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BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	
DAVIDSON HOTEL COMPANY, LLC,	)	FILE AHB-WCA-16-25
	)	
Appellant,	)	
	)	
From the Decision of the	)	
	)	
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA,	)	
	)	
Respondent.	)	
	)	

DECISION

Statement of the Case

Workers' compensation insurance is a comprehensive benefits system that balances the interests of workers and their employers. Workers receive timely compensation for employment-related injuries but are generally barred from suing their employers. Employers are protected from lawsuits but must provide benefits regardless of fault.[1]

Because workers' compensation insurance is mandatory for all California employers, the Legislature charged the Insurance Commissioner with closely scrutinizing all insurance plans to

[1] See 2 Witkin, Summary of Cal. Law 11th, Workers' Compensation § 1 (2018).

protect both workers and their employers.[2] To assist the Insurance Commissioner (Commissioner) in carrying out this responsibility and to support employers seeking affordable coverage, the Insurance Code mandates that insurers publicly file with the Commissioner all terms, policies, endorsements, rates and related information used to provide workers' compensation insurance.[3]

This proceeding arises out of Travelers Property Casualty Company of America's (Travelers or Respondent) use of an unfiled side agreement that modified Travelers' obligations under the approved policy. Davidson Hotel Company, LLC. (Davidson or Appellant) contends Travelers' unfiled side agreement violates Insurance Code sections 11658 and 11735, as it modifies the premium owed and the party's obligations under the insurance policies. Appellant's argument substantially relies upon the Insurance Commissioner's precedential decision *In the Matter of Shasta Linen Supply, Inc.*,[4] in which the Commissioner held that unfiled side agreements were unlawful and void.

Respondent maintains that neither the Side Agreement[5] nor its contents were required to be filed, notwithstanding the *Shasta Linen* decision. Respondent further argues the Insurance Code's filing requirements do not apply because Appellant is not domiciled in California. Travelers also contends Insurance Commissioner lacks jurisdiction over this appeal and may not grant the remedies Appellant requests. Lastly, Travelers urges the Commissioner not to void the unfiled Side Agreement.

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[2] *Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1118, rehg. den. May 23, 2018 (*Nielsen Contracting*).

[3] Ins. Code, §§ 11657-11660; 11730-11742.

[4] *In the Matter of the Appeal of Shasta Linen Supply, Inc.* (Cal. Ins. Comm'r, June 20, 2016) AHB-WCA-14-31 (*Shasta Linen*). The Commissioner designated *Shasta Linen* precedential pursuant to Government Code section 11425.60, subdivision (b).

[5] Throughout this decision "Side Agreement" refers to Travelers' unfiled ancillary agreement with Appellant. Travelers titled the document "Agreement" on its face. (See Exh. 105.)

For the reasons set forth below, the Commissioner finds that Travelers' unfiled Side Agreements are void and unenforceable pursuant to Insurance Code section 11658 and California Code of Regulations, title 10, section 2268 and Travelers' misapplied its filed rates and rating plan information in violation of Insurance Code section 11735.

Statement of Issues

1. Did the unfiled Side Agreement between Travelers and Davidson constitute a collateral agreement and/or endorsement in violation of Insurance Code section 11658 and California Code of Regulations, title 10, section 2268?

2. Did the unfiled Side Agreement between Travelers and Davidson constitute a collateral agreement between the parties that misapplied Travelers' Insurance Code section 11735 filings?

3. If so, what is the proper remedy?

Procedural History

On July 19, 2016, Davidson filed an appeal with the California Department of Insurance (CDI), Administrative Hearing Bureau (AHB) in response to Travelers' March 25, 2016 decision rejecting Davidson's Complaint and Request for Action. On July 20, 2016, Chief Administrative Law Judge (CALJ) Kristin L. Rosi issued an Appeal Inception Notice.

On November 7, 2016, Travelers filed a Motion to Dismiss Davidson's appeal arguing the Insurance Commissioner lacked jurisdiction over the appeal. On December 1, 2016, Davidson filed its Opposition to the Motion to Dismiss. The CALJ declined to rule on Travelers' motion noting that the Insurance Code and its applicable Regulations do not permit motions to dismiss.

On January 6, 2017, the CALJ scheduled the evidentiary hearing for May 18, 2017. At the parties' request, the CALJ continued the evidentiary hearing to September 13, 2017. Days before the evidentiary hearing, Davidson requested a continuance, as several of its witnesses were unable to travel due to an impending hurricane. With Travelers' consent, the CALJ continued the evidentiary hearing a second time, to January 31, 2018.

The evidentiary hearing commenced on January 31, 2018. At the hearing, Nicholas P. Roxborough, Esq. and Ryan R. Salsig, Esq. of Roxborough, Pomerance, Nye & Adreani, LLP appeared on behalf of Appellant. Kathleen Birrane, Esq. and Michael O'Day, Esq. of DLA Piper, Tim Moroney, Esq. of Doctor Law Group, and Jodi K. Ebersole, Esq. of the Travelers Companies, appeared on behalf of Respondent. The parties submitted documentary evidence and presented witnesses. The evidentiary record includes witness testimony and all exhibits admitted into evidence as identified in the parties' Exhibit Lists. The parties completed their briefing on May 11, 2018.

On September 10, 2018, the CALJ closed the record and took the matter under submission.

Findings of Fact

The Commissioner finds, by a preponderance of evidence, the following material facts.[6]

I. Davidson Hotel Company

Davidson Hotel Company, LLC is a privately-held limited liability company, headquartered in Atlanta, Georgia.[7] Davidson is a full-service hospitality company providing

[6] References to the transcript of the evidentiary hearing are "Tr." followed by the page number(s) and, where line references are used, a ":" followed by the line number(s).
[7] Davidson was headquartered in Memphis, Tennessee at the time the Side Agreements were executed. (Tr. 150:13-17.)

hotel management services to institutional owners.[8] Davidson currently employs 6,000 hotel workers at 46 properties throughout the country.[9] During the time period at issue, Davidson operated six California hotels and employed 700 California hotel workers.[10]

From 2009 through 2012, Davidson's California payroll exceeded $80,000,000, equaling approximately $20,000,000 per policy year.[11] This represented approximately 13 percent of Davidson's overall payroll.[12] During that same time, Davidson incurred 2,004 workers' compensation insurance claims, 300 of which were filed by California employees.[13] Travelers has paid, or has reserved funds to pay, $13,228,946 for Davidson's claims, $4,607,281 of which are for California workers.[14] As of January 2018, Davidson had paid Travelers $16.9 million for four years of coverage.[15] Travelers still holds $1.6 million in reserves.[16]

Prior to 2009, Davidson received its workers' compensation insurance from American Zurich Insurance Company through a guaranteed cost policy.[17] Davidson's premium under its 2008-2009 Zurich policy totaled $2,450,000.[18] In late 2008, Zurich informed Davidson that its guaranteed cost policy premium would increase to approximately $3,160,000. As a result, Davidson's insurance broker researched other workers' compensation insurance programs, such as large deductible plans, retrospective rating plans, and less expensive guaranteed cost

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[8] Exh. 267-2.
[9] Tr. 146::24-147:2; Exh. 267:16-267:17.
[10] Exh. 118; Tr. 75:10-18.
[11] Exh. 118; Tr. 154:8-11.
[12] Exh. 118; Tr. 155:1-5.
[13] Exh. 118. California claims represent about 15% of Davidson's total claims during the policy periods.
[14] *Ibid.* California claims represent approximately 35% of total claims dollars.
[15] Tr. 104:12-105:17.
[16] Tr. 105:18-21.
[17] Exh. 212;
[18] Exh. 212-2.

options.[19] After reviewing its options, Davidson selected a large deductible, plan from Travelers. Davidson admits it understood the terms and conditions its policy with Travelers.

II. Travelers' Workers' Compensation Insurance Policies with Davidson

A. Guaranteed Cost Policies

Most California employers receive workers' compensation insurance coverage through guaranteed cost policies. Under a guaranteed cost policy, the insured pays a fixed annual premium for the policy term, regardless of subsequent loss experience. The fixed premium is the sum of the average losses and certain fees. Average losses take into account the base rate for each classification assigned to the policy and the employer's experience modification factor.[20] The fees are the estimated costs of providing the insurance; that is sales, underwriting, profit and other fixed costs. Thus, a company with average losses of $500,000, may be charged $750,000 in premium; $500,000 to cover expected loss payments and $250,000 in fees.

Every guaranteed cost policy and its endorsements must adhere to the Insurance Code and its applicable regulations. All rates, rating plans and other premium information charged in a guaranteed cost policy must be filed with the Workers' Compensation Insurance Rating Bureau (WCIRB) and approved by the Insurance Commissioner prior to use.[21] In addition, every guaranteed cost policy must contain statutorily-required dispute resolution and cancellation language.[22]

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[19] *Id.*

[20] The Workers' Compensation Insurance Rating Bureau (WCIRB) promulgates experience ratings for each qualified employer pursuant to the California Workers' Compensation Experience Rating Plan (ERP). Experience rating utilizes a policyholder's past claims experience to forecast future losses by measuring the policyholder's loss experience against the loss experience of policyholder's in the same classification, to produce a prospective premium credit, debit or unity modification. (Ins. Code, § 11730, subd. (c).) The rules governing the reporting of loss data are found in the California Workers' Compensation Uniform Statistical Reporting Plan (USRP). Provisions of the ERP and USRP are part of the Insurance Commissioner's regulations, codified at California Code of Regulations, title 10, section 2352.1.

[21] Ins. Code, § 11735.

[22] Ins. Code, § 11650 *et seq.*; see also California Code of Regulations, title 10, section 2509.77.

B. Travelers' Guaranteed Cost Policy Terms

Travelers and Davidson entered into four separate one-year guaranteed cost policies from March 1, 2009 through March 1, 2013.[23] The policies contain standard language approved by the Commissioner. For example, each policy states that the workers' compensation law applicable to this policy is the law of each state named on Information Page 3.A.[24] Travelers further warrants that "all premium for this policy will be determined by our manual of rules, rates, rating plans and classifications" and promises that "the only agreements relating to this insurance are stated in this policy."[25] The policy further provides that the "terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy."[26]

Each policy sets out the rates that Travelers may charge Appellant.[27] Travelers filed those rates with the Commissioner before the policies' commencement.[28] For policy year 2012 to 2013, Travelers set Appellant's California Classification Code 9050 rates at $6.15 per $100 of payroll, and Appellant's Code 9079 rates at $2.95 per $100 of payroll.[29] In addition, as required by law,[30] Travelers warrants in each policy that it adheres to a single uniform loss experience rating plan and applies that experience rating to each policy.[31] Appellant's California experience modification factor for policy year 2012-2013 equaled 0.95.[32] Based on these rates and experience modification, Travelers estimated Appellant's 2012-2013 annual premium at $3,335,867.[33]

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[23] Exhs. 101-104.
[24] E.g., Exh. 104-56.
[25] E.g. Exh. 104-60, 104-56.
[26] E.g. Exh. 104-56.
[27] E.g., Exh. 104-7.
[28] Workers' compensation insurance rate filings are available on the CDI's website at www.insurance.ca.gov.
[29] Exh. 104-7.
[30] Ins. Code, § 11752.8.
[31] E.g., Exh. 104-7
[32] *Ibid.*
[33] Exh. 104-3. Davidson's estimated California premium totaled $870,100. (Exh. 104-7.)

Travelers' guaranteed cost policies also include a cancellation provision and a "short rate" cancellation notice, as required by the Insurance Code.[34] Cancelation under the policy is governed by its California Cancellation Endorsement, which permits the insurer to cancel for non-payment of premium, failure to comply with state law and reporting requirements or a material change in ownership.[35] The policies provide that after cancellation, the final premium will be determined as follows:

> a. If we [Travelers] cancel, final premium will be calculated pro rata based on the time the policy was in force. Final premium will not be less than the pro rata share of the minimum premium.
>
> b. If you cancel, the final premium may be more than pro rata; it will be based on the time this policy was in force, and increased by our short rate calculation table and procedure. Final premium will not be less than the minimum premium.[36]

The short rate penalty, which discourages employers from changing insurers mid-year, is a percentage of the full-term premium based on the number of days of coverage in the canceled policy.[37]

Policy Part One, section D states that Travelers will pay the following costs as part of any claim, proceeding or suit they defend:

> 1. reasonable expenses incurred at our request, but not lost earnings;
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> 2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the amount payable under this insurance;
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> 3. litigation costs taxed against you;
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> 4. interest on a judgment as required by law until we offer the amount due under this insurance; and

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[34] E.g., 104-60.
[35] E.g. Exh. 104-149.
[36] E.g., Exh. 104-60. This provision may be found in Part Five, Section E of each of Travelers' policies.
[37] *Shasta Linen, supra,* at p. 14; Exh. 104-46 to 104-48.

