STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Atlantic Coast Life Insurance Company and Southern Atlantic Re, Inc. Petitioners, v. South Carolina Department of Insurance, Respondent.	)	Docket No. 24-ALJ-09-0427-CC **ORDER**

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court (Court or ALC) pursuant to a Motion for Temporary Restraining Order and/or Immediate Stay, a Motion to Seal and a Motion for Expediated Hearing filed by Atlantic Coast Life Insurance Company (ACL) and Southern Atlantic Re, Inc., (SAR) (collectively, Petitioners) on December 18, 2024. Petitioners filed a request for a contested case hearing,[1] challenging the December 10, 2024 decision of Respondent South Carolina Department of Insurance (DOI or Department), in which DOI's Director ordered that: 1) Petitioners remain under the administrative supervision of Michael J. FitzGibbons,[2] 2) Petitioners notify all producers who sell Petitioners' products that it is prohibited from writing any new business effective December 31, 2024 and, 3) Petitioners cancel all new policies and new annuities after December 31, 2024, returning to the purchaser of a policy or annuity described above, within five (5) business days, all money received from the purchaser in connection with the transaction. Additionally, the Director also ordered a partial lift of the confidentiality of the administrative supervision proceedings to permit the disclosure of certain specified information based on its determination that it was in the best interest of the public or in the best interest of each insurer, its insureds, its creditors or the general public. In support of the

[1] While filed and captioned as a contested case proceeding as discussed herein, the relief sought by Petitioners is injunctive in nature.

[2] This December Order amended the Department's April 10, 2024 Confidential Order in which the Director placed Petitioners on administrative suspension with Mr. Fitzgibbons serving as Petitioners' supervisor. As will be discussed hereinafter, the Department subsequently lifted the confidentiality of its Orders notwithstanding the proceedings pending before this Court.

Motion, Petitioners included an affidavit from Daniel Cathcart, the Chief Executive Officer of ACL and SAR.

On December 23, 2024, the Court held a conference call with the parties at which time, Petitioners informed the Court that the Director lifted the confidentiality and made public the April 10, 2024 Order. For the reasons that will be more fully explained below, Petitioners' Motion for a Stay is granted until an expedited hearing before this Court is held on the Director's December Order to cease and desist and, its Motion to Seal is denied, in part.

DISCUSSION

Jurisdiction

At the outset, this Court has appellate jurisdiction over orders or decisions of the Department. S.C. Code Ann. § 38-3-210 (2015); *see also* § S.C. Code 38-9-360(A)(2) (Supp. 2024) (referencing ALJ's review of Department's notification of Adjusted RBC Repot). "Review by an administrative law judge of a final decision in a contested case, heard in the appellate jurisdiction of the Administrative Law Court, must be in the same manner as prescribed in Section 1-23-380 ..." S.C. Code Ann. § 1-23-600(E) (Supp. 2024). Additionally, the Court generally has authority "[t]o issue those remedial writs as are necessary to give effect to its jurisdiction." S.C. Code Ann. § 1-23-630(A) (2005). Subsection 1-23-600(G) of the South Carolina Code (Supp. 2024) further provides:

> [n]otwithstanding another provision of law, the Administrative Law Court has jurisdiction to review and enforce an administrative process issued by an agency or by a department of the executive branch of government, as defined in Section 1-30-10, such as a subpoena, administrative search warrant, cease and desist order, or other similar administrative order or process. A department or agency of the executive branch of government authorized by law to seek an administrative process may apply to the Administrative Law Court to issue or enforce an administrative process. A party aggrieved by an administrative process issued by a department or agency of the executive branch of government may apply to the Administrative Law Court for relief from the process as provided in the Rules of the Administrative Law Court.

Here, Petitioners challenge the Department's Order to cease writing new business effective December 31, 2024. Accordingly, I find that subsection 1-23-600(G) vests this Court with subject matter jurisdiction over the matter. *See* § 1-23-600(G); *see also* S.C. Code Ann. § 1-30-10 (Supp. 2024) (Department of Insurance is within the executive branch of the state government).

