MICHAEL D. COMPEAN, State Bar No. 125106
FREDERICK G. HALL, State Bar No. 130465
BLACK, COMPEAN & HALL
A Limited Liability Partnership
275 E. Hillcrest Drive, Suite160-1021
Thousand Oaks, CA 91360c

Attorneys for Defendant, California Insurance Guarantee Association

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 THIRD AMENDED ADVERSARIAL COMPLAINT UNDER FEDERAL RULES OF CIVIL PROCIDEURE, RULE 12(b)(6) OR ALTERNATIVELY FOR A MORE DEFINITE STATEMENT UNDER PEDERAL RULE OF CIVIL PROCEUDRE, RULE (e)** **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: February 28, 2024 Hearing Date: March 13, 2024 Courtroom: 220 Time: 10:30 am 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"), a defendant in the above-captioned adversary proceeding, respectfully moves to dismiss the Third Amended Adversarial Complaint [Docket no. 163 ("Third Adversarial Complaint")] of Plaintiff Roman Catholic Bishop of Oakland ("Plaintiff", "RCBO" or "Debtor") under Federal Bankruptcy Rule of Procedure, Rule 7102 and Federal Rules of Civil Procedure Rule 12(b)(6) on the ground that the First and Third Causes of Action of the Third Adversarial Complaint each 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 as to each of said causes of action.

The Rule 12(b)(6) Motion will be made on the following grounds:

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

2. The Third Cause of Action of the Third Adversarial Complaint fails to state a viable claim for Breach of Statutory Duties against CIGA.

The alternative motion for a more definitive statement is made under Federal Rule of Civil Procedure Rule 12(e) as both the First and Third Causes of Action of the Third Adversarial Complaint are vague as to the basis of the claims asserted against CIGA as it related to compliance with the Proof of Claim requirements of California insurance Code Article 14.2. This is made even more apparent considering the prior opposition of RCBO [Docket no. 136] to CIGA's original motion to dismiss [Docket no. 63] relating to the prior First Amended Adversarial Complaint as to the claimed Proof of Claims ("POC") submitted by RCBO and attached thereto as Exhibits 1 through 27 [Docket no. 136-1 to 136-27].

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This Motion, and the 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: January 26, 2024

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

By: 

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

Unlike the other defendants, CIGA is not an insurance company. CIGA is a statutory entity created by the California Legislature by way of the enactment of Article 14.2 of the Insurance Code, California Insurance Code Section 1063, et seq. Its obligations are created, defined, and limited to certain specifically defined and limited "covered claims." 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)), in order to state a claim against CIGA, the Third Adversarial Complaint [Docket no. 163] must state a claim that qualifies as a "covered claim" as defined in Insurance Code §1063.1(c). Absent that, there simply is no claim stated against defendant CIGA. The Third Adversarial Complaint is completely devoid of any reference to Insurance Code §1063.1(c), or any of the statutory requirements for a "covered claim." Thus, it fails to state a claim against CIGA.

A. Pleadings

This Adversary Proceeding under case number 23-04028 was initially brought by Plaintiff, the Roman Catholic Bishop of Oakland (hereinafter referred to as "Plaintiff", "RCBO" or "Debtor") via a First Amended Adversarial Complaint [Docket no. 2] (hereinafter referred to as "Adversarial Complaint") against various insurance companies which had insured RCBO over various years.

As discussed herein, the current operative pleading is the Plaintiff's Third Amended Adversarial Complaint ("Third Adversarial Complaint.") The original First Amended Adversarial Complaint named CIGA in two causes of action for declaratory relief and for breach of contract as successor as to Commercial Union.

The Chapter 11 Bankruptcy case, number 23-40523 WJL, and the Adversarial Proceedings under Case nos. 23-04028 and 23-04037 deal with a multitude of Clergy Abuse claims that have been filed against the RCBO. (Third Adversarial Complaint, ¶25.)

After various motions to dismiss, including CIGA's [Docket number 69], were filed, opposed by RCBO [Docket no. 136] and granted with leave to amend, RCBO filed its Second Adversarial Complaint. [Docket number 161.] It was framed in three counts. The first count was for Declaratory relief against all Defendants; the second against all defendants, except CIGA, for

breach of contract; and the third against CIGA for breach of statutory duties imposed on it under Article 14.2 of the California Insurance Code (sometimes referred to as "Article 14.2").

