JAMES J. DONELON, COMMISSIONER OF INSURANCE FOR THE STATE OF LOUISIANA IN HIS CAPACITY AS REHABILITATOR OF LOUISIANA HEALTH COOPERATIVE, INC. VERSUS TERRY S. SHILLING, ET AL.	SUIT NO.: 651,069 SECTION: 22 19TH JUDICIAL DISTRICT COURT PARISH OF EAST BATON ROUGE STATE OF LOUISIANA

DEFENDANTS' RESPONSE TO THE RECEIVER'S STATUS REPORT REGARDING RISK CORRIDOR EXPECTATIONS

Defendants Milliman, Inc. ("Milliman"), Group Resources Incorporated ("GRI"), Buck Global LLC, Allied World Specialty Insurance Company a/k/a Darwin National Assurance Company, Atlantic Specialty Insurance Company, Evanston Insurance Company, RSUI Indemnity Company, and Zurich American Insurance Company (collectively, "Defendants") respectfully submit the following Response to the Receiver's Status Report Regarding Risk Corridor Expectations (the "Status Report") that was filed on behalf of Plaintiff James J. Donelon (the "Plaintiff" or "Rehabilitator"), Commissioner of Insurance for the State of Louisiana in His Capacity as Rehabilitator of Louisiana Health Cooperative, Inc. ("LAHC").

I. RECENT DEVELOPMENTS IN THE *HEALTH REPUBLIC* CLASS ACTION UNDERSCORE THE NEED FOR THE REHABILITATOR TO PROVIDE INFORMATION CONCERNING HIS CLAIMS TO DEFENDANTS

Plaintiff's Status Report downplays the significance of recovery in *Health Republic Insurance Company v. U.S.*, No. 16-00259-MMS (Ct. Fed. Cl.) ("*Health Republic*") in order to justify moving ahead with expensive discovery in this case. However, since the Rehabilitator filed his report, the parties in *Health Republic* have taken significant steps towards finalizing the amounts owed to each class member.

A July 10, 2020 status report filed in *Health Republic* (attached as **Exhibit A**) states that the parties have reached an agreement "on the amount of the risk corridors payments owed to each class member with respect to all but three class members." LAHC is among the class members for whom an agreement has been reached. Because the federal government contends that LAHC owes it money, and contends that "those debts be offset against [LAHC's] risk corridors payments… the parties cannot agree on the amount of a stipulated judgment for" LAHC and six other class members. (*Id.*) Those class members are not stuck in limbo, however. Their disputes will not be subject to protracted litigation, as the "parties agree the disputes at issue… could be

resolved through briefing to the Court." (*Id.* at 2). Moreover, the parties will be submitting another "joint status report" this Friday, July 17, "setting forth the remaining legal issues and a short statement of the parties' respective positions on those issues, as well as the parties' positions on the treatment of the disputed subclass's risk corridor claims during the pendency of the subclass's dispute." (*Id.*) Thus, it appears that the parties in *Health Republic* are working expeditiously to resolve the few remaining disputes, and additional clarity on what LAHC is entitled to recoup should be forthcoming.

Defendants learned of these developments in *Health Republic* by searching the docket last week and reviewing the case filings, confirming that the Rehabilitator should be required to provide regular updates and information concerning his efforts to recover monies from the federal government. We respectfully request that the Rehabilitator be ordered to update Defendants and the Court concerning *Health Republic* at least every 30 days, and he should be required to update Defendants and the Court of developments, including court rulings, that directly impact LAHC's claims against the U.S., or the U.S.'s claims against LAHC's estate, within two business days.

Moreover, as the parties discussed with the Court at the June 29, 2020 Motion To Compel hearing, it is imperative that the Rehabilitator produce to the Defendants all of the reports and other filings from the Rehabilitation Action that, *inter alia*, reflect the amounts recovered by, and still owed to, LAHC, purported obligations of the Rehabilitator to third parties, and any details concerning the federal government's claims against LAHC's estate. The Rehabilitator has not committed to providing the requested information from the Rehabilitation Action, and there is no reason for delay.

