

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

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In the Matter of

Index No.: 450500/16

the Liquidation of

(Hon. Carol R. Edmead)

HEALTH REPUBLIC INSURANCE OF
NEW YORK, CORP.

AFFIRMATION

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David Axinn, an attorney at law duly admitted to practice before the courts of the State of New York, affirms the following:

1. I am the Special Deputy Superintendent of the New York Liquidation Bureau (“NYLB”), and an agent of Adrienne A. Harris, Superintendent of Financial Services of the State of New York in her capacity as Liquidator (“Liquidator”) of Health Republic Insurance of New York, Corp. (“Health Republic”). The NYLB serves as the staff for the Liquidator in the Health Republic proceeding in this Court. I make this affirmation based on my personal involvement in this case, my review of the files maintained by the Liquidator, and conversations I have had with NYLB employees in the ordinary course of business, in support of the Liquidator’s application for (i) entry of an order, substantially in the form annexed hereto as Exhibit A, approving the Release Agreement (the “Release Agreement”) entered into by the Liquidator and the United States; and (ii) for such other and further relief the Court deems just and proper.

2. 31 U.S.C. § 3713 (the “Federal Priority Statute”), provides in relevant part:

(a) (1) A claim of the United States Government shall be paid first when –

- A. a person indebted to the Government is insolvent and –
 - i. the debtor without enough property to pay all debts makes a voluntary assignment of property;
 - ii. property of the debtor, if absent, is attached; or
 - iii. an act of bankruptcy is committed....

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

Id. (emphasis added).

3. The federal government has applied this statute to assert priority of federal claims over other creditors in the liquidation of insurance companies under state insolvency schemes. In United States v. Fabe, 508 U.S. 491 (1993), the U.S. Supreme Court considered whether the Federal Priority Statute preempted an Ohio insurance insolvency statute that designated federal claims as the fifth priority class behind other classes of creditors. Although federal law would ordinarily preempt state law in cases of direct conflict under the Supremacy Clause (U.S. Const. Art. VI ¶2), the Court held that under certain circumstances, state law may reverse preempt federal law under Section 2(b) the McCarran Ferguson Act, 15 U.S.C. § 1012¹ when the state regulates the “business of insurance.” Id. at 500-01. The Fabe Court developed a four-part test to determine whether the federal law is precluded, as follows: (1) the federal statute is not precluded if the statute specifically relates to the business of insurance under 15 U.S.C. § 1012(b); (2) the federal statute is not precluded unless the state law is enacted for the purpose of regulating the business of insurance; (3) the federal statute is not precluded if the state activities which brought about the challenge to federal law are not the business of insurance; and (4) the federal statute will be precluded only if it invalidates, impairs or supersedes the state law regulating insurance. 508 U.S. at 501-02. In examining the Ohio insolvency statute, the Fabe Court held the Ohio statute precluded the Federal Priority Statute, but only with regard to the payment of administrative claims

¹ Section 2(b) of the McCarran-Ferguson Act states: “No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.”

and claims under insurance policies. Id. at 508-09. The Court reasoned that to the extent a state priority statute protects policyholders by prioritizing their claims, the state is regulating the business of insurance. The protection of other creditors, however, is subject to preemption under the Federal Priority Statute. In sum, Fabe established the rule that in insurance insolvency proceedings, a state insolvency scheme may give priority to administrative² and policy claims, but the federal government has priority over all other claims. Id.

4. New York Insurance Law § 7434 complies with the Federal Priority Statute and Fabe by establishing administrative claims of the receiver as Class One, policy claims as Class Two, and claims of the federal government as Class Three.³ Insurance Law § 7434(a)(1). All other classes of creditors are below federal claims.

5. In the aftermath of Fabe, the federal government established a process by which state insurance receivers may apply for a release of potential federal claims in the receivership. The process is designed to provide assurance to state receivers that they can make distributions and close estates without the threat of being held personally liable under the Federal Priority Statute for unknown or unasserted claims of the federal government. 31 U.S.C. § 3713(b). The federal waiver process is particularly helpful in cases, such as Health Republic, where the Liquidator has sufficient assets to make distributions below Class Three.

6. On April 3, 2018, the Liquidator submitted a request to the federal government for a partial release (“Partial Release”) of Health Republic to permit the Liquidator to make a distribution of up to 10 percent of Health Republic’s assets on allowed Class Two claims. At the

² The Supreme Court also held that the preference given by the Ohio priority scheme to the receiver’s administrative expenses are not preempted by the Federal Priority Statute as such expenses are “reasonably necessary to further the goal of protecting policyholders.” Id. at 509.

