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9 **BEFORE THE INSURANCE COMMISSIONER**
10 **OF THE STATE OF CALIFORNIA**

11 In the Matter of the Appeal of

File AHB-WCA-19-46

12 **PERSONNEL STAFFING GROUP LLC**
13 **dba BARNETT MANAGEMENT,**

**ORDER ADOPTING PROPOSED
DECISION**

14 Appellant,

15 From the Decision of the

16 **PROTECTIVE INSURANCE**
17 **COMPANY,**

18 Respondent.
19

20 This matter came on for hearing before Administrative Law Judge Clarke de Maigret of
21 the Department's Administrative Hearing Bureau on November 16 and 17, 2020. Judge de
22 Maigret closed the record on February 26, 2021.

23 Judge de Maigret signed his Proposed Decision on April 15, 2021, and recommended its
24 adoption as the decision of the Insurance Commissioner. The Commissioner received the
25 Proposed Decision on April 19, 2021 and duly considered the findings and conclusions set forth
26 within the Proposed Decision.

27 Now, therefore, pursuant to the provisions of California Insurance Code section 11737(f),
28 and California Code of Regulations, Title 10, section 2509.69, IT IS SO ORDERED that the

1 attached Proposed Decision is hereby adopted by the Insurance Commissioner as his Decision in
2 the above-entitled matter.

3 This Decision shall become effective 30 days after it is served on the parties unless
4 reconsideration is ordered within that time.

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6 DATED: May 21, 2021

RICARDO LARA
Insurance Commissioner

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8 By: 

9 BRYANT W. HENLEY
Deputy Commissioner & Special Counsel
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**BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal of)
)
PERSONNEL STAFFING GROUP LLC)
dba BARNETT MANAGEMENT,) FILE AHB-WCA-19-46
)
Appellant,)
)
From the Decision of the)
)
PROTECTIVE INSURANCE COMPANY,)
)
)
Respondent.)
_____)

PROPOSED DECISION

Because workers' compensation insurance is mandatory for employers in this state, the Legislature charged the Insurance Commissioner ("Commissioner") with closely scrutinizing insurance plans to protect workers and their employers. To support the Commissioner in carrying out this responsibility, the Insurance Code and related regulations mandate that insurers file the forms they use to provide insurance.

This proceeding arises from Protective Insurance Company's ("Protective") use of unfiled side agreements to supplement policies that Protective issued to Personnel Staffing Group LLC dba Barnett Management ("PSG"). PSG asserts that the side agreements are void

and unenforceable with respect to insured risks in California, because the forms were not filed in accordance with legal requirements. Protective argues that California's filing requirements do not apply to the side agreements and that the agreements should be enforced regardless. Protective also argues that the Commissioner lacks authority to hear and decide this appeal, and that this proceeding is barred by PSG's unclean hands.

For the reasons discussed below, this tribunal concludes that the Commissioner possesses adjudicatory authority over this matter, PSG's appeal is not barred, and Protective's unfiled side agreements are void and unenforceable with respect to California risks.

Issues Presented

1. Did the Collateral Agreement and Amendment No. 1 thereto between the parties, dated as of January 1, 2017 ("Collateral Agreement"),¹ or the General Agreement of Indemnity between the parties, also dated as of January 1, 2017 ("Indemnity Agreement"), constitute an endorsement form and/or ancillary agreement that was required to be filed and approved pursuant to Insurance Code section 11658 and California Code of Regulations, title 10 ("Regulations"), section 2268?²

2. Are the Indemnity Agreement and/or the Collateral Agreement (collectively, "Side Agreements") unenforceable because they were not filed with the Commissioner pursuant to section 11658 and Regulations section 2268?

¹ Protective argues that the Collateral Agreement should not be considered in this proceeding, because it was not properly raised in PSG's appeal notice. (Protective's Post-Hearing Memorandum, filed Feb. 2, 2021 ("Resp. PH Br."), p. 28.) The ALJ disagrees, having determined that the Collateral Agreement is properly within the scope of this appeal for the reasons set forth on pages 6-7 of the January 10, 2020, Order Denying Respondent's Motion to Dismiss Appeal.

² In its appeal notice, PSG also asserted that the Side Agreements constitute *policy* forms. (Exhs. 432-5, 432-9.) But PSG did not address that assertion in its post-hearing briefing, so the ALJ deems the issue to be waived. (Exhibit references containing a dash denote a specific page number. For example, 432-5 indicates the fifth page of Exhibit 432, which is marked as "432-5.")

Procedural Background

PSG submitted to Protective a Complaint and Request for Action, dated August 16, 2019 (“CRA”), requesting that Protective (1) acknowledge that the Side Agreements are void and unenforceable with respect to risks insured in California, and (2) cease and desist from enforcing the Side Agreements with respect to those risks.³ Protective rejected the requests in a letter to PSG, dated September 13, 2019 (“Rejection”).⁴

On September 20, 2019, PSG initiated this proceeding by filing a notice of appeal from Protective’s Rejection with the Department of Insurance’s Administrative Hearing Bureau (“AHB”). AHB issued an Appeal Inception Notice on September 26, 2019, assigning the matter to Administrative Law Judge Clarke de Maigret (the “ALJ”).

On October 8, 2019, Protective filed a Response to and Motion to Dismiss PSG’s Appeal. PSG filed a reply to the motion on January 3, 2020. The ALJ denied the motion in an order dated January 10, 2020.

On October 19, 2019, January 15, 2020, and May 15, 2020, the ALJ conducted unreported telephone status conferences, during which he ordered the parties to address document production issues.

After various discovery requests, objections and responses, Protective filed a Motion to Compel Discovery against PSG on June 5, 2020. Following briefing by both parties, the ALJ denied the motion in an order dated June 23, 2020, which was amended on June 24, 2020.

On June 26, 2020, and August 5, 2020, the ALJ conducted unreported telephone status conferences to discuss pre-hearing scheduling.

In September and October 2020, the parties filed witness declarations in lieu of direct

³ Exh. 431.

⁴ Exh. 432-22.

testimony, as well as proposed hearing exhibits.