Stay/Temporary Restraining Order of December 11 Decision

In the Motion to Stay, Petitioners request the Court stay DOI's December 11th Order pursuant to Rules 16 and 68 of the Rules of Procedure for the South Carolina Administrative Law Court (SCALC Rules) and Rule 65 of the South Carolina Rules of Civil Procedure (SCRCP). Petitioners also move for a temporary restraining order prohibiting Respondent and "all those in active concert with Respondent from taking any steps to enforce or give effect to the December Order." Petitioners' Motion is supported by an affidavit of Daniel Cathcart, Petitioners' Chief Executive Officer. Mr. Cathcart attested that Petitioners will suffer immediate and irreparable injury, loss and/or damages to their financial condition unless the order is stayed. Mr. Cathcart indicated that ACL will unlikely be able to restart their business because an abrupt suspension would likely permanently disrupt its longstanding relationships and reputation with funeral homes and other agents sourcing pre-need business. In addition, Mr. Cathcart attested that the December Order is based on, and modifies, the April Order, an order which rests entirely upon the integrity of the Department's Adjusted Risk Based Capital (RBC) Report (Adjusted RBC Report).[3] Mr. Cathcart maintains that the Department's Adjusted RBC Report is flawed because it disallowed admitted assets, amounting to a negative adjustment of approximately $4.5 billion for ACL and $460.3 million for SAR. Mr. Cathcart further indicated that because it believes the Department misapplied the "single person" rule set forth under subsection § 38-12-220(A)(1) of the South Carolina Code (2015) it timely requested a confidential hearing on the Adjusted RBC Report. Petitioners argue that unless and until a hearing on the matter is complete, there is no basis for the underlying Supervision Order or the December Order.[4] Petitioners further assert that they are

[3] As a requirement of licensure, Petitioner is required to prepare and submit to the Director an RBC Report of its RBC Levels. S.C. Code Ann. § 38-9-320(A) (Supp. 2024). The RBC Report provides an accounting of the licensee's risk-based capital and it is used as a tool to help regulators identify when a licensee is in financial trouble. S.C. Code Ann. § 38-9-310(16) (Supp. 2024). The Director may, however, adjust the licensee's RBC if, in its judgment, the Director believes the RBC Report is inaccurate. S.C. Code Ann. § 38-9-320(F) (Supp. 2024). Additionally, the Department may suspend or revoke the certificate of authority of an insurer in hazardous financial condition or place the insurer in supervision or receivership. S.C. Code Ann. § 39-5-120. As stated above, the Director exercised its authority and modified Petitioners RBC Report. The Director's modified report is recognized as the Adjusted RBC Report. S.C. Code Ann. § 38-9-310(1) (Supp. 2024). Petitioners challenged the Director's notification of the Adjusted RBC Report pursuant to section 38-9-370 of the South Carolina Code (2015). Notably, the Director provided Petitioners with notice of issuance of an Adjusted RBC Report the same day that the April 10, 2024 Order was issued placing Petitioners under administrative supervision.

[4] Pursuant to subsection 38-9-370(A) of the South Carolina Code (Supp. 2024), Petitioners timely sought review of the Director's Adjusted RBC Report. The Director appointed Justice Hearn as his designee to conduct the hearing. By order dated October 22, 2024, the Honorable Justice Kaye Hearn held the matter in abeyance for sixty days. Upon

entitled to a stay as they are likely to succeed on the merits since the December Order is based entirely upon the findings of the Utah Department of Insurance and not the Department's own assessment of Petitioners condition under the applicable South Carolina law. Moreover, Petitioners argue the Department's reliance on the Utah decision is unsound since the findings of the Utah Department of Insurance are under review.

In analyzing Petitioners' arguments, I find that the appropriate standard review is whether a stay should be granted pursuant to subsection 1-23-600(G) of the South Carolina Code (Supp. 2024). The purpose of a stay is to preserve the status quo pending a determination on appeal. *Graham v. Graham,* 301 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct.App.1990); *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n,* 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) ("To stay an order is to hold it in abeyance or refrain from enforcing it; a stay is a stopping."). "The granting of a motion for a stay of proceedings rests entirely within the discretion of the trial [court]." *City of Spartanburg v. Belk's Dep't Store of Clinton,* 199 S.C. 458, 20 S.E.2d 157, 167 (1942). "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North American Co.*, 299 U.S. 248, 254–255 (1936).

