UNITED STATES TAX COURT

RESERVE MECHANICAL CORP. F.K.A. RESERVE CASUALTY CORP., Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	))))))))))	 Docket No. 14545-16 Judge Kathleen Kerrigan Filed Electronically

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Internal Revenue Code of 1986

Miscellaneous

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PRELIMINARY STATEMENT

The trial herein was held in Houston, Texas, before the Honorable Kathleen Kerrigan on April 28 through May 2, 2017. Reply briefs are due October 10, 2017.

OBJECTIONS TO RESPONDENT'S REQUEST FOR FINDINGS OF FACT ("RRFF")[1]

1. thru 5. No objection; PRFF 2-3 and 5 are more complete than RRFF 1, 3 and 5, respectively.

6. Objected to as misleading and inaccurate. Petitioner's insurance arrangements were bona fide. Also, PRFF 5, 14-15, 83, 86-88 and 90 are more accurate and complete.

[1] Unless otherwise indicated, any capitalized terms used but not defined herein have the meanings assigned to such terms in Petitioner's brief ("P-Brf.") and any section references are to the Internal Revenue Code of 1986, as amended, and Treasury Regulations thereunder, as in effect for and applicable to the year(s) in issue, and all Rule references are to this Court's Rules of Practice and Procedure.

7. thru 10. No objection. See PRFF 5, 7-8. "Assistant Treasurer" in PRFF 7 should be "Assistant Secretary."

11. thru 14. No objection; PRFF 13-14, 19-22, 29, 31-34, 38-43 and 49 are more complete and informative.

15. and 16. No objection; PRFF 15 and 39-40 are more informative.

17. Objected to as inaccurate; PRFF 17-18 are more accurate.

18. No objection; PRFF 16 is more informative; ZW's operations were less significant than Peak's.

19. Objected to as inaccurate and misleading and based on a highly selective and unfair reading of the Reserve Feasibility Study, which states, in relevant part, as follows:

> The current conventional policies for Peak offer broad and comprehensive coverage that is appropriately designed and priced. There are however significant opportunities to supplement the conventional program with a well structured alternative risk management program by designing policies that buy back some of the deductibles or fill gaps in coverage.

Ex. 16-J, p. RSV-6014-6015 (emphasis added). The Reserve Feasibility Study further describes the policies at issue (except the punitive wrap policy) and emphasizes that Peak faced significant risks to continued growth and profitability from multiple sources, which were not adequately covered by Peak's conventional insurance. Ex. 16-J, p. RSV-6015; see also PRFF 77, 79; Ex. 9-J, pp. RSV-5683-5687; Ex. 19-J, p. RSV-5754.

A cursory review of Petitioner's policies makes clear the supplemental and gap-filling (i.e., not duplicative) nature of the coverage provided. Compare policies referenced in PRFF 77 and 79 with those at Ex. 34-J, pp. 151-489; see also Ex. 9-J, pp. RSV-5683-5687; Ex. 19-J, p. RSV-5765. None of Petitioner's policies duplicated Peak's commercial policies. For example, Peak's facilities were located in the Bunker Hill Superfund Site but Peak had no pollution liability coverage prior to obtaining such coverage from Petitioner (i.e., it gap-filled Peak's commercial coverage). PRFF 51; Ex. 19-J, p. RSV-5767. Also, Petitioner's loss of major customer policy, which responded to the Stillwater loss in 2009, also gap-filled Peak's commercial coverage, which did not cover risks associated with such loss. PRFF 77, 79, 99-104; Ex. 34-J, pp. 151-489. Also, the table in RRFF 19 is confusing and misleading since the EMC-related line items in the second (five entries) and third (six entries) columns do not match up.

20. and 21. No objection to a finding that Peak deducted the referenced amounts on its 2007 and 2006 Forms 1120S. Peak's 2007 and 2006 sales were about $7.5 million and $6 million, respectively. Ex. 34-J, pp. 115, 137. The record does not show the premiums RocQuest paid in 2006. RocQuest deducted insurance premiums of $3,755 in 2007. Ex. 34-J, p. 43.

