

**S259215**  
**S.Ct. Case No.:**

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

**BLAKELY McHUGH, et al.**  
Plaintiffs/Appellants/Petitioners,

**vs.**

**PROTECTIVE LIFE INSURANCE COMPANY**  
Defendant/Respondent.

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After Decision by the Court of Appeal  
Fourth Appellate District, Div. One (D072863)  
(Superior Court of San Diego County, Hon. Judith F. Hayes  
37-2014-00019212-CU-IC-CTL)

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**REQUEST FOR JUDICIAL NOTICE IN SUPPORT  
OF PETITION FOR REVIEW**

---

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**RJN0001**

Pursuant to Evidence Code section 452, subd. (d), Plaintiffs/Appellants/Petitioners, BLAKELY McHUGH and TRYSTA M. HENSELMEIER (collectively “Petitioners”) respectfully requests that this Court take judicial notice of the attached documents in support of their above-entitled Petition for Review:

**1. Exhibit A:** A true and correct copy of the California Department of Insurance Notice of Motion and Motion to Quash Subpoenas and Motion for Protective Order; Declarations of Michael J. Levy and Charles Tsai, previously filed in the federal district court (N.D. Cal.) on December 18, 2018, in the matter of *Moriarty v. Am. Gen. Life Ins. Co.*, Case No. 17-cv-01709 BTM-BGS (S.D. Cal.). (See Evid. Code § 452, subd. (d) [approving judicial notice of “records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States”]; and § 459, subd. (a). [permitting reviewing courts to take judicial notice of matters enumerated in § 452].)

**2. Exhibit B:** A true and correct copy of the Declaration of Jack B. Winters, Jr., in Support of Michele L. Moriarty’s Response to and Joinder in California Department of Insurance’s Motion to Quash Subpoenas and For Protective Order, previously filed in the federal

district court (N.D. Cal.) on January 2, 2019, in the matter of *Moriarty v. Am. Gen. Life Ins. Co.*, Case No. 17-cv-01709 BTM-BGS (S.D. Cal.). (See Evid. Code § 452, subd. (d) [approving judicial notice of “records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States”]; and § 459, subd. (a). [permitting reviewing courts to take judicial notice of matters enumerated in § 452].)

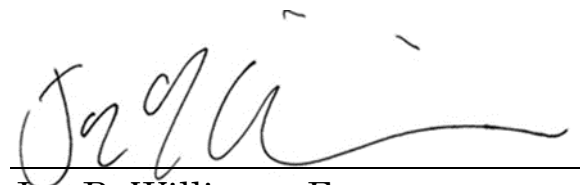
Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Jon R. Williams', is written over a horizontal line.

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DATED: Nov. 18, 2019

**McHUGH, et al. v. PROTECTIVE LIFE INSURANCE**  
**Supreme Court of the State of California**  
**CA Supreme Court Case No.: S \_\_\_\_\_**  
**Court of Appeal Case No.: D072863**  
**San Diego County Superior Court Case No.: 37-2014-00019212-CU-IC-CTL**

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**1) REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR REVIEW**


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Dated: **November 18, 2019**

Signature:   
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**RJN0005**

# Exhibit A

**RJN0006**

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9  
10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

**KAW**

12  
13  
14 IN RE:

**CV 18 80217**

MISC. CASINO

**MISC**

15 **MICHELLE L. MORIARTY**, individually,  
as successor-in-interest to Heron D.  
16 **Moriarty**, decedent, on behalf of the Estate  
of Heron D. Moriarty, and on behalf of the  
17 Class,

18 Plaintiff,

19 v.

20 **AMERICAN GENERAL LIFE**  
**INSURANCE COMPANY**, a Texas  
21 Corporation; **BAYSIDE INSURANCE**  
**ASSOCIATES, INC.**, a California  
22 Corporation; and **DOES 1-20**, inclusive,  
23

24 Defendants.

Underlying Case No. 17-cv-01709-BTM-  
BGS pending in Southern District of  
California (Underlying Action)

**CALIFORNIA DEPARTMENT OF  
INSURANCE'S NOTICE OF MOTION  
AND MOTION TO QUASH SUBPOENAS  
AND MOTION FOR PROTECTIVE  
ORDER;**

**DECLARATIONS OF MICHAEL J.  
LEVY AND CHARLES TSAI**

Date: TBD  
Time: TBD  
Dept: TBD  
Judge: TBD

By Fax

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1 NOTICE OF MOTION AND MOTION

2 PLEASE TAKE NOTICE that as soon as counsel may be heard in the United States District  
3 Court for the Northern District of California, nonparty California Department of Insurance (CDI)  
4 will, and hereby does, move the Court for an order quashing deposition subpoenas (the  
5 Subpoenas) directed to non-party CDI and its employees Leslie Tick and Pam O'Connell, issued  
6 by Defendant American General Life Insurance Company (AGLIC) on December 11, 2018 in  
7 *Moriarty v. American General Life Insurance Company, et al.*, United States District Court,  
8 Southern District of California, Case No. 17-cv-01709 (Underlying Action). In the alternative,  
9 CDI requests the Court enter a protective order significantly narrowing the scope of the  
10 Subpoenas to only factual information, preventing the disclosure of CDI's privileged and  
11 confidential information, and barring questions seeking improper opinion testimony.

12 This motion is made pursuant to Rules 26 and 45 of the Federal Rules of Civil Procedure.  
13 Pursuant to Civil Local Rule 37-1, counsel for CDI met and conferred with AGLIC's counsel on  
14 December 14, 2018 but was unable to resolve the issues that are subject of this motion.  
15 Declaration of Charles Tsai (Tsai Decl.), ¶¶ 3-5.

16 This motion is based on this Notice of Motion and Motion, the supporting Memorandum of  
17 Points and Authorities, the declarations of Michael J. Levy and Charles Tsai filed herewith, all  
18 pleadings and papers on file in the Underlying Action, oral argument of counsel, and any other  
19 matter which may be submitted at the hearing.

20 STATEMENT OF THE ISSUES

21 1. Should the Subpoenas to nonparty CDI and its employees be quashed under Federal  
22 Rule of Civil Procedure 45?

23 2. If the Subpoenas are not quashed, should the Court enter a protective order under  
24 Federal Rule of Civil Procedure 26 that narrows the scope of the Subpoenas?

25  
26  
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28

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 INTRODUCTION

3 By this motion, nonparty California Department of Insurance (CDI) moves to quash  
 4 deposition subpoenas (the Subpoenas) issued by AGLIC (American General Life Insurance  
 5 Company), which are overly broad, improperly seek privileged and confidential information from  
 6 CDI, and improperly seek opinion testimony from CDI staff. In 2012, the California Legislature  
 7 passed Assembly Bill No. 1747 (AB 1747), effective January 1, 2013, which added California  
 8 Insurance Code<sup>1</sup> sections 10113.71 and 10113.72 and changed existing law with respect to life  
 9 insurance policies. The underlying action, *Moriarty v. American General Life Insurance*  
 10 *Company, et al.*, United States District Court, Southern District of California, Case No. 17-cv-  
 11 01709 (Underlying Action) is a class-action lawsuit against AGLIC alleging that the statutes are  
 12 retroactive, and that AGLIC violated California Insurance Code sections 10113.71 and 10113.72  
 13 by not applying the statutes to policies issued or delivered prior to January 1, 2013 (the effective  
 14 date of the statutes). AGLIC issued subpoenas to CDI seeking to depose its employees, including  
 15 a supervising attorney and the manager of compliance auditors, on "CDI's position" with respect  
 16 to the applicability of the statutes to life insurance policies issued and delivered before January 1,  
 17 2013, including policies renewed after January 1, 2013.