II. THE FEDERAL GOVERNMENT'S FAILURE TO PAY THE FULL RISK CORRIDOR AMOUNTS OWED TO LAHC DIRECTLY CAUSED LAHC'S INSOLVENCY AND ALLEGED LOSSES

The relevance **to this case** of the Risk Corridor payments and the Rehabilitator's claims against the federal government cannot be overstated. The Rehabilitator's ability to collect the $63 million in Risk Corridor payments owed to LAHC is obviously critical because recouping that money alone could reduce the alleged $91 million in damages claimed in this action by two-thirds or more. Beyond that, however, the Rehabilitator ignores the direct role that the federal government's failure to pay what it owed to LAHC in 2014-15 played in causing LAHC's insolvency and alleged damages. As the *Health Republic* Complaint asserts, LAHC and the other Co-Ops "relied upon the risk corridor program in designing and pricing both their 2014 and 2015

plans, as was the intent of the program." (Complaint, *Health Republic*, ¶ 50 (attached as **Exhibit C**)). Yet in September 2015—well after LAHC had applied for and received federal start-up and solvency loans, issued policies to tens of thousands of new enrollees, and set rates for the 2014 and 2015 plan years—the federal government stated that it would pay only 12.6% of the Risk Corridor amount originally committed to it. (*Id.*, ¶ 16). Developing those facts and pursuing potential claims based on the U.S. government's breaches could further reduce, or even eliminate, the damages the Rehabilitator is claiming against these Defendants, and/or establish that the Defendants were not negligent, the Defendants did not cause any harm to LAHC, and that the U.S. government's breaches constituted an intervening cause of LAHC's losses.

At least one other court—in a case brought by the Kentucky Insurance Commissioner, as liquidator of that state's ACA Co-Op ("KYHC"), that raised virtually identical claims to LAHC's, against many of the same Defendants as here—has examined and made factual findings concerning the direct link between the federal government's failure to make full Risk Corridor payments and the ACA Co-Ops' insolvency and damages. In granting summary judgment dismissing the liquidator's claims against KYHC's directors and officers, the Franklin Circuit Court in *Roof v. Beam Partners, LLC et al.*, held that "the failure of KYHC is not demonstrative of gross negligence or incompetence of these defendants or the other CO-OPS throughout the country that failed; instead, it serves to highlight the necessity of the risk corridor payments in such a high-risk market." (Aug. 3, 2018 Opinion & Order Granting Summary Judgment (the "Kentucky Order"), p. 16) (attached as **Exhibit B**).[1]

In concluding that the federal government, not KYHC's directors, officers, actuaries or other outside vendors, primarily caused KYHC's damages, the Kentucky Court thoroughly examined the purpose behind the Risk Corridor program and determined that it was essential to the Co-Ops' survival. KYHC, like LAHC and the other *sui generis* ACA Co-Ops, were "designed to provide a public service, namely, to be an insurer of last resort under the ACA and to guarantee that all individuals, regardless of health had an opportunity to obtain adequate coverage." (Ex. B, Kentucky Order, p. 21 n.10). Because of their "public service" function, the Co-Ops faced "increased risk" and "massive new costs, as they were required to accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage." (*Id.* at 2). The Co-Ops

[1] The Kentucky Supreme Court is scheduled to hear oral argument on the KYHC's liquidator's appeal of the Kentucky Order on July 21, 2020.

also faced significant risk because they "lacked reliable data to estimate the cost of providing care for the expanded pool of individuals seeking coverage." (*Id.*) Finally, the ACA mandated that the Co-Ops' sole source of initial funding consist of federal start-up and solvency loans that were meant to sustain the Co-Ops until they earned enough premiums to become self-sufficient. (*Id.*)

To counterbalance these limitations and risks, "the ACA created a temporary risk corridor program" that was designed to provide the Co-Ops with a three-year runway to self-sufficiency. (*Id.* at 2). As the Kentucky Court found, the Risk Corridor payments "permitted issuers to lower premiums by not adding a risk premium to account for perceived uncertainties in the 2014 through 2016 markets," and "protect[ed] against uncertainty in rate setting… by limiting the extent of issuer's financial losses and gains." (*Id.* at 2-3). Thus, the Kentucky Court determined that the withholding of Risk Corridor monies was fatal to the Co-Ops:

> Congress created the risk corridor program for the very purpose of alleviating the many risks associated with this [new, post-Affordable Care Act] market, and it was therefore not unreasonable that KYHC relied upon these payments to get them through the risky navigation of uncharted territory, namely, setting rates for thousands of previously uninsured citizens. Congress then did a complete "about face" and changed the rules by eliminating much of the funding for risk corridor payments, paying KYHC and many other CO-OPs a fraction of their requested payments. In fact, as a result of the risk corridor program's failure, only four (4) of the country's original (23) CO-OPs still operate, offering plans in only five (5) states.