On October 15, 2020, PSG filed Objections to and Motion to Strike portions of the declaration of Protective's witness, Patrick Schmiedt. Protective filed an opposition to the motion on November 9, 2020. The ALJ issued an order denying the motion on the same date.

On November 16 and 17, 2020, the ALJ conducted an evidentiary hearing by remote videoconference.⁵ Nicholas P. Roxborough, Esq. and Ryan S. Salsig, Esq. of Roxborough, Pomerance, Nye & Adreani, LLP appeared on PSG's behalf. Michael P. O'Day, Esq. and Aidan McCormack, Esq. of DLA Piper LLP appeared on Protective's behalf.

The ALJ admitted the following documents, which were pre-filed by PSG in lieu of direct testimony: Declaration of Daniel Barnett, including Exhibits A through I thereto; Declaration of Jeff Friedrich, including Exhibits A through F thereto; Declaration of Nicholas Roxborough, including Exhibits A and B thereto; and Declaration of Bohdan Vasilik, together with Exhibits A and B thereto. Cross and redirect examination were conducted of Mr. Friedrich, Mr. Barnett and Mr. Vasilik. The ALJ also admitted the Declaration of Patrick Schmiedt, together with Exhibits A through Z and AA through CC thereto, which were pre-filed by Protective in lieu of direct testimony. Finally, the ALJ admitted the parties' jointly pre-filed Exhibits 1 through 7, PSG's pre-filed Exhibits 200 through 208, and Protective's pre-filed Exhibits 400 through 423 and 425 through 444.

Following the evidentiary hearing, each party filed post-hearing briefs and requests for official notice. In an order dated February 26, 2021, the ALJ granted PSG's official notice request, denied Protective's official notice request, and closed the administrative record.

⁵ See Executive Order N-63-20, issued March 19, 2020, which suspends rights to in-person hearings, due to the COVID-19 pandemic.

Findings of Fact

The ALJ makes the following findings of fact, based on a preponderance of the evidence in the record:⁶

A. The Parties Businesses and the Workers' Compensation Policies

PSG is a Florida limited liability company⁷ that provides staffing and payroll services.⁸ It is based in Illinois⁹ and has operations and employees in more than 40 states, including California.¹⁰

Protective is an insurance company that is incorporated and headquartered in Indiana.¹¹ It is licensed to sell workers' compensation insurance, among other lines.¹² It does business in all 50 states.¹³

Protective issued PSG two workers' compensation policies ("Policies") covering its employees in California and several other states.¹⁴ The first Policy period ran from January 1, 2017 to June 30, 2017, and the second Policy period ran from June 30, 2017 to June 30, 2018.¹⁵ Protective issued PSG no insurance other than workers' compensation insurance.¹⁶

Each Policy consists of a standard-form workers' compensation policy and multiple attached endorsements, including endorsements specifically related to California.¹⁷ Among these

⁶ Unless otherwise noted, the findings apply to all periods at issue in this appeal, regardless of the tense used.

⁷ Transcript of Proceedings of November 16-17, 2020 ("Tr."), 177:6-13. Transcript references indicate the page number and line number, separated by a colon. For example, "177:6-13" refers to page 177, lines 6 through 13.

⁸ Tr. 148:5-15.

⁹ Tr. 144:11-15,

¹⁰ Tr. 125:25—126:1; Declaration of Bohdan Vasilik, dated September 18, 2020 ("Vasilik Decl."), ¶ 6.

¹¹ Declaration of Patrick Schmiedt, dated October 8, 2020 ("Schmiedt Decl."), ¶ 4.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Exhs. 1, 2.

¹⁵ Exhs. 1, 2; Schmiedt Decl., ¶¶ 68, 74.

¹⁶ Tr. 214:3-7.

¹⁷ Exhs. 1, 2.

are California Large Risk Deductible Endorsements,¹⁸ under which PSG agreed to reimburse Protective for deductible amounts up to \$500,000 per claim in exchange for an approximately 84-percent reduction of premium.¹⁹

Most of the premiums and claims under the Policies are attributable to PSG's California operations. The final audited payroll for both Policies was slightly over \$1.1 billion, of which the California payroll constituted about \$678 million.²⁰ As of August 2020, the most recent period in the record, PSG's California employees accounted for 4,450 out of 6,678 total claims under the Policies.²¹ As of that time, the California claims represented nearly 79-percent of the total incurred claim value and 88-percent of outstanding claim reserves.²²

B. The Side Agreements

In late November 2016, just over a month before the first Policy incepted, Protective provided PSG's broker with forms of the Indemnity Agreement and the Collateral Agreement.²³ Protective conditioned its issuance of PSG's insurance on execution of those Side Agreements, explaining that the forms were required for loss sensitive insurance programs because of the inherent credit risk.²⁴ Protective does not require Side Agreement forms to be executed when issuing guaranteed cost insurance.²⁵

In December 2016, Protective submitted a Workers Compensation & Employers Liability proposal to PSG's broker that stated: "Collateral and Indemnity Agreements need to be executed

¹⁸ Exhs. 1-74, 2-89.

¹⁹ Tr. 220:1-19; Exh. 1-11, 1-74, 2-15, 2-89.

²⁰ Vasilik Decl., ¶ 7. Workers' compensation premiums are calculated based on the insured's payroll.

²¹ *Id.* at ¶ 8.

²² *Id.* at ¶¶ 9, 12.

²³ Exh. 403.

²⁴ Tr. 213:18—214:2, 225:11—226:12; Exh. 6; Schmiedt Decl., ¶ 28. Under a loss sensitive arrangement, such as the large deductible plan here, increased claims during a policy period generally raise the insured's cost of insurance for the period. In contrast, under a guaranteed cost arrangement, claims during a policy period do not affect the insured's cost for the period.