³ To the extent the federal government were to assert a claim under a policy, such claim would be classified as a Class Two claim under Insurance Law § 7432(a)(1)(ii).

time of the request, the Liquidator's action against the federal government, *Maria T. Vullo (in her capacity as Liquidator of Health Republic Insurance of New York, Corp.) v. United States of America*, No. 17-1185C, was pending in the Federal Court of Claims (the "Federal Lawsuit"). In the Federal Lawsuit, the Liquidator sought hundreds of millions of dollars in monies due Health Republic under the Patient Protection and Affordable Care Act ("ACA").

7. On April 9, 2021, this Court entered an order, a copy of which is annexed hereto as Exhibit B, approving, among other things, a stipulation for entry of final judgment between the Liquidator and the United States requiring the federal government to pay the Liquidator a net balance of \$220,838,583.33 to resolve the Federal Lawsuit. As part of the resolution, the Court allowed the federal government's remaining claim in the liquidation proceeding for a solvency loan ("Solvency Loan") made to Health Republic as a Class Eight claim under Insurance Law § 7434(a)(1)(viii) in the amount of \$246,976,417.52. (Ex. B at 1).

8. As a result of the Federal Lawsuit resolution and the \$220.8 million payment to the Health Republic estate, the Liquidator projected that there would be sufficient assets to make distributions to reach Class Six General Creditor claims in whole or in part. On or around May 17, 2021, the Liquidator submitted a supplemental request to the federal government for a full release to enable the Liquidator to distribute all of the assets on allowed claims and close the estate. To this end, the Liquidator and the federal government finalized and executed a Release Agreement, dated November 2, 2021, annexed hereto as Exhibit C (without exhibits). According to the recitals, the Release Agreement "may be submitted by the Liquidator for the approval of [the Court] supervising the liquidation of Health Republic." (Ex. C at Section II, ¶ 8). Further, the Release Agreement provides that it "shall not be effective unless and until it is approved by

the Court, if approval is required, and the time for appeals of any such approval has expired.” (Ex. C at Section III, ¶ 7).

9. The Liquidator views the Release Agreement as requiring Court approval because it contains certain terms potentially affecting the timing of distributions, which may have a material impact on the administration of the estate. Specifically, the Release Agreement provides:

This Release Agreement is contingent upon payment by Health Republic to the United States of the Solvency Loan Claim to the extent any funds are available to pay Class Eight claims under § 7434(a)(1) of the New York Insurance Law. This Release Agreement will be effective only after the United States has received such payment.”

Ex. C at Section III, ¶ 2; emphasis added.

10. Because the Solvency Loan was allowed as a Class Eight claim, it will not be eligible to receive a distribution under Insurance Law § 7434(a)(1) unless and until every claim in each class above Class Eight is paid in full. The net result is that the Release Agreement will not be effective until the Court approves the Liquidator’s final closing report, and the Liquidator pays final distributions to all eligible classes. At that time, the Liquidator, subject to Court approval, will finally determine the amount of assets and which classes will receive full or partial distributions. Once final distributions are made, the Release Agreement will become effective.

11. The Court’s approval of the Release Agreement is in the best interests of the creditors. Although the Release Agreement is contingent upon the closing of the estate and payment of available funds to Class Eight, it serves the interests of all creditors by providing a path forward by which the Liquidator may resolve remaining claims, pay final distributions, and close the estate. Without approval of the Release Agreement, the Liquidator would have no direct path to obtaining a full release from the federal government, and the uncertainty concerning

potential latent or unknown federal claims could add significant delays to the closing of the Health Republic estate.

12. The Liquidator proposes to give notice of the return date of the accompanying Order to Show Cause by (i) publishing a notice (“Notice”), in substantially the form of annexed as Exhibit D, in the *New York Post*, or a publication of similar circulation, at least ten (10) before the return date of the motion and (ii) by posting the Order to Show to Cause and its supporting papers on the Legal and Estate Notices section of the website maintained by the NYLB, www.nylb.org, and the Health Republic Internet web page at <http://www.healthrepublicny.org/>, within five (5) days of the entered Order to Show Cause being posted to the New York State Courts Electronic Filing (NYSCEF) system.

13. The Liquidator respectfully requests that this Court make the return date of the Order to Show Cause at least 21 days after it is filed to provide the Liquidator sufficient time to satisfy the proposed notice requirements.