Notwithstanding the Court's inherent power, DOI argues section 38-3-210 of the South Carolina Code prohibits this Court from issuing a stay because the examination findings indicate that the insurer has a deficiency in the amount of admitted assets and capital and surplus. However, section 38-3-210 of the South Carolina Code only prohibits the issuance of a stay when the order of the Director or his designee is "to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets." I find that the Department has failed to sufficiently show that the challenged order directed Petitioners "to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets." § 38-3-210. While the December Order may tangentially be related to the Adjusted RBC Report and the Department's concerns of the

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receipt of the December Order discussed herein, Petitioners contacted the Department, requesting a confidential hearing on the Adjusted RBC Report on or about the nearest business day to December 21, 2024, the date of expiration of the continuance order. As of the date of this order, a hearing on the matter has yet to be held. Importantly, pursuant to subsection 38-9-360(A)(2) (2015), when an Adjusted RBC Report notification is challenged, a Mandatory Control Event Level does not occur until notification that the challenge is unsuccessful.

sufficiency of Petitioners' capital, the December Order did not direct Petitioners to make good the "alleged" impairment in its capital or surplus or deficiency in the amount of its admitted assets. In other words, the Department suggested that writing less coverage makes good the deficiency in its admitted assets and capital surplus. However, it offered no evidence or statutory authority that ceasing to write new businesses will restore the alleged deficiency. Furthermore, the December Order merely ordered that Petitioners remain under administrative supervision, that Petitioners notify its producers that it is prohibited from writing any new business effective December 31, 2024, and that Petitioners cancel and return returning to the purchaser, all money received in connection with transactions for new policies and new annuities after December 31, 2024. Moreover, as emphasized by the Department, the Adjusted RBC Report is still under review by the Department. As such, I find that this Court has the inherent power to issue a stay. Therefore, I must consider whether a stay is warranted. In its Motion, Petitioners argue that a stay is appropriate because, in addition to the irreparable harm which the Order will cause, they are likely to succeed on the merits.

April 10, 2024 Order of Supervision

Petitioners argue they are likely to be successful on the merits because there was no basis for the Department's April 10, 2024 order since its placement on supervision was predicated upon the occurrence of a Mandatory Control Level Event.[5] Petitioners contend that unless and until the hearing process on the Adjusted RBC Report is complete, there is no factual basis for the April Order of Supervision since a Mandatory Control Level Event cannot occur until notification by this Court that the challenge to the Adjusted RBC Report is unsuccessful. *See*. S.C. Code 38-8-360(A)(2).

Conversely, the Department argues Petitioners are precluded from challenging the RBC Report adjustment because they failed to exhaust their administrative remedies. The Department argues Petitioners "seek[] to challenge the proposed actions of the Department taken during administrative supervision." The Department explains in its reply that prior to the issuance of the December Order, Petitioners sought permission and were permitted by Mr. Fitzgibbons to write new business. Mr. Fitzgibbons November 4, 2024 revocation of his prior approval and the

[5] A mandatory control level event includes the filing of an RBC Report which indicates that the licensee's Total Adjusted Capital is less than its Mandatory Control Level RBC. S.C. Code Ann. § 38-9-360(1) (Supp. 2024).

Director's subsequent December Order reflect shared concerns regarding Petitioners' financial condition. The Department contends that if the Petitioners wished to challenge the April 10 Order of Supervision or any of the Supervisor's actions taken in furtherance thereof, it must adhere to the statutory mechanism afforded to insurers to seek reconsideration of the Department's (proposed) actions. See S.C. Code Ann. § 38-26-70 (2015).

Pursuant to subsection 38-26-40(A) of the South Carolina Code (2015), the Department may initiate administrative supervision of an insurer if one or more of the following circumstances

> (1) The insurer's condition renders the continuance of its business hazardous to the public or to its insureds.
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> (2) The insurer has exceeded its powers granted under its certificate of authority and applicable law.
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> (3) The insurer has failed to comply with a provision of the insurance laws of this State.
>
> (4) The business of the insurer is being conducted fraudulently.
>
> (5) The insurer gives its consent.

S.C. Code Ann. § 38-26-40. Action by the Director under subsection 38-26-40(A), is subject to review pursuant to related regulations and the Administrative Procedures Act. S.C. Code Ann. § 38-26-40(B)(3) Code (2015). Additionally, while on supervision, the insurer may contest an action taken or proposed to be taken by the supervisor and, denial of the insurer's request upon reconsideration entitles the insurer to review under related regulation and the Administrative Procedures Act. S.C. Code Ann. § 38-26-70.