5. expenses we incur.[38]

This provision further states that Travelers has a duty to defend, at its own expense, any claim or proceeding arising under the insurance.[39]

The policies are silent regarding collateral, installment payments, collection actions, attorneys' fees, and medical cost containment. Nor do the policies' provide for binding arbitration or any other alternative dispute resolution methods.

B. Large Deductible Endorsement

Davidson's guaranteed cost policies each contained more than 90 endorsements altering the policies' terms.[40] At least nine endorsements are California-specific. Included among those are the California Cancellation Endorsement, the California Short-Cancellation Table, the Policy Amendatory Endorsement-California, and the Employers' Liability Coverage Amendatory Endorsement-California.[41]

Davidson's policy also included a Workers' Compensation Large Deductible Endorsement, filed and approved by the CDI.[42] A large deductible plan alters an insured's obligations under the policy. Under most workers' compensation insurance policies, the insurer is statutorily obligated to pay an employee's entire claim, from the "first dollar" to the last. With a large deductible plan, the employer agrees to reimburse the insurer for claim costs up to an agreed-upon amount.

Appellant's Large Deductible Endorsement (LDE) totaled five pages and its purpose is stated from the outset:

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[38] E.g. Exh. 104-56 to 104-57.
[39] E.g. Exh. 104-56.
[40] Exh. 104-53 to 104-55 details the 96 endorsements to Davidson's policy.
[41] Exhs. 104-141; 104-146; 104-148; 104-149.
[42] E.g. Exh. 104-87.

> In consideration of a reduced premium, you have agreed to reimburse us up to the deductible amounts stated in the Schedule at the end of this endorsement for all payments legally required, including Allocated Loss Adjustment Expense(s),[43] where you have elected to include such expense as indicated in the Schedule, which arises out of any claim or suit we defend.[44]

Under the LDE's terms, ALAE encompass attorneys' fees and litigations costs, investigation fees, and medical cost containment expenses which can be directly allocated to a particular claim.[45] The LDE permits Travelers to cancel Davidson's policy if Davidson fails to reimburse Travelers "for any amounts as required by this endorsement, or, if you fail to provide security in a form, and amount acceptable to us."[46]

The LDE's final two pages, titled "Schedule", describe Travelers' method of calculating premium and provide Davidson's agreed-upon deductible amount. In 2012, Davidson selected a $250,000 deductible.[47] The deductible amount sets out the maximum amount Davidson must reimburse Travelers for each claim.[48] The Schedule also provides that ALAE will be included in Davidson's deductible and that Davidson will reimburse Travelers for claims handling in the amount of 7.5 percent.[49] Finally, for policy year 2012, the LDE provides that premium will be charged at a rate of $0.4034 per $100 of audited payroll excluding monopolistic states payroll.[50]

The LDE is silent as choice of law, dispute resolution, collateral obligations, and attorneys' fees arising out a dispute between the parties.

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[43] ALAE are expenses incurred in the investigation and defense of workers' compensation claims.
[44] E.g. Exh. 104-87.
[45] E.g. Exh. 104-88.
[46] E.g. Exh. 104-89.
[47] E.g. Exh. 104-90.
[48] E.g. Exh. 104-87.
[49] E.g. Exh. 104-90.
[50] E.g. Exh. 104-91.

III. Travelers' Side Agreements with Davidson

Side Agreements are a mandatory component of every LDE.[51] For each policy year at issue, Travelers and Davidson entered into an unfiled and unattached 40-page Side Agreement.[52] Davidson executed the Side Agreements after the policies incepted. For example, Davidson's 2009-2010 Side Agreement was executed on April 17, 2009; 45 days after the policy began.[53] As outlined below, the Side Agreement defines claims handling fees and obligations, introduces a collateral requirement, sets forth minimum program cost, permits Travelers to collect attorneys' fees, alters the cancellation terms and requires binding arbitration of disputes.

A. Cover Page

Although titled "Cover Page," this section is actually nine to ten pages and contains the information necessary to compute the program's cost. Page two provides the rating plan formula applicable to Appellant's policy. This formula calculates Davidson's premium as follows:

> Non-Loss Responsive Rate(s) x Corresponding Exposure Base(s), but in no event less than any stated Minimum Non-Loss Responsive Premium shown in the Non-Loss Responsive Premium part of the Cover Page.[54]

The Minimum Non-Loss Responsive Premium is the sum of the Workers' Compensation Deductible Premium, Loss Reimbursement Premium and Workers' Compensation Premium.[55] For policy year 2012, Travelers calculated Davidson's Minimum Non-Loss Responsive Premium at $754,512.[56] The Minimum Non-Loss Responsive Premium is not defined or included in

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[51] Tr. 215:10-14. As of January 2018, Travelers had approximately 1100 active side agreements. (Tr. 608:15-21.)
[52] See Exhs. 105 to 108. Travelers concedes the Side Agreements were never filed with the WCIRB or the Department of Insurance. (Tr. 548:9-21.)
[53] Exh. 105-33.
[54] Exh. 108-4.
[55] E.g. Exh. 108-5.
[56] *Ibid.*

Davidson's policy or in the LDE. In fact, Travelers admits its billing department never sees the underlying insurance policy since billing is based entirely on the Side Agreement.[57]

The Cover Page also includes a collateral requirement and a payment schedule. For policy year 2012, Travelers calculated Davidson's collateral requirement at $4,300,000.[58] The Cover Page also describes the how collateral will be paid and adjusted, and sets out terms for Letters of Credit. In addition, the Cover Page also includes a Cash Collateral Adjustment formula which provides:

> Cash Collateral = (((Incurred Deductible Losses x (1 + Deductible LCF)) + (Incurred Loss Reimbursement Plan Losses x (1 + Loss Reimbursement Plan LCF)) + (Retrospective Plan Incurred Losses x (1 + Retrospective LCF))) x Loss Development Factor) – ((Deductible Losses x (1 + Deductible LCF)) + (Loss Reimbursement Losses x (1 + Loss Reimbursement Plan LCF)) + (Retrospective Plan Paid Losses x (1 + Paid LCF)))[59]

Travelers may adjust the cash collateral amount if the cash collateral falls below $300,000. Neither the policy, nor the LDE provide for cash collateral or reference the Loss Development Factors (LDF) applied to Davidson's policy.[60]

B. Preamble & Definitions Section

Each Side Agreement also contains a "Definitions" section describing the terms which Travelers states have special meaning.[61] Relevant to this proceeding is the Agreement's definition of "ALAE" and Davidson's "obligations".

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[57] Tr. 302:21-25; Tr. 506:9-14; Exh. 131, p. 15:9-12.
[58] Exh. 108-9. The Side Agreement defines "collateral" as "security for your Obligations which you are required to provide to us pursuant this Agreement and which is acceptable to us in form content, issuer and amount." (Exh. 108-13.) This definition is not included in Davidson's policy or in its LDE.
[59] Exh. 108-10.
[60] Travelers admits the Cash Collateral formula and LDFs are found only in the Side Agreement. (Tr. 226:2-7; Tr. 303:10-24.)
[61] E.g. Exh. 108-12.

Prior to defining applicable terms, the Agreement sets forth the understanding between the parties, as well as their rights and obligations. Specifically, Travelers states:

> The Agreement represents the agreement the parties have reached whereby we will provide to you certain insurance coverages and services for the Policies we have issued pursuant to this Agreement, which Policies are incorporated herein by reference, in consideration of your payment of the Obligations described in the Sections and Exhibits comprising this Agreement.[62]

This section also defines ALAE and states that ALAE has the same meaning as that provided in the policy. But the Side Agreement's definition includes two additional expense categories not listed in the policy or LDE: (1) supplementary payments; and (2) defense costs. [63]

The Side Agreement defines "obligations" as any indebtedness or liability of any kind arising in connection with any past, present or future Agreements, Agreement Letters, and any agreement incorporated by reference, including but not limited to attorneys' fees that Travelers may incur in enforcing Davidson's obligations.[64] Given that the Side Agreement incorporates the policies by reference, this provision alters the parties' obligations, since neither the policy nor the LDE require Davidson to pay Travelers' attorney's fees and litigations costs.

C. Rating Plan(s) Computation Section

The Rating Plan(s) Computation Section effectuates the rates, terms and obligations in the Cover Page. Indeed, Travelers states "we issue such Policy(ies) based upon your compliance with the terms and conditions set forth in this Section."[65]

The Side Agreement's Cover Page explicitly provides a cash collateral formula. This section defines the formula's terms, rates, exposure bases, and other charges.[66] It further explains

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[62] *Ibid.*
[63] E.g. Exh. 108-12.
[64] E.g. Exh. 108-14.
[65] E.g. Exh. 108-16.
[66] *Ibid.*

Travelers' non-loss responsive premium calculation method, as laid out on the Cover page.[67] Lastly, this section provides that Travelers may charge Davidson under the ALAE's medical cost containment expense component, as explained in a separate two-page exhibit.[68]

D. Miscellaneous Charges and Payment Sections

The Miscellaneous Charges section requires Appellant to reimburse Travelers, within five days of a demand, for all costs and expenses, including attorneys' fees, incurred in connection with the collection or enforcement of any of Appellant's obligations.[69] Should Appellant fail to remit payments within five days, Travelers may charge interest at the prime rate plus two percent. Neither the underlying insurance policy, nor the LDE contain such a provision.

The Payments section describes how obligations shall be paid. Specifically, Appellant must make monthly estimated collateral and rating plan payments.[70] In the event of default, Travelers may retain any overpayments as security for future obligations.

E. Collateral and Remedies Section

This provision concerns security and default. As explained above, Travelers required cash collateral as security for Davidson's obligations under the policy and Side Agreement.[71] Travelers may keep the cash collateral until, at its sole discretion, it decides it no longer needs it. Should Davidson cancel or Travelers decide not to renew the program, Travelers may require a letter of credit as substitute collateral.[72] The letter of credit shall be provided within 15 days after Travelers' request. Failure to provide a letter of credit upon request results in default and

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[67] E.g. Exh. 108-18.
[68] E.g. Exh. 108-19.
[69] E.g. Exh. 108-20.
[70] E.g. Exh. 108-21.
[71] E.g. Exh. 108-24; Tr. 252:12-20.
[72] *Ibid.*

termination of the policy and Agreement.[73] There is no such provision in the underlying policy or LDE.

This section also includes a detailed default provision. "Default" means failure to pay any amount due, failure to perform any obligation under any Agreement Letter or any agreement incorporated in the Side Agreement, or failure to present a Letter of Credit upon request.[74] Should Appellant default, Travelers may immediately "terminate [the] insurance program or any insurance Policy issued thereunder and cancel or non-renew any certificates of insurance."[75] In essence, this provision permits Travelers to cancel an insurance policy if an insured fails to perform any obligation under the unfiled Side Agreement.

F. General Conditions Section

Lastly, the Side Agreement contains a detailed general conditions provision, which describes cancellation calculations and dispute resolution procedures. Section B sets forth cancellation terms and calculations, differing from those in the underlying policy. If the policy is cancelled by either party prior to expiration, for the purposes of calculating an insured's Maximum Loss Content,

> [t]he audited Exposure Base for that Policy shall be calculated by adding the audited Exposure Base from the beginning of the Policy period to the date of cancellation and the estimated Exposure Base for the balance of the original Policy period, subject to your Minimum Maximum Loss Content. If such Policy is cancelled by either party, your Minimum Program Cost is a flat charge in the amount set forth in the Maximum Loss Content and Minimum Program Cost part of the Cover Page.[76]

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[73] E.g. Exh. 108-26.
[74] *Ibid.*
[75] *Ibid.* Section J, subdivision (2)(c).
[76] E.g. Exh. 108-28.