14. No previous application for the relief sought herein has been made to any court of competent jurisdiction.

WHEREFORE, it is respectfully requested that this Court enter an order substantially in the form of the proposed order annexed hereto as Exhibit A, approving the Release Agreement entered into between the Liquidator and the federal government, and (ii) for such other and further relief the Court deems just and proper.

Dated: New York, New York
March 1, 2022



David Axinn

EXHIBIT A

At IAS Part 35 of the Supreme Court of the State of New York, County of New York, at the courthouse, 60 Centre Street, in the County, City and State of New York, on the ____ day of _____, 2022.

P R E S E N T :

HON. CAROL R. EDMOND, J.S.C.

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In the Matter of

Index No. 450500/2016

the Liquidation of

ORDER

HEALTH REPUBLIC INSURANCE OF NEW YORK, CORP.

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The Superintendent of Financial Services of the State of New York as liquidator (“Liquidator”) of Health Republic Insurance of New York, Corp. having moved this Court for an order (1) approving the Release Agreement (“Release Agreement”) between the Liquidator and the United States; and (2) for such other and further relief the Court deems just and proper.

NOW, upon reading the affirmation of David Axinn, Special Deputy Superintendent of the New York Liquidation Bureau and agent of the Liquidator; and after due deliberation, it is:

ORDERED, that the application to approve the Release Agreement is granted.

E N T E R

J. S. C.

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

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

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MARIA VULLO,

Plaintiff,

- v -

HEALTH REPUBLIC INSURANCE OF NEW YORK CORP.,

Defendant.

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INDEX NO. 450500/2016
MOTION DATE 02/09/2021
MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 174

were read on this motion to/for MISCELLANEOUS.

The Superintendent of Financial Services of the State of New York as liquidator (“Liquidator”) of Health Republic Insurance of New York, Corp. (“Health Republic”) having moved this Court for an order (1) approving a Stipulation For Entry of Final Judgment (“Stipulation”) between the Liquidator and the United States of America (the “United States”) Finally resolving the Liquidator’s claims against the United States in a lawsuit entitled, Linda A. Lacewell, in her capacity as Liquidator of Health Republic Insurance of New York, Corp. v. The United States of America, pending in the United States Court of Federal Claims(No. 17-1185 C); (2) allowing, as recommended by the Liquidator and as agreed in the Stipulation, the claim of the United States for a Solvency Loan made to Health Republic under the Patient Protection and Affordable Care Act as a Class Eight claim under Section 7434 of the New York Insurance Law (“Insurance Law”); (3) permitting, as contemplated by the Health Republic order of liquidation, entered May 11, 2016 (“Liquidation Order”), the submission of additional claims to the Liquidator other than Policy Claims, as defined in the Liquidation Order, for a period of four months from

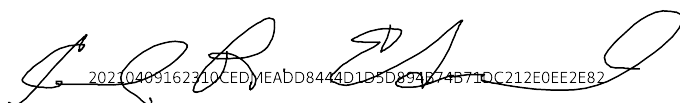
the date of entry of the order approving this application, and thereafter barring all further claims against Health Republic.

NOW, upon reading the affirmation of John Pearson Kelly, General Counsel of the New York Liquidation Bureau, and the supporting Affidavit of Ronald H. Labenski, CFO of the New York Liquidation Bureau, and after due deliberation, it is:

ORDERED, that the application to approve the Stipulation is granted and the Liquidator is authorized to enter into the Stipulation and take such actions as may be necessary to implement the terms of the Stipulation; and it is further

ORDERED, that the Liquidator's recommendation to allow the claim of the United States, as set forth in the Stipulation, is granted and the United States shall have an allowed Class Eight claim under Insurance Law Section 7434(a)(1) in the amount of \$246,975,417.52; and it is further

ORDERED, that additional claims other than Policy Claims, as defined in the Liquidation Order, may be submitted to the Liquidator for a period of four months from the date of entry of this Order, and thereafter all further claims against Health Republic are barred.


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4/9/2021
DATE

CAROL R. EDMED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

EXHIBIT C

RELEASE AGREEMENT

This Release Agreement is being entered into by the United States and David Axinn, the Special Deputy Superintendent of the New York Liquidation Bureau and Agent of Adrienne A. Harris, Acting Superintendent of Financial Services of the State of New York, as Liquidator (“Liquidator”) of Health Republic Insurance of New York, Corp. (“Health Republic”).

I. PARTIES

The parties to this Release Agreement are the United States and the Liquidator (collectively, the “Parties”).