²⁵ Tr. 213:5-10.

and returned within 25 days of the Effective Date. If not executed and received, Notice of Cancellation may be sent on the 26th day.”²⁶ Consistent with that statement, the Collateral Agreement provides that “Protective has made it a condition precedent that its exposure under ... deductible provisions of insurance policies ... be at all times adequately collateralized upon the terms and conditions of this agreement[.]”²⁷ The Indemnity Agreement similarly provides that “upon condition that this instrument be executed, Protective has issued or caused to be issued such policy or policies of insurance as [PSG] may require[.]”²⁸

PSG did not immediately sign the Side Agreements.²⁹ It objected that the Collateral Agreement form did not reflect terms the parties had tentatively agreed upon.³⁰ It also objected that the Indemnity Agreement applied mainly to surety bonds—which PSG was not purchasing—and seemed generally inappropriate to workers’ compensation insurance.³¹

The parties negotiated changes to the Collateral Agreement, which were ultimately reflected in Amendment No. 1 to that agreement.³² However, PSG did not seek changes to the Indemnity Agreement, because Protective indicated it was non-negotiable.³³ PSG ultimately signed both Side Agreements in March 2017 after the insurance had incepted, believing that Protective would cancel its coverage if PSG refused.³⁴

Neither Side Agreement form was ever filed with the Commissioner for use in

²⁶ Declaration of Jeff Friedrich, dated Sep. 21, 2020 (“Friedrich Decl.”), ¶ 6, Exh. A.

²⁷ Exh. 3-1.

²⁸ Exh. 5-1.

²⁹ Exhs. 3-4, 5-4.

³⁰ Friedrich Decl., ¶¶ 7, 8.

³¹ *Id.* at ¶ 11.

³² *Id.* at ¶¶ 8 through 11; Exh. 4. For purposes of this proposed decision, the term “Collateral Agreement” refers collectively to the main Collateral Agreement and its Amendment No. 1.

³³ Tr. 98:21—99:15.

³⁴ Tr. 263:3-10; Exhs. 3-4, 4-1, 5-4; Friedrich Decl., ¶ 6. PSG signed the main Collateral Agreement and its Amendment No. 1 simultaneously. (Exhs., 3-4; 4-1.)

California.³⁵ Nor do the underlying filed Policies or endorsements contain any provisions of either Side Agreement.³⁶

1. The Collateral Agreement

The Collateral Agreement primarily concerns the collateral PSG must post in connection with the Policies, and the parties' respective rights and obligations concerning the collateral.³⁷ As relevant here, the Collateral Agreement provides:

[PSG] shall forthwith deposit or cause to be deposited with Protective, as collateral ... TEN MILLION AND 00/100 (\$10,000,000) DOLLARS (hereinafter for convenience called Primary Collateral) as security (a) against any and all liability, losses, costs, damages, attorneys' and counsel fees and disbursements and expenses of whatever kind or nature which Protective may sustain or incur in taking any steps it may deem necessary in making any investigation, in defending or prosecuting any actions, suits or other proceedings which may be brought under or in connection therewith, or in recovering or attempting to recover, salvage or any unpaid bond or filing or insurance premium, or policy deductible, in obtaining or attempting to obtain release from liability, or in enforcing any of the covenants of this Collateral Agreement, and (b) for the performance of every agreement made by [PSG] ... in connection with any such bonds or filings or policies including, but not limited to, General Agreement of Indemnity and any Indemnity Agreement in favor of Protective, and (c) against any unpaid or deferred premiums for insurance provided by or procured through Protective.

... [PSG] shall also deposit or cause to be deposited with Protective, subject to the same terms and conditions as are applicable to the Primary Collateral, additional collateral ... (hereinafter for convenience called Secondary Collateral) having a total value of at least 110% of the aggregate of the reserves set up by [PSG] ... on claims for which Protective is or may be responsible under any such bonds or filings or policies. Whenever there shall be a question as to the adequacy of claim reserves to be established, the determination by Protective shall finally govern....³⁸

³⁵ Declaration of Nicholas Roxborough, dated Sep. 22, 2020 ("Roxborough Decl."), ¶¶ 3, 4.

³⁶ Compare Exhs. 1 and 2 with Exhs. 3 through 5.

³⁷ Exh. 3.

³⁸ *Ibid.*

The Collateral Agreement also authorizes Protective to invest cash collateral and provides that “Protective shall not be responsible for any loss resulting to the Primary or Secondary Collateral from any cause other than the wrongful act or neglect of its officers and employees.”³⁹ The agreement further authorizes Protective to hire one or more investment managers to invest the collateral, and provides that they “shall also not be liable for any loss ... arising out of any investment made ... in accordance with the terms of this Agreement.”⁴⁰

2. The Indemnity Agreement

The Indemnity Agreement primarily concerns PSG’s payment and indemnification obligations in connection with surety bonds that might be issued,⁴¹ even though PSG never purchased any bonds from Protective.⁴² As relevant here, the agreement provides:

2) ...[PSG] shall at all times indemnify and keep indemnified Protective and hold and save it harmless from and against any and all liability, losses, costs, damages, attorneys’ and counsel fees and disbursements, and expenses of whatever kind or nature ... which Protective may sustain or incur in taking steps it may deem necessary ... in enforcing any of the covenants of this agreement[.]...

...

8) ... [PSG] undertake[s] to be liable to Protective for any premium or premiums due in consideration of any policy or policies of insurance issued by Protective or procured by Protective through other insurer or co-insurer, and issued at the request of [PSG.] ...

9) Should Protective issue or procure any policy of insurance containing deductible provisions for and at the request of [PSG], [PSG] undertake[s] to be liable to Protective for any deductible amounts Protective may be obligated to third parties as result [sic] of issuance of such policy...

...

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Exh. 5.

⁴² Tr. 248:12-16.

15) The parties hereto agree that this transaction shall be governed by the rules of law of the State of Indiana. Also, all parties to this agreement whether foreign or domestic agree to submit to the jurisdiction of the courts of the State of Indiana all matters involving a dispute under this agreement and specifically understand and desire that a judgment by court of the State of Indiana or District Court of the United States of America will be enforceable worldwide.