22. Objected to as misleading. Peak paid $57,300 in insurance expenses through June 30, 2008 and claimed insurance expense deductions of $95,828 in 2007. Ex. 34-J, p. 113, 126; see also objs. to RRFF 20-21.

23. Objected to as inaccurate. In the testimony Respondent cites, Mr. Zumbaum only testified that Peak continued its insurance coverage with EMC. Tr. 158:18-21.

24. Objected to as inaccurate and misleading. Mr. Zumbaum testified that he understood that Peak could not obtain pollution coverage from a commercial insurance company and that he contacted Capstone based on the advice of MEL's owner who operated a business with exposures similar to Peak's. Tr. 123:7-124:16; PRFF 51; see also PRFF 53-58, 67. He did not testify that he "did not investigate or conduct any due diligence regarding insurance companies in Idaho that could provide additional insurance coverage to Peak."

25. Objected to as misleading. Mr. Zumbaum testified that the only insurance claims prior to 2008 that he could recall filing concerned Peak's company vehicles. Tr. 159:16-21.

26. thru 29. Objected to as incomplete and misleading. The roof was badly damaged and leaking, and after Mr. Zumbaum's repeated attempts to get the insurer, EMC, to cover more of the loss proved futile (EMC would only pay $2,000 despite the severe damage to Peak's roof), Peak had to replace the roof out-of-

pocket for about $25,000. Tr. 122:11-123:6. PRFF 60-61 are more accurate and complete.

30. Objected to as misleading and inaccurate. See obj. to RRFF 23. Further objects to the implication that Peak's continuance of its coverage with EMC somehow means that the roof damage did not occur or that Messrs. Zumbaum and Weikel were not unhappy with this experience or EMC.

31. and 32. Objects to the implication that there is no evidence in the record concerning the insurance needs or risk profiles of Peak, RocQuest and ZW because such implication is patently false. The substantial evidence in the record includes, among other things, the Reserve Feasibility Study, together with the information that was collected in connection with its preparation, which included, by way of example only, a description of the companies, an analysis of their insurance needs and risk profiles, copies of their existing insurance policies, and their income tax returns and other financial statements and records. Exs. 16-J, 34-J. Also, the majority of the documents Respondent subpoenaed had already been provided to Respondent by Petitioner. Entire record. Any documents the insureds had in their possession, custody or control that Petitioner had not already provided to Respondent were also provided in response to Respondent's subpoenas. Tr. 173:9-175:3, 191:6-193:24; Ex. 99-P. RRFF 31 and 32 are drafted very narrowly

with reference to "communications with third party insurers" in an attempt to shift the focus away from the substantial evidence in the record that does not support Respondent's position.

33. and 34. Objected to as misleading. The record contains evidence detailing the losses that Peak and its affiliates had previously suffered and the experiences of Messrs. Zumbaum and Weikel who ultimately decided to form Petitioner. PRFF 55-56, 60-62, 64-66. More importantly, the record contains substantial evidence concerning the insurance needs and risk profiles of Peak and its affiliates. See PRFF 19-58, 68-70, 75-76.

35. Objected to as inaccurate and misleading. Capstone is not a "turnkey captive management and captive formation company." Capstone offers services requiring insurance-related expertise, including captive feasibility studies, assistance with regulatory filings, accounting, and other services related to forming or operating an insurance company, to its clients and among those services is a turnkey type of administration program to overcome the transaction costs associated with small and intermediate sized captives. Tr. 41:7-18,778:20-779:16; Ex. 9-J, p. RSV-5639. Clients have the option to utilize some, all or none of those services. TR. 778:20-779:16.

36. Objected to as inaccurate. Mr. Feldman testified unequivocally that it is the client who makes the decision about whether and to what extent to utilize Capstone's services (if at

all). Tr. 779:3-16. Also, Mr. Snyder of Willis (i.e., not Capstone) reviewed, edited, approved and signed the Reserve Feasibility Study. PRFF 71.