18 The Subpoenas are overly broad and improper and must be quashed. First, AGLIC  
 19 improperly seeks CDI's legal opinion as to the application of AB 1747 and sections 10113.71 and  
 20 10113.72. However, in 2012, CDI has already publicly issued instructions regarding CDI's  
 21 positions as to the applicability of these statutes. Second, AGLIC improperly seeks to depose  
 22 CDI's in-house attorneys regarding privileged information related to CDI's positions in the  
 23 instructions as well as the basis for such instructions. Third, AGLIC also improperly seeks to  
 24 obtain CDI's official and confidential investigation and examination information related to other  
 25 insurers. Fourth, the Subpoenas place an undue burden upon CDI. CDI is not a party in the  
 26 Underlying Action and AGLIC issued three separate subpoenas to CDI and its employees,  
 27

28 <sup>1</sup> Unless otherwise noted, all statutory citations are to the California Insurance Code.

1 seeking the same improper and irrelevant information from CDI employees (who are not able to  
2 opine as to CDI's position on the statutes).

3 Alternatively, if the Subpoenas are not quashed, the Court should enter a protective order to  
4 narrow the scope of the Subpoenas and the issues permitted for the depositions. The scope of the  
5 Subpoenas should be limited to only factual information. AGLIC should also be prevented from  
6 inquiring CDI witnesses as to privileged and confidential information as well as improper opinion  
7 testimony.

8 On December 14, 2018, CDI's counsel met and conferred with AGLIC's counsel with  
9 respect to the Subpoenas and CDI's grounds for this motion. Tsai Decl., ¶¶ 3-4. However, CDI  
10 and AGLIC were unable to come to agreement with respect to the Subpoenas. Tsai Decl., ¶ 5.

### 11 STATEMENT OF FACTS AND ALLEGATIONS

#### 12 I. UNDERLYING CLASS ACTION AGAINST AGLIC

13 In 2012, the California Legislature passed Assembly Bill No. 1747, 2011-2012 Reg. Sess.  
14 (Cal. 2012) (AB 1747), which added sections 10113.71 and 10113.72. Ex. 1 at 1. AB 1747 was  
15 effective January 1, 2013. Ex. 1 at 1. Section 10113.71 requires that all life insurance policies  
16 contain a grace period of at least 60 days. Ex. 1 at 1. Section 10113.72 requires that an applicant  
17 for an individual life insurance policy be given the right to designate at least one person in  
18 addition to himself/herself to receive notice of lapse or termination of a policy for nonpayment of  
19 premium. Ex. 1 at 2. Section 10113.72 also requires that insurers notify policy owners at least  
20 annually of his/her right to change the designee. Ex. 1 at 2.

21 On November 1, 2012, CDI issued System for Electronic Rate and Form Filing (SERFF)  
22 instructions for complying with AB 1747. Ex. 2. SERFF is an Internet-based product of the  
23 National Association of Insurance Commissioners (NAIC) which is used by insurance companies  
24 for rate and form filing.<sup>2</sup> Ex. 3 at 1 (selected portions of SERFF user manual).<sup>3</sup> Insurers use

25 <sup>2</sup> The NAIC "is the U.S. standard-setting and regulatory support organization created and  
26 governed by the chief insurance regulators from the 50 states, the District of Columbia and five  
27 U.S. territories. Through the NAIC, state insurance regulators establish standards and best  
28 practices, conduct peer review, and coordinate their regulatory oversight."  
[https://www.naic.org/index\\_about.htm](https://www.naic.org/index_about.htm) (last accessed December 16, 2018).

<sup>3</sup> The SERFF user manual is publicly available. <https://login.serff.com/stateManual.html>  
(last accessed December 17, 2018).

1 SERFF to electronically submit insurance rate and policy forms to state departments of insurance  
2 for review and approval of new products as well as rate or other changes to existing products. Ex.  
3 3 at 1. State departments of insurance can also post state filing requirements and instructions for  
4 insurers to look at in advance of filing preparation. Ex. 3 at 4-5.

5 In the Underlying Action, Plaintiff brings a class action suit against AGLIC alleging the  
6 following causes of action: declaratory and injunctive relief, breach of contract, bad faith,  
7 negligence, and claims under California's Unfair Competition Law (UCL), Cal. Bus. & Prof.  
8 Code § 17200 *et seq.* Ex. 4 (First Amended Class Action Complaint). Plaintiff alleges that  
9 AGLIC failed to comply with sections 10113.71 and 10113.72 for insurance policies issued or  
10 delivered prior to January 1, 2013, and in force at any time thereafter. Ex. 4 at 2. Plaintiff further  
11 alleges that AGLIC's response to her demands to obtain policy benefits has been to assert that  
12 sections 10113.71 and 10113.72 do not apply to policies issued or delivered prior to January 1,  
13 2013, because this would be an illegal retroactive application of these statutes. Ex. 4 at 3.  
14 Plaintiff alleges that California courts have interpreted sections 10113.71 and 10113.72 and  
15 concluded that the statutes apply to policies issued before January 1, 2013.

## 16 II. AGLIC'S SUBPOENAS TO NONPARTY CALIFORNIA DEPARTMENT OF INSURANCE

17 On November 29, 2018, AGLIC's counsel emailed CDI's Deputy General Counsel  
18 regarding subpoenas that AGLIC anticipated issuing to CDI in the Underlying Action.  
19 Declaration of Michael J. Levy (Levy Decl.), ¶ 8. The email contained copies of three anticipated  
20 subpoenas to CDI as well as detailed questions with respect to the testimony AGLIC is seeking  
21 from CDI. Levy Decl. ¶ 8. On December 7, 2018, CDI's Deputy General Counsel met and  
22 conferred with AGLIC's counsel in an attempt to resolve disputes with respect to the anticipated  
23 subpoenas but was unable to do so. Levy Decl. ¶¶ 9-10.

24 On December 11, 2018, AGLIC issued three subpoenas to CDI for depositions to take  
25 place in San Francisco: (1) CDI; (2) Leslie tick, CDI's Assistant Chief Counsel of the Policy  
26 Approval Bureau, responsible for supervising CDI attorneys whose legal services to CDI  
27 include reviewing insurance policies for compliance with applicable law; and (3) Pam  
28 O'Connell, Division Chief of CDI's Market Conduct Division, the manager of CDI's  
compliance auditors who analyze insurers' market practices for compliance with applicable

1 law (the Subpoenas).<sup>4</sup> Levy Decl. ¶ 11; Exs. 6-8. The subpoena to CDI contained an  
2 attachment setting forth 8 categories of matters for examination. Ex. 6 at 2.

3 On December 14, 2018, CDI's counsel further met and conferred with AGLIC's counsel in  
4 an attempt to resolve the disputes with respect to the Subpoenas, but they were likewise unable to  
5 do so. Tsai Decl. ¶¶ 3-5.

## 6 ARGUMENT

### 7 I. THE SUBPOENAS MUST BE QUASHED

8 Rule 45 of the Federal Rules of Civil Procedure provides that the court *must* quash or  
9 modify a subpoena that requires disclosure of privileged or other protected matter, if no exception  
10 or waiver applies, or subjects a person to undue burden. Fed. R. Civ. P. 45(d)(3)(A). In addition,  
11 the court may quash or modify a subpoena if it requires disclosing a trade secret, or other  
12 confidential research, development, or commercial information, or disclosing an unretained  
13 expert's opinion or information that does not describe specific occurrences in dispute. Fed. R.  
14 Civ. P. 45(d)(3)(B). Motions to quash or modify subpoenas are to be filed in "the court for the  
15 district where compliance is required." Fed. R. Civ. Proc. 45(d)(3)(A). If a subpoena is served  
16 less than 14 days before the deposition, objections or a motion to quash can be served anytime  
17 before the deposition, Fed. R. Civ. P. 45(d)(2)(B); *see WM High Yield v. O'Hanlon*, 460  
18 F.Supp.2d 891, 894 (S.D. In. 2006).