Here, the order placing Petitioners on administrative supervision was issued on April 10, 2024, the same day the Director issued its notification of the Adjusted RBC Report. The Order of Supervision was based on the Director's conclusion that a Mandatory Control Level Event had occurred and its determination that continuance of Petitioners' business was hazardous to the public and their insureds. Markedly, while the Director concluded that the continuance of Petitioners' business was hazardous to the public, he did not make a specific finding as to which of Petitioners' actions caused him to reach this conclusion. In fact, all of the findings set forth in the April 10, 2024 Order pertain to the facts which gave rise to the Department's notification of an Adjusted RBC Report. Thus, in the absence of specific findings to suggest otherwise, it can be presumed that the Department's determination that the continuance of Petitioners' business was hazardous because of the sufficiency of its risk-based capital, an issue which Petitioners timely

contested.[6] With the issue of the Adjusted RBC Report pending review before the Department, I find that the question of whether the Director was authorized to place Petitioners under administrative supervision is not yet ripe for this Court's review.

But even if it were ripe for review, it appears Mr. FitzGibbons abused his discretion when he directed Petitioners to cease writing new business by December 31, 2024. Section 38-26-60 of the South Carolina Code (2015) only authorizes a supervisor to:

> **provide**, after notice to the insurer, that the **insurer may not do** any of the following things during supervision **without the prior approval** of the Director or his appointed supervisor:
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> (1) dispose of, convey, or encumber its assets or its business in force;
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> (2) withdraw its bank accounts;
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> (3) lend its funds;
>
> (4) invest its funds;
>
> (5) transfer its property;
>
> (6) incur debt, obligation, or liability;
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> (7) merge or consolidate with another company;
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> **(8) approve new premiums or renew policies;**
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> (9) enter into a new reinsurance contract or treaty;
>
> (10) terminate, surrender, forfeit, convert, or lapse an insurance policy, a certificate, or a contract, except for nonpayment of premiums due;
>
> (11) release, pay, or refund premium deposits, accrued cash or loan values, unearned premiums, or other reserves on an insurance policy, certificate, or contract;
>
> (12) make a material change in management;
>
> (13) increase salaries and benefits of officers or directors or the preferential payment of bonuses, dividends, or other preferential payments.

S.C. Code Ann. § 38-26-60 (emphasis added).

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[6] I recognize that Petitioners' April 15, 2024 request for a confidential hearing was made pursuant to subsection 38-9-370(A) of the South Carolina Code and that Petitioners did not expressly contest the Director's decision to place it on administrative supervision. *Compare* S.C. Code Ann. § 38-9-370(A)(1) (YR) (establishing right to challenge notification of an Adjusted RBC Report), *with* S.C. Code Ann. § 38-26-40(B)(3) (providing for judicial review of action taken by the Director under Administrative Supervision of Insurers Act); *see also* § 38-26-40 (authorizing Director to place insurers on administrative supervision). Nevertheless, because the Director's Order of Supervision was based entirely on the Adjusted RBC Report, I find that Petitioners' April 15, 2024 request for review was sufficient to also encompass the Order of Supervision. Indeed, to find otherwise would disembowel Petitioners of its due process rights, especially when considering Petitioner are statutorily granted five-days after notification of the Adjusted RBC Report to request a hearing before the Department.

Here, Mr. FitzGibbons notified Petitioners that it was "unwilling to continue to permit [Petitioners] to incur new liabilities, particularly policyholder liabilities when all companies RBC are at a mandatory control level and each of the insurers exhibit negative surplus" since its risk-based capital (RBC) reflected mandatory control level and each of the insurers showed negative surplus. In other words, Mr. FitzGibbons' notice served to provide Petitioners a blanket denial of approval to approve any new premiums or renew policies. However, the statute only empowers a supervisor to direct what actions the **insurer may not do, absent prior approval.**[7] Said differently, Mr. FitzGibbons' authority was limited to designating which of Petitioners' actions necessitated prior approval. Nonetheless, I must still consider whether Petitioner presented a prima facie case to challenge the Director's order to cease writing new business.

