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

In the Matter of	
	Index No. _____/2016
the Application of	
Maria T. Vullo, Acting Superintendent of Financial Services of the State of New York, for an order to take possession of the property of and liquidate the business and affairs of	
HEALTH REPUBLIC INSURANCE OF NEW YORK, CORP.	

MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION OF THE ACTING SUPERINTENDENT OF FINANCIAL SERVICES OF THE STATE OF NEW YORK

ERIC T. SCHNEIDERMAN
Attorney General for the State of New York
Attorney for the Acting Superintendent of
Financial Services of the State of New York
120 Broadway, 24th Floor
New York, NY 10271
(212) 416-8610

David Holgado
Senior Enforcement Counsel

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Eric T. Schneiderman, Attorney General of the State of New York (the "**Attorney General**"), on behalf of Maria T. Vullo, Acting Superintendent of Financial Services of the State of New York (the "**Superintendent**"), respectfully submits this memorandum of law in support of the Superintendent's accompanying verified petition (the "**Petition**"),[1] duly verified on the 20th day of April, 2016, in which the Superintendent seeks, pursuant to Article 74 of the New York Insurance Law (the "**NYIL**"), an order, substantially in the form annexed thereto as Exhibit A (the "**Proposed Liquidation Order**"): (i) appointing the Superintendent and her successors in office as liquidator ("**Liquidator**") of Health Republic Insurance of New York, Corp. ("**HRINY**"); (ii) authorizing and directing the Liquidator to take possession and/or control of the property and assets of HRINY and to liquidate the business and affairs thereof in accordance with Article 74 of the NYIL; (iii) vesting the Liquidator with title to and all rights in all property, contracts and agreements however defined, rights of action and books and records of HRINY, wherever located; (iv) authorizing the Liquidator to deal with the property and business of HRINY in the name of HRINY or the Liquidator; (v) authorizing the Liquidator, in her discretion, to reject any executory contracts to which HRINY is a party; (vi) authorizing the Liquidator to pay, without further order of the Court, the actual and necessary expenses incurred by the Liquidator in the administration of this liquidation proceeding (the "**Liquidation Proceeding**") (collectively, "**Administrative Expenses**"); (vii) pursuant to Section 7419 of the NYIL, issuing the injunctive relief set forth in the Proposed Liquidation Order and described further below; (viii) confirming the judicial immunity of the Liquidator and her employees, attorneys, representatives and agents; (ix) without extending any deadline already set forth in a contract or policy, providing for Policy Claims to be submitted in accordance with existing

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Petition.

procedures; (x) with respect to all claims other than Policy Claims, deferring until further order of the Court the deadline set forth in Section 7432(b) of the NYIL for all persons who may have claims against HRINY to present such claims to the Liquidator; (xi) granting the Liquidator the authority to refrain from adjudicating all claims other than Administrative Expenses and Policy Claims; and (xii) granting such other and further relief as specified below and as the Court may deem just and proper.

The Superintendent also requests that the Court enter the order to show cause filed contemporaneously herewith (the "**Order to Show Cause**") and, pursuant to Section 7419 of the NYIL, grant the injunctive relief set forth therein and described further below pending a hearing on the Proposed Liquidation Order (the "**Hearing**").[2]

PRELIMINARY STATEMENT

HRINY is a not-for-profit health insurance CO-OP (Consumer Operated and Oriented Plan) established under the federal Patient Protection and Affordable Care Act (the "**ACA**"). HRINY is licensed under Article 43 of the NYIL to provide health service indemnity coverage to persons covered by insurance policies issued by HRINY (the "**Members**"). As a new not-for-profit CO-OP with no private source of funding, HRINY was entitled to receive certain low- or no-interest loans from The Centers for Medicare & Medicaid Services ("**CMS**"), an operating division of the Department of Health and Human Services ("**HHS**"), for the purpose of financing start-up costs and insurance reserves. In addition, in recognition of the difficulties in starting up a new health care program with no private source of capital, under the CO-OP program initially devised by Congress and HHS, HRINY was entitled to receive funding from three premium stabilization programs established by the ACA, known as the "3Rs" – Risk

[2] The facts relevant to the relief requested are stated in the accompanying Petition, which is incorporated herein by reference.

