policies issued by Commercial Union.

First, the alleged Commercial Union policies were entered into and in effect between October 25, 1970 and December 1, 1975. However, CIGA's statutory obligations and involvement were not even triggered until Bedivere's liquidation in March 2021, more than 45 years later. (Cal. Ins. Code section 1063.1(b); *Denny's Inc. v. Workers' Comp. Appeals Bd.*, 104 Cal.App.4th 1433, 1436, 129 Cal.Rptr.2d 53, 55 (2003.)

Second, even after CIGA's statutory obligations are triggered, CIGA does not assume the contractual obligations of the insolvent insurer, here Commercial Union. (*Isaacson,* 44 Cal. 3rd at 787.) Indeed, the California Supreme Court noted that CIGA has no contractual relationship and is not in contractual privity with either the insolvent insurer, or its insured, such as Plaintiffs. (*Isaacson,* 44 Cal.3d at 789, 244 Cal.Rptr. at 665, 750 P.2d at 307.) CIGA's obligations do not

relate back to the duty owed by the insolvent insurer. (*Saylin,* 179 Cal.App.3d at 262–263, 224 Cal.Rptr. at 497.)

As a matter of law, as noted above, CIGA is not an insurance company. It did not issue any policies of insurance to RCBO and was not and could not have had any contractual privity with RCBO.

Although RCBO alleges CIGA "assumed the responsibilities of" Commercial Union, this conclusory allegation is wrong as a matter of law. (*Isaacson*, 44 Cal. 3rd at 787, 789.) CIGA's liability, if any, is strictly limited by to statutorily defined "covered claims." (Cal. Ins. Code §1063.12(a).) As such, CIGA's liability arises by statute, not contract.

In light of the foregoing, CIGA is not and cannot be liable to Plaintiff for breach of contract. The Second Cause of Action of the Adversarial Complaint thus fails to state facts upon which a claim against CIGA has been stated as a matter of law and leave to amend should be denied.

7. PLAINTIFF HAS FAILED TO ALLEGE THAT ITS CLAIM IS TIMELY

Pursuant to California Insurance Code section 1063.1, subdivision (c)(1)(C), in order for a claim to qualify as a "covered claim", the claim must be presented to CIGA or the liquidator on or before the "last date" (or more commonly referred to as the "bar date") fixed for the filing of claims in the domiciliary liquidation proceeding of the insolvent insurer. (*HCM Healthcare, Inc. v. California Ins. Guarantee Assn.*, 187 Cal.App.4th 1317, 115 Cal.Rptr.3d 185 (2010); *Snyder v. California Ins. Guarantee Assn.,* 229 Cal.App.4th at 1209, 177 Cal.Rptr.3d at 861–862.) The date set for the last date for submission of claims in the liquidation proceeding for Commercial Union was October 21, 2021. (Ex. 3 to the Request for Judicial Notice.) Thus, in order to allege a "covered claim" against CIGA, the Adversarial Complaint must allege that RCBO's claims with respect to each of the Underlying Actions was presented on or before October 21, 2021.

Yet, there are no allegations thatPlaintiff presented any of the Underlying Actions to the Liquidator or CIGA as required in Insurance Code section 1063.1(c)(1)(C) which provides in part:

> (c)(1) "Covered claims" means the obligations of an insolvent insurer, including the obligation for unearned premiums, that satisfy all of the following requirements:
>
> * * *

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(C) Which are presented as a claim to the liquidator in the state of domicile of the insolvent insurer or to the association on or before the last date fixed for the filing of claims in the domiciliary liquidating proceedings.

Absent any allegations that one or more of the Underlying Actions were timely presented to the Liquidator by way of Proof of Claim or to CIGA on or before the bar date, December 31, 2021, the Adversarial Complaint fails to state a claim against CIGA.