Before any responsive pleadings were filed as to the Second Adversarial Complaint, RCBO sought and was granted leave to file the now operative Third Adversarial Complaint. The Third Adversarial Complaint is essentially the same as the prior Second Adversarial Complaint, but it deleted references relating to "ACE Limited Insurance Company and Certain Underwriters at Lloyd's of London Subscribing to Syndicates 2623(AFB) And 623 (AFB)" adds to the caption named defendant CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING SEVERALLY AND NOT JOINTLY TO SLIP NOS. CU 1001 AND K66034 ISSUED TO THE ROMAN CATHOLIC ARCHBISHOP OF SAN FRANCISCO AND NOS. K 78138 AND CU3061 ISSUES TO THE ROMAN CATHOLIC OF OAKLAND ("Lloyd's). It also added a new paragraph 22 relating to Lloyd's and related renumbering of sequential paragraphs of the Third Adversarial Complaint. There was an Exhibit A attached to the Second and Third Adversarial Complaints. While the pages are less numerous as to said Exhibit A as to the Third Adversarial Complaint, each seems to list the same 400+ abuse claims that have been asserted against RCBO.

In its Third Adversarial Complaint, RCBO alleges that this matter is within the jurisdiction of the District and Bankruptcy Courts under 28 USC Sections 157 and 1334. (Second Adversarial Complaint, ¶1.) RCBO also contends that this matter is a "core" matter under 28 USC Section 157(b). (*Id*., ¶2.) RCBO consents to this court entering a final order as to the issues involved. (Id., ¶3.) As noted hereinafter CIGA disputes those assertions or that this court can issue any final judgment herein.

All the named insurers in this matter, Case no. 23-04028, appear to be liability insurers of various levels, primary, excess and umbrella. Defendant CIGA, a California statutory entity, is one of the named Defendants due to the insolvency of one of RCBO's primary carriers, Commercial Union Insurance Company ("Commercial Union.") Commercial Union underwent several name and apparently ownership changes including OneBeacon and Armour Insurance Company, all of which will collectively be referred to as "Commercial Union" unless the context notes otherwise.

Unlike the other defendants named in the Third Adversarial Complaint, CIGA is a statutory

entity, created and existing pursuant to Article 14.2 of the California Insurance Code.[1] 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).) 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. (Cal. Ins. Code §1063.12(a).) One of the statutory requirements of "covered claims" is that the claim be presented as a claim on or before the last date fixed for the filing of Proofs of Claim (POC) in the liquidation proceeding of the insolvent insurer, here Commercial Union. (Cal. Ins. Code §1063.1(c)(1)(C).)

The Third Adversarial Complaint, like the Second Adversarial Complaint, maintains the first cause of action for declaratory relief against all defendants and again separates CIGA from the second cause of action for breach of contract and has named it in a third cause of action for breach of statutory duties.

The operative complaint alleges CIGA is now somehow implicated in 198 of the pending claims and now includes the blanket allegation that "RCBO submitted a timely proof of claim to CIGA regarding the applicable Suits" [Docket no. 163, paragraph 40] which is plainly inconsistent with its prior opposition to CIGA's Motion to Dismiss the First Adversary Complaint [Docket no. 63] in which RCBO represented that there were only 27 Proof of Claims [Docket nos. 136-1 to 136-27] that had been timely submitted to the Commercial Union liquidator, which POC's actually referred to only 24 case names and no other details of the supposedly timely submitted "Suits."

As noted above, the Third Adversarial Complaint's Exhibit A lists over 400 various pending claims against RCBO, their Superior Court case numbers where applicable, a claim number, an alleged proof of claim number, the dates the matters were tendered to RCBO's broker, designated as AJG, and thereafter to the carriers RCBO is claiming has obligations relating to such matters.

As to "The Parties" portion of the Third Adversarial Complaint, it is alleged that

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[1] While the Third 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.

Commercial Union issued RCBO various policies for the policy periods of October 25, 1970, to October 26, 1972, for the period of October 26, 1972, to October 26, 1973, and lastly for the period of October 26, 1973, to December 1, 1975. In paragraph 9 of the same pleading alleges that Commercial Union defended an unidentified number of clergy abuse claims before it was deemed insolvent and thereafter withdrew such defense.