#### 19 A. The Subpoenas Seek Privileged or Other Protected Matters

20 In a civil case, state law governs privilege regarding a claim or defense for which state law  
21 supplies the rule of decision. Fed. R. Evid. 501. In other words, state privilege law applies to  
22 purely state law claims brought in federal court pursuant to diversity jurisdiction. *Burrows v.*  
23 *Redbud Cmty. Hosp. Dist.*, 187 F.R.D. 606, 610-11 (N.D. Cal. 1998).

24 Here, the Underlying Action involves state law claims and the Subpoenas seek an  
25 abundance of privileged and protected matters under California law. First, the Subpoenas  
26

27 <sup>4</sup> The subpoenas issued by AGLIC on December 11, 2018 are substantially similar to  
28 those that AGLIC previously informally sent to CDI's Deputy General Counsel. Exs. 5-8; Levy  
Decl. ¶¶ 8,11.



1 improperly seek information protected by the attorney-client privilege. The client, whether or not  
 2 a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential  
 3 communication between client and lawyer. Cal. Evid. Code § 954. The lawyer who received or  
 4 made a communication subject to the privilege under this article shall claim the privilege  
 5 whenever he is present when the communication is sought to be disclosed. Cal. Evid. Code §  
 6 955. A state agency can be a client and can assert the attorney-client privilege. *Roberts v. City of*  
 7 *Palmdale*, 5 Cal.4th 464, 370-71 (Cal. 1993).

8 One of the Subpoenas was issued to Leslie Tick (Ex. 7), an attorney employed by CDI as  
 9 the Assistant Chief Counsel of CDI's Policy Approval Bureau. Levy Decl. ¶ 2. An attorney-  
 10 client relationship exists between CDI and Ms. Tick. AGLIC seeks to question Ms. Tick about  
 11 the basis for CDI's SERFF instructions for AB 1747. Ex. 5 at 4. AGLIC also seeks to question  
 12 Ms. Tick regarding an email sent by Ms. Tick to another insurer's counsel on July 14, 2016 (Ex. 6  
 13 at Ex. B) as follows:

14 "a. Specifics surrounding the occasion for this email.

15 b. Did the CDI provide guidance that AB1747 (the "Statutes") does not apply to change  
 16 the terms of a policy issued prior to January 1, 2013?

17 c. Did the CDI provide guidance that AB1747 (the "Statutes") applies to new policies  
 18 issued on or after January 1, 2013 and does not apply to policies renewed on or after  
 19 January 1, 2013?" Ex. 5 at 2-3.

20 The most Ms. Tick could testify to would be whether and in what form guidance may have  
 21 been provided, and she could authenticate the email attributed to her.<sup>5</sup> However, Ms. Tick's  
 22 testimony about what such guidance says would be hearsay without an exception and violate the  
 23 best evidence rule, as the guidance and email speak for themselves. Also, if Ms. Tick were to  
 24 testify about any matters beyond authenticating the email, she could divulge communications that  
 25 are protected by the attorney-client privilege. For example, any communications between Ms.

26  
 27 \_\_\_\_\_  
 28 <sup>5</sup> CDI offered to produce certified records responsive to this line of inquiry. Levy Decl. ¶ 9.

1 Tick and other CDI employees including other attorneys, senior staff, and the Insurance  
2 Commissioner are protected by the attorney-client privilege.

3 AGLIC also seeks to question Nancy Hom, another attorney in CDI's Policy Approval  
4 Bureau, regarding an email Ms. Hom sent to another insurer on October 11, 2012 (Ex. 6 at Ex. C)  
5 as follows:

6 "a. Specifics surrounding the occasion for this email.

7 b. Did the CDI provide guidance to the industry with respect to implementation of the  
8 new grace period requirements of AB1747 (the "Statutes") indicating that the new grace  
9 period applies to policies issued or delivered on or after January 1, 2013?

10 c. Did the CDI provide guidance that the requirements of AB1747 are not retroactive  
11 and that the bill applies only to policies issued or delivered on or after AB1747's effective  
12 date of January 1, 2013 and not to "in force business" or to "existing" policies and blocks of  
13 life insurance business in California already as of that date?" Ex. 5 at 3.

14 Similar to Ms. Tick, if Ms. Hom were to testify about any matters beyond authenticating the  
15 email and identifying guidance that has been issued, she too could divulge communications that  
16 are protected by the attorney-client privilege, including any communications between Ms. Hom  
17 and other CDI employees, which are protected by the attorney-client privilege. Since the only  
18 information that either Ms. Tick or Ms. Hom could testify to is the existence of documents readily  
19 available and certifiable by a CDI records custodian, no need exists to compel oral testimony by  
20 this state agency's attorneys, and the burden of interfering with the inner workings of the agency  
21 and the risk of treading upon privileged communications and relationships plainly outweigh any  
22 benefit to the instant litigation.

23 Second, the Subpoenas improperly seek information protected by the attorney work-product  
24 privilege. "A writing that reflects an attorney's impressions, conclusions, opinions, or legal  
25 research or theories is not discoverable under any circumstances." Cal. Code Civ. Proc., §  
26 2018.030(a). Thus, an attorney has a "qualified privilege against discovery of general work  
27 product and an absolute privilege against disclosure of writings containing the attorney's  
28 impressions, conclusions, or legal theories. *BP Alaska Exploration, Inc. v. Superior Court*, 199

1 Cal.App.3d 1240, 1250 (Cal. Ct. App. 1988). As a result, any testimony sought from Ms. Tick or  
 2 Ms. Hom as to the manner in which they prepared a document or email, including the emails  
 3 specifically identified by AGLIC (Ex. 6 at Exs. B, C), and how they reached the statements  
 4 contained in the document or email are privileged.<sup>6</sup>

5 Third, the Subpoenas improperly seek information protected by the official information and  
 6 deliberative process privileges. A public entity has a privilege to refuse to disclose official  
 7 information, and to prevent another from disclosing official information.<sup>7</sup> Cal. Evid. Code §  
 8 1040(b). Moreover, the California Government Code does not require the disclosure of  
 9 preliminary drafts, notes, or interagency or intra-agency memoranda. Cal. Gov. Code § 6254(a).  
 10 The Subpoenas specifically seek such information, including the basis for CDI's SERFF  
 11 instructions for AB 1747. Ex. 5 at 3. However, CDI cannot reveal basis or sources of the SERFF  
 12 instructions without divulging information protected by the official information and deliberative  
 13 process privileges. Similarly, CDI employees cannot be required to reveal the sources, if any, of  
 14 any preliminary drafts, notes, or interagency or intragency memoranda used or relied upon in  
 15 preparing their letters, emails, or discussions. Such information is part of the employee's  
 16 deliberative process (as well as CDI's) and contains official information that cannot be disclosed.  
 17 *Times Mirror Co. v. Superior Court*, 53 Cal.3d 1325, 1339-1344 (Cal. 1991).

#### 18 B. The Subpoenas Seek Confidential and Official Information

19 The Subpoenas also improperly seek information regarding any CDI inquiries or corrective  
 20 actions during investigation and examinations with respect to the application of the statutes in  
 21 AB 1747. Ex. 5 at 2. Specifically, AGLIC seeks testimony from CDI on whether it has included,  
 22 and/or does it now include, inquiries designed to determine whether an insurance company is  
 23 applying sections 10113.71 and 10113.72 to policies issued and delivered before January 1, 2013.  
 24 Ex. 5 at 2. AGLIC also seeks testimony on whether CDI has ever requested that an insurance  
 25

26 <sup>6</sup> The attorney-client privilege and work product privilege apply equally to the subpoena  
 issued to CDI. Ms. Tick will likely be CDI's employee to be deposed with respect to most of the  
 categories identified in the attachment to the subpoena issued to CDI.