II. RECITALS

1. The Judgment dated April 23, 2021 (Attachment A), U.S. Court of Federal Claims, Case 1:17-cv-01185-ZNS, resolved certain amounts due between the United States and Health Republic arising under the programs created and loans authorized by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), 124 Stat. 119, and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (2010), 124 Stat. 1029 (collectively, the “ACA”).
2. The Judgment stated that Health Republic is entitled to payment from the United States in the amount of \$438,368,502.32 under the ACA risk corridors program for benefit years 2014 and 2015 and the United States is entitled to payment from Health Republic in the amount of \$217,529,918.99, for amounts owed under the ACA risk adjustment program, risk adjustment user fees, the start-up loan, the CSR program, and for associated accrued interest.
3. Under the Judgment, the \$217,529,918.99 payment due from Health Republic to the United States was paid through deduction from the \$438,368,502.32 owed by the United States

to Health Republic. The net amount paid by the United States to Health Republic was \$220,838,583.33.

4. The Parties agree that the United States also has a \$246,976,417.52 Class Eight claim under § 7434(a)(1) of the New York Insurance Law against Health Republic pursuant to 42 U.S.C. § 18042 for a Solvency Loan given by the United States to Health Republic (“Solvency Loan Claim”).

5. This Release Agreement is contingent upon payment by Health Republic to the United States of the Solvency Loan Claim to the extent funds are available to pay Class Eight claims under § 7434(a)(1) of the New York Insurance Law. This Release Agreement will be effective only after the United States has received such payment.

6. The Parties do not intend this Release Agreement to release any possible claims the United States may have or may acquire against anyone for tax, fraud (including, but not limited to, securities and pension benefit fraud), criminal liabilities, or reimbursement liabilities and penalties arising under 42 U.S.C. § 1395y(b), or any liability under 31 U.S.C. § 3713(b) arising from such claims.

7. Except for the express terms of this Release Agreement, the Parties do not intend to create, enhance, diminish, defeat or otherwise affect such claims, if any, as the United States may have against the Liquidator or the Health Republic estate.

8. The Parties understand that this Release Agreement may be submitted by the Liquidator for the approval of the Supreme Court of the State of New York, New York County (“Court”), which is supervising the liquidation of Health Republic.

9. The United States enters into this Release Agreement in reliance upon the information contained in the Liquidator's supplemental affidavit, dated May 17, 2021, attached as Exhibit B to this Release Agreement.

III. AGREEMENT

1. The United States has a \$246,976,417.52 Class Eight claim, under § 7434(a)(1) of the New York Insurance Law, against Health Republic pursuant to 42 U.S.C. § 18042 for a Solvency Loan given by the United States to Health Republic.

2. This Release Agreement is contingent upon payment by Health Republic to the United States of the Solvency Loan Claim to the extent any funds are available to pay Class Eight claims under § 7434(a)(1) of the New York Insurance Law. This Release Agreement will be effective only after the United States has received such payment.

3. Subject to satisfaction of the conditions in paragraph III.1-4, and the exclusions in paragraph III.6, the United States hereby releases and discharges the Liquidator and the Health Republic estate from any and all liability under 31 U.S.C. § 3713(b) in connection with the Health Republic liquidation.

4. Notwithstanding any other provision to this Release Agreement, the United States does not release the Liquidator and the Health Republic estate for:

(a) any claim arising under any criminal law or any liability under 31 U.S.C.

§ 3713(b) arising from such claim;

(b) any criminal, civil, or administrative claim, right or defense arising under Title 26, U.S. Code (Internal Revenue Code), including but not limited to the IRS Claim, or any liability under 31 U.S.C. § 3713(b) arising from such claims;

(c) any claim or action arising under 31 U.S.C. § 3729 et seq. (False Claims Act), 31 U.S.C. § 3801 et seq. (Program Frauds Civil Remedies Act), 42 U.S.C. § 1320a-7a (Civil Monetary Penalties statute), 29 U.S.C. Ch. 18 (Employee Retirement Income Security Program), or 42 U.S.C. § 1395y(b) (Medicare as Secondary Payer) or any liability under 31 U.S.C. § 3713(b) arising from such claim;

(d) any claim arising under any other statute or common law principle governing pension benefit, fraudulent conveyance or any other form of fraud or any liability under 31 U.S.C. § 3713(b) arising from such claim;

(e) any obligation created by or reflected in this Release Agreement.