Regulatory Framework

Workers' compensation insurance in this state is closely scrutinized and highly regulated.⁴³ The Insurance Code and related regulations specify the form and manner in which insurers' rates, rating information, policy forms and endorsement forms must be filed with the Commissioner.⁴⁴ Insurance Code section 11735 requires insurers to file their rates and related rating information. Section 11658 requires insurers to file their policy and endorsement forms before use.⁴⁵ Specifically, subdivision (a) of that section provides:

A workers' compensation insurance policy or endorsement shall not be issued by an insurer to any person in this state unless the insurer files a copy of the form or endorsement with the rating organization pursuant to subdivision (e) of Section 11750.3⁴⁶ and 30 days have expired from the date the form or endorsement is received by the commissioner from the rating organization without notice from the commissioner, unless the commissioner gives written approval of the form or endorsement prior to that time.

An endorsement is "a form, agreement or document that amends, adds to, subtracts from,

⁴³ *In the Matter of the Appeal of Shasta Linen Supply, Inc.*, (Cal. Ins. Comm'r, June 20, 2016, AHB-WCA-14-31) (*Shasta Linen*), p. 40. All administrative decisions cited herein, including *Shasta Linen*, have been designated precedential pursuant to Government Code section 11425.60(b).

⁴⁴ *In the Matter of the Appeal of Adir International, LLC* (Cal. Ins. Comm'r, Nov. 20, 2018, AHB-WCA-16-14) (*Adir*), p. 22; *In the Matter of the Appeal of Davidson Hotel Company, LLC* (Cal. Ins. Comm'r, Nov. 21, 2018, AHB-WCA-16-25) (*Davidson*), p. 20.

⁴⁵ *Adir, supra*, p. 23; *Davidson, supra*, p. 21.

⁴⁶ Section 11750.3(e) provides that a rating organization may be established in California to "examine policies, daily reports, endorsements or other evidences of insurance for the purpose of ascertaining whether they comply with the provisions of law and to make reasonable rules governing their submission...." That rating organization is the Workers' Compensation Insurance Rating Bureau of California ("WCIRB").

supplements, or revises a policy form and is attached to a policy form to be effective.”⁴⁷

In addition, Regulations section 2268(b) provides that “[a]n insurer shall not use a policy form, endorsement form, or *ancillary agreement* except those filed and approved by the commissioner in accordance with these regulations.”⁴⁸ Regulations section 2250(f) provides:

“Ancillary agreement” means an agreement that is a supplementary writing or contract relating to a policy or endorsement form that adds to, subtracts from, or revises the obligations of either the insured or the insurer regarding any terms of an insurance policy including, but not limited to, dispute resolution agreements, policy premium amounts or rates, expense or tax reimbursement or allocation, deductible amounts, policy duration, cancellation, or claims administration. “Ancillary agreements” do not include:

- (1) Limiting and restricting endorsements ...;
- (2) Customized limiting and restricting endorsements ...; or
- (3) Agreements specifying only terms described ... below ...:
 - (A) the method for making payments,
 - (B) the method for funding deductible amounts or other policy-related charges due under a policy,
 - (C) the amounts of collateral or security the insured is required to maintain for claims that do not exceed the deductible,
 - (D) payment due dates,
 - (E) payment transmittal information, or
 - (F) the method of selecting a claims administrator, provided that such claims administrator may only administer claims that do not exceed the deductible.

Discussion

PSG argues that the Side Agreements constitute endorsements and ancillary agreements

⁴⁷ Cal. Code Regs., tit. 10, § 2250(b).

⁴⁸ Italics added.

that were required to be filed under Insurance Code section 11658 and Regulations section 2268, and that the Side Agreements are void and unenforceable because they were unfiled.⁴⁹ Protective argues that the Side Agreements were not required to be filed and, even if they were, they should still be enforced under equitable principles. Protective also argues that the Commissioner lacks authority to adjudicate this proceeding, and that PSG's appeal is barred by the doctrine of unclean hands.⁵⁰ These issues are discussed in turn, starting with the threshold jurisdictional questions.⁵¹

I. The Commissioner Has Authority to Adjudicate this Appeal.

Protective contends that the Commissioner lacks jurisdiction over this appeal because it involves only form-filing issues, rather than rating issues.⁵² Protective also maintains that the Commissioner lacks authority because the Side Agreements "operate outside of California and do not concern obligations arising in California."⁵³ Protective's arguments are unconvincing.

A. The Appeal Concerns the Application of Protective's Rating System.

The Commissioner's adjudicatory authority here arises under Insurance Code section 11737(f), which provides, in part:

Every insurer or rating organization shall provide within this state reasonable means whereby any person *aggrieved by the application of its filings* may be heard by the insurer or rating organization on written request to review *the manner in which the rating system has been applied in connection with the insurance afforded or offered*. ... Any party affected by the action of the insurer or rating organization on the request may appeal ... to the commissioner who, after a hearing held ... may affirm, modify, or reverse that action.⁵⁴

⁴⁹ PSG's Post Hearing Brief, filed Jan. 29, 2021 ("App. PH Br."); PSG's Reply to Protective's Post-Hearing Memorandum, filed February 17, 2021 ("App. Reply").

⁵⁰ Resp. PH Br.; Protective's Reply to PSG's Post Hearing Brief, filed February 18, 2021 ("Resp. Reply").

⁵¹ The parties' arguments concerning issues not needed to determine this appeal are omitted from this discussion.

⁵² Resp. PH Br., 25-27.

⁵³ *Id.* at p. 27.

⁵⁴ Italics added.

As the Commissioner explained in his precedential decisions *In the Matter of the Appeal of Adir International, LLC (Adir)* and *In the Matter of the Appeal of Davidson Hotel Company, LLC (Davidson)*, “An insurer correctly applies its section 11735 rate filing *only* when it charges its rates using policies and endorsements filed under Insurance Code section 11658 and Regulations section 2268. Charges under unfiled forms are not valid.”⁵⁵

PSG’s appeal alleges that Protective improperly conditioned the issuance of PSG’s insurance on execution of the unfiled Side Agreement forms.⁵⁶ By logical extension, Protective must also have improperly conditioned its *rate charges* on those unfiled forms—regardless whether the forms themselves contained any rating information⁵⁷—since rates apply only to *issued* insurance. Accordingly, PSG’s appeal in effect asserts that *Protective applied its rates in a manner that violated the Insurance Code’s filing requirements*. The appeal therefore concerns “the manner in which the rating system has been applied” and falls within the Commissioner’s adjudicatory authority under section 11737(f).