27 <sup>7</sup> "Official information" means information acquired in confidence by a public employee  
 28 in the course of his or her duty and not open, or officially disclosed, to the public prior to the time  
 the claim of privilege is made." Cal. Evid. Code § 1040(a).

1 company take corrective action designed in any way to achieve the application of sections  
2 10113.71 and 10113.72 requirements to life insurance policies issued and delivered before  
3 January 1, 2013. Ex. 5 at 2.

4 Pursuant to sections 730, 733, CDI's Market Conduct Division conducts examinations of  
5 insurance companies to evaluate compliance with California insurance laws and regulations.  
6 However, CDI is required to keep such insurer and examination information confidential. Cal.  
7 Ins. Code §§ 735.5(c) ("All working papers, recorded information, documents, and copies thereof  
8 produced by, obtained by, or disclosed to the commissioner or any other person in the course of  
9 an examination made pursuant to this article shall be given confidential treatment and are not  
10 subject to subpoena and shall not be made public by the commissioner or any other person . . ."),  
11 12919 ("Communications to the commissioner or any person in his office in respect to any fact  
12 concerning the holder of, or applicant for, any certificate or license issued under this code are  
13 made to him in official confidence . . .").

14 Further, CDI's enforcement activities through market conduct examinations are protected  
15 from disclosure. *See* Cal. Evid. Code § 1040. AGLIC should not be permitted to delve into the  
16 processes through which CDI identify a particular violation of insurance law and how such  
17 violation should be enforced. And it is clear that AGLIC should not be permitted to examine Pam  
18 O'Connell, CDI's manager of compliance auditors, as to her thought processes about how  
19 particular statutes may or may not apply in certain circumstances, what she instructs her team to  
20 look for when conducting audits, or how those thought processes or instructions are generated.<sup>8</sup>  
21 Such an examination plainly treads upon investigative and deliberative processes, and as such,  
22 poses a serious risk of undermining CDI's regulatory authority over insurance companies.

23 **C. The Subpoenas Require CDI to Disclose an Unretained Expert's Opinion**  
24 **or Information that Does Not Describe the Specific Occurrences in Dispute**

25 A subpoena may be quashed where it seeks to obtain an unretained expert's opinion. Fed.  
26 R. Civ. P. 45(d)(3)(B)(ii); *see Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792, 814

27 \_\_\_\_\_  
28 <sup>8</sup> Leslie Tick and Nancy Hom's communications concerning insurers may also be  
protected from disclosure. Cal. Ins. Code §§ 735.5, 12919.

1 (9th Cir. 2003) (finding district court did not abuse its discretion in quashing subpoena seeking  
2 expert testimony). Rule 45 was intended to provide appropriate protection for non-party  
3 witnesses against a growing problem of the use of subpoenas to compel the giving of evidence  
4 and information by unretained experts. *Ibid*.

5 Here, it is clear that the Subpoenas seek to obtain an unretained expert's opinion. The  
6 matters of examination in the subpoena directed to CDI (Ex. 6 at 2), as well as AGLIC's  
7 counsel's email to CDI (Ex. 5 at 1-4), focus on CDI's "position" as to the application of AB1747  
8 and its statutes. Specifically, AGLIC seeks to question staff with respect to their belief about  
9 what is CDI's "position" on the following;

- 10 • whether sections 10113.71 and 10113.72 apply to life insurance policies that were issued  
11 and delivered before January 1, 2013;
- 12 • whether sections 10113.71 and 10113.72 apply to life insurance policies that were issued  
13 and delivered before January 1, 2013 but renewed after January 1, 2013 and, relatedly, its  
14 position on the concept of renewal as applied to life insurance policies;
- 15 • whether sections 10113.71 and 10113.72 apply to life insurance policies that were issued  
16 or delivered after January 1, 2013; and
- 17 • whether or to what extent CDI seeks to determine as part of its market conduct  
18 examinations an insurer's application of sections 10113.71 and 10113.72 to life insurance  
19 policies that were issued and delivered before January 1, 2013. Exs. 5, 6.

20 AGLIC's counsel asserts that "testimony on these topics will serve to memorialize the  
21 CDI's general, regulatory guidance in the industry related to these statutes and its corresponding  
22 conduct in the enforcement of the statutes' requirements generally in market conduct exams and  
23 similar activities." Ex. 5 at 1. However, as noted throughout this motion, CDI is not a party to  
24 the Underlying Action and its employees are not retained as expert witnesses. Thus, AGLIC  
25 improperly seeks the unretained expert opinions of CDI employees. Moreover, CDI has already  
26 given its "position" by publicly issued SERFF instructions for AB 1747 in 2012. Ex. 2. The  
27 SERFF instructions speak for themselves and contain CDI's positions and guidance related to the  
28 statutes.

1 AGLIC also improperly seeks CDI's legal opinions in the interpretation of the statutes and  
2 their application to certain life insurance policies. Indeed, AGLIC's counsel's email to CDI  
3 indicates that AGLIC is primarily interested in CDI's "position" and "guidance" with respect to  
4 the AB1747 and sections 10113.71 and 10113.72. Exs. 5 at 1-4. Federal Rule of Evidence 702  
5 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to  
6 understand the evidence or to determine a fact in issue, a witness qualified as an expert by  
7 knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion  
8 or otherwise." However, an expert cannot give an opinion on ultimate issue of law. *Specht v.*  
9 *Jensen*, 853 F.2d 805, 808 (10th Cir. 1988) (summarizing federal circuit holdings as to the same).  
10 "In no instance can a witness be permitted to define the law of the case." *Id.* at 810. Nor can an  
11 expert testify as to an interpretation of law. *Id.*

12 Even if AGLIC seeking such testimony were not improper (which it is), the views and  
13 opinions of CDI staff as to AB 1747 are not relevant as they have no tendency to make any *fact*  
14 more or less probable than it would be without the evidence; and any such "fact" (interpretations  
15 of law) is not of consequence in determining the action. Fed. R. Evid. 401. CDI staff does not  
16 have the authority to express CDI's position or opinions. *Heckart v. A-1 Self Storage, Inc.*, 4  
17 Cal.5th 749, 769 fn. 9 (Cal. 2018) ("*Heckart*"); see also Cal. Ins. Code § 12921.9. Moreover, the  
18 correspondence (emails and letter) upon which AGLIC focuses is entitled to little weight.  
19 *Heckart, supra*, 4 Cal.5th at 769 fn. 9.

20 Finally, and as noted above, the issues before the court (the extent to which Insurance Code  
21 sections 10113.71 and 10113.72 do or do not have retroactive effect) are questions of law, are not  
22 a proper subject-matter for expert testimony, and are matters commended to the trial court for  
23 resolution. The trial court may or may not accord deference to an agency determination to the  
24 extent CDI has actually issued legal guidance under the principles articulated in *Yamaha Corp. of*  
25 *America v. State Bd. of Equalization*, 19 Cal.4th 1, 7 (Cal. 1998) ("*Yamaha*"). If such guidance  
26 has been issued, the guidance speaks for itself. But, to the extent CDI has not issued guidance,  
27 AGLIC cannot compel CDI to issue guidance that CDI has not chosen to issue by questioning its  
28 attorneys and chief auditor about their opinions about the agency's position, and imputing that

1 position to the agency. The *Yamaha* factors' emphasis on the circumstances attendant with the  
2 legal interpretation would not weigh in favor of granting deference to "the agency's" legal  
3 interpretation under such circumstances. *Ibid.*; *Heckart, supra*, 4 Cal.5th at 769 fn. 9.