Corridors, Risk Adjustment, and Reinsurance. These programs were designed to mitigate losses over a period of years and address the uncertainty related to the implementation of the ACA. The Risk Corridors Program, in particular, was designed to protect insurers from pricing uncertainties and to limit losses and gains beyond an allowable range. Under the Risk Corridors Program, HHS collects funds from insurers with lower-than-expected claims and makes payments to insurers with higher-than-expected claims.

Beginning on January 1, 2014 and continuing through September 25, 2015, HRINY issued individual and small group health insurance policies to New Yorkers both on and off the New York State of Health, The Official Health Plan Marketplace (the "**Marketplace**"). HRINY also issued one large group policy to its employees. HRINY's policies covered health care and pharmaceutical services provided to Members pursuant to certain health benefit and prescription drug plans underwritten by HRINY. By October 2015, Health Republic had approximately 215,000 enrollees – (i) 72,000 individual enrollees on the Marketplace; (ii) 34,000 individual enrollees off the Marketplace; (iii) 5,700 small group enrollees on the Marketplace; (iv) 87,000 small group enrollees off the Marketplace; and (v) 16,000 private exchange enrollees.

In June 2015, CMS and the New York State Department of Financial Services (the "**NYDFS**") received an independent audit report (the "**Audit**"), prepared by BDO USA, LLP, concerning HRINY's 2014 annual report. The Audit reported certain financial and other reporting errors in the financial statements prepared by HRINY included in the annual report. After receiving the Audit, CMS and the NYDFS required HRINY to submit a revised annual report and corrected financial statements for 2014 as well as a corrected quarterly financial statement for the period ending March 31, 2015. After their review of such financial reports and taking certain other investigative actions, CMS and the NYDFS determined that, as of December

31, 2015, HRINY's total admitted assets would be less than the aggregate amount of its liabilities and required surplus as of that date. As a result, CMS and the NYDFS concluded that HRINY was unable to profitably manage its business without a further infusion of capital.

Accordingly, on September 25, 2015, (i) the NYDFS directed HRINY to cease writing new health insurance policies and to commence an orderly wind down process; (ii) the Marketplace announced that HRINY would not be certified to sell insurance products on the Marketplace in 2016; and (iii) CMS notified HRINY that it was terminating the loan agreement it had entered into with HRINY on February 17, 2012 as of December 31, 2015.

On October 1, 2015, HRINY's financial condition worsened even further when HHS publicly reported that HRINY would receive less funding than it had expected under the federal Risk Corridors Program. As part of this October 1 announcement, HHS reported that Risk Corridors collections for 2014 were insufficient to make full Risk Corridors payments for that year, and that the payments to insurers like HRINY would be reduced to a proration rate of 12.6 percent. Thus, HRINY would receive only 12.6 percent of what it was due under the Risk Corridors Program, which was $18.8 million of $149.3 million. To date, HRINY has received approximately only $18.1 million of Risk Corridors payments for 2014, a small fraction of the amount that was intended to protect insurers like HRINY from higher-than-expected losses during the first few years after the passage of the ACA. The failure to receive these expected funds caused further deterioration of HRINY's financial condition.

Based on this additional information, on October 30, 2015, CMS, the NYDFS and the Marketplace announced that HRINY's financial condition was substantially worse than HRINY had previously reported to the NYDFS. On the same day, the NYDFS directed HRINY to terminate all insurance policies as of November 30, 2015 and to assist in the orderly transition

of Members to other insurance carriers, as the NYDFS had determined that it was in the best interest of the public to accelerate the wind down of HRINY's business. On October 31, 2015, the NYDFS and the Marketplace notified all Members that they were required to purchase alternative insurance policies, for new coverage effective as of December 1, 2015. The NYDFS worked diligently with the Marketplace to facilitate the transition of Members to alternative insurance carriers.