B. The Side Agreements Concern the Transaction of Insurance in California.

Insurance Code section 41 provides that “[a]ll insurance in this State is governed by the provisions of this code.” Section 35 defines the term “Transact” to include “solicitation” and “[t]ransaction of matters subsequent to execution of the contract and arising out of it.”

Protective undoubtedly solicited business in this state when it issued insurance covering millions of dollars of California payroll.⁵⁸ And, by paying benefits to thousands of PSG’s

⁵⁵ *Adir, supra*, p. 51; *Davidson, supra*, p. 47.

⁵⁶ Exhs. 432-5, 432-10.

⁵⁷ Because determination of this appeal does not depend on whether the Side Agreements contain rating information that was required to be filed under Insurance Code section 11735, the ALJ does not address that question.

⁵⁸ Vasilik Decl., ¶ 7.

California employee claimants,⁵⁹ Protective transacted matters in this state subsequent to execution of the insurance contracts. Therefore, PSG's insurance program, including the Side Agreements on which it was conditioned, constitutes a California insurance transaction governed by the Insurance Code, including section 11737(f)'s jurisdictional provisions. While the program may simultaneously be a transaction in other states, that does not abrogate the Commissioner's authority over California insurance matters.

II. The Doctrine of Unclean Hands Is Unavailable as A Defense.

Protective argues that the doctrine of unclean hands bars PSG from any relief, because of misrepresentations and omissions that PSG made during the underwriting process, as well as PSG's refusal to pay ongoing deductible obligations.⁶⁰ The ALJ disagrees.

"Generally, the equitable doctrine of unclean hands applies when a plaintiff has acted unconscionably, in bad faith, or inequitably in the matter in which the plaintiff seeks relief."⁶¹ Unclean hands may be a complete defense to an action.⁶² However, the doctrine is inapplicable as a matter of law to a claim based on a violation of a statute intended to protect consumers.⁶³

This appeal involves such a claim, namely that Protective violated Insurance Code section 11658 by failing to file the Side Agreements. Section 11658 is unquestionably intended to protect consumers, by mandating that insurers file their forms for governmental review and by prohibiting use of unfiled forms. Consequently, the unclean hands defense is unavailable here.

III. The Side Agreements Constitute Endorsements and Ancillary Agreements That Were Required to Be Filed under Insurance Code Section 11658 and Regulations Section 2268.

Protective argues that Insurance Code section 11658 and Regulations section 2268's

⁵⁹ *Id.* at ¶ 8.

⁶⁰ Resp. PH Br., pp. 33-35. This tribunal makes no determinations regarding PSG's alleged misconduct.

⁶¹ *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 432.

⁶² *Ibid.*

⁶³ *Mendoza v. Ruesga* (2008) 169 Cal.App.4th 270, 279-280.

filing requirements are inapplicable, because the Side Agreements are neither endorsements nor ancillary agreements, and because PSG's insurance program does not sufficiently concern California.⁶⁴ The ALJ disagrees.

A. The Side Agreements Constitute Endorsements to PSG's Policies.

According to Protective, the Side Agreements are not endorsements because they do not "add or delete coverage."⁶⁵ But Protective has pointed to no statute, regulation or case indicating that a document must add or delete coverage to constitute an endorsement, nor is the ALJ aware of any such authority.⁶⁶

Under Regulations section 2250(b), endorsements include agreements that amend, add to or supplement insurance policies. "An endorsement need not concern an insurer's indemnity or insurance obligations. [Citation.] Indeed many endorsements relate solely to administrative matters, unrelated to risk of loss or indemnity."⁶⁷

Because Protective made execution of the Side Agreements a condition to issuing PSG's Policies, the Side Agreements form an integral part of the parties' insurance transaction. "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."⁶⁸ And, because none of the Side Agreements' provisions were contained in the filed policy documents, *all* of those provisions added to or supplemented the Policies.

For example, the Collateral Agreement contains a requirement that PSG deposit millions of dollars of collateral to secure "the performance of every agreement made by [PSG] ... in

⁶⁴ Resp. PH Br., pp. 29-33; Resp. Reply, pp. 12-20.

⁶⁵ Resp. PH Br., pp. 30-31.

⁶⁶ Coverage generally refers to the "[i]nclusion of a risk under an insurance policy" or "the risks within the scope of an insurance policy." (Black's Law Dictionary, (11th ed. 2019), coverage.)

⁶⁷ *Adir, supra*, p. 35; *Davidson, supra*, p. 33.

⁶⁸ Civil Code, § 1642.

connection with any ... policies[.]”⁶⁹ By securing all of PSG’s Policy obligations, the Collateral Agreement unquestionably supplements the Policies.⁷⁰

Similarly, the Indemnity Agreement provides that PSG must indemnify Protective against costs and attorneys’ fees “which Protective may sustain or incur in taking steps it may deem necessary ... in enforcing any of the covenants of this agreement[.]”⁷¹ Because those covenants include liability undertakings by PSG for premiums and deductibles,⁷² the indemnity supplements the Policies’ charge provisions by potentially obligating PSG to reimburse Protective for attorneys’ fees and costs in collection claims against PSG.⁷³

For these reasons, both Side Agreements add to and supplement the Policies, thereby constituting endorsements.

B. The Side Agreements Constitute Ancillary Agreements.

PSG argues that both Side Agreements constitute ancillary agreements under Regulations section 2250(f) because they add to or revise PSG’s obligations under the Policies.⁷⁴ Protective argues that the Side Agreements do not materially alter the Policies and that they fall within the regulatory exceptions the “ancillary agreement” definition.⁷⁵

Under section 2250(f), an “ancillary agreement” includes a policy-related contract that adds to or revises a party’s obligations regarding any policy terms including, for example, “dispute resolution agreements[.]” Ancillary agreements exclude certain limiting and restricting

⁶⁹ Exh. 3.