4 **D. The Subpoenas Subject CDI and Its Employees to Undue Burden**

5 Rule 45 provides that the court from which the subpoena was issued "shall quash or modify  
6 the subpoena if it . . . subjects a person to undue burden." *Mattel Inc. v. Walking Mountain*  
7 *Productions*, 353 F.3d 792, 814 (9th Cir. 2003) [quoting Rule 45]. This is a case-specific inquiry  
8 that turns on such factors as relevance, need of party for information, breadth of request, time  
9 period covered by request, and burden imposed. *American Elec. Power Co. v. United States*, 191  
10 FRD 132, 85 (S.D. Ohio 1999). A court may consider a movant's non-party status when  
11 weighing burdens imposed by the subpoena. *SEC v. Seahawk Deep Ocean Tech.*, 166 FRD 268  
12 (D. Conn. 1996). Discovery may also be refused where the burden of the proposed discovery  
13 outweighs its likely benefits, taking into account such factors as the needs of the case, the parties'  
14 resources, the importance of the issues at stake, and the role of proposed discovery in resolving  
15 those issues. Fed. R. Civ. Proc. 26(b)(2); *Cascade Yarns, Inc. v. Knitting Fever, Inc.*, 755 F.3d  
16 55, 58-59 (1st Cir. 2014) [applied proportionality limitations in Rule 26(b)(2) and considered that  
17 third party had no stake in litigation].

18 Here, the Subpoenas subject CDI to undue burden because CDI is a nonparty and the  
19 testimony sought is irrelevant to the Underlying Action. Plaintiff's complaint in the Underlying  
20 Action is fundamentally about the retroactivity of certain statutes, and as noted above,  
21 interpretation of the law is within the province of the court in the Underlying Action. Plaintiff's  
22 complaint also contains a cause of action for bad faith (Ex. 4 at 26-29) and AGLIC believes  
23 "[t]his testimony would be relevant not only as existing guidance from the State's regulatory  
24 body but, perhaps primarily, on the issues of reasonableness and state of mind from the insurers'  
25 perspectives in applying the Statutes' requirements in a manner consistent with the CDI's  
26 positions, guidance and compliance enforcement activities." Ex. 5 at 1. However, Plaintiff's  
27 complaint does not contain *any* allegations regarding CDI's positions or its guidance to insurers  
28 with respect to AB 1747 and the statutes. Moreover, AGLIC seeks testimony related to a letter,

1 emails, and discussions *other* insurers (not AGLIC) had with CDI employees, including legal  
2 staff like Leslie Tick and Nancy Hom. Ex. 5 at 1-3. In other words, such correspondence is not  
3 relevant because CDI was responding to specific inquiries from third parties, none of whom are  
4 parties to the Underlying Action. See Ex. 6 at Exs. A, C. Moreover, Lisa Hastings' (Senior  
5 Insurance Compliance Officer with CDI's Ratings and Underwriting Services Bureau) letter  
6 specifically advised CDI "does not engage in debates with consumers or their attorneys regarding  
7 legal interpretations of insurance laws." Ex. 6 at Ex. A.

8 More importantly, the views and opinions of CDI staff are irrelevant to CDI's position on  
9 the statutes. Letters, emails, and discussions "are not the result of careful consideration by senior  
10 agency officials' but rather reflect an interpretation prepared . . . by a single staff member."  
11 *Heckart, supra*, 4 Cal.5th at 769 fn. 9 (internal quotes omitted) (finding correspondence from CDI  
12 legal staff entitled to little weight). And it is clear that such a letter, emails, and discussions are  
13 not quasi-legislative rules (promulgated pursuant to delegated lawmaking power) and were not  
14 disseminated as an annotation by CDI to be considered by anyone other than the recipient, and  
15 there is no information regarding how carefully the issue was considered. *Ibid.*; see also Cal. Ins.  
16 Code § 12921.9 (requiring public legal opinions to be signed by Commissioner of Chief Counsel  
17 of CDI and specifying such opinions are not construed as setting forth agency guidelines,  
18 instruction or standard).

19 Even assuming arguendo that the topics of the Subpoenas and the CDI staff opinions are  
20 both relevant to the Underlying Action, the Subpoenas are cumulative and a waste of time.  
21 Federal Rule of Evidence 403 provides that the "court may exclude relevant evidence if its  
22 probative value is substantially outweighed by a danger of one or more of the following: unfair  
23 prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly  
24 presenting cumulative evidence." Fed. R. Evid. 403. AGLIC issued three different subpoenas for  
25 the same issues and topics. See Exs. 5-8. Moreover, in 2012, CDI publicly issued the SERFF  
26 instructions for AB 1747 and sections 10113.71 and 10113.72 (Ex. 2) and it is unclear if these  
27 instructions, as well as related CDI correspondence, is even disputed by Plaintiff in the  
28 Underlying Action.



1 II. IN THE ALTERNATIVE, THE SCOPE OF THE SUBPOENAS SHOULD BE SIGNIFICANTLY  
2 NARROWED

3 Rule 45 is not intended to diminish rights conferred by Rules 26 through 37 and,  
4 accordingly, factors to be considered in undue burden analysis include relevance, whether request  
5 is cumulative and duplicative, time and expense required to comply with subpoena, and  
6 importance of issues at stake in the litigation. *Linder v. Calero-Portocarrero*, 183 F.R.D. 314,  
7 319 (D.C. Cir. 1998). The court may grant protective orders to limit the evidence produced under  
8 the subpoena as well as other orders to protect the witness against unreasonable burden. Fed. R.  
9 Civ. P. 26(c)(1). Protective orders provide a safeguard for parties and other persons in light of the  
10 otherwise broad reach of discovery. *United States v. Columbia Broadcasting System, Inc.*, 666  
11 F.2d. 364, 368-69 (9th Cir. 1982).

12 Here, as discussed above, the Subpoenas improperly seek CDI's legal opinion as well as  
13 privileged and confidential information. The Subpoenas also place an undue burden upon  
14 nonparty CDI because they seek irrelevant information and are cumulative and a waste of time.  
15 Thus, if the Subpoenas are not quashed, the Court should enter a protective order to prevent  
16 AGLIC from requesting CDI's privileged and confidential information as well improper opinion  
17 testimony. The protective order should also limit the scope of the Subpoenas to only the  
18 following factual information:

- 19 • authentication of the letter by Lisa Hastings to David Klevatt dated March 23, 2015, and  
20 non-privileged information about why she wrote it;
- 21 • authentication of the email by Leslie Tick to Robert Cerny sent on July 14, 2016, and non-  
22 privileged information about why she wrote it;
- 23 • authentication of the email by Nancy Hom to Ms. Lucas sent on October 11, 2012, and non-  
24 privileged information about why she wrote it;
- 25 • authentication of the SERFF instructions for AB 1747; and
- 26 • non-privileged factual testimony recounting what was discussed on October 12, 2012 and  
27 October 24, 2012 between CDI employees and representatives from ACLI and ACLHIC.
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CONCLUSION

Based on the foregoing, CDI respectfully requests the Court quash the Subpoenas. In the alternative, CDI requests that the Court enter a protective order that significantly narrows the scope of the Subpoenas.

Dated: December 18, 2018

Respectfully Submitted,

XAVIER BECERRA  
Attorney General of California  
LISA W. CHAO  
Supervising Deputy Attorney General  
HEATHER B. HOESTEREY  
Deputy Attorney General



CHARLES TSAI  
Deputy Attorney General  
*Attorneys for Nonparty California  
Department of Insurance.*

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DECLARATION OF MICHAEL J. LEVY

I, Michael J. Levy, declare:

1. I am an attorney of law, duly licensed to practice before all courts of the State of California. I am currently the Deputy General Counsel - Litigation for the California Department of Insurance (CDI). In that capacity, I supervise all litigation involving CDI and CDI's five litigation teams. I am familiar with the file in the underlying action and the subpoenas issued to CDI. I have personal knowledge of the matters stated herein and I could, and would, testify competently thereto if called upon to do so.