The main change made as to CIGA in the Second and now operative Third Adversarial Complaints was the addition of Exhibit A, a list of some 400 plus pending claims, the listing of 198 of the claims set forth in Exhibit A asserted against CIGA presumably because it is contended that such claims were covered to some extent under the policies issued by the now insolvent Commercial Union policies, and now including the blanket allegation that "RCBO submitted a timely proof of claim to CIGA regarding the applicable Suits" [Docket no. 163, paragraph 40]. However, in so doing, RCBO is ignoring its own prior pleading and its prior litigation position.[2] RCBO appears to be attempting to plead away the Proof of Claims issues raised by CIGA in its prior Motion to Dismiss [Docket no. 63] based on California Insurance Code section 1063.1(c)(1)(C) and litigated between RCBO and CIGA in which RCBO submitted to the Court proofs of claim [Docket nos. 136-1 to 136-27] for, at most, only 24 claims, not 198 claims, as being timely filed, and thus, falling within the possible scope of CIGA's obligations to compensate as "covered claims" under Article 14.2.

The Opposition to the Original Motion to Dismiss [Docket no. 136 and the 27 exhibits thereto, Docket nos. 136-1 to 136-27] admitted that the RCBO only filed 24 of the required POC's that referenced any case name in the Commercial Union liquidation proceeding copies of which were set forth in the RCBO's Exhibits to its opposition. In fact, most of said exhibits [Exhibits 1 through 24 Docket numbers 136-1 through 136-24] included copies of the actual POC forms, none of which contained any actual information indicating that any of them in fact involved claims that were in litigation at the time the POC's were submitted on December 27, 2021.[3] Exhibits 1 through

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[2] While maybe not truly "inconsistent" pleadings, see Rutter, Federal Civil Procedure Before Trial, ¶8:630, at least this inconsistency borders as being barred under judicial estoppel. Id., ¶8:618 and *New Hampshire v. Maine* (2001) 532 US 712, 749, 121 S. Ct. 1808, 1814.

[3] Three of the exhibits to the opposition [Docket nos. 136-25, 136-26 and 136-27 did not contain POC forms.

24 all indicated that there was no pending litigation as of that date. The only attachments to the individual POC forms were invoices from the RCBO's own attorneys, the Foley firm. The only reference to actual or particular claims relating to any particular POC is the reference of a case name on the invoices, but as there are many parties whose names are listed as fictitious persons for their privacy, and even that is not definitive.[4] Thus, while RCBO still alleges that Commercial Union was defending it as of the date of liquidation, March 11, 2021 [Docket no. 163, paragraph 9], there is still no listing of which claims it was defending, other than the assumption that they would be existing lawsuits filed on or before March 11, 2021.

It cannot be determined which out of the 24 Exhibits with actual proof of claim forms, were related to the lawsuits which Commercial Union is alleged to have been defending and were filed before March 11, 2021.

B. Jurisdiction

Again, CIGA contends that the Third Adversarial Complaint 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.[5]

Further, even assuming that the District Court and Bankruptcy Courts have jurisdiction, CIGA contends that the Third 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).)

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[4] To the extent that those allegations are inconsistent, again insofar as the POC issue, with the prior pleading and litigation position taken by RCBO, the Court may exercise its discretion to preclude such claims being asserted against CIGA under the judicial estoppel doctrine, see footnote 3.

[5] 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.

C. Request for Judicial Notice

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 and the Exhibits to RCBO's Opposition to CIGA Motion to Dismiss. [Docket number 136.] A copy of the Liquidation Order (hereinafter "Liquidation Order") is attached to the Request for Judicial Notice as Exhibit A. A true and correct copy of the Notice of Compliance (hereinafter "Notice of Compliance") is attached to the Request as Exhibit B and the Proof of Claim forms as Exhibit C. As discussed hereinafter, the Liquidation Order triggered the involvement of CIGA under Article 14.2 of the California Insurance Code.

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 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.*)

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"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

In addition to, and as noted above, this matter involves various insurance disputes alleged to be existing between RBCO and, for simplicity's sake, 8 different insurers, not to mention the two insurers involved in the Adversary Action no. 23-04037, plus CIGA. There are several primary

carriers, including Commercial Union, and various excess carriers and umbrella carriers.[6]

All insurers appear to be liability carriers as RCBO seems to be complaining mainly of a failure of said carriers to defend and indemnify it as against the underlying claims though there are no allegations that any of the underlying matters have gone to judgment, presumably due to the stay resulting from this Chapter 11 proceeding, though the status of the suits is not alleged.