5. Under the terms of this Release Agreement, the United States or its duly authorized representative shall have the right, prior to the destruction of Health Republic's records in accordance with the orders of the Court, during normal business hours, on a date and at a location agreed upon by the Parties, to inspect, and if it wishes, to copy at its own expense, such documents, books, and records of the estate and of the Liquidator, as shall be reasonably necessary to determine the existence and amount of claims the United States may have against the Health Republic estate, or to determine Health Republic's compliance with the terms of this Release Agreement. No documents, books, or records of the estate or the Liquidator may be destroyed unless notice is given to the United States of any motion filed with the Court requesting approval of additional destruction. If the Liquidator does not request approval from

the Court, he or she must obtain prior written authorization from the United States before destruction of any documents, books, or records of the estate or the Liquidator.

6. Except for the express undertakings of the Liquidator and the United States in this Release Agreement, nothing in this Release Agreement shall be construed:

(a) to establish or perfect any claims, substantive rights, or procedural rights of the United States;

(b) to limit, restrict, diminish, or defeat any claims, substantive rights, or procedural rights of the United States;

(c) to establish or perfect any objections or defenses, substantive rights, or procedural rights of the Liquidator; or

(d) to limit, restrict, diminish, or defeat any defenses, substantive rights, or procedural rights of the Liquidator.

7. The Parties agree that this Release Agreement shall not be effective unless and until it is approved by the Court, if approval is required, and the time for appeals of any such approval has expired. The Parties further agree to cooperate with each other in seeking prompt approval of this Release Agreement from the Court.

8. This Release Agreement may be executed by the Parties in any number of counterparts, including counterparts transmitted by way of facsimile or email, and each of which shall be deemed to be an original and all of which, collectively, shall be deemed to be one and the same instrument. The Parties agree that an electronic signature alone may substitute for and have the same legal effect as a manual signature.

SHARON
WILLIAMS

Digitally signed by SHARON
WILLIAMS
Date: 2021.10.25 08:44:16
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By: Sharon C. Williams
Trial Attorney
Civil Division, Department of Justice
Attorney for the United States

Dated: November 2, 2021



By: David Axinn
Special Deputy Superintendent of the
New York Liquidation Bureau and
Agent of Adrienne A. Harris, Acting
Superintendent of Financial Services
of the State of New York, as
Liquidator of Health Republic
Insurance of New York, Corp.

EXHIBIT D

**IN THE MATTER OF THE LIQUIDATION OF
HEALTH REPUBLIC INSURANCE OF NEW YORK, CORP.
Supreme Court County of New York
Index No.: 450500/16**

NOTICE

The Superintendent of Financial Services of the State of New York and her successors in office were appointed liquidator (“Liquidator”) of Health Republic Insurance of New York, Corp. (“HRINY”). The Liquidator has, pursuant to New York Insurance Law (“Insurance Law”) Article 74, appointed David Axinn, Special Deputy Superintendent (“Special Deputy”), as her agent to liquidate the business of HRINY. The Special Deputy carries out his duties through the New York Liquidation Bureau (“NYLB”), 180 Maiden Lane, New York, New York 10038. The Liquidator has submitted to the Court an application seeking entry of an order: (1) approving the Release Agreement between the Liquidator and the United States; and (2) for such other and further relief the Court deems just and proper.

A hearing on the application is scheduled for the ____ day of ____, 2022, at ____ M., before the Court at the Courthouse, Part 35 Room 438, 60 Centre Street, New York, New York (“Return Date”). If you wish to object to the application, you must serve a written statement setting forth your objections and all supporting documentation (“Answering Papers”) upon the Liquidator, at least seven (7) days prior to the Return Date, and the original Answering Papers must be e-filed with the Court on or before the Return Date. Service on the Liquidator shall be made by electronic mail or overnight carrier at the following address:

Superintendent of Financial Services of the State of New York as
Liquidator of Health Republic Insurance of New York, Corp.
180 Maiden Lane, 15th Floor
New York, New York 10038
Attention: General Counsel
legal@nylb.org

The application is available for inspection at the HRINY Internet web page at <http://www.healthrepublicny.org/> and the NYLB Internet web page at <http://www.nylb.org/>. In the event of any discrepancy between this notice and the documents submitted to Court, the documents control.

Requests for further information should be directed to the NYLB, Creditor and Ancillary Operations Division, at ReceiverOps@nylb.org.

Dated:

ADRIENNE A. HARRIS
Superintendent of Financial Services of the
State of New York as Liquidator of
Health Republic Insurance of New York,
Corp.