In the event of cancellation, Davidson's Non-Loss Responsive Premium would be calculated using its audited exposure base from the policy period's inception to the date of cancellation, subject to any minimum non-loss responsive premiums set forth in the Non-Loss Responsive Premium part of the Cover Page.[77]

The Side Agreement provides that Connecticut law governs all disputes.[78] It also contains a two-page arbitration provision subjecting all disputes to binding arbitration in Connecticut.[79] This provision supplants the dispute resolution language in the guaranteed cost policies.[80]

G. Medical Cost Containment Expenses Component of ALAEs Exhibit

The Side Agreement also materially alters the definitions and parties' obligations regarding ALAE. Davidson's Large Deductible Endorsement states that ALAE, including medical cost containment expenses, will be included in Davidson's deductible and that Davidson will reimburse Travelers for claims handling in the amount of 7.5 percent.[81] But the Side Agreements' ALAE exhibit alters this understanding, by allowing Travelers to apply a 27 percent charge to any savings resulting from medical bill repricing or auditing.[82] For example, if Travelers reprices a medical bill based on a state-mandated fee schedule, Davidson must pay Travelers 27 percent of the realized savings. Neither the policy nor the LDE mention this additional ALAE expense.

IV. Travelers' Filing of Side Agreements with CDI

On February 14, 2011, the Insurance Commissioner issued a directive to all workers' compensation insurance carriers. The directive reminded insurers that Insurance Code section

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[77] *Ibid.*
[78] E.g. Exh. 108-32.
[79] E.g. Exh. 108-29 to 108-30.
[80] Travelers' Post-Hearing Memorandum, p. 11.
[81] E.g. Exh. 104-90.
[82] E.g. Exh. 108-36.

11658 and California Code of Regulations, title 10, section 2268 prohibit the use of any unfiled policies, endorsements and collateral and/or side-agreements.[83] The Commissioner ordered insurers to submit any unfiled side agreements immediately. The Commissioner further stated that insurers' attempted enforcement of unfiled side agreements could constitute a violation of California law.[84]

Upon receiving the Commissioner's directive, Travelers met with trade associations to discuss the filing requirements. Travelers was aware the Insurance Code's filing requirements, but believed its Side Agreements did not "modify" policy terms.[85]

In early 2012, nearly one year after the Commissioner's directive, Travelers submitted a proposed Side Agreement to the CDI. The original submission did not include the Cover Page, newly titled by Travelers as a "Program Summary," or the Definitions.[86] On March 19, 2012, Travelers submitted the Program Summary and Definitions. At that time, Travelers stated the Program Summary did not modify the policy and thus did not need to be filed pursuant to Insurance Code section 11658 or California Code of Regulations, title 10, section 2268.[87] On March 20, 2012, CDI attorney Christina Carroll sent Travelers an electronic message indicating the Program Summary did not need to be included in the section 11658 form filing as "it merely contains fill-in-the-blanks for premiums, deductibles, etc. as well as formulas."[88]

On April 4, 2012, Travelers filed its newly titled Insurance Program Agreement with the CDI. Identified by Travelers as "Endorsement WC 99 06 Q6," the filed Side Agreement contains the Definitions, Rating Plan(s) Computation, Payment, Defaults and Remedies, General

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[83] Exh. 229; Exh. 112.
[84] Exh. 229-3; Exh. 112-3.
[85] Tr. 548:18-549:11; Tr. 550:7-17; Tr. 350:14-19; Exh. 135 at p. 274:9-17.
[86] Exh. 244-1.
[87] *Ibid.* Exh. 244-2.
[88] Exh. 245-1.

Conditions and Medical Cost Containment Expense Component of ALAE sections included in the unfiled Side Agreements.[89]

Notably, the filed Insurance Program Agreement contains significant modifications. For instance, the filed Definitions section now describes "cash securities account," "administrative expense reimbursement," "maximum/minimum retrospective plan premium" and "incurred loss"; terms that were not described in the unfiled Side Agreement.[90] Travelers also revised the Rating Plan(s) Computation section, modified the Deductible Plan Computation and Retrospective Plan Computation provisions, and added a Maximum/Minimum Retrospective Plan Premium provision.[91] The Payment section now includes provisions on Loss Funds, Deductible Plan Claims Handling Reimbursement Charges Adjustment and a Final Deductible and Retrospective Plan Adjustments.[92] The Payment section also modifies billing and adjustment terms for losses and claims handling expenses and materially changes the plan adjustment requirements.[93] Travelers also reformed its Default and Remedies provisions to vary depending upon the type of security provided, and substantially restructured its Cancellation calculations.[94] Travelers likewise amended the General Provisions section so that the filed Side Agreement no longer requires arbitration in Connecticut, nor are insureds required to consent to Connecticut law or jurisdiction.[95] Lastly, Travelers added the following language in the Legal Agreement

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[89] Exh. 113. The filed Side Agreement also received a new title page, indicating the Side Agreement is an "Insurance Program Agreement." (Exh. 113-5)
[90] Exh. 246-7 to 246-9. Compare with Exh. 108-14 to 108-15. The filed Side Agreement also added a "standard premium" provision and modified the "written premium" provision.
[91] Exh. 246-11 to 246-13. As to Deductible Plan reimbursements, Travelers' filed Side Agreement adds "We will also require a deposit of your Deductible Plan Losses. That amount is set forth in the Loss Funds part of the Program Agreement."
[92] Exh. 246-15; Exh. 246-17.
[93] Exh. 246-17.
[94] Exh. 246-19 to 246-26.
[95] Exh. 246-27 to 246-29.

section: "In the event of a conflict between any provision of this Agreement and any provision of any Policy, the Policy shall control."[96] This language came at CDI's behest.[97]

Analysis

Travelers contends the Insurance Commissioner lacks jurisdiction over this appeal arguing Appellant has not pled a violation that may be adjudicated under section 11737, subdivision (f). Travelers also argues its Side Agreement was not an endorsement or collateral agreement, notwithstanding its subsequent filing. Further, Travelers contends section 11658 and Regulations section 2268's filing requirements apply only to side agreements issued to employers headquartered in California. Lastly, Travelers argues voiding the Side Agreement would be unduly harsh. Appellant argues the Commissioner's jurisdiction has already been determined by *Shasta Linen*, and that Travelers' Side Agreement fall squarely within the definition of an endorsement and collateral agreement. As a result, Appellant contends the Side Agreements are void as a matter of law. Each of these contentions is addressed separately.

I. The Commissioner Has Exclusive Jurisdiction Over This Appeal

Respondent's first defense is jurisdictional. Travelers contends Appellant failed to plead a "rate or rating" issue, thereby divesting the CDI of any jurisdiction.[98] Travelers also argues the Federal Arbitration Act and the Side Agreement's language preclude the Commissioner from remedying Travelers' Insurance Code violations.[99] These arguments are without merit.

A. Applicable Law

In California, workers' compensation insurance programs are closely scrutinized and highly regulated pursuant to the Insurance Code's broad regulatory structure. The Legislature has

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[96] Exh. 246-29.
[97] Tr. 578:24-579:8.
[98] Travelers' Post-Hearing Memorandum, pp. 26-29.
[99] *Id.* at p. 34; Travelers' Post-Hearing Reply Brief, pp. 18-20.

charged the Commissioner with the authority to oversee the form and substance of all workers' compensation insurance plans, from the scope of required coverages to the amount employees pay for premiums.

The Insurance Code and its applicable regulations set forth comprehensive workers' compensation form and rate requirements for all insurers. Insurance Code sections 11651 through 11664 detail an insurer's form and policy obligations, while Insurance Code sections 11730 through 11742 outline an insurer's rate filing requirements. These provisions, working in conjunction, mandate certain policy language and specify the form and manner in which all policies, endorsements, rates and rating plans must be filed prior to use.

1. The Statutory Rate Filing Scheme

California has an "open rating" workers' compensation regulatory system, in which each insurer sets its own rates and files them with the Commissioner. This framework is intended to curtail monopolistic and discriminatory pricing practices, ensure carriers charge rates adequate to cover their losses and expenses, and provide public access to rate information so that employers may find coverage at the best competitive rates.[100]

Insurance Code section 11735 lays out the statutory rate filing requirements. Subdivision (a) provides in part that "[e]very insurer shall file with the commissioner all rates and supplementary rate information that are to be used in this state. The rates and supplementary rate information shall be filed not later than 30 days prior to the effective date." The Insurance Code defines "rate" as "the cost of insurance per exposure base unit," subject to certain limitations.[101] And "supplementary rate information" is defined as "any manual or plan of rates, classification

[100] See, generally, Ins. Code, §§ 11730-11742.
[101] Ins. Code, § 11730, subd. (g). Rates exclude the application of individual risk variations based on loss or expense considerations, as well as minimum premiums.

system, rating schedule, minimum premium, policy fee, rating rule, rating plan, and any other similar information needed to determine the applicable premium for an insured."[102] In addition, section 11735, subdivision (e) states that with regard to deductible plans, supplemental rate information shall include an endorsement that includes all of the following: (1) language that protects the rights of injured workers and ensures that benefits are paid by the insurer without regard to any deductible; (2) language that notwithstanding the deductible, the insurer shall pay all of the obligations of the employer for workers' compensation benefits for injuries occurring during the policy period; and (3) language specifying whether loss adjustment expenses are to be treated as advancements within the deductible to be reimbursed by the employer.

2. The Statutory Form Filing Scheme

Both the Insurance Code and its applicable regulations mandate that insurers file and receive approval before using any policy or endorsement in California. Specifically, Insurance Code section 11658 states:

> (a) 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 (c) of Section 11760 and 30 days have expired from the date the form or endorsement is received by the commissioner from the rating organization . . . unless the commissioner gives written approval of the form or endorsement prior to that time.
>
> (b) 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.*[103]

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

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[102] Ins. Code, § 11730, subd. (j).
[103] Emphasis added.

supplements, or revises a policy form and is attached to a policy form to be effective.[104] It may concern matters unrelated to the insurer's indemnity or obligations.

In addition, California Code of Regulations, title 10, section 2268 provided at the time the Side Agreements were executed that "no collateral agreements modifying the obligation of either the insured or the insurer shall be made unless attached to and make a part of the policy."[105] As such, any party's obligation concerning workers' compensation insurance that is not contained in the insurance policy itself must be made part of the policy through an endorsement. Unendorsed side agreements or obligations are prohibited.[106] Accordingly, an insurer must file and receive approval for any agreement that modifies or alters the insured's: (1) obligation to reimburse or otherwise pay the insurer for loss adjustment expenses and other policy or claim expenses; (2) indemnity or loss obligations; (3) payment or reimbursement obligations; (4) allocation of loss adjustment expenses or other fees and expenses; (5) timing of reimbursement or payments to the insurer; (6) collateral; (7) circumstances that constitute default; (8) choice of law; (9) arbitration obligation; and (10) other material obligations under any workers' compensation insurance program, plan or policy.[107]

3. Insurance Code Section 11737(f)'s Appeal Language

Insurance Code section 11737, subdivision (f), confers upon the Commissioner

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[104] *Adams v. Explorer Ins. Co.* (2003) 107 Cal.App.4th 438, 450-451; *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1117. In 2016, the Department amended California Code of Regulations, title 10 section 2250, subdivision (b) which codifies the Court's language that an endorsement is "form, agreement or document that amends, adds to, subtracts from, supplements, or revises a policy form and is attached to a policy form to be effective."

[105] In 2016, section 2268 was amended to delete the term "collateral agreement" and instead state "an insurer shall not use a policy form, endorsement for, or ancillary agreement except those filed and approved by the Commissioner in accordance with these regulations." The regulation was also amended to define "ancillary agreement" to include "dispute resolution agreements." Although not applicable here because the Side Agreements were issued prior to 2016, these charges are clarifications and not substantive changes to the regulations. (See *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1116, fn. 5.)

[106] *Shasta Linen*, *supra*, at p. 43.