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.[7]

The Third 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." (Second Adversarial Complaint, ¶¶ 27-30.)

As noted in CIGA's request for Judicial Notice, on March 11, 2021, Commercial Union was deemed insolvent and order liquidated on March 11, 2021, thus triggering CIGA's involvement under California Insurance Code Article 14.2. This should have also resulted in a stay of the lawsuits then pending and which Commercial Union was allegedly defending, for at least 60 days though subject to extension. (See California Insurance Code section 1063.6.)

The Liquidator of Bedivere Insurance Company, the corporate successor to Commercial Union, set December 31, 2021, as the last date for submission of claims to the Estate of Bedivere Insurance Company. Thus, under California law, the rights and liabilities of the insurer, its insureds and other interested parties are fixed as of that date. (See Cal. Ins. Code section 1019.)

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

CIGA is a statutory entity created by the California Legislature by way of the enactment of

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[6] . The operative dates of the various policies do not appear to cover all years where the alleged abuse may have occurred given the dates of abuse set forth in Exhibit A.

[7] Presumably as RCBO is contending this is a "core" matter and thus within the Bankruptcy and the District Courts jurisdiction under 28 USC §1334, it felt no need to alleged citizenship of the other defendant carriers.

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. to certain specifically defined and limited "covered claims." As such, unlike the other insurer defendants, it is not sufficient to allege that the underlying claims are covered by the relevant insurance policy. To state a claim against CIGA, the Third Adversary Complaint must allege a "covered claim" under Article 14.2, California Insurance Code Section 1063, et seq. In *Isaacson v. California Insurance Guarantee Association, supra*, 44 Cal. 3rd at 784, the California Supreme Court noted that:

> ""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)

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, 26 Cal.Rptr.3d 845 (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, among other things:

1. Assume the contractual obligations of the insolvent insurer, see Section 5 herein.
2. "Covered claims" require that the claim be presented to CIGA or the liquidator before the last date fixed in the liquidation proceeding, here December 31, 2021, see Section 7 herein.
3. Even those claims that otherwise may be "covered claims," do not include claims where there is any other insurance is available to pay those same claims, see Section 8 herein.[8]

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 the events necessary to create a "covered claim" have occurred. Thus, at a minimum, RCBO must allege that all the requirements for a "covered claim" as to CIGA have been satisfied to be able to maintain any action against CIGA. 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 extent it is covered by any other insurance of a class covered by this article available to the claimant

[8] Further, no prior judgment or any agreements between the insured and third parties are binding on CIGA without CIGA's consent. (See California Insurance Code section 1063.2 (g).)

or insured." (Ins. Code, § 1063.1, subd. (c)(9)(A).)

Nonetheless, the Third 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)), in order to state a claim against CIGA, the Third Adversarial Complaint must state a claim that qualifies as a "covered claim" as defined in Insurance Code §1063.1(c). Absent that, there simply is no claim against defendant CIGA. In essence, since RCBO opened the door as to CIGA's obligations, it needs to fill in the blanks sufficient to show what claims, in light of the prior pleadings, qualify as "covered claims."

5. THE FIRST CAUSE OF ACTION FAILS TO ALLEGE FACTS SHOWING A BASIS FOR DECARATORY RELIEF AS TO CIGA

In this case, RCBO seeks coverage under the Commercial Union policies alleged in Paragraph 9 of the Third Adversarial Complaint, while this may be enough to assert a claim against the other defendant insurers, it is not sufficient to state a claim against CIGA. Even if one or more of the underlying claims fall within the coverage of the now insolvent Commercial Union policies, that alone, is not sufficient 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 Third 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. (Third Adversarial Complaint, ¶9.) 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 or 1063.2. Indeed, whether the insolvent insurer accepts the defense prior to its insolvency is not even a requirement of the "covered claim." And such prior decisions by the now insolvent insurer are not binding on CIGA. (California Insurance Code section 1063.2(g) and *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.) Said actions simply have no bearing on CIGA's statutory obligations. They do not compel the conclusion that just because Commercial Union was defending some actions prior to Marh 11, 2021, that transforms said claims into "covered claims" in the abstract.