On November 9, 2015, the NYDFS issued an order pursuant to Section 1311 of the NYIL (the "**1311 Order**") directing HRINY to suspend paying any and all claims and otherwise operate only in the ordinary course, except as otherwise expressly approved by the Superintendent.[3] Since that time, HRINY's new management team and HRINY's advisors have been working collaboratively with the NYDFS and the New York Liquidation Bureau (the "**NYLB**") to prepare for and effectuate an orderly wind down and liquidation of HRINY, in a manner that minimizes harm to Members and those health care professionals, providers and facilities that provided health care services to Members (the "**Providers**").

As a New York insurance company, HRINY is regulated by the Superintendent. Unlike other companies, insurance companies (including HRINY) cannot be debtors under federal bankruptcy law.[4] Instead, HRINY may only be rehabilitated or liquidated pursuant to Article 74 of the NYIL. Article 74 authorizes the Superintendent to apply for an order directing her to liquidate a financially distressed insurance company. N.Y. Ins. Law. § 7404. An order to liquidate an insurer authorizes the Superintendent to take possession of the insurer's property and liquidate the business of the insurer. *Id.* § 7405(a).

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[3] A copy of the 1311 Order is attached to the Petition as Exhibit C.

[4] Section 109 of title 11 of the United States Code (the "**Bankruptcy Code**") provides that a domestic insurance company cannot be a debtor under chapter 11.

The Superintendent submits that placing HRINY into liquidation and granting the relief requested in the Order to Show Cause and the Proposed Liquidation Order is in the best interests of HRINY's Members, Providers and other creditors as well as the public. Pursuant to relevant case law, the Superintendent's judgment in this regard is afforded broad deference.

At least two independent statutory grounds, each alone sufficient, support placing HRINY into liquidation: (i) HRINY's board of directors has unanimously consented to the Liquidation Proceeding; and (ii) HRINY is insolvent.

Further, the injunctive relief requested in the Order to Show Cause and the Proposed Liquidation Order (the "**Injunctive Relief**") falls squarely within the Court's broad authority granted by Section 7419 of the NYIL and is necessary and appropriate to ensure an orderly liquidation of HRINY. The Injunctive Relief includes the standard, general relief granted in New York liquidation proceedings, as well as more specific relief tailored to the unique circumstances of liquidating a CO-OP such as HRINY. The Proposed Liquidation Order also establishes an efficient process for the submission of Policy Claims and appropriately defers the claims submission deadline for, and the adjudication of, all claims other than Policy Claims. Finally, the provisions confirming the judicial immunity of the Liquidator, the NYLB, and each of their respective employees, attorneys, representatives, and agents, are consistent with public policy and well-established law.

ARGUMENT

I. THE SUPERINTENDENT IS ENTITLED TO BROAD DEFERENCE

The Superintendent's determinations that (i) HRINY should be placed into liquidation and (ii) the Injunctive Relief is necessary to enable the Superintendent to fulfill her duties as Liquidator are entitled to broad deference. The NYDFS has been monitoring HRINY – the only CO-OP in New York – since it began issuing policies in 2014. Since the summer of

2015, the NYDFS has been working closely with CMS and the New York State Department of Health to monitor the financial condition of HRINY. The Superintendent's determination that placing HRINY into liquidation is in the best interests of HRINY's Members, creditors, and the public is the result of this lengthy and deliberate process and is entitled to broad deference.[5]

Further, the Superintendent is uniquely qualified to determine what relief is necessary, in light of "the nature of the case and the interests of policyholders, creditors, shareholders, members, [and] the public . . . ." N.Y. Ins. Law. § 7417. Given the Superintendent's expertise and responsibilities in the area of insurance and the unique challenges presented by liquidating a CO-OP such as HRINY, the Court should defer to the Superintendent's determination that the relief requested in the Order to Show Cause and the Proposed Liquidation Order, including the Injunctive Relief, is necessary to enable the Superintendent to fulfill her duties as Liquidator.[6]

II. HRINY SHOULD BE PLACED INTO LIQUIDATION

Section 7402 of the NYIL enumerates fifteen different grounds that each, independently, warrants entry of an order directing the Superintendent to liquidate a New York

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[5] *See, e.g., In re N.Y. Title & Mortg. Co.*, 281 N.Y.S. 715, 729 (N.Y. Sup. Ct. 1935) (in considering the Superintendent's determination that "liquidation is desirable and necessary," the court held that "[o]nly the strongest showing to the contrary could justify the court's refusal to follow the recommendations of the administrative officer to whom the supervision of insurance companies has been entrusted by the legislature."); *see also Kentucky Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583, 588 (Ky. 1995) (citing *N.Y. Title & Mortg. Co.* for the same proposition); *Minor v. Stephens*, 898 S.W.2d 71, 81 (Ky. 1995) (same).