December 10, 2024 Order

Petitioners argue the Department's December Order is plainly unwarranted because it is based entirely on the Utah Department of Insurance's issuance of an Emergency Order against three of Petitioners' Utah-domiciled affiliates, not DOI's assessment of Petitioners under the applicable South Carolina law. Additionally, Petitioners argue the findings set forth in the Utah Order stem from a report of an outside consulting firm for which Petitioners' Utah affiliates have identified multiple substantial errors in turn giving rise to their administrative challenge to the Utah Department of Insurance's findings. Nonetheless, the Department argues that the Director's actions are not in error because he has the power under subsection 38-5-120(D)(2)(b) of the South Carolina Code (2015) to reduce, suspend, or limit the volume of business, if the Director or designee determines that the insurer is in an unsound condition or in a hazardous condition or the condition of the insurer renders the continuance of its business hazardous to the general public.

Here, the Director concluded administrative action was appropriate:

> In light of the public Utah Order regarding the affiliates of ACL and SAR, and the findings and directives therein, I have no difficulty in determining pursuant to Subsection 38-26-50(D) that it is in the best interest of each insurer, its insureds, to make public the directive for the insurers not to write any new business. This measure is necessary to avoid confusion, uncertainty and speculation as to the status of ACL and SAR by providing essential relevant information regarding these insurers, and to assure policyholders, creditors, the industry and the public that

[7] I acknowledge that under subsection 38-5-120(D)(2)(b) the Director's designee may reduce, suspend, or limited an insurers business if determined that the insurer is in an unsound condition. However, here, Mr. Fitzgibbons did not make a determination that Petitioners were in an unsound or hazardous condition and thus, his actions must be reviewed under authorities granted under section 38-26-60 of the South Carolina Code.

> appropriate regulatory steps have been taken to protect their interests with respect to ACL and SAR its creditors, or the general public to make public the directive for the insurers not

Undeniably, the above conclusion reflects that the Director's determination that administrative supervision was necessary was entirely based on the action of Petitioners' Utah affiliates and not an assessment of Petitioners under the applicable South Carolina law. While the Department may indeed be working with the Utah Insurance Department to conduct a full scope financial examination of A-CAP's five affiliated insurance companies, including ACL and SAR, the basis for the Director's actions were solely founded on findings and directives regarding the affiliates of ACL and SAR, not Petitioners' actions. Yet, the Department maintains in its response to Petitioners' Motion that its actions were justified because the insurer is in an unsound condition or a condition that renders the continuance of its business hazardous to the general public.

In support of its contention, the Department filed a September 2024 Executive Summary of the valuation of certain A-CAP assets. Additionally, the Department included an affidavit from Mr. Fitzgibbons in which he attested to the ongoing assessment of Petitioners financial position as well as copy of his November 14, 2024 directive that "[a]ll the companies' RBC's reflect mandatory control level and each of the insurers exhibit negative surplus." The Department argues that these exhibits present the Court with the Department's findings of fact and conclusions of law made pursuant to the ongoing joint examination by the states of Utah and South Carolina and that under subsection 38-13-20(E)(1) of the South Carolina Code (2015), examination findings are prima facie evidence in a subsequent legal or regulatory action, subject to the review of this court. S.C. Code § 38-26-40(B)(3). In other words, the Department believes it has made a prima facie case by the mere submission of evidence of its examination. However, subsection 38-26-40(E)(1) only applies when the Department has **terminated or suspended an examination** to pursue other legal or regulatory action. Here, Mr. Fitzgibbons affidavit plainly states that the assessment of Petitioners financial position is ongoing. Additionally, the December Order's directive for Petitioners to remain under administrative supervision is clear indication that the matter is still under examination. As stated in the Department's reply, administrative supervision is used to enhance regulatory oversight. Nevertheless, I must still consider whether the evidence before the Court establishes a prima facie case.

Is Petitioner in an unsound or hazardous condition?

The term unsound is not defined under Title 38 of the South Carolina Code yet it ordinarily means "not healthy or whole." Unsound, Merriam-Webster, https://www.merriam-webster.com/dictionary/unsound, (last visited December 23, 2024). *E.g.*, Branch v. City of Myrtle Beach, 340 S.C. 405, 532 S.E.2d 289 (2000) ("When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning."). Further, subsection 38-5-120(A)(5) of the South Carolina Code (2015) provides that the Director may consider one or more of the following standards to determine whether the continued operation of an insurer transacting insurance business in this State is hazardous to the general public, its creditors, or its policyholders:

> (a) adverse findings reported in financial condition and market conduct examination reports, audit reports, and actuarial opinions,
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> reports, or summaries;
>
> (b) the National Association of Insurance Commissioners Insurance Regulatory Information System and its other financial analysis solvency tools and reports;
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> (c) whether the insurer has made adequate provision, according to presently accepted actuarial standards of practice, for the anticipated cash flows required by the contractual obligations and related expenses of the insurer, when considered in light of the assets held by the insurer with respect to such reserves and related actuarial items including, but not limited to, the investment earnings on such assets, and the considerations anticipated to be received and retained under such policies and contracts;
>
> (d) whether the ability of an assuming reinsurer to perform and the reinsurance program of the insurer provides sufficient protection for the remaining surplus of the insurer after taking into account the cash flow of the insurer, the classes of business written, and the financial condition of the assuming reinsurer;
>
> (e) whether the operating loss of the insurer in the immediately preceding twelve month period or less is greater than fifty percent of the remaining surplus of the insurer regarding policyholders in excess of the minimum required, provided that for the purposes of this section, the operating loss of an insurer includes, but is not limited to, net capital gain or loss, change in nonadmitted assets, and cash dividends paid to shareholders;
>
> (f) whether the operating loss, excluding net capital gains, of the insurer in the immediately preceding twelve month period or less is greater than twenty percent of the remaining surplus of the insurer regarding policyholders in excess of the minimum required;
>
> (g) whether a reinsurer, obligor, or any entity within the insurance holding company system of the insurer is insolvent, threatened with insolvency, or delinquent in

payment of its monetary or other obligations, and which in the opinion of the director or his designee may affect the solvency of the insurer;

(h) contingent liabilities, pledges, or guaranties which individually or collectively involve a total amount which in the opinion of the director or his designee may affect the solvency of the insurer;

(i) whether a controlling person of an insurer is delinquent in the transmitting to or payment of net premiums to the insurer;

(j) the age and collectability of receivables;

(k) whether the management of an insurer, including officers, directors, or other people who directly or indirectly control the operation of the insurer, fails to possess and demonstrate the competence, fitness, and reputation necessary to serve the insurer in that position;

(l) whether management of an insurer has failed to respond to inquiries relative to the condition of the insurer or has furnished false and misleading information concerning an inquiry;

(m) whether management of an insurer has filed a false or misleading sworn financial statement, released a false or misleading financial statement to lending institutions or to the general public, made a false or misleading entry, or omitted an entry of a material amount in the books of the insurer;

(n) whether the insurer has failed to meet financial and holding company filing requirements in the absence of a reason satisfactory to the director or his designee;

(o) whether the insurer has grown so rapidly and to an extent that it lacks adequate financial and administrative capacity to meet its obligations in a timely manner;

(p) whether the insurer has experienced or will experience in the foreseeable future cash flow or liquidity problems;

(q) whether management has established reserves that do not comply with minimum standards established by state insurance laws, regulations, statutory accounting standards, sound actuarial principles, and standards of practice;

(r) whether management persistently engages in material underreserving that results in adverse development;

(s) whether transactions among affiliates, subsidiaries, or controlling persons for which the insurer receives assets or capital gains, or both, do not provide sufficient value, liquidity, or diversity to assure the ability of the insurer to meet its outstanding obligations as they mature; and

(t) any other finding determined by the director or his designee to be hazardous to the insurer's policyholders, creditors, or general public.

More specifically, the Department indicates that on February 23, 2024, A.M. Best[8] issued a credit report downgrading ACL's long term credit rating to "BBB" (Good) from "BBB+" (Good), stating that the "ratings of the members of A-CAP Group have been placed under review with negative implications based on A-CAP's risk-management capabilities failing to identify counterparty risk and mitigating its exposure. Indeed, under the Department's own evidence, ACL's AM Best credit rating is good. Nevertheless, the Department argues ACL has shifted its obligations to 777 Re, Ltd., a Bermuda-based reinsurance company who has since lost its license and ceased operations.[9] In other words, the Department believes Petitioners are wholly unsound because one particular reinsurer that a ACL is using is not financially strong. The insolvency of one reinsurer is simply not ample evidence to establish that Petitioners are unsound. Yet, the Department also argues the financial conditions of Petitioners' affiliates has an impact on the financial condition of Petitioners since one of Petitioners' Utah affiliates is a significant reinsurer of ACL and because SAR also holds some of the same investments which the Utah Insurance Department found to be impaired. While Petitioners have not presented the Court with any evidence to suggest this is other than true,[10] Mr. Cathcart attested that Petitioners are continuing to pay all their debts and that its pre-need insurance business has a positive cash flow. More importantly, he also stated that in the absence of the adjustments made by the Adjusted RBC Report, ACL would have a risk-based capital ratio of 628.64%, and SAR would have a risk-based capital ratio of 1,382.87%—amounts which he claims to be well above any levels that would trigger regulatory concerns under South Carolina law (that is, the Company Action Level, Regulatory Action Level, Authorized Control Level, or Mandatory Control Level). Additionally, the financial examination of ACL, SAR and their Utah affiliates continues to this day.