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. 3d 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 for declaratory relief.

6. THE THIRD CAUSE OF ACTION FAILS TO ALLEGE FACTS SHOWING CIGA HAS VIOLATED ANY STATUTORY OBLIGATIONS AND FAILS TO STATE A CLAIM AGAINST CIGA

The third cause of action of the Third Adversary Complaint is asserted against CIGA only for violation of its statutory obligations. As noted above, the requirement for CIGA to have a statutory obligation to pay any claim is that the claim qualify as a "covered claim" as defined in Article 14.2. To the extent here relevant, this requires a showing that the claim falls within the policy of the insolvent insurer (Cal. Ins. Code §1063.1(c)(1)(A).) Second, that there is no other insurance available to the insured or the claimants for the claims. (Cal. Ins. Code §1063.1(9)(A).) Lastly, the RCBO timely submitted POC's in the Commercial Union liquidation proceeding . (Cal.

Ins. Code §1063.1(c)(1)(C).)

Here, the Third Adversarial Complaint fails in each regard. There are no allegations as to the scope of the Commercial Union policies or what they cover or any limitations. There are no allegations that none of the other policies, primary, excess or umbrella, provide coverage for the claims in whole or in part or the extent to which such coverage exists, and no allegations as to the timely filing of POC's in the Commercial Union liquidation proceeding.

7. PLAINTIFF HAS FAILED TO ALLEGE THAT ITS CLAIMS FOR COVERAGE WERE TIMELY AS TO REQUIREMENT OF CAL. INS. CODE §1063.1(c)(1)(C)

Based on the prior pleadings and judicial submissions of RCBO, of the 198 claims listed in Paragraph 9 of the Third Adversarial Complaint, at most, maybe 24 or so appear to have been submitted to Commercial Union, its Liquidator or to CIGA on or before December 31, 2021 liquidation deadline [Docket no. 136 and the 27 exhibits thereto, Docket nos. 136-1 to 136-27] notwithstanding the newly added and inconsistent blanket allegation that "RCBO submitted a timely proof of claim to CIGA regarding the applicable Suits" [Docket no. 163, paragraph 40]. That leaves 174 claims where are no allegations or information as to compliance with the POC requirement of California Insurance Code §1063.1(c)(1)(C).

A. Insufficient Allegations of Tenders to Commercial Union.

Seeking to avoid, if not obfuscate, the prior litigation history with CIGA, RCBO now contends that it tendered the 198 matters to Commercial Union by claiming at various times it tendered the matters to its broker, AJG who thereafter sent the matters one to Commercial Union, OneBeacon, which was a successor to Commercial Union, and/or Armour Risk though there are no allegations how the latter entity fits in as to the claim filing requirement of California Insurance Code section 1063.1(c)(1)(C) as that statute does not authorize filing of claims with brokers or agents.

The first problem is that the alleged tender of claims to AJG is of no consequence as AJG is the agent of RCBO, not the agent or designated agent for Commercial Union for notice, nor are there any allegations that the Liquidator for Commercial Union designated AJG as an entity to which claims may be submitted. AJG as RCBO's broker is the agent of RCBO not Commercial

Union. (See Third Adversary Complaint, paragraph 28; *Carlton v. St. Paul Mercury Ins. Co*. (1994) 30 Cal.App.4th 1450, 1457, 36 Cal.Rptr.2nd 29 and Cal. Ins. Cod §§31 and 33.) Further, RCBO fails to acknowledge that it previously admitted that it submitted, at most, 27 POC's by the required December 31, 2021 deadline.

Second, while Exhibit A does contain a column purporting to show some kind of an alleged notice of some of the involved claims, the information provided does not establish what information was provided or that adequate information was allegedly sent to a proper entity designated to accept notice. Exhibit A leaves it open to conjecture if said notices sufficed under the Commercial Union policies or, whether such tenders were sent to CIGA or the Liquidator's offices. Of course, for claims submitted after December 31, 2021, last date set in the liquidation proceeding, they would not qualify as "covered claims" as to CIGA, even if submitted to the Liquidator. (*HCM Healthcare,* 187 Cal.App.4th 1317, 1324–1325, 115 Cal.Rptr.3d 185, 191 (2010) holding the enforcement of the claim filing deadline under Insurance Code section 1063.1, subdivision (c)(1)(C) applies even where the insured is unaware of the claim until after the POC deadline has passed.)