[6] *See Matter of Dinallo v. DiNapoli*, 9 N.Y.3d 94, 97 (2007) (As to his role as court-appointed receiver on behalf of distressed insurers, "the Legislature, by statutory enactment, bestowed upon the Superintendent broad fiduciary powers to manage the affairs of distressed domestic insurers and to marshal and disburse their assets."); *Mills v. Fla. Asset Financing Co.*, 31 A.D. 3d 849, 850 (3d Dep't 2006) ("The Legislature has granted [the Superintendent] plenary powers and broad discretion to manage, as a fiduciary, the affairs of an insolvent insurer.").

insurer.[7] As set forth in the Petition, at least two of those grounds exist in the present case. First, Section 7402(*l*) of the NYIL provides that a New York insurer may be placed into liquidation if it "[h]as consented to such an order through a majority of its directors, shareholders, or members." HRINY's board of directors unanimously adopted resolutions consenting to the entry of an order of liquidation and the commencement of this Liquidation Proceeding, as evidenced by the certified copy of the resolutions of HRINY's board of directors attached to the Petition as Exhibit B.

Second, Section 7402 (a) of the NYIL provides that the Superintendent may apply for an order to liquidate a New York insurer that is insolvent within the meaning of Section 1309 of the NYIL.[8] Based on her review of financial statements provided by HRINY, the Superintendent has determined that HRINY's required reserves and other liabilities exceed its admitted assets. Thus, the Superintendent has found that HRINY is unable to pay its outstanding obligations as they mature in the regular course of business, and is, therefore, insolvent within the meaning of Section 1309 of the NYIL.

Because each of these grounds is a sufficient basis for entry of the Proposed Liquidation Order, HRINY should be placed into liquidation.

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[7] *See* N.Y. Ins. Law. § 7404 ("The superintendent may apply under this article for an order directing the superintendent to liquidate the business of a domestic insurer . . . upon any of the grounds specified in subsections (a) through (o) of section [7402] of this article, whether or not there has been a prior order directing the superintendent to rehabilitate such insurer.").

[8] Section 1309 of the NYIL provides in pertinent part: "Whenever the superintendent finds from a financial statement or report on examination that an authorized insurer is unable to pay its outstanding lawful obligations as they mature in the regular course of business, as shown by an excess of required reserves and other liabilities over admitted assets . . . such insurer shall be deemed insolvent and the superintendent may proceed against it pursuant to the provisions of article seventy-four of this chapter."

III. THE INJUNCTIVE RELIEF SHOULD BE GRANTED

The NYIL authorizes the granting of a broad spectrum of injunctive relief in insurer liquidation proceedings. Section 7419(a) of the NYIL provides that, "[u]pon application by the superintendent for an order to show cause under this article or at any time thereafter, the court . . . may without notice issue an injunction restraining the insurer, its officers, directors, shareholders, members, trustees, agents, servants, employees, policyholders, attorneys, managers, and all other persons from the transaction of its business or the waste or disposition of its property." Section 7419(b) of the NYIL further provides that the Court may "at any time during a proceeding under this article issue such other injunctions or orders as it deems necessary to prevent interference with the superintendent or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, the obtaining of preferences, judgments or other liens, or the making of any levy against the insurer, its assets or any part thereof." The Injunctive Relief requested here falls squarely within the Court's broad authority pursuant to Section 7419 and is necessary for several reasons.