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[8] A.M. Best is an American credit rating agency that focuses on the insurance industry. Both the Securities and Exchange Commission and the National Association of Insurance Commissioners have designated A.M. Best as a Nationally Recognized Statistical Rating Organization (NRSRO) in the United States. A.M. Best credit rating services assess the creditworthiness of and/or reports on over 16,000 insurance companies worldwide. It warrants that its credit ratings are independent, indicative and interactive, and summarize their expert professional opinions on an insurance company's ability to pay claims, debts and other financial obligations in a timely manner.

[9] The Department represents that its notification of the Adjusted RBC Report stemmed from Petitioners "extensive investments in 777 Partners, a Miami-based private equity firm with a diverse portfolio that includes significant interests in insurance, airlines, and sports teams, and its affiliates."

[10] I recognize that Petitioners have not had ample time to reply to the Department's response yet Petitioners have been on notice of the Department's valuations of A-Cap's assets since September 2024.

Considering the evidence currently before me, it appears there is a reasonable dispute regarding the sufficiency of Petitioner's RBC. Therefore, I further find that the Department has failed to sufficiently establish that it has specifically determined that Petitioners continued operation of its business is hazardous to the general public, its creditors, or its policyholders. Additionally, I find Petitioners have made a clear case of hardship that they will suffer irreparable harm should the December Order not be stayed considering that Mr. Cathcart attested that ACL may not be able to restart its business if the December Order goes into effect. As such, in order to preserve the status quo and prevent irreparable harm to Petitioners, the Department shall be temporarily restrained from taking any steps to enforce or give effect to the Supervisor's directive to ACL and SAR to cease writing all new business effective. Additionally, with exception to Petitioners placement under the Department's supervision, the remaining directive of the Director are stayed until the expedited hearing before this Court is held.

Motion to Seal Records

Petitioners also moves for an order pursuant to Rule 6(B)(4) of the South Carolina Administrative Law Court to seal the following documents:

(1) Affidavit of Dan Cathcart;

(2) Exhibits 1 through 5 to the Affidavit of Dan Cathcart, which consist of:

a. The confidential December 11, 2024 Order by the Director of the South Carolina Department of Insurance;

b. The confidential April 10, 2024 Order by the Director of the South Carolina Department of Insurance;

c. The confidential April 10. 2024 Notification issued by the South Carolina Department of Insurance and its Attachments A and B;

d. The April 15, 2024 Letter by counsel to the South Carolina Department of Insurance requesting a confidential hearing concerning the April 10, 2024 confidential Notification; and

e. The October 22, 2024 Order by the Honorable Justice Kay Hearn (Ret.) entered in the confidential hearing matter;

(3) The December 11, 2024 Order accompanying Petitioners Request for Contested Case Hearing; and

(4) Petitioners Motion for Temporary Restraining Order and/or Immediate Stay.

Pursuant to the First Amendment to the United States Constitution, article I, section 9 of the South Carolina Constitution, and section 14-5-10 of the South Carolina Code (2017), no South Carolina court—not this Court, the court of appeals, nor any trial court—may seal any portion of a court record from public view absent lawful authority and specific findings of fact that justify the sealing. *State v. Price*, 441 S.C. 423, 442, 895 S.E.2d 633, 642-43 (2023) (citing *Davis v. Jennings*, 304 S.C. at 506, 405 S.E.2d at 604 (holding that the trial court shall make specific factual findings when a protective order to seal is sought); *Ex parte Cap. U-Drive-It, Inc.* v. *Rhett Alexander Beaver*, 369 S.C. 1, 10, 630 S.E.2d 464, 469 (2006)). "Public access to courts and their records serves several fundamental interests which are crucial to the proper functioning of judicial and government systems." *Cap. U-Drive-It*, 369 S.C. at 12, 630 S.E.2d at 470. "Public access promotes free discussion of governmental affairs by imparting a more complete understanding of the judicial system and issues resolved therein and, it serves as a check on inappropriate or corrupt practices." *Id.* "This presumption of access, however, may be rebutted where countervailing interests outweigh the public interests in access." *Davis v. Jennings*, 304 S.C. at 505–06, 405 S.E.2d at 603 (citing *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir.1988) (internal citations removed)). "The burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption." *Id.*