[107] *Nielsen Contracting*, *supra*, 22 Cal.App.5th at pp. 1116-1118; *Shasta Linen*, *supra*, at pp. 43-44; see also, *American Zurich Ins. Co. v. Country Villa Service Corp.* (C.D. Cal. 2015) 2015 WL 4163008, 80 Cal. Comp. Cases 687 (*American Zurich*).

jurisdiction over private party appeals concerning the application of insurers' rates and rating plans. Specifically, the statute provides, in pertinent part:

> Every insurer … shall provide within this state reasonable means whereby any person aggrieved by the application of its filings may be heard by the insurer … 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 … on the request may appeal … to the commissioner, who after a hearing … may affirm, modify, or reverse that action.

This jurisdiction is exclusive to the Commissioner. As explained in *Farmers Ins. Exchange v. Superior Court*:

> Particularly when regulatory statutes provide a comprehensive scheme for enforcement by an administrative agency, the courts ordinarily conclude that the Legislature intended the administrative remedy to be exclusive unless the statutory language or legislative history clearly indicates an intent to create a private right of action [in court].[108]

B. Analysis and Conclusions of Law

1. Appellant Sufficiently Pled Insurance Code Violations

Travelers contends Davidson did not plead an Insurance Code section 11735 violation, and as such the CDI lacks jurisdiction. This argument rests, in part, upon Travelers' conclusion that Insurance Code section 11658 violations may not be adjudicated in a private party appeal under section 11737, subdivision (f).[109] It also relies upon Appellant's cross-examination questions. Travelers' arguments are not persuasive.

Travelers points to Appellant's questioning of Christine Zysk to conclude that Davidson is alleging only a section 11658 violation. In response to testimony by Travelers' witness,

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[108] *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 850; *Julian v. Mission Comm. Hosp.* (2017) 11 Cal.App.5th 360, 379, as modified on denial of reh'g. (May 23, 2017).
[109] Travelers' Post-Hearing Memorandum, pp. 26-29.

Appellant asked:

> Q: You're familiar with Insurance Code section 11658, correct?
> A: Yes.
> Q: And Travelers has been aware of California Insurance Code section 11658 since at least 2009, correct?
> A: Yes.[110]

This reliance is misplaced.

Davidson's appeal specifically alleges Travelers' unfiled Side Agreements violate both Insurance Code section 11658 and section 11735.[111] Similarly, Appellant's opposition to Travelers' motion to dismiss alleges "the Side Agreements that Davidson contends are void affect the rates and rating system that is being applied to Davidson's insurance."[112] Travelers knew of these contentions and its response addresses Appellant's section 11658 and 11735 allegations.[113] In addition, the CALJ stated from the outset of this matter that the issue to be determined was "whether the side agreements between Davidson and Travelers constitute a collateral agreement pursuant to [Regulations] section 2268, such that they must be filed and approved by the Commissioner in accordance with Insurance Code section 11658, and then whether the side agreements misapply Travelers' filed rates."[114] Thus, it is clear that Davidson pled from the outset both section 11658 and section 11735 violations. In any event, nothing in the applicable statute or regulations requires flawless pleading. The Commissioner must consider the pleadings as a whole and Appellant need only plead facts entitling it to some relief.[115]

Travelers also contends section 11737, subdivision (f) does not permit the Commissioner

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[110] Tr. 350:14-20.
[111] See Davidson's Appeal From Rejection of Complaint and Request for Action, dated July 14, 2016 ["In addition, the Side Agreements were not filed pursuant to Insurance Code section 11735."]
[112] Davidson's Opposition to Travelers' Motion to Dismiss, filed December 1, 2016, p. 3.
[113] Travelers' Response to Davidson's Appeal, filed August 8, 2016, pp. 6, 14.
[114] Tr. 16:3-9.
[115] *Gressley v. Williams* (1961) 193 Cal.App.2d 636, 639; *Dole v. City of Mountain View* (1976) 55 Cal.App.3d 110, 105.

to decide section 11658 form filing violations. Travelers' argument ignores the Commissioner's precedential decision in *Shasta Linen*. There, the Commissioner determined he had jurisdiction under section 11737, subdivision (f) to find that an unfiled and unapproved collateral agreement violated section 11658.[116] Similarly, Appellant asserts Respondent misapplied its rating plan by illegally enforcing an unfiled side agreement in violation of section 11658. Accordingly, the Commissioner has jurisdiction to hear and decide this case under Insurance Code section 11737, subdivision (f).[117]

2. The Arbitration Provision Does Not Preclude the Commissioner from Enforcing the Insurance Code

Lastly, Travelers contends the Federal Arbitration Act (FAA)[118] and the Side Agreement's unfiled arbitration provisions preclude the Commissioner from asserting jurisdiction over this proceeding or issuing any remedy for Insurance Code violations. In support of these assertions, Travelers cites federal case law favoring arbitration and the New York Court of Appeal's holding in the *Matter of Monarch Consulting, Inc. v. National Union Fire Insurance Company of Pittsburgh, PA* (2016) 26 N.Y.3d 659 (*Monarch Consulting*).[119] Neither argument is persuasive.

In *Monarch Consulting*, a New York court considered whether the McCarran-Fergusson Act[120] preempts the FAA in relation to California Insurance Code section 11658. There, the plaintiff argued the insurance program agreement's arbitration clause was unenforceable since it was not filed in accordance with 11658. Plaintiff further argued that compelling arbitration under

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[116] *Shasta Linen*, *supra*, at p. 69.
[117] This issue is discussed more fully in Section V below.
[118] 9 U.S.C. § 2.
[119] Travelers' Post-Hearing Memorandum, p. 34; Travelers' Post-Hearing Reply Brief, pp. 18-20.
[120] 15 U.S.C. § 1011 *et seq.*

the unfiled agreement would undermine California law.[121] The court concluded that because the FAA did not "invalidate, impair, or supersede" section 11658, the McCarran-Ferguson Act was not implicated.[122] California case law, however, distinguishes this holding

In *Nielsen Contracting*, the court held it was unnecessary to address the preemption argument, where the arbitration clause and its delegation provision, violated Insurance Code section 11658.[123] As the court explained, under the FAA's savings clause, an arbitration agreement is not enforceable if a party establishes a state law contract defense, such as fraud, duress or illegality.[124] Although arbitration agreements are not invalidated by "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue," the agreement's enforceability remains subject to all other contract defenses.[125] Since the delegation clause and arbitration provision were not filed under section 11658 and Regulations section 2268, they were void and unenforceable.[126] Accordingly, the FAA does not preclude the Commissioner from determining whether the unfiled Side Agreements are unlawful and therefore unenforceable.[127]

II. Insurance Code's Filing Requirements Apply to Insurers Covering Any California Risks

Travelers argues Insurance Code section 11658 and Regulations section 2268's filing requirements apply only to California-headquartered employers. Travelers contends that Davidson is not a California employer, and therefore Travelers was not required to file its Side

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[121] *Id.* at p. 670.
[122] *Id* at p. 664.
[123] *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1121.
[124] *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 339; *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1107.
[125] *McGill v. Citibank N.A.* (2017) 2 Cal.5th 945, 962; *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1107.
[126] *Nielsen Contracting*, *supra*, 22 Cal.App.5th at pp. 1113-1114, 1118.
[127] In addition, governmental regulations cannot be evaded by private contract. (*Alpha Beta Food Markets v. Retail Clerks Union Local 770* (1955) 45 Cal.2d 764, 771.)

Agreement in California.[128] In support, Travelers cites Insurance Code sections 11658 and 11658.5 as well as failed legislation. These arguments are contrary to the Insurance Code's unambiguous language, contrary to Travelers' own actions and contrary to public policy.

A. Insurance Code's Mandatory Filing Requirements Apply to all Policies Covering California Employees

Travelers argues California workers' compensation insurance filing requirements apply only to California employers. Travelers defines a "California employer" as one headquartered in California or one whose California payroll constitutes the majority of the employer's payroll. Travelers also argues that because the Side Agreements were executed in Tennessee, California's mandatory filing laws do not apply. In support, Travelers cites section 11658's application to policies or endorsements "issued by an insurer to any person in this state." Travelers argues this language means an insurer need not seek approval of its policies or endorsements unless the insured is domiciled in California. Travelers' contentions misstate California insurance law and conflate contract interpretation with mandatory filing requirements.

All insurance in California is governed by the Insurance Code and the Insurance Code, along with the CDI, regulates all insurance contracts, unless specifically exempted.[129] In California, workers' compensation insurance is mandatory for most employers. As such, the Legislature granted the Commissioner broad authority to protect both California workers and their employers.[130] To accomplish this objective, the Legislature mandated that the Commissioner have full access to insurance information through compulsory filing requirements.[131] Any insurer offering workers' compensation insurance in California must

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[128] Travelers' Post-Hearing Memorandum, pp. 17-19; Travelers' Post-Hearing Reply Brief, pp. 2-4.
[129] Ins. Code, § 41; *Wayne v. Staples, Inc.*, (2006) 135 Cal. App. 4th 466, 476–77.
[130] *American Zurich*, *supra*, 2015 WL 4163008 at p. *17.
[131] *Nielsen Contracting, supra,*, 22 Cal.App.5th at p. 1118.

comply with those filing requirements. Nothing in the Insurance Code limits those filing requirements or requires filing only when the policy is issued to California-headquartered employers.[132] Travelers' interpretation would add language, since neither section 11658 nor Regulations section 2268 mention a California-headquartered business.

While Travelers focuses on where the insurance contract was executed and the location of Davidson's headquarters, neither the Insurance Code nor case law requires California execution or a California headquarters. Section 11658's language is clear and unambiguous. An insurer offering workers compensation to a person in this state must file and seek approval of all policies and endorsements. "[133] Accordingly, any policy or 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. Indeed, by Travelers' interpretation, employers could simply circumvent California law by executing the insurance contract out of state. Such a reading is clearly contrary to the Insurance Code and the Legislature's comprehensive regulatory scheme.

Travelers next seeks to limit the definition of a California employer. Travelers argues an employer is located in California "if it is organized under the laws of California, has its principal place of business or headquarters in California, or performs a majority of administrative and executive functions in California."[134] Travelers offers no case law or statutory support for this definition. In fact, Travelers definition is contrary to the Labor Code's definition. For workers'

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[132][132] Travelers also argues "there is no requirement for Travelers to file the [Side Agreement] in Tennessee or any other state." (Travelers' Post-Hearing Memorandum, p. 19.) Notwithstanding this statement's veracity, Travelers' argument is irrelevant. California law has long required that insurers file all policy forms, endorsements and collateral agreement before use. Travelers was aware of this requirement and its failure to comply is not excused by the laws of other states.

[133] Person" means any person, association, organization, partnership, business trust, limited liability company or corporation. (Ins. Code, § 19.)

[134] Travelers' Post-Hearing Memorandum, p. 18.

compensation insurance purposes, the Labor Code defines an "employer" as every person who has any natural person in service.[135] Accordingly, there is no question Davidson is a California employer. During the policy terms at issue, Davidson employed approximately 700 workers in California and managed six California hotels. Davidson hired and fired those employees, directed those employees, insured those employees under various workers' compensation insurance policies and paid those employees more than $80 million over four years. Davidson also paid workers' compensation premiums for those employees and paid over $4.6 million in California workers' compensation insurance claims. That Davidson employs workers in other states or is headquartered in Atlanta is irrelevant to this proceeding. [136]

B. Insurance Code section 11658.5 Was Enacted After Travelers Issued Davidson's Side Agreements and Does Not Concern Filing Requirements

Travelers also relies heavily on Insurance Code 11658.5's language regarding binding arbitration clauses. Section 11658.5 provides in relevant part:

> (a)(1) An insurer that intends to use a dispute resolution or arbitration agreement to resolve disputes arising in California out of a workers' compensation insurance policy or endorsement issued to a California employer shall disclose to the employer, contemporaneously with any written quote that offers to provide insurance coverage, that choice of law and choice of venue or forum may be a jurisdiction other than California and that these terms are negotiable between the insurer and the employer. The disclosure shall be signed by the employer as evidence of receipt where the employer accepts the offer of coverage from that insurer.
>
> (2) After compliance with paragraph (1), a dispute resolution or arbitration agreement may be negotiated by the insurer and the employer before any dispute arises.

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[135] Labor Code, § 3300, subd. (c).