A. The Injunctive Relief Generally Granted to Insurers in a Liquidation Proceeding is Warranted

Most of the Injunctive Relief provided in the Order to Show Cause and the Proposed Liquidation Order is generally granted at the outset of New York liquidation proceedings and is necessary to enable the Superintendent to fulfill her statutory mandate to "take possession of the property of [the] insurer and to liquidate the business of the same" in a manner consistent with "the dominant purpose of [Article 74] . . . the preservation and enhancement of [the] company's assets to the end that the interests of all its creditors, policyholders, stockholders and the public will be subserved." *Knickerbocker Agency, Inc. v. Holz*, 4 N.Y.2d 245, 253 (1958). As set forth in paragraphs 1 through 4 of the Order to Show

Cause and paragraphs 8 through 11 of the Proposed Liquidation Order, this standard injunctive relief includes, among other things, enjoining and restraining all persons and entities from (i) transacting HRINY's business; (ii) wasting or disposing of HRINY's property; (iii) interfering with the Liquidator, the Liquidation Proceeding or the Liquidator's possession, control, or management of HRINY's property; (iv) disclosing any information that is proprietary to HRINY or not in the public domain; and (v) commencing, continuing, advancing, or otherwise prosecuting any actions, claims, lawsuits, arbitrations, alternative dispute resolution proceedings, or other formal legal or administrative proceedings, except for any investigation or enforcement action by any state or federal agency, against (a) HRINY or (b) the Liquidator, the NYDFS, the Superintendent, the NYLB, any of their respective officers, employees, attorneys, representatives, or agents (collectively, "**Representatives**") or any Representatives of HRINY, in each case as related to HRINY or the Liquidation Proceeding. New York courts routinely grant these standard injunctive provisions at the outset of insurance liquidation proceedings, and the Court should do so in this case.[9] Given that HRINY's outstanding liabilities already exceed its available assets, the Superintendent's primary goal in commencing the Liquidation

[9] *See, e.g., In re Drivers Ins. Co.*, Order of Liquidation, Index No. 700282/2015, ¶¶ 6, 7 (N.Y. Sup. Ct. Aug. 6, 2015) (the "**Drivers Liquidation Order**") available at: http://www.nylb.org/Documents/Drivers_Order_Liq.pdf; *In re Essence Healthcare of New York, Inc.*, Order of Liquidation, Index No. 452879/2014, ¶¶ 6, 7 (N.Y. Sup. Ct. Feb. 20, 2015) (the "**Essence Liquidation Order**") available at: http://www.nylb.org/Documents/Essence_Liquidation_Order_r1.pdf; *In re CignaHealthcare of New York, Inc.*, Order of Liquidation, Index No. 452836/2014 ¶¶ 6, 7 (N.Y. Sup. Ct. Jan. 30, 2015) (the "**Cigna Liquidation Order**") available at: http://www.nylb.org/Documents/Cigna_Liquidation_Order.pdf; *In re Eveready Ins. Co.*, Order of Liquidation, Index No. 160307/2014, ¶¶ 6, 7 (N.Y. Sup. Ct. Dec. 3, 2014) (the "**Eveready Liquidation Order**") available at: http://www.nylb.org/Documents/Eveready_Liquidation_Order.pdf; *In re Health Partners of New York*, Order of Liquidation, Index No. 402965/08, ¶ 14, 16 (N.Y. Sup. Ct. Dec. 22, 2008) (the "**HPNY Liquidation Order**"); *In re MDNY Healthcare, Inc.*, Order of Liquidation, Index No. 401811/08, ¶ 14, 16 (N.Y. Sup. Ct. July 31, 2008) (the "**MDNY Liquidation Order**"); *see also In re Fin. Guaranty Ins. Co.*, Order of Rehabilitation, ¶¶ 6-8, Index No. 401265/2012 (N.Y. Sup. Ct. June 28, 2012) (the "**FGIC Rehab. Order**") available at: http://www.fgic.com/policyholderinfocenter/rehabdocs/docs/FGIC_Order_of_Rehabilitation.pdf.

Proceeding is to protect and preserve the HRINY estate for the benefit of all Providers, Members and other claimants. The Injunctive Relief described above is necessary to ensure that the Liquidator is not forced to waste valuable estate resources defending against frivolous lawsuits or other attempts by individual Providers, Members or other claimants to interfere with the Liquidator's efforts to maximize recoveries for claimants as a whole, in accordance with the NYIL.