37. and 38. No objection.

39. Objected to as inaccurate. Capstone is a separate business from the Feldman Firm. Tr. 613:20-619:14, 643:7-644:22.

40. and 41. Objected to as misleading and inaccurate. PRFF 57-58 are more accurate and complete. MEL's owner, who Messrs. Zumbaum and Weikel considered a mentor, advised that Peak should consider obtaining more insurance coverage in light of Peak's growth and suggested Peak consider forming a captive insurance company and contacting Capstone. See PRFF 57-58. Respondent incorrectly suggests that Mr. Zumbaum went out of his way to inquire about what insurance Peak might need from MEL's owner.

42. and 43. No objection; PRFF 58 and 67 are more accurate and informative than RRFF 42 and 43, respectively.

44. Objected to as misleading and inaccurate. Messrs. Zumbaum and Weikel obviously were informed by their own experiences with the businesses that they operated and the existing commercial insurance coverage that they maintained. They also had received the advice of Mr. Pope, Capstone and the Feldman Firm and other professionals. PRFF 58, 68, 70-75.

45. Objected to as misleading and inaccurate. Petitioner's income tax returns, general ledgers, financial statements, bank

records and other records are in evidence, and these records reflect the expenses that Petitioner incurred in connection with its insurance company operations. See Exs. 2-J thru 4-J, 24-J thru 33-J, 123-P thru 127-P.

46. No objection, except the Reserve Feasibility Study is a captive feasibility study prepared by experienced insurance professionals with the benefit of an investigation, an on-site visit and independent review and not just a document with that title. Ex. 16-J; see also PRFF 68-75.

47. Objected to as inaccurate and unsupported by the record. Mr. Zumbaum testified that he did not remember whether the Reserve Feasibility Study was paid for separately. Tr. 179:1-7. Capstone charged Peak about $75,000 for the study. Tr. 698:4-11; see also Tr. 317:24-318:7.

48. Objected to as inaccurate. Mr. Feldman testified that Capstone had charged Peak about $15,000 for the feasibility study. Tr. 698:4-11.

49. No objection; PRFF 110 is more informative regarding Mr. McNeel's position with Capstone.

50. No objection; PRFF 70 is more informative regarding the conduct of the site visit.

51. Objected to as unsupported by the record; Mr. McNeel testified that the site visit in Osburn, Idaho lasted most of the day, which he estimated was 6 to 8 hours. Tr. 129:24-130:3.

52. Objected to as inaccurate. Mr. McNeel testified that the documents in Exhibit 34-J were received prior to and after the August 2008 site visit. Tr. 311:1-7. The index to Exhibit 34-J states that it is dated as of December 14, 2009 and some of the documents in Exhibit 34-J would not have existed as of the date of the August 13, 2008 site visit. Ex. 34-J, p. 1.

53. No objection.

54. Objected to as imprecise. To the extent that the background information existed as of the date of the site visit, such information was reviewed prior to Messrs. McNeel's and Feldman's site visit in August 2008. Tr. 306:8-15.

55. No objection; PRFF 70-72 are more complete.

56. Objected to as misleading and inaccurate. RRFF 56 omits "and" after the word "sole" in the quote. Ex. 16-J, p. RSV-5995. The Reserve Feasibility Study also states that it "is intended only for the use of the Board of Directors of the proposed insured." Id. at p. RSV-6047.

57. No objection.

58. Objected to as inaccurate and misleading. The fact that Capstone provided feasibility study services to Peak and management and administration services to Petitioner is irrelevant to whether Petitioner's insurance arrangements are bona fide. Respondent also ignores the fact that Willis participated and joined in the issuance of the Reserve

Feasibility Study. See obj. to RRFF 36. Moreover, Dr. Doherty, who opined that Petitioner was an insurance company and its insurance arrangements constituted insurance, testified that he was aware of situations where the captive manager advised and prepared the feasibility study and also managed the captive insurance company. Tr. 280:6-21; Ex. 104-P, pp. 5, 27-28.