2. Leslie Tick is an attorney with CDI and the Assistant Chief Counsel in CDI's Policy Approval Bureau. She is responsible for supervising the CDI attorneys whose legal services to CDI include reviewing insurance policies to ensure they comply with law.

3. Pam O'Connell is the Division Chief of CDI's Market Conduct Division, which is responsible for conducting examinations of insurance companies to determine compliance with California insurance statutes and regulations. Ms. O'Connell is manager of CDI's compliance auditors who analyze insurers' market practices in claim handling and underwriting to ensure the insurers' conduct complies with law.

4. I am informed and believe that Lisa Hastings is a Senior Insurance Compliance Officer with CDI's Ratings and Underwriting Services Bureau, and that in that capacity, she investigates and mediates consumer complaints, identifies violations of the Insurance Code and California Code of Regulations and suggests corrective action when appropriate, pursuant to Insurance Code section 12921.1. Insurance Code section 12919 requires Senior Compliance Officers (including Ms. Hastings) and others involved in these CDI functions, to maintain the confidentiality of all information submitted to the department during the course of investigating consumer complaints.

5. Nancy Hom is an Attorney III in CDI's Policy Approval Bureau. Her responsibilities include performing legal review of insurance-policy form filings, defending CDI in litigation, and providing legal research and legal advice.

1           6.    On November 7, 2018, I spoke with Randall Doctor, counsel for Defendant American  
2 General Life Insurance Company (AGLIC) in *Moriarty v. American General Life Insurance*  
3 *Company, et al.*, United States District Court, Southern District of California, Case No. 17-cv-  
4 01709, regarding subpoenas that AGLIC anticipated issuing to CDI. Mr. Doctor asked that I  
5 agree to produce Ms. Tick, Ms. O'Connell, and other staff for depositions, and he explained the  
6 nature of the testimony he sought. I explained that it appeared the testimony would consist of  
7 privileged information and unauthorized opinion testimony that didn't appear to be relevant to the  
8 litigation. I offered to produce certified records of any guidance we had issued on whether  
9 Insurance Code sections 10113.71 and 10113.72 had retroactive application. He declined the  
10 offer and requested I speak directly with litigation counsel.

11           7.    On November 16, 2018, I again spoke with Mr. Doctor, as well as with additional  
12 AGLIC's counsel Michael Mulvaney and Christopher Frost, regarding subpoenas that AGLIC  
13 anticipated issuing to CDI. They explained the testimony they sought, and I again reiterated that  
14 it did not appear there was significant admissible non-privileged information among the subjects  
15 they had described, but I suggested and they agreed to submit a detailed list of subjects of the  
16 anticipated testimony.

17           8.    On November 29, 2018, Mr. Doctor emailed me copies of three proposed deposition  
18 subpoenas that AGLIC anticipated issuing to: (1) CDI; (2) Leslie Tick, and (3) Pam O'Connell.  
19 Per our November 16, 2018 discussion, Mr. Doctor's email also contained deposition topics along  
20 with detailed questions that AGLIC seeks to ask CDI and its employees. A true and correct copy  
21 of the November 29, 2018 email is attached to the motion as Exhibit 5.

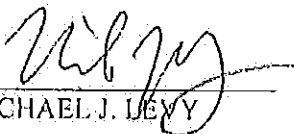
22           9.    On December 7, 2018, I again spoke with Messrs. Doctor, Mulvaney, and Frost with  
23 respect to AGLIC's anticipated subpoenas to CDI. During the conversation, I explained CDI's  
24 general issues with AGLIC's anticipated subpoenas as well as specific objections as to the  
25 testimony topics identified in Mr. Doctor's November 29, 2018 email to me. I objected to their  
26 intent to question our attorneys and senior auditor staff about their thought-processes and  
27 opinions. I explained that any testimony they provided about the statutes' application would only  
28 be the staff members' opinion and could not be construed to be an official position of the

1 Insurance Commissioner or General Counsel (as authorized by Insurance Code section 12921.9  
2 subdivision (a)). I explained that much of the inquiry would be protected by the attorney-client,  
3 deliberative-process, investigative, and other privileges. I also explained how involving senior  
4 department attorneys and regulatory staff in private litigation interferes with the agency's  
5 functions, and since they possess no personal knowledge of any facts in dispute between the  
6 parties, their testimony is not relevant. I offered to produce certified copies of the SERFF  
7 instructions and any emails or other (non-privileged) documents they were seeking. I requested  
8 they drop the request for depositions. They declined to do so. They insisted the trial court would  
9 provide deference to the agency's opinion about the law. I indicated that under *Yamaha* and  
10 *Heckart*, the factors do not weigh in favor of significant deference, and that the trial court would  
11 decide what the law is. I also indicated that, if AGLIC proceeded to issue the subpoenas, CDI  
12 would refer to the matter to the Office of the Attorney General to file a motion to quash the  
13 subpoenas.

14 10. We were unable to come to an agreement with respect to AGLIC's anticipated  
15 subpoenas to CDI. However, we did agree that, in the event that CDI's anticipated motion to  
16 quash is denied, the depositions would be held in San Francisco on January 23, 2019. We also  
17 agreed to stipulate to an order shortening time so the motion could be timely heard before the date  
18 set for the depositions.

19 11. On December 11, 2018, by agreement, I accepted service by email of AGLIC's  
20 subpoenas to CDI, Leslie Tick, and Pam O'Connell.

21 I declare under penalty of perjury under the laws of the State of California and the United  
22 States of America that the foregoing is true and correct. Executed on December 18, 2018, at  
23 Sacramento, California.

24  
25   
26 MICHAEL J. LEVY  
27  
28

DECLARATION OF CHARLES TSAI

I, Charles Tsai, declare:

1. I am an attorney of law, duly licensed to practice before the courts of the State of California and the United District Court for the Northern District of California. I am a Deputy Attorney General in the California Department of Justice, Office of the Attorney General, counsel for the California Department of Insurance (CDI). I am familiar with the file in the underlying action and the subpoenas issued to CDI. I have personal knowledge of the matters stated herein and I could, and would, testify competently thereto if called upon to do so.

2. On December 11, 2018, counsel for Defendant American General Life Insurance Company (AGLIC) in *Moriarty v. American General Life Insurance Company, et al.*, Case No. 17-cv-01709, issued subpoenas directed to nonparty CDI as well as its employees Leslie Tick and Pam O'Connell.

3. On December 14, 2018, pursuant to Civil Local Rule 37-1, by telephone, I conferred with AGLIC's counsel, including Randall Doctor, Michael Mulvaney, and Christopher Frost, in an attempt to resolve the dispute with respect to AGLIC's subpoenas to CDI and its employees.

4. During the conversation, I explained CDI's general issues with AGLIC's subpoenas as well as CDI's specific objections to the topics and testimony identified in the matters of examination and November 29, 2018 email from Mr. Doctor. I also indicated CDI would file a motion to quash the subpoenas upon these grounds.

5. AGLIC's counsel and I were unable to resolve the disputes with respect to the subpoenas AGLIC issued to CDI and its employees.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed on December 18, 2018, at Los Angeles, California.

  
CHARLES TSAI

**DECLARATION OF SERVICE BY OVERNIGHT COURIER**

Case Name: Moriarty v American General Life Ins. Co.  
Misc. Case No.:

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On December 18, 2018, I served the attached **CALIFORNIA DEPARTMENT OF INSURANCE'S NOTICE OF MOTION AND MOTION TO QUASH SUBPOENAS AND MOTION FOR PROTECTIVE ORDER; DECLARATIONS OF MICHAEL J. LEVY AND CHARLES TSAI** by placing a true copy thereof enclosed in a sealed envelope with the Golden State Overnight (GSO) courier, addressed as follows:

Michael D. Mulvaney  
Christopher C. Frost  
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Jeffrey Mark Byer  
Sandler Lasry Laube Byer and Valdez  
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San Diego, CA 92101-3542  
*Attorneys for Defendant Bayside Insurance Associates, Inc.*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 18, 2018, at Los Angeles, California.