In addition, paragraphs 6 and 7 of the Proposed Liquidation Order vest the Liquidator with the authority to pay, without further order of the Court, Administrative Expenses and to reject any executory contracts to which HRINY is a party. This authority provides the Liquidator with the flexibility necessary to procure claims processing and other services that are essential to the orderly liquidation of HRINY and to rid the estate of any burdensome or unnecessary contractual obligations. In addition, paragraph 5 of the Liquidation Order vests the Liquidator with the authority to bring claims on behalf of HRINY. This authority provides the Liquidator with an important tool to pursue recoveries from third parties, including outstanding Risk Corridor amounts owed to HRINY, for the benefit of the HRINY estate. Like the Injunctive Relief described above, this authority is consistent with relief typically granted in New York liquidation proceedings and should be granted in this case.[10]

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[10] *See, e.g.*, Drivers Liquidation Order ¶ 10; Essence Liquidation Order ¶¶ 8, 12; Eveready Liquidation Order ¶ 10; Cigna Liquidation Order ¶¶ 8, 12; *see also State of Iowa v. CoOpportunity Health*, Final Order of Liquidation, Equity No. EQCE077579, ¶¶ 11, 16, 18 (Iowa Dist. Ct. Mar. 2, 2015) (the "**Iowa CO-OP Liquidation Order**") available at: http://www.iid.state.ia.us/sites/default/files/press_release/2015/03/02/final_order_of_liquidation_pdf_17399.pdf; *State of Nev. v. Nev. Health CO-OP*, Permanent Injunction and Order Appointing Commission as Permanent Receiver of Nevada Health CO-OP, Case No. A-15-725244-C, ¶ 14(a), (h), (p) (Nev. Dist. Oct. 14, 2015) (the "**Nevada CO-OP Receivership Order**") available at: http://nevadahealthcoop.org/wp-content/uploads/Ordr_Perm_Injun_and_Ordr_Appt_Comm_as_Perm_Rec_of_Nev.pdf; *see also* FGIC Rehab. Order ¶4.

B. The Injunctive Relief Specific to Insolvent Health Insurance CO-OPs is Necessary and Appropriate

In addition to the injunctive relief described above, which is commonly granted at the outset of New York liquidation proceedings, the Order to Show Cause and the Proposed Liquidation Order include certain specific injunctive relief tailored to the unique circumstances of an insolvent health insurance CO-OP. To ensure an orderly liquidation, the Superintendent respectfully submits that the following Injunctive Relief is necessary and consistent with similar relief granted in other health insurance receiverships in New York and receivership proceedings for other CO-OPs in Iowa, Louisiana and Nevada.

Prohibition on Balance Billing. Paragraph 6 of the Order to Show Cause and paragraph 13 of the Proposed Liquidation Order prohibit a Provider, irrespective of whether the Provider participated in the HRINY network, from collecting or attempting to collect from any Member sums owed by HRINY related to services covered by HRINY other than coinsurance amounts, copayments, and deductibles owed by such Member. As set forth therein, this prohibition on "balance billing" is mandated by Section 4307(d) of the NYIL[11] and also reinforces applicable regulations requiring Providers to include "hold harmless" provisions in all agreements governing their provision of services to Members.[12] Prohibiting balance billing is

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[11] Section 4307(d) of the NYIL provides that "In the event that . . . any . . . health service corporation is deemed insolvent, as provided in [Section 4310(c)] of this article, then no individual subscriber or enrollee of, or served by, the . . . health service corporation shall be liable to any provider of health care services for any covered services of the insolvent . . . health services corporation. No provider of health care services or any representative of such provider shall collect or attempt to collect from the individual subscriber or enrollee sums owed by a . . . health service corporation deemed insolvent, and no provider or representative of such provider may maintain any action at law against an individual subscriber or enrollee to collect sums owed to such provider by such . . . health service corporation." Section 4310(c) of the NYIL provides that a health services corporation "shall be deemed insolvent whenever it is presently or prospectively unable to fulfill its outstanding contracts and other liabilities and reserves."