59. No objection, except that ZW's operations were minimal compared to those of Peak. See RRFF 18; PRFF 16. RocQuest's operations consisted primarily of leasing real estate and facilities that Peak utilized in its manufacturing and other operations. See PRFF 17-18. Peak was the primary insured under the policies at issue. PRFF 78.

60. Objected to as misleading. There is no requirement that Mr. McNeel have the specific experience stated in RRFF 60. Mr. McNeel had substantial insurance industry experience, including underwriting experience, which included working with oil and gas companies that, like companies in the mining industry, have operations that can be dangerous and pose significant pollution-related risks. Tr. 385:21-386:20. Moreover, Mr. McNeel was not the only person involved in preparing the Reserve Feasibility Study. Mr. Snyder, another seasoned insurance industry professional, assisted in its preparation. See PRFF 71-72. Mr. Feldman, who had experience with environmental superfund sites, also participated in the on-

site inspection in Idaho. Id. PRFF 70; Tr. 766:21-767:24. RRFF 60 also overlooks Capstone's experience with MEL, a company similar to Peak, which was also involved in the mining industry. Tr. 647:10-648:9, 760:18-761:2.

61. Objects to the implication that Peak did not have insurable risks other than weather-related issues. Peak had numerous exposures due to its being a manufacturer in a dangerous underground mining industry with a concentration of its business in a small number of major customers. See PRFF 20-37, 41-49, 53-59, 99-104. Peak also operated in a flood plain within the Bunker Hill Superfund Site. PRFF 38-52.

62. Objected to as misleading and incomplete. PRFF 71-72 are more accurate and complete.

63. Objected to as inaccurate and misleading. Mr. Snyder testified that Mr. McNeel would have given him an oral briefing about the owners, business and operations of the putative insureds, and would have answered Mr. Snyder's questions regarding the preparation of the Reserve Feasibility Study. Tr. 58:24-59:11. Mr. Snyder testified that he had long known Mr. McNeel, whom he believed was a very capable insurance professional. Tr. 59:12-21. Mr. Snyder did not say that he relied on Mr. McNeel's ultimate conclusions; he testified that he had a high confidence level in the information provided by Mr. McNeel. Id. Moreover, Mr. Snyder had access to Exhibit 34-

J, the documentary information collected in connection with preparation of the Reserve Feasibility Study. Tr. 24:19-25:6.

64. and 65. Objected to as misleading. Mr. Snyder testified that he was assigned to the healthcare industry due to his company's industry specialization, but that he still worked with energy, construction, environmental resources, aviation, and real estate companies and a "wide sweep of other companies," including companies engaged in oil and gas exploration, pipe construction, mineral development, etc. Tr. 46:17-47:22.

66. and 67. No objection. The insureds did have commercial automobile insurance as shown by the copies of the automobile insurance policies that were collected in preparing the Reserve Feasibility Study. Compare Ex. 16-J, p. RSV-6021 with Ex. 34-C, pp. 2. This was misstated in the study.

68. No objection; PRFF 77-79 are more complete.

69. Objected to as inaccurate and misleading. Of the premiums under the 2008 direct written policies, Petitioner received $335,853 while PoolRe received $76,236 of such premiums under the 2009 Stop Loss Endorsement. PRFF 81, n.9; Ex. 35-J. For reinsuring the risks of more than 150 insureds under the 2008 Quota Share Policy, Petitioner received $76,236 in PoolRe Quota Share Reinsurance Premiums from PoolRe. PRFF 89-97; Ex. 125-P, p. 6.

The premiums set forth in the direct written policies were supported by, among other things, Mid-Continent's pricing indications and Mr. McNeel's underwriting work. PRFF 110-128. Moreover, two independent actuaries testified at trial that the premiums were reasonable in amount. PRFF 128.