[136] Travelers also contends *Shasta Linen* and *American Zurich* stand for the proposition that section 11658 protects only California-headquartered employers since both employers were California corporations.(Travelers' Post-Hearing Memorandum, pp. 17-18.) Neither decision so holds. While both cases involved California corporations, neither decision relied upon that fact in finding a violation of section 11658 or Regulations section 2268. This argument misstates both rulings and is unpersuasive.

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> (d) *For purposes of this section*, a "California employer" means 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.[137]

Travelers contends section 11658.5's definition of a California employer guides interpretation of section 11658 and Regulations section 2268. In fact, Travelers argues it relied upon this interpretation in choosing not to file its Side Agreements.[138] This argument is false.

First, section 11658.5 was not enacted until 2011 and it did not become effective until 2012. Thus, Travelers could not have relied upon this language from 2009 through 2011, when it issued Davidson three Side Agreements.[139] Second, section 11658.5, subdivision (d)'s definition of a "California employer" applies only to that section. The legislative intent is clearly stated. Any other interpretation is erroneous and contrary to the statute's intent and plain meaning.

Travelers' argument is also contrary to California case law. As stated in *Nielsen*, the Legislature enacted section 11658.5 to address circumstances where an insurance contract designates controlling law or the forum/venue to be a jurisdiction other than California.[140] The Legislature sought to ensure that employers were fully informed of these provisions and understood the provisions were negotiable. Nothing in section 11658.5 or its legislative history support Travelers' contention that the Legislature intended to create rules applicable to section

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[137] Ins. Code, § 11658.5 (emphasis added).
[138] Tr. 548:18-549:10.
[139] In arguing against section 11658.5's clear language, Travelers cites extensively to the legislative history of failed statutory amendments regarding collateral agreements. The Court of Appeal has held that "section 11658 and Regulations section 2268 are clear and unambiguous, and therefore resort to legislative history regarding a separate code section is inappropriate. " (*Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1120; see also *Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 758.) Accordingly, such legislative history is irrelevant and need not be considered.
[140] *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1120.

11658's filing requirements.[141] In fact, "because section 11658.5 does not concern or address the filing requirement issue," it does not govern section 11658's interpretation or the remedies available when an insurer intentionally fails to file and obtain approval of collateral terms.[142] Accordingly, Travelers' argument is without merit.

C. Travelers' Argument is Contrary to its Actions

Travelers' actions also belie their argument. Travelers filed and attached no less than nine California-specific endorsements on Davidson's policies. If Travelers believed California's filing requirements did not apply, there would be no need to seek approval for or attach its California Large Deductible Endorsement or any other California-specific endorsements to Davidson's policies. That Travelers sought California approval and attached California-specific endorsements to Davidson's policies demonstrates Travelers' argument is hollow.

D. Travelers' Interpretation is Contrary to Public Policy

Finally, Travelers' argument is contrary to public policy. If Travelers's contention were accurate, the Commissioner could not regulate insurance in California. As Appellant notes, multi-state employers such as Wal-Mart, could circumvent California workers' compensation insurance laws by simply locating their headquarters outside of California. There is no support for this interpretation and there is ample evidence the Legislature intended to protect all California workers, not just those whose employer is headquartered in California.[143] Put simply a policy or endorsement is considered "issued" in California to the extent it covers California employees. To hold otherwise would frustrate the public policy behind workers' compensation regulation.

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[141] *Id.* at pp. 1120-1121. This holding is further supported by recent regulatory clarification. (See, Cal. Code Regs., tit. 10, § 2250, subdivision (f) and § 2268, as amended in 2016.)
[142] *Id.* at p. 1120.
[143] Insurance Code section 41 provides that "all insurance in this State is governed by the provisions of this code."

III. Respondents Violated Insurance Code Section 11658 by Using an Unfiled and Unapproved Endorsement and Collateral Agreement

Having rejected Travelers' jurisdictional arguments, the Commissioner turns to the Side Agreements' legality. Travelers argues the unfiled agreements did not violate Insurance Code section 11658 because prior to Commissioner Jones taking office on January 1, 2011, the CDI did not require the filing and approval of such ancillary agreements. Travelers further argues the unfiled Side Agreements did not modify the parties' obligations and thus were not required to be filed pursuant to Regulation 2268.[144] In support, Travelers relies on its own definition of endorsements. Travelers' arguments are unconvincing.

A. Applicable Law

Insurance Code section 11658 provides that a workers' compensation insurance policy or endorsement "shall not be issued to any person in this state" unless filed and approved by the Commissioner. An endorsement is any form, agreement or document that amends, adds to, subtracts from, supplements, or revises a policy form and is attached to a policy form to be effective.[145] Put another way, "any amendment to or modification of any existing policy of insurance that may vary any term or condition of the policy" is an endorsement that must be filed and approved before use.[146] It may concern matters wholly unrelated to the description of the insurer's indemnity and insurance obligations.[147]

California Code of Regulations, title 10, section 2268, in force at the time the Side Agreements were executed, provided: "No collateral agreement modifying the obligation of either the insured or the insurer shall be made unless attached to and made a part of the policy."

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[144] Travelers' Post-Hearing Memorandum , pp. 22-24.
[145] Cal. Code Regs., tit. 10, § 2268; see also, *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1117.
[146] *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1117; *Adams v. Explorer Ins. Co.*, *supra*, 107 Cal.App.4th at pp. 450-451.
[147] *American Zurich*, *supra*, 2015 WL 4163008 at p. *12.

This regulation is clear on its face that any obligation concerning the workers' compensation insurance that is not contained in the policy must be made part of the policy. Unfiled and unattached side agreements are prohibited.[148]

B. Analysis and Conclusions of Law

1. Travelers' Side Agreement Was an Unfiled Endorsement to Davidson's Policies

Travelers asserts its Side Agreement is not an endorsement and thus did not require filing pursuant to section 11658.[149] Travelers contends that because the Insurance Code defines "insurance" as "a contract undertaken to indemnify another against loss, damage or liability," endorsements must be defined as documents that shift the risk of loss. Travelers further contends that since the Side Agreement did not shift the risk of loss or modify the policy, it is not an endorsement. Both the Commissioner and California courts reject these arguments.

a. Endorsements Modify the Policies' Terms and Conditions

Contrary to Travelers' assertions, an endorsement is an amendment or modification to an existing policy that alters or varies *any term or condition* of the policy.[150] In fact, the court of appeal in *Nielsen Contracting*, recently rejected an identical argument and reaffirmed that an endorsement "may alter or vary any term or condition of the policy."[151] An endorsement need not concern an insurer's indemnity or insurance obligations.[152] Indeed many endorsements relate solely to administrative matters, unrelated to risk of loss or indemnity. For example, the

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[148] *Shasta Linen*, *supra*, at p. 43; *American Zurich*, *supra*, 2015 WL 4163008 at p. *16.
[149] Travelers' Post-Hearing Memorandum, pp. 19-20; Travelers' Post-Hearing Reply Brief, p. 7.
[150] *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1117; *Adams v. Explorer Ins. Co.*, *supra*, 107 Cal.App.4th at pp. 450-451; *Shasta Linen*, *supra*, at p. 54; *American Zurich*, *supra*, 2015 WL 4163008 at pp. *5, *12.
[151] *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1117.
[152] *American Zurich*, *supra*, 2015 WL 4163008 at p. *12.

arbitration clause in *Nielsen* did not relate to indemnity obligations but was nonetheless required to be filed under section 11658.[153]

In light of the comprehensive regulatory scheme and unambiguous state and federal case law on this issue, there is no reason to adopt Travelers' narrow definition.[154]

b. The Side Agreement Modified the Parties' Obligations

There is no question that Travelers' Side Agreement modified the policies' terms and conditions, as well as the obligations of the insured and insurer. Even a cursory review of the policy and Side Agreement mandate this conclusion. First, the language of the policies and the Side Agreements establish that the Side Agreements were part of Appellant's insurance program and intended to modify the parties' obligations. Each underlying insurance policy specifically provides that "the only agreements relating to this insurance are stated in this policy."[155] But the Side Agreement then expressly incorporates Davidson's workers' compensation insurance policy. Indeed, the Side Agreement

> represents the agreement the parties have reached whereby [Travelers] will provide to you certain insurance coverages and services for the Policies we have issued pursuant to this Agreement, which Policies are incorporated herein by reference, in consideration of your payment of the Obligations described in the Sections and Exhibits comprising this Agreement.[156]

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[153] Davidson's policies contained cancellation endorsements, blanket waiver endorsements and non-renewal endorsements, none of which relate to Travelers' indemnity obligations.

[154] Travelers has been aware this definition for well over a decade. In *Travelers Cas. And Sur. Comp. v. American Intern. Surplus Lines Ins. Co.* (S.D. Cal. 2006) 465 F.Supp.2d 1005, 1025, the federal court held that "endorsements are modifications to the basic insuring forms in the policy and may alter or vary and term or condition of the policy."

[155] E.g. Exh. 104-56.

[156] E.g. Exh. 108-12.

As such, the Side Agreement's intent was to modify the policies' terms and conditions. Travelers' witnesses admitted as much, stating repeatedly that the Side Agreement's terms govern premium, billing, risk of loss, cancellation, and indemnification.[157]

Second, the Side Agreement significantly modifies the parties' financial agreements and obligations. The policy and the LDE permit Travelers to charge premium at a disclosed base rate per $100 of audited payroll, and require Appellant to reimburse Travelers for claims handling in the amount of 7.5 percent.[158] The Side Agreement adds an initial collateral requirement and a cash collateral adjustment formula. It also permits Travelers to require a letter of credit, unilaterally adjust the cash collateral amount, deplete the cash collateral and apply loss developments factors. Neither the policy nor the LDE contain provisions requiring cash collateral in addition to premium. These obligations materially alter Appellant's financial obligations under the program. In addition, there is no question that these terms governed Appellant's insurance obligations. Indeed, Travelers' witnesses testified that the policy and LDE are unnecessary in calculating the insurance program's costs.[159]

The Side Agreement also modifies the ALAE definition by adding two additional expense categories not included in the LDE. More significantly, the Side Agreement alters the ALAE's medical cost containment expense calculation. The LDE holds Davidson responsible for medical cost containment expenses incurred with respect to a particular claim.[160] These include bill auditing expenses, preferred provider network expenses, medical fee review panel expenses, and certain utilization expenses. The Side Agreement's medical cost containment expense exhibit instead requires Davidson to pay to a 27 percent charge on any savings resulting from

[157] Tr. 261:11-262:3; Tr. 302:21-25.
[158] E.g. Exh. 104-90.
[159] Tr. 261:11-262:3.
[160] E.g. Exh. 104-88.

medical bill repricing or auditing. Put differently, rather than paying the actual medical cost containment expenses as outlined in the LDE, Travelers charges Davidson a percentage of the savings obtained.[161]

The Side Agreement also alters the default provision of Appellant's insurance policy. The filed and approved California Cancellation Endorsement provides that Travelers may cancel Appellant's policy for one of 12 specified reasons, including failure to report payroll, failure to pay premium and material misrepresentations. Travelers' Side Agreement adds other default provisions. For instance, if Appellant "fails to perform any Obligation or to satisfy any requirements under any Agreement Letters, any agreements incorporated herein by reference or other similar agreement(s)," Travelers may terminate the insurance program or any insurance policies issued thereunder.[162] In essence, the Side Agreements permits Travelers to cancel Appellant's insurance if Appellant fails to comply with any of the Side Agreement's unfiled and unapproved terms.

Lastly, the Side Agreement altered the parties' dispute resolution provisions. Disputes under Appellant's policy are exclusively governed by Insurance Code section 11737, subdivision (f), which provides for an appeal right to the CDI. This language is mandated by the Commissioner's Regulations and must appear in every California workers' compensation insurance policy.[163] The policy and LDE are silent on choice of law and binding arbitration. On the other hand, the Side Agreement includes a two-page arbitration provision mandating the arbitration of premium and claims-handling disputes. The Side Agreement further requires

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[161] Tr. 539:13-23.
[162] E.g. Exh. 108-26.
[163] Cal. Code Regs., tit. 10, § 2509.43, subd. (d) requires that every policy incepting after May 23, 1999 provide insureds notice of their statutory appeal rights with the Insurance Commissioner. The form of that notice is set forth in Regulations section 2509.77.