B. The Is No Allegation that Proper Proofs of Claims Have Been Timely Submitted Under Article 14.2

Pursuant to California Insurance Code section 1063.1, subdivision (c)(1)(C), 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" 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 December 31, 2021. (Ex. 3 to the Request for Judicial Notice.) Thus, to allege a "covered claim" against CIGA, the Third Adversarial Complaint must allege that RCBO's claims with respect to each of the Underlying Actions was presented on or before December 31, 2021.

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:

* * *

(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.

In *HCM Healthcare, Inc. v. California Ins. Guarantee Assn.* (2010) 187 Cal.App.4th 1317 [115 Cal.Rptr.3d 185], *as modified (Sept. 28, 2010),* the Court specifically addressed the meaning and effect of California Insurance Code section 1063.1, subdivision (c)(1)(C). In that case, HCM was insured under a policy issued by the insolvent Legion Insurance Company that was liquidated in Pennsylvania. June 30, 2005 was set as the last date to submit proofs of claim in the Legion Liquidation.

In April 2005, the family of Lupe Barela, a former resident of one of HCM's nursing homes, sued HCM and others for elder abuse that Barela allegedly suffered at HCM's facility. HCM tendered the Barela claim to CIGA on October 20, 2005 under Legion's policy. More than two months later on December 23, 2005, appellants signed and later submitted to Legion's Pennsylvania liquidator a POC for the Barela suit.

In November 2005, after the POC deadline had passed, the family of Carl Fulsom, another former resident of one of HCM's nursing homes, sued HCM and others for elder abuse, alleging Fulsom suffered personal injuries while living at HCM's facility. On November 21, 2005, HCM notified CIGA of the Fulsom lawsuit, and on February 6, 2006, appellants signed and later submitted to Legion's liquidator a proof of claim for the Fulsom suit.

HCM contended their claims were timely because the June 30, 2005 deadline did not apply to them. HCM noted that the Pennsylvania liquidation statutes specifically allowed late filing of a claim for good cause. HCM argued that there was clearly good cause as the Fulsom suit was not even filed until after the claim filing deadline had passed, and, in any event, HCM's principal did not recall receiving any notice of the Legion liquidation or a POC form until after the claim filing deadline had expired.

However, the *HCM* Court held that HCM could cite no authority that Pennsylvania's "good cause" statute "trumps" California's statutory requirement that a policyholder must file its claim "on or before the last date fixed for the filing of claims in the domiciliary liquidating proceedings."

(*HCM, supra,* 187 Cal.App.4th at 1322 [115 Cal.Rptr.3d at 189].) The Court noted that the differences between the California and Pennsylvania statutes necessarily exemplify that it is the California statute that must be honored. (*Id*., f.n. 1.) As such, the *HCM* Court upheld CIGA denial of the HCM claims holding "…California reasonably may enforce a different deadline for the processing of claims with CIGA than a liquidating jurisdiction might apply in deciding whether as a matter of equity and discretion to process claims that were not timely filed in the foreign jurisdiction." (*HCM, supra,* 187 Cal.App.4th at 1324 [115 Cal.Rptr.3d at 191].)

The *HCM* decision establishes that in order for a claim to qualify as a "covered claim" for CIGA's purposes, the claim must be presented to CIGA or the liquidator on or before the "last date" fixed for the filing of claims (or more commonly referred to as the "bar date") established in the domiciliary liquidation proceeding. Even more significantly, it establishes a claim that is presented late for "good cause" (e.g., the claim was not asserted against the insured until after the bar date) still does not qualify as a "covered claim" even if the claim may be "deemed" timely under the liquidation law. The court acknowledged that the fact that a claim may be accepted by the liquidator under discretionary authority granted by the liquidating state does not affect whether the claim qualifies as a "covered claim" for CIGA's purposes under California law.

Although the Third Amended Complaint added a new the blanket allegation that "RCBO submitted a timely proof of claim to CIGA regarding the applicable Suits" [Docket no. 163, paragraph 40], in so doing, RCBO ignored its own prior pleading and its prior litigation position. RCBO is attempting to plead away the Proof of Claims issues under California Insurance Code section 1063.1(c)(1)(C) raised by CIGA in its prior Motion to Dismiss [Docket no. 63] and litigated between RCBO and CIGA in which RCBO submitted to the Court proofs of claim [Docket nos. 136-1 to 136-27] for, at most, only 24 named claims, not 198 claims, as being timely filed, and thus, arguably falling within the possible scope of CIGA's obligations to compensate as "covered claims" under Article 14.2.