70. Objected to as inaccurate and misleading. The policies, the aggregate limits and premiums stated are correct, but the total premiums are misleading for the same reasons stated in response to RRFF 69. The aggregate limits under the policy allocated to Petitioner would also need to be similarly pro-rated. PRFF 77-79 are more complete and informative.

71. thru 76. No objection.

77. Objected to as misleading. The agreement says it is effective November 26, 2008. Ex. 52-J. There is no evidence to demonstrate that the agreement was signed prior to Petitioner being formed on December 3, 2008, and there is nothing in the record that suggests that this created any issues. Tr. 453:2-9.

78. No objection; PRFF 85 and 88-97 explain the PoolRe Quota Share Reinsurance Arrangement.

79. No objection; PRFF 85-87 explain the CreditRe Reinsurance Arrangement.

80. No objection; PRFF 77-79 are more complete and informative.

81. Objected to as inaccurate and misleading. Of the premiums under the 2009 direct written policies, Petitioner received $365,224 while PoolRe received $82,904 of such premiums under the 2009 Stop Loss Endorsement. PRFF 81, n.9; Ex. 59-J. For reinsuring the risks of more than 150 insureds under the 2009 Quota Share Policy, Petitioner received $82,904 in PoolRe Quota Share Reinsurance Premiums from PoolRe. PRFF 89-97; Ex. 125-P, p. 6.

The premiums set forth in the direct written policies were supported by, among other things, Mid-Continent's pricing indications and Mr. McNeel's underwriting work. PRFF 110-128. Moreover, two independent actuaries testified at trial that the premiums were reasonable in amount. PRFF 128.

82. Objected to on the same grounds as stated in response to RRFF 70.

83. Objected to as misleading. First, knowing the reasons for these adjustments to the coverages at issue is not critical to the issues herein. Petitioner's experts were provided copies of the insurance policies for each of the years at issue, and their opinions were that Petitioner is an insurance company and that the insurance arrangements at issue are insurance. Ex. 97-P (Snyder II); Ex. 103-P (Kinion); Ex. 107-P (Doherty). Respondent offered no credible evidence to the contrary. Respondent had 4 attorneys at the trial with ample opportunity to ask questions,

but Respondent does not appear to have asked a single question about the adjustments to the policies that were issued by Petitioner for 2009. (Entire record).

84. No objection; PRFF 85 and 88-97 explain the PoolRe Quota Share Reinsurance Arrangement.

85. No objection; PRFF 85-87 explain the CreditRe Reinsurance Arrangement.

86. No objection. Prior to the issuance of the final version of the Reserve Feasibility Study, a draft was prepared a few weeks after the August 2008 on-site visit. Tr. 52:25-53:6, 55:13-21, 57:5-58:19, 403:17-404:9; see also Ex. 9-J, RSV-5684-5687 filed with the Anguilla Regulator in October 2008 that contains conclusions reflected in the Reserve Feasibility Study. See also Stip. ¶ 8.

87. No objection. Petitioner issued policies after 2008 and continued to collect information regarding Petitioner's insureds after Petitioner was formed.

88. thru 90. No objection.

91. No objection to a finding that Petitioner attached copies of its 2008 insurance policies to its Form 1024 application. (Ex. 19-J).

92. No objection.

93. No objection to a finding that the form of the excess D&O liability policy attached to the Form 1024 did not have the

names of the directors and officers listed on Schedule 1-A. Information submitted with the Form 1024 application for tax-exempt status clearly reflected the owners of the insured entities. Ex. 19-J, p. RSV-5776. See infra note 13.

94. thru 99. Objected to as inaccurate and misleading. While the schedules to Petitioner's 2008 tax liability and regulatory changes policies contained clerical errors, those policies and the accompanying binder clearly identify the insureds by name (i.e., Peak, RocQuest and ZW) and the policy numbers (i.e., RSRV-TAX-081 and RSRV-REG-081). Exs. 35-J, 42-J, 44-J; Ex. 19-J, pp. RSV-5844, 5969. The errors have been corrected. See Stip. ¶¶ 55-57; Exs. 49-J, 50-J; Tr. 5:20-8:1; entire record. While Petitioner does not dispute that these errors were made, Petitioner does object to Respondent's suggestion that errors of such immaterial nature should be considered as somehow relevant to any issue here. See Reply to Arg. II.D.