⁷⁰ Protective suggests that Regulations section 2250’s exceptions to the definition of “Ancillary Agreement” should also apply to endorsements in order for the exceptions to be effective. (See Resp. Reply, p. 17-18.) That question need not be decided here, since neither of the Side Agreements fell within the exceptions, for the reasons discussed below.

⁷¹ Exh. 5, ¶ 2.

⁷² *Id.* at ¶¶ 8, 9.

⁷³ See *Hot Rods, LLC v. Northrup Grumman Systems Corp.* (2015) 242 Cal.App.4th 1166, 1179-1181 [broadly worded indemnity covering attorneys’ fees applied to direct claims between parties, as well as third party claims].

⁷⁴ App. PH Br., pp. 14-16.

⁷⁵ Resp. PH Br., pp 31-33.

endorsements not applicable here, as well as agreements specifying *only* the following terms: (A) the method for making payments; (B) the method for funding deductible amounts or other policy-related charges; (C) the amounts of collateral or security the insured is required to maintain *for claims that do not exceed the deductible*; (D) payment due dates; (E) payment transmittal information; or (F) the method of selecting a claims administrator for claims that do not exceed the deductible.⁷⁶

Both Side Agreements add to PSG's obligations under the Policies, for the reasons described in the preceding section. In addition, the Indemnity Agreement designates Indiana law as governing the parties' transaction, and requires the parties to submit to the jurisdiction of Indiana courts.⁷⁷ Those provisions constitute a "dispute resolution agreement" within the meaning of Regulations section 2250(f). Finally, neither Side Agreement includes *only* terms falling within the enumerated exceptions to the "ancillary agreement" definition. The Indemnity Agreement contains, for example, PSG's indemnity obligations and the dispute resolution clause. And while the Collateral Agreement specifies collateral amounts that PSG must maintain, those amounts broadly secure *all* of PSG's obligations under the Policies and the Indemnity Agreement, rather than just claim amounts up to the deductible.⁷⁸ The Collateral Agreement also contains provisions allowing appointment of investment managers and waivers concerning investment losses, none of which fall under Regulations section 2250(f)'s definitional exceptions.⁷⁹

For these reasons, both Side Agreements are ancillary agreements.

⁷⁶ Cal. Code Regs., tit. 10, § 2250(f)(1)—(f)(3).

⁷⁷ Exh. 5, ¶ 15.

⁷⁸ Exh. 3, ¶¶ A, B.

⁷⁹ *Id.* at ¶ D.

C. The Side Agreements Were Required to Be Filed under Section 11658 and Regulations Section 2268.

Insurance Code section 11658 and Regulations section 2268 require endorsements and ancillary agreements to be filed prior to use. However, Protective points out that even if the Side Agreements are endorsements or ancillary agreements, the statutory filing requirements apply only to forms issued to “any person in this state.”⁸⁰ Protective argues that the agreements were not issued in California and that PSG is not a person in this state, since it is not a California corporation, is not headquartered in this state, and is not a “California employer” as defined in section 11658.5.⁸¹ Therefore, according to Protective, section 11658 does not apply to the Side Agreements. These arguments are unconvincing.

Section 11658.5 defines “California employer” as “an employer whose principal place of business is in California and whose California payroll constitutes the majority of the employer’s payroll for purposes of determining premium under the policy.” But section 11658.5, which is unrelated to filing requirements, states that the definition applies “[f]or purposes of *this* section[.]”⁸² Section 11658 is a separate section and, more importantly, does not use the term “California employer.” Accordingly, the definition is inapposite here, and there is no need to determine whether PSG meets it.⁸³

What is clear, however, is that PSG employed thousands of California workers and paid them hundreds of millions of dollars during the policy periods at issue.⁸⁴ A company with such substantial California operations unquestionably constitutes a “person in this state” under any reasonable interpretation of that phrase. “Nothing in the Insurance Code ... requires filing only

⁸⁰ Resp. PH Br., p. 29.

⁸¹ *Ibid.*

⁸² Italics added.

⁸³ See *Davidson, supra*, pp. 30-31 [The definition of “California employer” applies only to section 11658.5, not to section 11658. Because section 11658.5 does not concern filing requirements, it does not govern the interpretation of section 11658.]

⁸⁴ Vasilik Decl, ¶¶ 7, 8.

when the policy is issued to California-headquartered employers.”⁸⁵ Nor does it matter where the Side Agreements originated or were executed. “[A]ny ... endorsement issued to an employer in California must be filed and approved prior to use. No tribunal has ever read ‘in this state’ to mean that the contract be executed in California.”⁸⁶

Accordingly, Insurance Code section 11658 and Regulations section 2268 apply to the Side Agreements and required them to be filed before use.

IV. The Unfiled Side Agreements Are Unenforceable with Respect to California Risks.

The unfiled Side Agreements misapplied Protective’s filed rating systems and are illegal and void with respect to insured risks in this state. Further, relevant equitable considerations compel finding the agreements to be unenforceable.

A. The Unfiled Side Agreements Misapplied Protective’s Filed Rating System.

For purposes of Insurance Code section 11737(f), insurers misapply their rating systems when they charge rates under forms not filed in accordance with Insurance Code section 11658 and Regulations section 2268.⁸⁷ Protective’s December 2016 proposal and the terms of the Side Agreements clearly establish that Protective conditioned the issuance of PSG’s insurance program on execution of the Side Agreements.⁸⁸ Since the rates Protective charged were part of the program, the rates were likewise conditioned on the unfiled agreements. Thus, by implementing its rate charges using the unfiled forms, Protective misapplied its filed rating system.

B. The Unfiled Side Agreements Are Illegal and Void.

Insurance code section 11658 provides that endorsements “shall not be issued by an

⁸⁵ *Davidson, supra*, p. 28.

⁸⁶ *Ibid.*

⁸⁷ *Adir, supra*, p. 51; *Davidson, supra*, p. 47.