As stated in Petitioners Motion, investigations conducted pursuant to Title 38 are generally confidential. S.C. Code 38-3-150 (Supp. 2024). However, as discussed herein, the Director lifted the requirement of confidentiality and made public its April 10, 2024 Order. Pursuant to subsection 38-26-50(D) of the South Carolina Code (2015) the Director "may open the proceedings or hearings or make public notices, correspondence, reports, records, or other information if the Director or his designee determines that it is in the best interest of the public or in the best interest of the insurer, its insureds, its creditors, or the general public."

The Department explained that it lifted the confidentiality of its Orders based upon a report that at least one of Petitioners was circulating information that its "financials are strong" and "is closing out a profitable" year and other misleading assertions regarding the Supervisor's directive to cease writing new business. The Department found Petitioners statements to be in contradiction with the Supervisor, inconsistent with the circumstances justifying ongoing regulatory action, and since they were otherwise confusing, inaccurate and misleading. While the Department's decision to lift the confidential nature of the proceedings during the pendency of

appears to this Court to be unprincipled, Petitioner has presented no argument or evidence to establish that the Department abused its discretion when it lifted the confidentiality of the April 10, 2024 order. Therefore, since Appellant has failed to point to any statute or regulation requiring that the underlying proceeding remain confidential, I find that this Court lacks the authority to seal the April 10, 2024 Order; the April 10. 2024 Notification issued by the South Carolina Department of Insurance and its Attachments A and B; the April 15, 2024 Letter by counsel to the South Carolina Department of Insurance requesting a confidential hearing concerning the April 10, 2024 confidential Notification; and the October 22, 2024 Order by the Honorable Justice Kay Hearn (Ret.) entered in the confidential hearing matter. Moreover, Rule 6 of the South Carolina Administrative Law Court Rules of Procedure (SCALC Rules) governs filings made under seal yet it only extends to personal data identifiers such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, or national security information. Here, the documents undeniably relate to financial information related to Petitioners business.

Furthermore, our Supreme Court reiterated this state's strict application of the constitutional requirement that all court proceedings remain open to public and the press. The Supreme Court recently reminded the lower courts that while the court may possess the inherent power to seal any portion of a court record from the public view, such power is very narrow and limited. *State v. Price* 441 S.C. 423, 895 S.E.2d 633, 642 (2023). Pursuant to Rule 41.1(b), of the South Carolina Rules of Civil Procedure, the party seeking to seal documents:

> shall state why sealing is necessary, explain why less drastic alternatives to sealing will not afford adequate protection, and address the following factors: (1) the need to ensure a fair trial; (2) the need for witness cooperation; (3) the reliance of the parties upon expectations of confidentiality; (4) the public or professional significance of the lawsuit; (5) the perceived harm to the parties from disclosure; (6) why alternatives other than sealing the documents are not available to protect legitimate private interests as identified by this Rule; and (7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

See also SCALC Rule 68. While the documents may include minimal reference to Petitioners' financial information, Petitioners have failed to meet their burden to show that the interests in favor of sealing the documents outweigh the presumption of public access to judicial records and documents. Moreover, there are less drastic alternatives to sealing the entirety of the documents

to ensure adequate protection of the individual financial information. Specifically, Petitioners' individual financial information shall be redacted from the aforementioned documents.

ORDER

IT IS THEREFORE ORDERED that DOI's December 11, 2024 Amended Decision is stayed pending a hearing on the merits.

IT IS FURTHER ORDERED that the Motion to Seal is **DENIED**.

IT IS FURTHER ORDERED that Petitioners personal financial information shall be redacted from all prior and future documents filed with this Court.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

December 30, 2024
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Stephanie Perez, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(is) and/or their attorney(s).

Stephanie Perez
Judicial Law Clerk

December 30, 2024
Columbia, South Carolina