8. PLAINTIFF HAS FAILED TO ALLEGE THAT THERE IS NO OTHER INSURANCE AVAILABLE TO COVER ANY PARTICULAR CLAIM

CIGA is solely as a fund of last resort, only paying claims where there is no other insurance available. (*R.J. Reynolds v. Cal. Ins. Guarantee Assn.,* 235 Cal.App.3d 595, 600, 1 Cal.Rptr.2d 405 (1991) holding "CIGA is an insurer of last resort and does not assume responsibility for claims where there is any other insurance available".) This rule has been upheld and repeated numerous times in California jurisprudence and is one of the foundations of CIGA's statutory role and function. (Cal. Ins. Code § 1063.1(c)(9); *Parkwoods Community Assn. v. Cal. Ins. Guarantee Assn.,* 141 Cal.App.4th 1362, 46 Cal.Rptr.3rd 921 (2006) and *Stonelight Tile, Inc. v. Cal. Ins. Guarantee Assn.,* 150 Cal.App.4th 19, 31-32, 58 Cal.Rpt.3rd 74 (2007) *Clark v. Cal. Ins. Guarantee Assn.,* 200 Cal.App.4th 391. 397, 133 Cal.Rptr.3rd 1 (2011)).

Yet, in attempting to state a claim against CIGA, RCBO has failed to allege any facts to establish that it has exhausted all other insurance available for the Underlying Actions. In fact, to the contrary, RCBO has alleged just the opposite that there are numerous policies of insurance that provide coverage for the Underlying Actions. (Adversarial Complaint, ¶¶ 7-10, 13-24, 30-35, 38-41.) As such, RCBO has alleged that there are numerous other insurance policies applicable to the Underlying Actions. Further, since the Adversarial Complaint fails to allege which insurance policies apply to which Underlying Actions, or the terms of such policies, or any facts relating to the Underlying Actions themselves, based on the allegations of the Adversarial Complaint, there can be no "covered claim" as against CIGA as the Adversarial Complaint alleges on its face there is other insurance available for the Underlying Actions.

Thus, the Adversarial Complaint fails to state a claim against defendant CIGA.

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9. THE ABSENSE OF FACTS ALLEGING ANY "COVERED CLAIMS" REQUIRES FURTHER STATEMENT AND THE MOTION FOR FURTHER STATEMENT UNDER FRCP, RULE 12(e) MUST BE GRANTED

As noted in Sections 5, 6, 7 and 8 the allegations of the Adversarial Complaint fails to allege that the underling claims potentially qualify as "covered claims" under CIGA's enabling statute, Article 14.2. As such, the Court is requested to order Plaintiff to submit a further statement of the basis for the claims against CIGA should it be allowed to proceed notwithstanding the Rule 12(b)(6) motions.

Such "'further statement" would be needed to clarify exactly how Plaintiff seeks to hold CIGA responsible to it as to each of the Underlying Actions. Only then would CIGA be on "notice" of the basis of the claims against it. (See Section 2B: *Gregory Vll. Partners, L.P. v. Chevron U.S.A., Inc.*, 805 F. Supp. 2d 888, 896 (N.D. Cal. 2011) ("A Rule 12(e) motion is proper . . . where the complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted".)

10. CONCLUSION

For all of the foregoing reasons, Defendant CIGA's motion to dismiss for failure to state a claim should be granted and the Adversarial Complaint should be dismissed under Fed. R. Civ. P. (b)(6). In the alternative, at a minimum the Plaintiff should be required to file an amended complaint with sufficient detail to provide Defendant CIGA with notice of the basis for the claims against CIGA as required by Fed. R. Civ. P. 12(e).[6]

[6] This filing does not constitute a waiver of Defendant CIGA's right to have any and all final orders in any and all non-core matters entered only after de novo review by a Federal district court (or, as applicable, appellate court) and/or the Moving Insurers' right to trial by jury in any proceeding as to any and all matters so triable, whether or not the same be designated legal or private rights, or in any case or controversy or proceeding related thereto, and whether such jury trial is pursuant to statute or the United States Constitution. Pursuant to United States Bankruptcy Court, Northern District of California Local Bankruptcy Rule 7012-1, Defendant CIGA hereby represents that CIGA does not consent to the entry of a final order or judgment by the Bankruptcy Court.

Dated: September 26, 2023

BLACK, COMPEAN & HALL, L.L.P.

By: _____*/s/ Frederick Hall*_____

By: Michael D. Compean
Frederick G. Hall

Attorneys for Defendant CALIFORNIA INSURANCE GUARANTEE ASSOCIATION