⁸⁸ Friedrich Decl, ¶ 6, Exh. A; Exh. 3-1; Exh. 5-1.

insurer” unless filed.⁸⁹ Unfiled endorsements are “illegal under section 11658 and therefore void as a matter of law.”⁹⁰ Indeed, the Commissioner has consistently found unfiled side agreements to be illegal and void *ab initio*.⁹¹

Protective argues that “there is no California statute or regulation that permits the [Side] Agreements to be declared void and unenforceable retroactively in California[.]”⁹² But Protective ignores the Commissioner’s determinations in *Shasta Linen*, *Davidson* and *Adir* that Insurance Code section 11737(f)—which broadly authorizes the Commissioner to “modify” or “reverse” an insurer’s action on an insured’s complaint—allows him to conclude that unfiled forms are void from the outset and unenforceable.⁹³

Protective further contends that using an unfiled form is unlawful only after the Commissioner provides a non-compliance notice pursuant to Insurance Code section 11658, subdivision (b).⁹⁴ However, that subdivision concerns non-compliant *filed* forms. It does not obligate the Commissioner to provide notice regarding *unfiled* forms. Accordingly, the notice requirement is inapplicable here.

For these reasons, Protective’s unfiled Side Agreements are illegal and void *ab initio*, to the extent they relate to California risks.

C. Relevant Equitable Factors Weigh Against Enforcing the Side Agreements.

Protective argues that the Side Agreements should be equitably enforced, even if they are

⁸⁹ Ins. Code, § 11658(a); *Shasta Linen*, *supra*, p. 65.

⁹⁰ *Shasta Linen*, *supra*, p. 65; accord *Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1118 [“[A] violation of these [filing] requirements prevents crucial regulatory oversight and thus renders the unfiled agreement unlawful and void as a matter of law.”].

⁹¹ *Shasta Linen*, *supra*, p. 65; *Adir*, *supra*, p. 61; *Davidson*, *supra*, p. 56.

⁹² Resp. PH Br., p. 35.

⁹³ *Shasta Linen*, *supra*, p. 65; *Adir*, *supra*, pp. 56-57; *Davidson*, *supra*, pp. 50-52.

⁹⁴ Resp. PH Br., 35. Section 11658(b) provides: “If the commissioner notifies the insurer that the filed form or endorsement does not comply with the requirements of law, specifying the reasons for his or her opinion, it is unlawful for the insurer to issue any policy or endorsement in that form.”

illegal.⁹⁵ Protective contends that the policy behind the filing laws “has not been seriously transgressed,” that PSG “seeks to avoid application of the [Side] Agreements after PSG stopped paying its obligations thereunder” and that “PSG misrepresented the size and scope of its operations in procuring the program.”⁹⁶ In light of these circumstances, Protective argues that “by voiding the agreements PSG would be unjustly enriched and the remedy would be unduly harsh.”⁹⁷ Case authority indicates otherwise.

“In *compelling* cases, illegal contracts will be enforced in order to ‘avoid unjust enrichment and a disproportionately harsh penalty upon the plaintiff.’ The extent of enforceability and the remedy granted depend upon a variety of factors, including the policy of the transgressed law, the type of illegality, and the particular facts.”⁹⁸

In *American Zurich Ins. Co. v. Country Villa Service Corp.*,⁹⁹ the court determined that agreements not filed pursuant to section 11658 were void and should not be enforced.¹⁰⁰ The court based its decision not to enforce the contracts on a limited number of “*relevant* equitable factors.”¹⁰¹ First, there was no risk of *unjust* enrichment where the insured did nothing to cause the illegality, the insurer should have known of its legal duties, and the insured remained liable under the filed policies and endorsements.¹⁰² Second, refusing to enforce the illegal agreements was not unduly harsh since the insurer knew or should have known of its legal filing obligations, enforcing the unfiled agreements would encourage illegal activity, and the insured would remain

⁹⁵ Resp. PH Br., 36-38.

⁹⁶ Resp. PH Br., 37-38; Resp. Reply, 3.

⁹⁷ Resp. PH Br., 38.

⁹⁸ *Shasta Linen, supra*, at p. 67, citing *Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 70, italics added.

⁹⁹ *American Zurich Ins. Co. v. Country Villa Service Corp.* (C.D.Cal., July 9, 2015, No. 2:14-cv-03779-RSWL-AS) 2015 WL 4163008 (*Country Villa*).

¹⁰⁰ *Id.* at *16-*17.

¹⁰¹ *Id.* at *16, italics added.

¹⁰² *Ibid.*

liable under the policy.¹⁰³ Third, the policy behind the “transgressed law” weighed against enforcing the agreements, because doing so would undermine section 11658’s statutory purpose by allowing insurers to bypass governmental review.¹⁰⁴ Fourth, the insurer was the party at fault because it knew or should have known of its filing requirements, and it would not be equitable to allow the party at fault for the illegality to enforce the illegal contract.¹⁰⁵ Finally, the court noted that the unfiled contracts “should not be enforced under California’s ‘settled rule’ that a contract in violation of a statute enacted for the protection of the public should not be enforced.”¹⁰⁶ In *Shasta Linen, Adir* and *Davidson*, the Commissioner closely followed the *Country Villa* court’s reasoning in declining to equitably enforce illegal unfiled side agreements.¹⁰⁷

As in those cases, the “relevant equitable factors” here weigh against enforcing the Side Agreements. Protective should have known of its filing obligations. There is no evidence that PSG bore any responsibility for Protective’s failure to file the Side Agreements. Nor is there any evidence that PSG will escape its liability under the Policies and filed endorsements if the Side Agreements are not enforced. And enforcing the unfiled Side Agreements would encourage further illegal activity and undermine the public policy behind section 11658. “Insurers who use ... unfiled side agreements frustrate public policy.”¹⁰⁸ “It would defeat the purpose of Insurance Code sections 11658 and 11735 by allowing an insurer to bypass the Commissioner’s mandatory review process by simply adding or modifying the policy’s terms in a separate, unexamined side agreement.”¹⁰⁹ In light of these factors, finding the Side Agreements unenforceable would not *unjustly* enrich PSG nor result in a disproportionately harsh penalty.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Shasta Linen, supra*, pp. 67-68.

¹⁰⁸ *Davidson, supra*, p. 53; *Adir, supra*, p. 59; *Shasta Linen, supra*, p. 67.

¹⁰⁹ *Davidson, supra*, p. 53; *Adir, supra*, p. 59.