Appellant to consent to Connecticut jurisdiction and dictates that Connecticut law applies to the Side Agreements and policies. Travelers intended these provisions to supersede those of the underlying policy. Indeed, the arbitration provision applies to "disputes that may arise . . . about the parties' rights and duties relative to the payment of premium and other charges under this Agreement and the Policies."[164]

Given that the Side Agreement modified several policy and LDE provisions, it was an endorsement. By issuing that unfiled and unapproved endorsement, Travelers violated Insurance Code section 11658.

2. Travelers' Side Agreement Was an Unfiled Collateral Agreement

Travelers next contends the Side Agreement was not a collateral agreement pursuant to Regulations section 2268.[165] Specifically, Travelers argues the Regulations' language was unclear and further contends the Side Agreement does not modify the obligations of the insured or insurer. These arguments are without merit.

Regulations section 2268, in effect at the time Davidson's Side Agreements were executed, provided that "no collateral agreements modifying the obligation of either the insured or the insurer shall be made unless attached to and made a part of the policy." Any and all obligations of either party under the workers' compensation insurance policy must be set forth in the policy or contained in a filed and approved endorsement attached to the policy. Unendorsed side agreements are strictly prohibited.[166] Not only has the Court of Appeal stated that section

[164] E.g. Exh. 108-29 to 108-30.
[165] Travelers' Post-Hearing Memorandum, pp. 21-23.
[166] *Shasta Linen*, *supra*, at p. 43; *American Zurich*, *supra*, 2015 WL 4163008 at p. *15 [the term "side agreement" is synonymous with "collateral agreement."]

2268's language is plain and unambiguous, but the court has also adopted the Commissioner's interpretation of section 2268.[167] As such, the regulatory language is clear.

It is also clear that the Side Agreements modified and altered the parties' obligations. An agreement must be filed if it changes the insured's (1) obligation to reimburse or otherwise pay the insurer for loss adjustment expenses and/or claims or other policy-related expenses; (2) indemnity or loss obligations; (3) payment or reimbursement obligation; (4) allocation of loss adjustment expenses or other fees and expenses; (5) timing of reimbursements or payments to the insurer; (6) collateral; (7) circumstances that constitute default; (8) choice of law; (9) arbitration obligation; and (10) other material obligations under any workers' compensation insurance program, plan or policy.[168] As discussed in Section III(B) above, the Side Agreement modified Appellant's financial obligations, added choice of law and arbitration provisions, altered the default and cancellation terms, modified medical cost containment expenses, and added a cash collateral requirement. Each of the provisions standing alone modified Appellant's obligations under the policy. Taken together, they wholly rewrote Appellant's insurance program. Thus, the Side Agreement was a collateral agreement under section 2268. Both Travelers' failure to file the Side Agreement prior to use and its failure to attach the agreement to Appellant's policy, violate that section.

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[167] *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1116 ["Although we are not bound by the *Shasta Linen* decision, we find its analysis persuasive on the prohibition of unfiled "collateral" or "side-agreements."]; *American Zurich*, *supra*, 2015 WL 4163008 at p. *15.

[168] *Id.* at pp. 43-4.

3. Case Law Supports the Finding that the Side Agreement is an Endorsement and Collateral Agreement

The conclusion that Travelers' Side Agreement constitutes an unlawful collateral agreement and unfiled endorsement is supported by precedential CDI decisions as well as judicial decisions from state and federal courts.

In *American Zurich*, a California federal court considered an insurance program and situation nearly identical to Travelers'. There, Zurich attached a large deductible endorsement to Country Villa's insurance policy and further specified the large deductible plan's terms in a 20-page, unfiled side agreement. The two-page endorsement defined relevant terms and indicated that Country Villa agreed to reimburse Zurich, up to the deductible amount, the sum of (1) all covered benefits and damages Zurich paid for the injured workers' benefit, (2) all ALAE and (3) all assessments incurred by Zurich related to the deductible amounts. The court held Zurich's failure to file its side agreement violated section 11658 and section 2268, notwithstanding the attached and approved large deductible endorsement.[169]

The Commissioner has also consistently held that side agreements, such as Travelers', are collateral agreements that must be filed pursuant to section 11658 and Regulations section 2268. In *Shasta Linen*, the Commissioner found a Reinsurance Participation Agreement (RPA) between an affiliate of the insurer and the insured to be an unfiled endorsement and unlawful collateral agreement in violation of Insurance Code section 11658 and Regulation section 2268.[170] While the parties had entered into a series of guaranteed cost insurance policies, the insurer also required the insured to sign the RPA, whose terms governed the parties' insurance relationship. Just as in this proceeding, the RPA's terms superseded the policies' terms or added

[169] *American Zurich*, *supra*, 2015 WL 4163008 at pp. *5-6.
[170] *Shasta Linen*, *supra*, at pp. 60-61.

new obligations. Having determined the RPA modified and supplanted the policies' terms, the Commissioner determined the RPA violated section 11658 and thus was void as a matter of law.[171] In so concluding, the Commissioner stated:

> The legal requirement for modifying any workers' compensation insurance obligation is to endorse the agreement to the insurance policy. This is done by filing the agreement with the WCIRB, which in turn will file it with the Insurance Commissioner, and endorse it to the insurance policy after the requisite time or approval. Unfiled side agreements are prohibited and shall not be used without complying with these requirements; otherwise, they are not permitted in this state and are void as a matter of law.[172]

Finally, the court of appeal has recently endorsed *Shasta Linen* in holding that unfiled arbitration and delegation clause provisions violate section 11658 and are thus void as a matter of law. *Nielsen Contracting* involved a nearly identical RPA to that found in *Shasta Linen*. In that proceeding, the insurer sought to enforce the RPA's binding arbitration provision. The insured argued the RPA violated the Insurance Code and its applicable regulations because it had not been filed and attached, as required by section 11658 and regulation 2268, and thus could not be enforced. Just as in *Shasta Linen* and *American Zurich*, the court found that the side agreement modified and supplanted many of the policies' terms and added an otherwise unmentioned provisions.[173] Finding *Shasta Linen's* analysis persuasive, the court held that:

> [u]nder the plain language of section 11658 and Regulations section 2268, defendants were required to file the delegation clause and arbitration provision with the Insurance Commissioner because these provisions were collateral side agreements that materially modified the earlier approved CIC policies.[174]

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[171] *Id.* at p. 69.
[172] *Id.* at p. 66.
[173] *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1102.
[174] *Id.* at p. 1116.

These cases demonstrate Travelers was required to file and receive approval prior to issuing the Side Agreement.[175] Travelers' failure to do so violates Insurance Code section 11658 and Regulations section 2268.

IV. Travelers' Large Deductible Endorsement and Subsequent Filing of the Side Agreement Does Not Extinguish its Insurance Code Violations.

Travelers relies upon its filed LDE, the Side Agreement's subsequent filing, and the CDI's February 11, 2011 directive to argue it did not violate Insurance Code section 11658 and Regulations section 2268. These arguments are without merit and have been consistently rejected by the courts.

A. Filing of a Large Deductible Endorsement Does Not Satisfy Regulatory Requirements

Travelers' five-page Large Deductible Endorsement does not relieve the insurer of its Insurance Code filing obligations. Travelers argues that because the CDI approved its LDE, the Side Agreement that effectuated the LDE's terms was similarly approved. Travelers' position is, however, inconsistent with the Insurance Code, the regulations and case law.

First, Travelers' position ignores both Insurance Code section 11658 and Regulations sections 2218 [176]and 2268 which require the filing and attachment of all policy forms, endorsements, terms and collateral agreements that modify the parties' obligations. The LDE does not relieve Travelers of its obligation to file the Side Agreement if the Side Agreement modifies the policy's terms. Indeed, nothing in the statute or regulations so hold. Read together, the statutes and regulations require Travelers to file all policy forms, side agreements, rates,

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[175] Travelers cites to cases overruled or deemed erroneous by *Nielsen Contracting* and *American Zurich*. Accordingly, the Commissioner will not consider those cases.

[176] Regulations section 2218, subdivision (a) provides that "*All* workers' compensation insurance forms must be submitted in duplicate to the [WCIRB] for preliminary inspection. The Bureau shall review such forms and submit them to the Commissioner for final action." (emphasis added.)

rating plans and supplemental rate information.[177] They do not permit Travelers to file some policy or rate information, and then modify or alter such terms with unfiled collateral agreements. Such action is expressly prohibited by the Insurance Code and is contrary to the code's comprehensive regulatory scheme.

Second, Travelers' argument ignores relevant case law on this point. In *American Zurich Insurance Company v. Country Villa Service Corporation*, 2015 WL 4163008, the Court found the insurers' unfiled and unattached side agreements governed integral aspects of the insurance relationship and that their sheer length and complex terms made it clear they were more than just the program's mechanics.[178] This holding directly contradicts Travelers' argument that the Side Agreement merely documented the financial parameters agreed to under the LDE and policy.

Accordingly, Travelers' LDE does not absolve Travelers from complying with all other regulatory filing requirements. The Insurance Code and regulations mandate the filing of *all* policies, endorsements, collateral agreements, rates, rating plans and supplemental rate information. The Insurance Code also mandates that *all* documents that modify or alter the parties' obligations be approved and attached to the insurance policy prior to use. This is the only method of Insurance Code compliance, and failure to follow these rules constitutes a violation of the statute and regulations.

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[177] *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1118 ["the Insurance Commissioner is charged with closely scrutinizing insurance plans to protect both workers and their employers {citation omitted). To accomplish this objective, the Legislature mandated that the Commissioner have full access to insurance information though mandated filing requirements."]

[178] *Id.* at p. *15.

B. The Insurance Commissioner's February 2011 Directive Does Not Extinguish Travelers' Insurance Code Violations

Travelers contends the Commissioner's February 2011 directive to insurance carriers extinguishes any Insurance Code violations.[179] In support, Travelers points to the Commissioner's letter which provided that "as to collateral agreements that have not been attached and made part of existing or expired policies, please notify your insurer membership that those collateral agreements may remain in place."[180] Travelers, however, omits other crucial language from the letter and ignores its own inaction.

The Commissioner issued his directive in February 2011 and Travelers waited nearly one year before presenting its Side Agreement to CDI and the WCIRB. During that time, Travelers met with other insurers to discuss a collective response to the Commissioner's directive. Also during that one year, Travelers issued Appellant its final Side Agreement, knowing that such agreement had not been filed or attached as required by California law.

The Commissioner's February 2011, directive expressly addressed those insurers who continued to enforce unfiled and unattached policies, endorsements or collateral or side-agreements.[181] As the Commissioner stated, while "some insurers may not be aware of this provision, have ignored it, or may have determined that it is not applicable and have failed to submit collateral agreements to the WCIRB," the collateral agreement insurers are currently using must be attached to the policy.[182] The Commissioner stated that unfiled and unattached collateral agreements may remain in place "but shall be subject to review by the Department if those agreements are to be unilaterally enforced by the insurer against any of its insureds."[183]

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[179] Travelers' Post-Hearing Memorandum, pp. 13-14.
[180] *Ibid.*
[181] Exh. 112.
[182] Exh. 112-3.
[183] *Ibid.*

> In particular, insurers need to be aware of the potential for violation of California law that may occur if those collateral agreements are enforced. These may include possible unenforceability of the collateral agreements for failing to attach them to the policy or submit them pursuant to Insurance Code section 11658 and 11750.3, enforcement actions by the Insurance Commissioner against the insurer for unfair practices and issuance of Cease and Desist Orders, and inability of the insurer to cancel the insurance policy for the insureds violation of any terms of the unattached agreement pursuant to Insurance Code Section 676.8.[184]

Nothing in the Commissioner's directive relieved insurers from liability under the Insurance Code. Under the language above, it did the opposite. Further, Travelers received the Commissioner's directive at the time it was issued and thus knew that continued use of unfiled collateral agreements would constitute a violation of California law.[185] Travelers' attempt now to relieve itself of willful Insurance Code violations lacks merit.