Colby Luong

Declarant



Signature

LA2018602844  
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# Exhibit B

**RJN0032**



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MICHELLE L. MORIARTY, Individually,  
14 as Successor-In-Interest to Heron D. Moriarty,  
Decedent, on Behalf of the Estate of Heron D.  
15 Moriarty, and on Behalf of the Class

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

18 IN RE:  
19 MICHELLE L. MORIARTY, Individually, as  
Successor-In-Interest to Heron D. Moriarty,  
20 Decedent, on Behalf of the Estate of Heron D.  
Moriarty, and on Behalf of the Class,  
21  
Plaintiff,  
22  
v.  
23 AMERICAN GENERAL LIFE INSURANCE  
24 COMPANY, a Texas Corporation; BAYSIDE  
INSURANCE ASSOCIATES, INC., a  
25 California Corporation; and DOES 1 thru 20,  
Inclusive,  
26  
Defendants.

MISC. CASE NO. 4:18-mc-80217-KAW

Underlying Case No. 17-CV-01709-BTM-WVG  
pending in Southern District of California  
(Underlying Action)

DECLARATION OF JACK B. WINTERS, JR.,  
IN SUPPORT OF PLAINTIFF MICHELLE L.  
MORIARTY'S RESPONSE TO AND JOINDER  
IN CALIFORNIA DEPARTMENT OF  
INSURANCE'S MOTION TO QUASH  
SUBPOENAS AND MOTION FOR  
PROTECTIVE ORDER

DATE: TBD  
TIME: TBD  
DEPT.:  
MAG. JUDGE KANDIS A. WESTMORE

27  
28 ///

WINTERS DECL. IN SUPP. OF MORIARTY'S RESPONSE TO AND JOINDER IN CDI'S  
MO. TO QUASH SUBPOENAS/MO. FOR PROTECTIVE ORDER - 4:18-mc-80217-KAW

1 I, JACK B. WINTERS, JR., hereby declare as follows:

2 1. I am an attorney licensed to practice before all courts in the state of California and  
3 this district. I am counsel of record for Plaintiff MICHELLE L. MORIARTY, Individually, as  
4 Successor-In-Interest to Heron D. Moriarty, Decedent, on Behalf of the Estate of Heron D. Moriarty,  
5 and on Behalf of the Class, in the Underlying Case No. 17-CV-01709-BTM-WVG pending in  
6 Southern District of California ("Underlying Action"), and am the principal in the law firm Winters  
7 & Associates. The facts set forth herein are personally known to me, are true and correct, and, if  
8 called upon to testify, I could and would do so competently.

9 2. Declarant is principally responsible for handling the merits-based issues raised in the  
10 Underlying Action dealing with the individual claims relating to bad faith, the professional  
11 malpractice claims, and issues concerning AG's failure to comply with the provisions of California  
12 Insurance Code §§ 10113.71 and 10113.72. Declarant has been involved in litigation on these issues  
13 against AG and other insurers for the last four years. Declarant is also Plaintiff's co-counsel in the  
14 California state court matter entitled *McHugh v. Protective Life Insurance Company*, Court of  
15 Appeal for the State of California, Fourth Appellate District, Division One, Case No. D072863.  
16 Declarant is also co-counsel in *Susan A. Pitt v. General American Life Insurance Company*, U.S.  
17 District Court, Northern District of California, Oakland Division, Case No. 3:18-CV-06609-YGR.

18 3. In the current action, Defendant AMERICAN GENERAL LIFE INSURANCE  
19 COMPANY ("AG") has requested the deposition of two individuals a Ms. Leslie Tick and a Ms.  
20 Pam O'Connell. As stated in the accompanying memorandum of points and authorities, Plaintiff  
21 joins in the objections and the requested Motion for a Protective Order.

22 4. On or about October 17, 2018, Attorney Christopher C. Frost, counsel for Defendant  
23 AG in the Underlying Action advised that his office was attempting to arrange for the deposition  
24 of California Department of Insurance personnel. At that time, declarant advised Mr. Frost that  
25 declarant wished to be involved in the arrangements for these depositions and be kept in the loop.  
26 Declarant further advised him that if depositions were taken of CDI personnel, that Plaintiff would  
27 then require discovery from the CDI. This was later confirmed in discovery plans submitted to the  
28 Underlying Action court handling the matter.

**WINTERS DECL. IN SUPP. OF MORIARTY'S RESPONSE TO AND JOINDER IN CDI'S  
MO. TO QUASH SUBPOENAS/MO. FOR PROTECTIVE ORDER - 4:18-mc-80217-KAW**

1           5.       Until receipt of CDI's motion, declarant was not advised of the setting of these  
2 depositions and subpoenas and, therefore, declarant was unable to participate in the resolution of this  
3 issue. Declarant asked that declarant's office be involved so that the CDI and its counsel would  
4 know that, if Ms. Tick or any other CDI witness was allowed to testify, this likely would result in  
5 declarant's office needing to conduct discovery which would substantially impact the current action.

6           6.       Prior to the receipt of CDI's motion, declarant expressed declarant's concerns about  
7 CDI's involvement in discovery in writing. Declarant requested that no such discovery take place  
8 for the various reasons raised in this Joinder and the accompanying Memorandum of Points and  
9 Authorities in support.

10          7.       Discovery related to Ms. Tick and other CDI officials was first raised in 2017, when  
11 Mr. Michael D. Mulvaney, one of AG's counsel, subpoenaed Ms. Tick for the trial in the *McHugh*  
12 *v. Protective Life Insurance Company* matter. While declarant was not privy to the technicalities,  
13 before the trial began declarant was contacted by State Attorney Tim Nader, who advised that Ms.  
14 Tick would not testify and that she would not waive her privilege. Ms. Tick had previously advised  
15 declarant that same year that she would not agree to testify. No motion or attempt to resolve this  
16 issue was raised in the *McHugh* matter, but Ms. Tick did not testify.

17          8.       Since its involvement with this matter, declarant's office has made several FOIA  
18 requests and has received documents pursuant to those requests. Currently, one request remains  
19 outstanding, with documents responsive to that request expected on January 11, 2019.

20          9.       While declarant is not counsel in the pending case of *Bentley v. United of Omaha Life*  
21 *Insurance Company*, declarant understands that similar attempts were made to subpoena the CDI.

22          10.       Allowing the subpoenaed depositions to take place would increase the burden on  
23 Plaintiff and require further discovery, including the deposition of other CDI personnel.

24          11.       Importantly, CDI has produced no documentation in response to the numerous FOIA  
25 requests made in this and other cases concerning the 2012 phone call between CDI personnel and  
26 various other parties at issue.

27          12.       This is not the first time CDI has had to resist the improper attempt to compel CDI  
28 staff attorneys to trial. In the case of *McHugh v. Protective Life Insurance Company*, Court of  
**WINTERS DECL. IN SUPP. OF MORIARTY'S RESPONSE TO AND JOINDER IN CDI'S**  
**MO. TO QUASH SUBPOENAS/MO. FOR PROTECTIVE ORDER - 4:18-mc-80217-KAW**

1 Appeal for the State of California, Fourth Appellate District, Division One, Case No. D072863, a  
2 case in which declarant was lead Plaintiff's counsel, Ms. Leslie Tick repeatedly advised that she  
3 would not testify in that case which involved some of the same issues. Ultimately, after a subpoena  
4 was served on Ms. Tick, the Office of the Attorney General was called in to refuse any appearance  
5 in the trial of that matter.