Accordingly, the illegal unfiled Side Agreements should not be enforced with respect to California risks.

Conclusions of Law

Based on the administrative record and the foregoing analysis of facts and law, the ALJ concludes as follows:

1. The Commissioner has authority to adjudicate this appeal under Insurance Code section 11737(f), because it involves the manner in which Protective applied its rating system, and the Side Agreements concern the transaction of insurance in California.
2. The unclean hands defense is unavailable as a matter of law, because the appeal alleges a violation of Insurance Code section 11658, a statute intended to protect consumers.
3. The Side Agreements constitute endorsements and ancillary agreements that were required to be filed under Insurance Code section 11658 and Regulations section 2268.
4. By conditioning its insurance program—including the program’s rate charges—on the unfiled Side Agreements, Protective misapplied its filed rating system for purposes of Insurance Code section 11737(f).
5. The unfiled Side Agreements are illegal under Insurance Code section 11658 and void *ab initio*, as related to risks insured in California.
6. Pursuant to applicable case authority and the Commissioner’s precedential decisions in *Shasta Linen*, *Adir* and *Davidson*, the illegal unfiled Side Agreements are unenforceable in relation to California risks.

ORDER


Protective’s Rejection of PSG’s CRA is REVERSED, pursuant to Insurance Code section 11737, subdivision (f). Protective shall immediately cease and desist from enforcing the Side

Agreements with respect to risks insured in California.

* * *

I submit this proposed decision based on the evidentiary hearing and the records in this matter, and recommend its adoption as the decision of the Insurance Commissioner of the State of California.

Dated: April 15, 2021



CLARKE de MAIGRET
Administrative Law Judge
Administrative Hearing Bureau
California Department of Insurance

1 **NOTICE OF TIME LIMITS FOR RECONSIDERATION & JUDICIAL REVIEW**
2 **In the Matter of PERSONNEL STAFFING GROUP LLC dba BARNETT**
3 **MANAGEMENT**
4 **Case No. AHB-WCA-19-46**

5 Petitions for reconsideration may be made pursuant to California Code of Regulations,
6 Title 10, section 2509.72. To be considered, a petition for reconsideration must be made timely,
7 and shall be based solely upon, and shall set forth specifically, the grounds upon which the
8 decision of the Commissioner allegedly is contrary to law or is erroneous. A petition for
9 reconsideration shall not refer to, or introduce, any evidence which was not part of the record of
10 the evidentiary hearing. Any such evidence nonetheless provided shall be accorded no weight.
11 Copies of documents received in evidence or already part of the records shall be referenced and
12 attached as exhibits. A Petition for Reconsideration must be served on all parties and should be
13 directed to:

14 Bryant Henley
15 Deputy Commissioner & Special Counsel
16 California Department of Insurance – Executive Office
17 300 Capitol Mall, 17th Floor
18 Sacramento, California 95814

19 Judicial review of the Insurance Commissioner’s Decision may be had pursuant to
20 California Code of Regulations, Title 10, section 2509.76, by filing a petition for a writ of
21 mandate against the Insurance Commissioner or the Department of Insurance, in accordance with
22 the provisions of section 1094.5 of the California Code of Civil Procedure. The right to petition
23 shall not be affected by the failure to seek reconsideration before the Commissioner. A petition
24 for a writ of mandamus (writ petition) shall be filed with the Court, and served on the Insurance
25 Commissioner as follows:

26 Agent for Service of Process
27 Government Law Bureau
28 California Department of Insurance
 300 Capitol Mall, 17th Floor
 Sacramento, California 95814

1 Since the Administrative Hearing Bureau is a division of the Department of Insurance,
2 and not a separate legal entity, the writ petition should *not* name the Administrative Hearing
3 Bureau or the Administrative Law Judge who presided over the matter as respondents. However,
4 a courtesy copy of any writ petition should be delivered to the Administrative Hearing Bureau of
5 the California Department of Insurance as follows:
6

7 Department of Insurance
8 Administrative Hearing Bureau
9 1901 Harrison Street, 3rd Floor
10 Oakland, California 94612

11 A request to the Commissioner or the Hearing Officer for a copy of the administrative
12 record for a writ petition pursuant to California Code of Regulations, Title 10, section 2509.76,
13 subdivision (d) should be made to:

14 Agent for Service of Process
15 Government Law Bureau
16 California Department of Insurance
17 300 Capitol Mall, 17th Floor
18 Sacramento, California 95814

19 The request should include the Matter name and Case Number specified above.
20
21
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DECLARATION OF SERVICE BY ELECTRONIC MAIL

Case Name/No.: In the Matter of the Rating Practices of:
PERSONNEL STAFFING GROUP LLC dba BARNETT MANAGEMENT
File No. AHB-WCA-19-46

I, MICHAEL CONSTANTINOU, declare that:

I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to this action. My business address is State of California, Department of Insurance, Executive Office, 300 Capitol Mall, 17th Floor, Sacramento, California, 95814.

I am readily familiar with the business practices of the Sacramento Office of the California Department of Insurance for collection and processing of correspondence for mailing. Said ordinary business practice is that correspondence is deposited with the United States Postal Service that same day in Sacramento, California. In light of the COVID-19 pandemic and statewide stay at home orders, however, current business practice is to serve administrative orders via electronic mail only. Upon request by a party to this matter, the Office of the Special Counsel will arrange for a hard copy to be deposited with the United States Postal Service.

On May 24, 2021, (**VIA ELECTRONIC MAIL**), I caused a true and correct copy of the following document(s):

- 1. ORDER ADOPTING PROPOSED DECISION**
- 2. PROPOSED DECISION**
- 3. TIME LIMITS AND NOTICE FOR RECONSIDERATION**
- 4. DECLARATION OF SERVICE BY ELECTRONIC MAIL**
- 5. PARTY SERVICE LIST**

to be served by electronic mail transmission to all parties and non-parties where indicated per this Declaration:

(SEE ATTACHED PARTY SERVICE LIST)

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California, on May 24, 2021.


Michael Constantinou

PARTY SERVICE LIST

Name/Address

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