Id. at 15-16 (internal citations omitted).

Given the direct causal link between the federal government's breach of its Risk Corridor obligations and the Co-Ops' (and other insurers') losses, the *Health Republic* class, including LAHC, is specifically seeking "consequential damages, special damages, or other damages that result as a consequence of" the federal government's wrongful actions. (Ex. C, Complaint, *Health Republic*, p. 24, ¶ C).[2] While the Rehabilitator did not discuss them, the claims for consequential damages are directly relevant here. For example, LAHC may not owe some or all of the nearly $7.1 million "interest payable," depending on how much interest accrued after the U.S. failed to make the full Risk Corridor payments. (Status Report, p. 6).

[2] Apart from the *Health Republic* class action, other state receivers/liquidators have directly sued the federal government for consequential damages allegedly sustained by their states' respective Co-Ops as a result of the federal government's breach of its payment obligations. *See, e.g., Ommen v. U.S.*, No. 1:17-cv-00957-RAH (Liquidator for Iowa/Nebraska Co-Op); *Richardson v. U.S.*, No. 1:18-cv-01731-MHS (Liquidator for Nevada Co-Op). If the Court so requests, we will promptly provide the Court with any pleadings from these liquidator actions.

These causation and loss causation issues underscore why it is critical that Defendants know everything about the Rehabilitator's case against the federal government, and the government's claims against LAHC, and why it is imperative that the Rehabilitator initially focus its efforts on recovering from the United States rather than singularly focusing on pressing forward with expensive litigation against Defendants in this case.

III. THE FEDERAL GOVERNMENT IS NOT PERMITTED TO SET-OFF THE AMOUNTS LAHC PURPORTEDLY OWES AGAINST THE RISK CORRIDOR AMOUNTS

Because of the direct connection between the Rehabilitator's claims against the U.S. and this case, Defendants and this Court have an interest in ensuring that the Rehabilitator is exhausting all available avenues and arguments to recoup what he can from the federal government. In that regard, the Rehabilitator's contention that "[t]here will have to be negotiations and discussions as to whether [$83.2m owed by LAHC to the federal government] may be offset against the Risk Corridor payment owed to LAHC's Receiver, and if so in what amounts, before the Receiver will see a dime of actual money from its Risk Corridor claim," (Status Report, p. 5), appears to disregard the governing LAHC Rehabilitation Order and Louisiana law.

The Rehabilitation Order precludes any lender from "exercis[ing] any form of set-off, alleged set-off, lien, any form of self-help whatsoever, or refuse to transfer any funds or assets to the Receiver's control without the permission of this Court." (Rehabilitation Order, pp. 4-5). Pointedly, the Rehabilitator has made this precise argument in this proceeding. Furthermore, Louisiana's Rehabilitation, Liquidation and Conservation Act subordinates "claims of the federal government" to the payment of other LAHC creditor claims, including certain administrative and claims-handling costs and certain by LAHC's policyholders, beneficiaries and insureds. La. R.S. 22:2025.

The ACA and its implementing regulations preserve state regulation of health insurer solvency requirements and proceedings relating to financially distressed or insolvent insurers. 42 U.S.C. § 18041(d). The final regulations regarding repayment of Co-Op loans, 45 C.F.R. § 156.520(b), also provide that repayment of Co-Op loans are "[s]ubject to [the Co-Op's] ability to meet State reserve requirements, solvency regulations, or requisite surplus note arrangements." By recognizing and preserving the states' jurisdiction over any insolvency proceeding, the federal

government consented to application of state law in relation to all aspects of the liquidation of an ACA-regulated health insurer, including priority of claimants.[3]

Given the clear prohibition against set-off in the Rehabilitation Order, and the subordination of the federal government's claims pursuant to Louisiana law, the Rehabilitator should be aggressively resisting any wrongful set-off by the federal government. And, once again, this threshold legal issue underscores both the need for the Rehabilitator to produce the Rehabilitation Action filings Defendants requested, and to keep the Court and Defendants closely informed of the efforts to prosecute his claims against the federal government.

Respectfully submitted,

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[3] Other state Insurance Commissioners have made this argument, under their respective states' laws, against the federal government's attempts to set off loan proceeds against Risk Corridor amounts. *See, e.g., Ommen,* First Amended Complaint at ¶¶ 206-41; *Richardson,* Complaint at ¶¶ 118-24, 151-69.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all counsel of record by facsimile, electronic mail, and/or by placing same in the United States mail, postage prepaid, this 15th day of July, 2020.

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