6 13. Currently, the Underlying Action is under the jurisdiction of the U.S. District Court  
7 for the Southern District of California. Currently, all pretrial matters, including discovery disputes,  
8 are under the jurisdiction of Magistrate Judge William V. Gallo, who has implemented a deadline  
9 for all class certification and merit-based factual discovery of January 31, 2019. Judge Gallo has  
10 indicated, in his Order dated December 24, 2018, that he will not entertain any further requests for  
11 extensions of the discovery deadline. See Underlying Action Dkt. No. 113, ¶ 1.

12 14. Exhibit "A," attached hereto and incorporated by reference herein, is a true and  
13 correct copy of excerpts of the deposition of John Mangan of October 17, 2018.

14 I declare under penalty of perjury under the laws of the United States of America that the  
15 foregoing is true and correct. Executed this 1st day of January, 2019, in La Mesa, California.

16 /s/Jack B. Winters, Jr.  
17 Email: jackbwinters@earthlink.net  
18  
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WINTERS DECL. IN SUPP. OF MORIARTY'S RESPONSE TO AND JOINDER IN CDI'S  
MO. TO QUASH SUBPOENAS/MO. FOR PROTECTIVE ORDER - 4:18-mc-80217-KAW

EXHIBIT A

**RJN0038**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

----- :  
: MICHELLE L. MORIARTY, :  
INDIVIDUALLY, As :  
Successor-in-interest to Heron: :  
D. Moriarty, Decedent, on :  
Behalf of the Estate of Heron :  
D. Moriarty, and on Behalf of :  
the Class, :

Plaintiff, :

vs. :

AMERICAN GENERAL LIFE :  
INSURANCE COMPANY, a Texas :  
Corporation; BAYSIDE INSURANCE: :  
ASSOCIATES, INC., a California: :  
Corporation; and Does 1-20, :

Defendants. :  
----- :

CASE NO. :  
17-CV-01709-BTM- :  
WVG :

VIDEO DEPOSITION OF JOHN MANGAN

DATE: October 17, 2018  
TIME: 10:27 a.m.  
LOCATION: Veritext Legal Solutions  
1250 I Street, NW  
Suite 350  
Washington, DC 20005

REPORTED BY: Constance H. Rhodes  
Reporter, Notary

Veritext Legal Solutions  
1250 Eye Street, Northwest  
Washington, DC 20005

1 October 12th or October 24th meeting documenting  
2 what you understood had been told to you by these  
3 individuals?

4 MR. FROST: Same objection.

5 THE WITNESS: I don't believe I sent it to  
6 them. Ted may have shared our summary with them.

7 BY MR. WINTERS:

8 Q Do you know if he did or not?

9 A I can't be sure. I don't know.

10 Q Do you recall during either of these  
11 conversations asking whether or not the California  
12 Department of Insurance was going to issue some  
13 type of formal opinion regarding these issues?

14 A "Opinion," I guess you would have to  
15 define. They agreed to provide instructions via  
16 their electronic filing service, which is called  
17 SERFF. Access to that system is by members only,  
18 licensed companies who are submitting forms  
19 subject to this or any other law. And they were  
20 going to provide instructions and expedited review  
21 of this -- of amendments to bring contracts --  
22 bring the new contracts to market after 1/1/13.

23 Q They indicated to you -- you didn't  
24 understand that SERFF was a California Department  
25 of Insurance publication, did you?



1 MR. FROST: Object to form. Misstates his  
2 testimony.

3 BY MR. WINTERS:

4 Q Well, let me rephrase. SERFF is a  
5 publication by the National Association of  
6 Insurance Commissioners, correct?

7 MR. FROST: Object to form.

8 THE WITNESS: It's actually not a  
9 publication. It's a system of rates and forms  
10 filing. It's a kind of software you might call it,  
11 a network each state uses. So California uses it  
12 along with many other states.

13 BY MR. WINTERS:

14 Q So it was your understanding to the  
15 extent that there was going to be any  
16 documentation of what you've been told, it would  
17 be in the SERFF notices?

18 MR. WOOD: I just object to the extent it  
19 misstates his testimony. Go ahead.

20 THE WITNESS: Right. It's not quite what  
21 I meant. I --

22 BY MR. WINTERS:

23 Q Go ahead.

24 A Within SERFF California customized some  
25 instructions to clarify how best to file these new

1 riders to update your sample form for future use.

2 Q Other than was going to be done through  
3 the SERFF system, did you understand that from any  
4 of these individuals that they intended to issue  
5 some type of formal opinion regarding how the  
6 statute was to apply?

7 MR. FROST: Object to form. Foundation.

8 THE WITNESS: No.

9 BY MR. WINTERS:

10 Q Did you understand -- was there any  
11 request that they issue a bulletin of some kind?

12 MR. FROST: Same objection.

13 THE WITNESS: No.

14 BY MR. WINTERS:

15 Q Was there any request that some form of  
16 regulation, further regulation, be written by the  
17 Department of Insurance?

18 MR. FROST: Same objection.

19 THE WITNESS: No.

20 BY MR. WINTERS:

21 Q I want to jump way -- sir, try to cut  
22 off some stuff.

23 When was the last time that you ever dealt  
24 with anyone at the department of insurance regarding  
25 these statutes that we've been talking about?

1 right?

2 A Yes.

3 Q Those are your member companies, right?

4 A Yes.

5 Q And do you see there where it says, as  
6 an example, the 60-day grace period under number 1  
7 and "all life insurance policies issued or  
8 delivered in California on or after 1/1/2013 must  
9 contain a grace period of at least 60 days.

10 Do you see that?

11 A I do.

12 Q And this, as you've testified, I  
13 believe, earlier, this -- this SERFF instruction  
14 comes from the CDI, correct?

15 A Yes.

16 Q And does it say anywhere in the SERFF  
17 instruction that policies issued before 1/1/2013  
18 must contain a grace period of at least 60 days?

19 MR. WINTERS: Same objections.

20 \*\*THE WITNESS: No. And it's important to  
21 note that these are forms for potential use.  
22 They're not existing contracts. They're forms that  
23 you could use in the future. So that's what we're  
24 talking about.

25 MR. WINTERS: Could you mark that for me,

1 immediate in stating that their understanding was  
2 the same at ours.

3 BY MR. WINTERS:

4 Q And as every attorney has said one last  
5 question, I'll ask one last question. I asked the  
6 court reporter to mark some testimony. It regards  
7 Exhibit 48, the SERFF instructions. And I want to  
8 make sure I understood your previous testimony.  
9 This SERFF instruction deals with policy forms,  
10 not actual policies that are contracts, correct?

11 MR. FROST: Object to form. Foundation.

12 THE WITNESS: Yes. SERFF deals with the  
13 presentation of sample forms, filing forms that are  
14 approved for use in the state.

15 MR. WINTERS: Okay. Very good. Well, sir  
16 I don't have any other questions.

17 Do you have anything else?

18 FURTHER EXAMINATION BY COUNSEL FOR  
19 DEFENDANTS

20 BY MR. FROST:

21 Q Yeah. Look at Exhibit 44 real quick,  
22 Mr. Mangan, while Jack huffs and puffs.

23 MR. WINTERS: Oh, I thought we were done.  
24 Trying to get the guy to the airport.

25

**STATE OF CALIFORNIA**  
Supreme Court of California

**PROOF OF SERVICE**

**STATE OF CALIFORNIA**  
Supreme Court of California

Case Name: **McHugh et al. v. Protective Life Insurance**

Case Number: **TEMP-RDR7K0G1**

Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **williams@williamsiagmin.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

<b>Filing Type</b>	<b>Document Title</b>
PETITION FOR REVIEW	D072863_Petition for Review_McHugh et al
ADDITIONAL DOCUMENTS	D072863_Request for Judicial Notice_McHugh et al

Service Recipients:

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/18/2019

---

Date

/s/Chenin Andreoli

---

Signature

Williams, Jon (162818)

---

Last Name, First Name (PNum)

Williams Iagmin LLP

---

Law Firm