[12] 11 CRR-NY 101.4 requires agreements with participating providers to include "a 'hold harmless' provision that prohibits a participating provider from collecting or attempting to collect from a subscriber any amounts owed to such participating provider for covered services, but excluding any amounts owed

necessary to minimize any harm caused to individual Members by the financial deterioration of HRINY and is consistent with relief granted in receivership proceedings for other New York health insurers[13] and CO-OPs.[14]

***Ipso Facto* Provisions.** Paragraph 5 of the Order to Show Cause and paragraph 12 of the Proposed Liquidation Order prohibit all persons and entities from modifying, including by declaring a default under or terminating, any existing contract on account of any contractual provisions based on HRINY's financial condition or insolvency, the commencement or continuation of the Liquidation Proceeding, HRINY's non-payment prior to the Liquidation Proceeding, or any action by the Liquidator with respect to HRINY. Prohibiting all persons and entities from exercising rights under these types of contractual *ipso facto* provisions is necessary to ensure an orderly, fair, and equitable wind-down of HRINY, and is consistent with relief granted in other receivership proceedings for CO-OPs,[15] Article 74 proceedings in New York,[16] as well as federal bankruptcy[17] and banking[18] law.

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by the subscriber to the provider pursuant to the subscriber's contract, it being understood that such a 'hold harmless' is in addition to the protections afforded to subscribers under Insurance Law section 4307(d)."

[13] *See, e.g.,* HPNY Liquidation Order ¶ 15; MDNY Liquidation Order ¶ 15.

[14] *See* Nevada CO-OP Receivership Order ¶ 6(a), (c); *Donelon v. Louisiana Health CoOperative, Inc.*, Order of Rehabilitation and Injunctive Relief, Number 641 928, at 8 (La. Dist. Sept. 1, 2015) (the "**Louisiana CO-OP Rehab. Order**") available at: http://www.ldi.la.gov/docs/default-source/documents/health/lahc-petition-and-court-order.pdf?sfvrsn=0; *Donelon v. Louisiana Health CoOperative, Inc.*, Permanent Order of Rehabilitation and Injunctive Relief, Number 641 928, at 9 (La. Dist. Sept. 21, 2015) (the "**Permanent Louisiana CO-OP Rehab. Order**") available at: http://www.ldi.la.gov/docs/default-source/documents/financialsolvency/receivership/Louisiana-Health-Cooperative/orderf6551b2a8b9e6b8a94f4ff0000585bf2.pdf?sfvrsn=0.

[15] Nevada CO-OP Receivership Order ¶ 7; Iowa CO-OP Liquidation Order ¶ 46.

[16] FGIC Rehab. Order ¶¶12-14, 18.

[17] Section 363(*l*) and 365(e)(1) of the Bankruptcy Code prohibit the enforcement of *ipso facto* clauses that may otherwise interfere with a debtor's right to use, sell or lease property, including by terminating or

IV. THE PROPOSED LIQUIDATION ORDER MAINTAINS EXISTING DEADLINES AND PROCEDURES FOR THE SUBMISSION OF POLICY CLAIMS

Based on her review of HRINY's existing claims submission process, the Superintendent has determined that HRINY has an efficient process in place for collecting Policy Claims. Accordingly, paragraph 18 of the Liquidation Order provides that Policy Claims must be submitted in accordance with existing requirements and deadlines. In addition, paragraph 18 of the Liquidation Order clarifies that entry of the Liquidation Order will not extend any deadlines for the submission of Policy Claims set forth in Providers' contracts or Members' policies. Maintaining existing deadlines and procedures for the submission of Policy Claims preserves Providers' and Members' contractual rights and facilitates the orderly and efficient submission, review and adjudication of Policy Claims.

With respect to all claims other than Policy Claims, the Proposed Liquidation Order defers the claims submission deadline set forth in Section 7432(b) of the NYIL[19] until further order of the Court. Based on the information available to date, absent the receipt of substantial additional recoveries, it is unlikely that HRINY will have sufficient assets to satisfy claims against HRINY other than claims for Administrative Expenses and a portion of Policy

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modifying a contract or lease with a debtor or any rights or obligations thereunder. 11 U.S.C. §§ 363(*l*), 365(e)(1).