Further, the 24 POC forms attached to the Opposition of RCBO [Docket number 136] to CIGA's Motion to Dismiss [Docket number 63] only provide notice of claims for attorney fees as to the noted matters identified on the attached invoices. Moreover, none of the matters referenced in

Exhibits 1 through 24 to the Opposition [Docket numbers 136-1 to 136-24] were in litigation as of the time of those "tenders" as none of the POC forms provide any identifying information as to any pending litigation.[9]

Out of the over 400 Underlying Claims, RCBO admitted that it only submitted 24 POC forms that were submitted to this Court as part of RCBO's Opposition, while these POC forms were timely, they only set forth claims for attorneys' fees, and do not set forth any sexual abuse claims. Given the allegations of the Third Adversarial Complaint, the RCBO has failed to allege any "covered claims" as against CIGA, and even if the 24 POC forms attached as exhibits to the Opposition of RCBO [Docket number 136] to CIGA's Motion to Dismiss [Docket number 63] are incorporated into the Third Adversarial Complaint and liberally construed in favor of the RCBO, at most, RCBO has alleged 24 claims for which the RCBO complied with the filing requirement of Insurance Code section 1063.1(c)(1)(C).

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 again failed to allege any facts

[9] This is interesting in that as to the original Adversarial Complaint in paragraph 11 it was alleged that CU was defending several of the involved lawsuits but stopped after liquidation, that date being March 11, 2021. Exhibits 1 to 24 of the Opposition do not list any such litigation. Exhibit A to the Amended Adversarial Complaint does not list filing dates but as noted in the exhibits to the prior Opposition of RCBO [Docket number 136] only at most 24 claims would have been pending as of March 11, 2021, though that number may be an overstatement.

in the Third Adversarial Complaint to establish that it has exhausted all other insurance available for the Underlying Actions.

RCBO has alleged that there are numerous other insurance policies potentially applicable to the Underlying Actions. Further, since the Third 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 Third Adversarial Complaint fails to state a claim against defendant CIGA by reason that there may be other insurance available to RCBO or the claimants for their claims.

9. THE ABSENSE OF FACTS ALLEGING ANY "COVERED CLAIMS" REQUIRES FURTHER STATEMENT UNDER FRCP, RULE 12 (e)

As noted in Sections 5, 6, 7 and 8 hereof, the allegations of the Third 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.

The Third Adversarial Complaint does not try to explain the basis for the ignoring the litigation position RCBO has taken with regard to the 24 claims that were at least submitted via POC forms filed prior to the liquidation deadline, assuming the information therein is otherwise adequate to satisfy the POC requirement.

Also, since the POC claim forms for Exhibit 1 through 24 of the Opposition do not relate to anything other than a claim for attorney fees as to those claims, and only to the extent of the listed attorney fees and costs, there should be no other claims that can be deemed timely presented without more factual context.

Such "'further statement" would be needed to clarify exactly how Plaintiff seeks to hold CIGA responsible to it as to each of the 198 Underlying Actions that RCBO now seeks to have CIGA respond to as "covered claims." 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 the foregoing reasons, Defendant CIGA's motion to dismiss for failure to state a claim should be granted as to the First and Third Causes of action of the Third Adversarial Complaint under Fed. R. Civ. P. (b)(6).

As to the alternative motion, due to the clearly inconsistent pleadings and positions taken by RCBO, CIGA is clearly entitled to a more definitive statement of the basis that RCBO is claiming that the claims asserted against CIGA qualify as "covered claims."

Thus, at a minimum the Plaintiff should be required to file an additional 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).[10] The filing of proper Proof of Claims, which RCBO has obfuscated by its pleadings, offers CIGA a bright line test as to those claims that may otherwise qualify as "covered claims" under California Insurance Code, Article 14.2.

Dated: January 26, 2024

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

By: _____

By: Michael D. Compean
Frederick G. Hall

Attorneys for Defendant CALIFORNIA INSURANCE GUARANTEE ASSOCIATION

[10] 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.