C. The Side Agreement Needed to be Filed at All Relevant Times

Travelers argues that prior to February 2011, there was no statute or regulation clearly requiring the filing and approval of such ancillary agreements.[186] This is wrong. Since 1995, Insurance Code section 11658 has required insurers to file all policies or endorsements for approval prior to use. Since 1968, Regulations section 2268 has prohibited the use of unfiled and unattached collateral agreements. As the Court of Appeal reiterated in *Nielsen Contracting*, "the plain language of section 11658 and Regulations section 2268" require insurers to file any collateral side agreements that modify the approved insurance policy.[187] Given *Nielsen's* finding that "section 11658 and Regulations section 2268 are clear and unambiguous," examination of

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[184] *Ibid.*
[185] Tr. 548:13-549:10.
[186] Travelers' Post-Hearing Memorandum, pp. 13-14. Travelers supports this contention by citing the legislative history from unadopted legislation. Section 11658 and Regulations section 2268 are clear and unambiguous and therefore resort to the legislative history regarding failed legislation is inappropriate and unnecessary. (See, *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1120.
[187] *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1116.

separate code sections or failed legislation is inappropriate and unnecessary.[188] That Travelers chose to ignore the statute's unambiguous mandate or chose to interpret the requirements differently does not render the regulatory scheme unclear.[189] Accordingly, Travelers' argument fails.

D. Subsequently Filing the Program Agreement Did Not Render the Unfiled Side Agreement Lawful

Travelers next argues that the filed and approved Program Agreement is substantially similar to Travelers' unfiled Side Agreement, rendering the Side Agreement's terms legal.[190] Travelers provides no statutory or case law support for this proposition, nor could the Commissioner locate any case holding that subsequent compliance with a statute or regulation relieves the party of liability for earlier noncompliance. At any rate, the filed Program Agreement and unfiled Side Agreements are not substantially similar. The most prominent difference is that in the event of a conflict, the policy takes precedence over the Program Agreement but not the unfiled Side Agreement. The Program Agreement also modified the Side Agreement's medical cost containment expense provision, the choice of law and arbitration provisions, and collateral and default provisions. Put simply, the Program Agreement is markedly different from the unapproved Side Agreement, and its filing does not excuse Travelers' prior Insurance Code violations.

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[188] *Id.* at p. 1120; see also *Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 758; *People v. Johnson* (2002) 28 Cal.4th 240, 247 ["resort to the legislative history is unnecessary where, as here, the statutory language is clear and unambiguous.]

[189] Travelers admits it was aware of the statutory and regulatory filing requirements prior to issuing the Side Agreements. (Tr. 548:13-21.)

[190] Travelers' Post-Hearing Memorandum, pp. 14, 32.

V. Respondents' Insurance Code Violations Constitute a Misapplication of Travelers' Filed Rating Plan

Travelers' use of an unfiled and unattached Side Agreement to apply its section 11735, subdivision (a) filed rates and its section 11735, subdivision (e) endorsement misapplies its rate filings, giving rise to a claim under section 11737, subdivision (f). Put differently, by applying unfiled and unattached terms and rates, Travelers misapplied its section 11735 rating plan filings.

A. Applicable Law

Insurance Code section 11737, subdivision (f), confers upon the Commissioner jurisdiction over private party appeals concerning the application of insurers' section 11735 filings. Section 11735, subdivision (a), requires insurers to file all rates and supplementary rate information, without exception, before using them in California. In addition, section 11735, subdivision (e) states that with regard to deductible plans, rate filings shall include an endorsement that includes all of the following: (1) language that protects the rights of injured workers and ensures that benefits are paid by the insurer without regard to any deductible; (2) that notwithstanding the deductible, the insurer shall pay all of the obligations of the employer for workers' compensation benefits for injuries occurring during the policy period; and (3) language specifying whether loss adjustment expenses are to be treated as advancements within the deductible to be reimbursed by the employer.[191]

[191] The distinction between the form and rate filings is neither technical nor frivolous. Insurance Code section 11735's filing and public inspection requirement protect the state's workforce by ensuring benefits are available to those injured or sickened in the course of their employment. The filing requirement ensures the Commissioner has the rate information necessary to determine that insurers charge amounts that are not discriminatory, not monopolistic, cover their losses and expenses, and do not threaten their solvency. In addition, section 11735's public inspection requirement provides broad access to filed rate information allowing employers to find coverage at the best competitive rates. When rate information is transparent, policyholders are better able to compare coverage and reduce their costs. And insurers are less likely to gain a monopolistic advantage when all carriers' pricing information is public.

B. Analysis and Conclusions of Law

California's comprehensive workers' compensation statutory and regulatory framework requires insurers to charge filed rates using filed forms. 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. In addition, a filed rate or rating plan must be validly endorsed on the policy to be used. Thus, by charging Appellant under the illegal, unfiled Side Agreement, Respondent misapplied its rate filings.

VI. Rate Disapproval Procedures Are Not Applicable to This Proceeding

Travelers argues that use of unfiled rate information is not unlawful unless the Commissioner follows the rate disapproval procedures laid out in Insurance Code section 11737, subdivisions (a) and (d).[192] Finding the use of unfiled rate information unlawful under subdivision (f) is neither equivalent to, nor predicated on, rate disapproval.[193]

Section 11737 delineates two separate roles for the Commissioner. Subdivision (f) authorizes the Commissioner to hear private party appeals concerning the application of rate filings. In contrast, subdivisions (a) though (e) permit the Commissioner to bring his own actions to disapprove unfiled or otherwise improper rates. When the Commissioner finds an unfiled rate or supplementary rating information unlawful under subdivision (f), he performs an *adjudicatory* function between the insurer and the affected party. When the Commissioner disapproves an unfiled rate under subdivisions (a) and (d), he acts in an *enforcement* capacity. Indeed, subdivision (f) makes no reference to disapproval. Thus, contrary to Travelers' assertions,

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[192] Travelers' Post-Hearing Memorandum, p. 31.

[193] See *Shasta Linen, supra,* at p. 45 ["The authority to hear grievances of employers for misapplication of rates … is separate from the Commissioner's authority to disapprove rates."]

determinations of unlawfulness and rate disapprovals are not equivalent.

Travelers further argues that use of unfiled rate information remains lawful unless the rates are first disapproved. Their argument implies that if use of unfiled rates were *per se* unlawful, the Commissioner's authority to disapprove those rates would be superfluous. According to that argument, disapproval must be a prerequisite to finding unfiled rates unlawful. But the argument overlooks statutory language and relevant case law.

First, rate disapproval allows the Commissioner to forestall the use of unlawful rates prior to private party appeals. If the Commissioner learns an insurer is using an unfiled rate, he may stop the unlawful activity by disapproving the rate on his own initiative, rather than waiting until a private party appeal.[194] Thus, rather than being superfluous, the rate disapproval mechanism serves an important policy aim.

Second, California courts have not accepted Travelers' argument. In *South Tahoe Gas Co. v. Hofmann Land Improvement Co.*,[195] the plaintiff public utility sought to enforce a higher contractual rate than the rate it had filed with the Public Utilities Commission ("PUC"). The defendant countered that the contract was illegal and violated state law and PUC regulations since it charged an unfiled rate. Much like Insurance Code section 11735, the Public Utilities Code section 489 requires the utility to file its rates and rating information. And similar to Insurance Code section 11737, Public Utilities Code section 728 permits the PUC to disapprove a utility's rates. Although there was no indication the PUC acted under section 728, the Court of Appeal agreed that a charge in excess of the filed rate was illegal.[196] In essence, the Court's ruling confirms that rate disapproval proceedings are not a prerequisite to finding the use of

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[194] Of course, the fact the rates are unfiled makes it likely the Commissioner will not learn of their unlawful use until an aggrieved private party raises an appeal, in which case rate disapproval would be too late to benefit the appellant.
[195] *South Tahoe Gas Co. v. Hofmann Land Improvement Co.* (1972) 25 Cal.App.3d 750.
[196] *Id.* at p. 755.

unfiled rates unlawful.

VII. The Side Agreements Are Void As a Matter of Law.

Having found the Side Agreements to be unfiled and unattached collateral agreements and/or endorsements, and having determined that the issuance of such agreements misapplied Travelers' filed rating plan, Appellant argues the Side Agreements are void as a matter of law, as they violate the Insurance Code's regulatory scheme.[197] Travelers counters with a number of arguments. First, Travelers argues unfiled collateral agreements are not void as a matter of law under section 11658 and Regulations section 2268. Second, Travelers contends the Commissioner may not find a contract void or unenforceable in private party appeals.[198] Travelers' arguments are unpersuasive.[199]

A. The Insurance Code's Plain Language and Relevant Case Law Render the Side Agreement Void, Irrespective of Any Action of the Commissioner.

As a threshold matter in addressing this issue, the parties conflate legal analysis about the status of an unfiled endorsement, with the imposition of remedies that flow from that analysis. Under section 11737 subdivision (f), the Commissioner may determine whether an insurer has misapplied its filed rates. In view of that determination, the Commissioner may "affirm, modify, or reverse" the action of an insurer or rating organization on appeal by a person aggrieved by the manner in which the rating system has been applied. In *Shasta Linen,* the Commissioner did not find that an unfiled side agreement was "voidable." Rather, he found it was "void as a matter of

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[197] Appellant's Post-Hearing Reply Brief, pp. 17-19.

[198] Travelers' Post-Hearing Memorandum, pp. 31-33; Travelers' Post-Hearing Reply Brief, pp. 14-18.

[199] Travelers misinterprets the Settlement Agreement in the Shasta Linen writ petition, saying the Commissioner "pronounced to the public" that the remedy in a matter arising under section 11737 is for the courts to decide. Travelers refers to a recital in the Agreement that "[T]he Dispute … is ultimately for the courts to decide." That is simply an acknowledgement by the parties – in a recital that has no operative effect in the agreement -- that courts "ultimately" review actions by administrative agencies pursuant to appropriate standards of review. Travelers also quotes a sentence that states "There is a good faith dispute …" whether an unfiled side agreement is void. That is a true statement; there was a dispute between the Commissioner and the respondents. Even if the Settlement Agreement provided that only a court could decide the Shasta Linen issues – which it does not do– the court decided the issues in *Nielsen.*

law." That was a legal conclusion, not the imposition of a remedy. The result of that finding was that the *filed* policy determined the obligations of the insurer and the insured and the unfiled side agreement had no effect.[200] In *Nielson,* the court of appeal agreed with the Commissioner's legal conclusion that the agreement is "void as a matter of law."[201] Nothing in *Nielson* suggests that the agreement's resulting failure was borne of judicial discretion—the agreement failed as void *ab initio* because it was illegal.

Travelers incorrectly argues that the Commissioner's determination of the proper application of Travelers's filed rates must implement rate modifications imposed by the void unfiled side agreement. The Commissioner's decision to reverse Travelers' misapplication of its rates and to require Travelers to apply only its filed rates, unmodified by the void unfiled agreement, is a proper exercise of the Commissioner's express authority under section 11737 subdivision (f) to "affirm, modify, or reverse" Travelers's decision.

1. The Insurance Code's Comprehensive Regulatory Scheme Supports Finding the Side Agreements Void

Section 11737, subdivision (f), grants the Commissioner broad authority to award remedies in workers' compensation appeals. As previously noted, the statute authorizes him to "affirm, modify, or reverse" an insurer's action concerning the application of its rating system.

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[200] Travelers argues that the Commissioner did not void side agreements in its settlement of *In the Matter of ... California Insurance Company and Applied Underwriters Captive Risk Assurance Company, Inc.* (*CIC/AURCRA*) *CIC/AUCRA* is not *Shasta Linen*. But that was not a matter arising under section 11737. Rather, the Commissioner issued a cease and desist order against the respondents under sections 1065.1 and 1065.3 to require the respondents "to cease and desist from issuing or renewing any workers' compensation insurance policy ... " that had a side agreement in violation of sections 11658, 11735 and former Regulation 2218. And further, distinguishable from this matter, it addressed the respondents' company-wide practices, not a dispute between the respondents and a particular insured. Travelers similarly argues that Commissioner's Settlement Agreement in *In the Matter of ... Zurich American Insurance Company et al.* (CDI Case No. DISP–2011-00811) did not void unfiled side agreements. In *Zurich,* like *CIC/AUCRA,* the Commissioner issued a cease and desist order under sections 1065.1 and 1065.3 that was not a case arising from an appeal under section 11737.