[18] In the context of a Federal Deposit Insurance Corporation ("**FDIC**") receivership, federal law provides that "the conservator or receiver may enforce any contract . . . notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment or exercise of rights or powers by a conservator or receiver." 12 U.S.C. § 1821(e)(13)(A). "In granting the FDIC this power, Congress codified the common law rule that ipso facto provisions are void as contrary to public policy." *Bank of N.Y. v. FDIC*, 453 F.Supp.2d 82, 96 (D.D.C. 2006), *aff'd*, 508 F.3d 1 (D.C. Cir. 2007).

[19] Section 7432(b) of the NYIL provides that "all persons who may have claims against [an] insurer shall present the same to the liquidator . . . within four months from the date of entry of [the liquidation] order, or, if the superintendent shall certify that it is necessary, within such longer time as the court shall prescribe."

Claims. Accordingly, the Superintendent has determined that it would be a waste of estate resources to establish a claims submission process for claims other than Policy Claims at this time.

V. THE PROPOSED LIQUIDATION ORDER APPROPRIATELY RECOGNIZES THE LIQUIDATOR'S JUDICIAL IMMUNITY

The Proposed Liquidation Order confirms that the Liquidator, the NYLB, and their respective employees, attorneys, representatives, and agents are not subject to liability for any action taken (or omitted from being taken) with respect to the Liquidation Proceeding, or any events, acts, or omissions leading up to the commencement of the Liquidation Proceeding, when acting in good faith, in accordance with the orders of this Court, and/or, in the case of the Liquidator and the NYLB, in the performance of their duties pursuant to Article 74 of the NYIL. This Court has recognized that judicial immunity is appropriate under these circumstances,[20] and consistent with well-established common law rules that dictate that a court-appointed receiver is entitled to judicial immunity for actions performed within his or her official capacity and within his or her court-appointed authority.[21]

In this case, the Liquidator is not acting in her capacity as a governmental official. Instead, the Liquidator acts in a private capacity under the supervision of the Court pursuant to Article 74 of the NYIL.[22] As such, the Liquidator and her agents are entitled to the judicial immunity typically accorded to court-appointed receivers.[23]

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[20] *See In re Liquidation of U.S. Capital Ins. Co.*, 948 N.Y.S.2d 549, 638 (N.Y. Sup. Ct. 2012) ("the Liquidator . . . operates as a statutory receiver and is entitled to judicial immunity for any acts or omissions when acting in good faith, in accordance with the liquidation order issued by the Court, or in the performance of his duties pursuant to Insurance Law Article 74.").

[21] *See, e.g., Copeland v. Salomon*, 56 N.Y. 2d 222 (N.Y. 1982); *Bankers Fed. Sav. FSB v. Off W. Broadway Developers*, 227 A.D.2d 306 (1st Dep't 1996).

[22] *Dinallo*, 9 N.Y. 3d at 103 (explaining that the Superintendent's role as liquidator or rehabilitator of a distressed insurer is "judicial and private," while "his role as regulator and supervisor is administrative

Under these circumstances, public policy recognizes that the Liquidator and her agents and employees are entitled to judicial immunity so that the Liquidator may perform her receivership function without fear or threat of litigation. Confirmation of this judicial immunity in the Proposed Liquidation Order is appropriate to provide notice to parties in interest and to forestall potential disputes, thereby promoting the efficient resolution of these proceedings.

CONCLUSION

For the reasons set forth above, this Court should grant the relief requested in the Petition and grant such other and further relief as the Court deems just and proper.

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New York, New York

Eric T. Schneiderman
Attorney General of the State of New York

Attorney for the Acting Superintendent of
Financial Services of the State of New York

By: _____
David Holgado
Senior Enforcement Counsel
120 Broadway, 24th Floor
New York, NY 10271
(212) 416-8610

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and public.").

[23] *See, e.g.*, Drivers Liquidation Order ¶ 17; Eveready Liquidation Order ¶ 17; Cigna Liquidation Order ¶ 14; FGIC Rehab. Order ¶ 19; HPNY Liquidation Order ¶ 19; MDNY Liquidation Order ¶ 19.