[201] *Nielsen,* at 1115. "Although we are not bound by the *Shasta Linen* decision ... we find its analysis persuasive on the prohibition of unfiled 'collateral' or 'side-agreements.' [internal citation omitted] *Nielsen* at 1116.

The statute contains no language restricting remedies the Commissioner may order. Nor has any California court inferred such restrictions from the statute. Indeed, the breadth of the Commissioner's authority is consistent with his comprehensive role to "require from every insurer a full compliance with all the provisions of [the Insurance Code]."[202]

While Travelers argue that remedies under rate disapprovals may only be applied prospectively, remedies for findings of unlawfulness under subdivision (f) may either be prospective or retrospective.[203] In fact, nothing in subdivision (f) suggests the Commissioner's decision to modify or reverse an insurer's action may apply only on a going-forward basis. That subdivision principally concerns past harm, in that it authorizes a private party "aggrieved" (past) to request action by an insurer to review the manner in which its rating system "has been applied" (past) in connection with the "insurance afforded or offered" (past). Since a prospective remedy would do nothing to address past harm, logically remedies under subdivision (f) may be retrospective.

Finally, because subdivision (f) does not limit the available remedies, the Commissioner's remedies may include refusing to enforce unlawful modifications to contracts, and sever unlawful provisions, as appropriate.[204] The California Supreme Court's holding in *Marathon Entertainment, Inc. v. Blasi*[205] clarifies this authority. There, an actress brought a claim before the California Labor Commissioner, seeking to void a contract with her manager on the grounds the agreement violated the Talent Agency Act. The Labor Commissioner found a violation and declared the contract void even though the statute specified no remedy. The Court explained that since "the Legislature has not seen fit to specify the remedy for violations" of the

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[202] Ins. Code, § 12936.
[203] *Shasta Linen, supra,* at p. 53.
[204] *Id.* at pp. 65-66.
[205] *Marathon Entertainment, Inc. v. Blasi* (2008) 42 Cal.4th 974, 996.

act, "the full voiding of the parties' contract is available, but not mandatory; likewise, severance is available, but not mandatory."[206] The Court further stated those remedies could be imposed at the administrative level, as well as by the courts.[207]

As the Commissioner stated in *Shasta Linen*, unfiled side agreements are prohibited and shall not be used without complying with statutory and regulatory requirements. Unfiled side agreements "are not permitted in this state and are void as a matter of law."[208]

2. Case Law Compels Finding the Side Agreements Void as a Matter of Law

In *American Zurich*, the court determined that Zurich's failure to file its IDA with the WCIRB and the Insurance Commissioner violated Insurance Code section 11658. The court, relying on section 11658, subdivision (a)'s statement that a workers' compensation insurance policy or endorsement "*shall* not be issued by an insurer" unless filed and approved, and subdivision (b)'s language that issues an unapproved policy or endorsement "is unlawful," concluded that "Section 11658 is clear: the unfiled and unapproved IDAs are illegal under Section 11658 and therefore void as a matter of law."[209]

The California Court of Appeal agrees. In *Nielsen Contracting,* the court noted that the Commissioner is charged with closely scrutinizing insurance plans to protect workers and their employers. To accomplish this objective, the Legislature required that the Commissioner have full access to insurance information through the mandatory rate and form filing requirements. "It follows that a violation of these requirements prevents crucial regulatory oversight and thus renders the unfiled agreement unlawful and void as a matter of law."[210] In so holding, the court

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[206] *Ibid.*
[207] *Id.* at pp. 996, 998.
[208] *Shasta Linen*, *supra*, at p. 66.
[209] *American Zurich*, *supra*, 2015 WL 4163008 at p. *16.
[210] *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1118.

rejected the argument that this remedy is not provided for in the Insurance Code. Instead, the court found ample notice to the insurer since "the statutes here specifically provide that an agreement that has not been appropriately filed is unlawful."[211] Accordingly, the court voided the Side Agreement's arbitration and delegation clauses.

California case law is clear. Unfiled side agreements are unlawful and void as a matter of law. Travelers' argument to the contrary is without merit.

B. No Compelling Reason Exists to Enforce the Side Agreements

Insurance Code section 11737, subdivision (f) provides that the Commissioner may "affirm, modify or reverse" the insurer's action that is the subject of the insured's appeal. In this matter, the Commissioner may "affirm, modify or reverse" Travelers' application of the Side Agreements. A contract made in violation of a regulatory statute is generally void.[212] Courts will not normally enforce an illegal agreement or one against public policy, as the public importance of discouraging prohibited transactions outweighs equitable considerations of possible injustice between the parties.[213] Because workers' compensation insurance is usually mandatory, the Commissioner is charged with closely scrutinizing insurance plans to protect workers and employers alike. Sections 11658 and 11735's filing requirements enable the Commissioner to perform that duty. Insurers who use unfiled rates or unfiled side agreements frustrate public policy.[214] 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.[215] As the Court of

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[211] *Id.* at p. 1119.
[212] *Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 70; *Asdourian v. Araj* (1985) 38 Cal.3d 276, 291.
[213] *Asdourian v. Araj*, *supra*, 38 Cal.3d at p. 291
[214] *Shasta Linen, supra,* at p. 67.
[215] *American Zurich*, *supra*, 2015 WL 4163008 at p. *17.

Appeal recently stated:

> These prohibitions would have no meaning if the insurer could enforce contracts despite having violated the disclosure and approval requirements. Allowing the insurer to make material modifications to the filed and approved dispute resolution mechanism without the knowledge of the Rating Bureau or the Insurance Commissioner would effectively remove any regulatory oversight of this process.[216]

Accordingly, public policy supports reversing Travelers' action in its entirety, because Travelers' Side Agreements are void, and requiring Travelers to apply only its filed rates.

While Travelers incorrectly contends the Commissioner lacks the power adjudicate the lawfulness of the unfiled agreement, Travelers inconsistently argues the Commissioner should exercise equitable authority and enforce the illegal agreement anyway. But Travelers has not demonstrated grounds for the Commissioner to only "modify," and not reverse, Travelers' prior decision. Analogously, in compelling cases, illegal contracts will be enforced in order to 'avoid unjust enrichment and a disproportionately harsh penalty upon the plaintiff.[217] In each case, the extent of enforceability and the kind of remedy granted depend upon a variety of factors, including the policy of the transgressed law, the kind of illegality and the particular facts.[218] Travelers did not demonstrate that declining to permit enforcement of the Side Agreements would result in unjust enrichment to the Appellant. There is no risk of unjust enrichment because "an insurer's issuance of an illegal contract, even if it results in enrichment to the insured, does not result in *unjust* enrichment, since the insured did nothing wrong and the insurer should have known of its own legal duties."[219] Further, Appellant is still responsible under the actual insurance policies for any premiums.

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[216] *Nielsen Contracting*, *supra*, 22 Cal.App.5th at p. 1118.
[217] *Malek v. Blue Cross of California*, *supra*, 121 Cal.App.4th at p. 707.
[218] *Ibid.*; *American Zurich*, *supra*, 2015 WL 4163008 at p. *16.
[219] *Id.* at p. *16; accord *Shasta Linen, supra,* at pp. 67-68.

Nor did Travelers demonstrate that reversing its decision is unduly harsh regardless ~~of~~ whether Appellant understood its terms.[220] Travelers knew of California's filing requirements and admits it entered into the final Side Agreement *after* receiving a reminder from the CDI that such unfiled agreements were unlawful. Additionally, permitting Travelers to enforce the Side Agreement would encourage illegal activity – i.e., the use of unfiled collateral agreements.[221]

Conclusions of Law

Based on the foregoing facts and analysis, the Commissioner makes the following legal conclusions:

1. Pursuant to Insurance Code section 11737, subdivision (f), the Commissioner has exclusive jurisdiction to adjudicate Appellant's claim that Travelers' unfiled Side Agreements misapplied Travelers' filed rating plan by violating Insurance Code sections 11658 and 11735, as well as California Code of Regulations, title 10, section 2268.

2. Travelers' Side Agreements constitute endorsements that must be filed and approved pursuant to Insurance Code section 11658. Travelers violated section 11658 by failing to file those Side Agreements.

3. Travelers' Side Agreements constitute collateral agreements that were required to be filed and attached and made part of the policy pursuant to California Code of Regulations, title 10, section 2268. Travelers violated California Code of Regulations, title 10, section 2268 by failing to attach its Side Agreements to Appellant's policies.

4. Travelers' Large Deductible Endorsement and subsequent filing of its Side Agreement does not extinguish its Insurance Code violations.

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[220] *Russell v. Soldinger* (1976) 59 Cal.App.3d 633, 646 [an illegal contract be ratified by any subsequent act.]
[221] *American Zurich, supra*, 2015 WL 4163008 at p. *17; accord *Shasta Linen, supra,* at p. 68.

5. Travelers' use of the unfiled Side Agreements in violation of Insurance Code section 11658 and California Code of Regulations, title 10, section 2268 resulted in a misapplication of Travelers' filed rating plan. Travelers failed to properly attach the Side Agreements to Appellant's policy as required by Insurance Code section 11735, subdivision (e), as well as section 11658.

6. Because the Side Agreements applied unfiled terms, conditions, obligations and supplementary rate information, contravening Insurance Code sections 11658 and 11735, as well as California Code of Regulations, title 10, section 2268, the Side Agreements are unenforceable and void as a matter of law. The unfiled Side Agreements violate public policy and no compelling reason exists to enforce them.

ORDER

IT IS ORDERED:

1. To the extent Appellant has remitted to Travelers funds in excess of the total amount that may be validly charged under Appellant's guaranteed cost policies and Large Deductible Endorsements, Travelers shall refund the excess to Appellant within 30 days after the date this proposed decision is adopted.

2. It is further ordered that the entirety of this Decision is designated precedential pursuant to Government Code section 11425.60, subdivision (b).

Dated: November 21, 2018

Dave Jones

DAVE JONES
Insurance Commissioner

NOTICE OF TIME LIMITS FOR RECONSIDERATION & JUDICIAL REVIEW
In the Matter of DAVIDSON HOTEL COMPANY, LLC.
Case No. AHB-WCA-16-25

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

A Petition for Reconsideration must be served on all parties and should be directed to:

Geoffrey F. Margolis
Deputy Commissioner & Special Counsel
California Department of Insurance – Executive Office
300 Capitol Mall, 17th Floor
Sacramento, California 95814

Judicial review of the Insurance Commissioner's Decision may be had pursuant to California Code of Regulations, Title 10, section 2509.76, by filing a petition for a writ of mandate in accordance with the provisions of section 1094.5 of the California Code of Civil Procedure. The right to petition shall not be affected by the failure to seek reconsideration before the Commissioner. A Petition for a Writ of Mandamus shall be filed with the Court, and served on the Insurance Commissioner as follows:

Chao Lor
Attorney
California Department of Insurance – Legal Office
300 Capitol Mall, 17th Floor
Sacramento, California 95814

Any Petition for a Writ of Mandamus should also be served on the Administrative Hearing Bureau of the California Department of Insurance as follows:

Department of Insurance
Administrative Hearing Bureau
45 Freemont Street, 22nd Floor
San Francisco, California 94105

DECLARATION OF SERVICE BY MAIL

Case Name/No.: In the Matter of the Appeal of:
DAVIDSON HOTEL COMPANY, LLC.
File AHB-WCA-16-25

I, CANDACE GOODALE, 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, Suite 1700, 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 with the United States Postal Service. Said ordinary business practice is that correspondence is deposited with the United States Postal Service that same day in Sacramento, California.

☒ On November 21, 2018 following ordinary business practices, I caused a true and correct copy of the following document(s):

DECISION; NOTICE OF TIME LIMITS FOR RECONSIDERATION & JUDICAL REVIEW

to be placed for collection and mailing at the office of the California Department of Insurance at 300 Capitol Mall, Sacramento, California, 95814 with proper postage prepaid, in a sealed envelope(s) addressed as follows:

(SEE ATTACHED 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 November 21, 2018.

CANDACE GOODALE