100. No objection; PRFF 77-79 are more complete.

101. Objected to as inaccurate and misleading. Of the premiums under the 2010 direct written policies, Petitioner received $356,697 while PoolRe received $88,617 of such premiums under the 2009 Stop Loss Endorsement. PRFF 81, n.9; Ex. 74-J. For reinsuring the risks of more than 200 insureds under the 2010 Quota Share Policy, Petitioner received $88,617 in PoolRe

Quota Share Reinsurance Premiums from PoolRe. PRFF 89-97; Ex. 27-J, p. RSV-5530.

The premiums set forth in the direct written policies were supported by, among other things, Mid-Continent's pricing indications and Mr. McNeel's underwriting work. PRFF 110-128. Moreover, two independent actuaries testified at trial that the premiums were reasonable in amount. PRFF 128.

102. Objected to on the same grounds as stated in response to PRFF 101.

103. and 104. No objection; PRFF 85 and 88-97 are more complete than RRFF 103, and PRFF 85-87 are more complete than RRFF 104.

105. and 106. No objection; PRFF 108 and 109 are more complete.

107. No objection, except that some of these documents were also executed by Messrs. Zumbaum and Weikel. Ex. 9-J.

108. No objection, except that Atlas ceased to perform these functions as of June 30, 2009. See PRFF 108.

109. Objected to as inaccurate. Messrs. Zumbaum and Weikel signed the application on October 21, 2008 as persons who would be officers and directors of Petitioner once it was formed. Petitioner was not formed until December 3, 2008. Stip. ¶ 7.

110. No objection.

111. No objection to a finding that Petitioner's general ledger reflects its initial capitalization was recorded in December 10, 2008 at $100,000. Ex. 28-P; see also Ex. 31-J, p. 1. Petitioner's profits during the years in issue contributed to its capital. Ex. 27-J, pp. RSV-5526. Petitioner met or exceeded the capital requirements under Anguilla law at all times from inception through December 31, 2010. PRFF 150.

112. Objected to as misleading and inaccurate. PRFF 129 is more accurate and informative. Anguilla was chosen because it was a British territory, overseen by the United Kingdom, and sufficiently mature and experienced with the regulation of these types of insurers, with the United Kingdom being well-recognized for its insurance expertise developed over several hundred years. PRFF 129; see also Ex. 16-J, p. RSV-6030-6031.

113. Objected to as inaccurate. Anguilla issued a separate license for each of the years 2008-2010. PRFF 10 is more accurate, complete and informative.

114. No objection; PRFF 108-109 are more complete.

115. Objected to as inaccurate. Atlas was the "resident" manager of Petitioner in Anguilla. See PRFF 108. In mid-2009, Capstone Insurance Management (Anguilla), Ltd. ("CIMA") replaced Atlas as Petitioner's "resident" manager. See PRFF 108-109; Ex. 9-J, pp. RSV-5630, 5631, 5639; Ex. 19-J, p. RSV-5697; Ex. 121-R. Messrs. Zumbaum and Weikel, who were officers and the indirect

owners of Petitioner, were the ultimate managers of and decision-makers for Petitioner.

116. Objected to as inaccurate and misleading. Mr. Zumbaum testified that he relied on Capstone to inform him as to matters that were occurring in Anguilla that pertained to Petitioner. Tr. 166:21-167:3.

117. Objected to as inaccurate, utterly ridiculous and unsupported by the record and irrelevant. To the extent that there were records produced concerning Petitioner's operations after the time that CIMA was in existence, those records involve CIMA. See obj. to RRFF 115. This is a red herring and another reminder of the poor quality and lack of substance, evidentiary, economic or otherwise, in Respondent's arguments. See also Ex. 9-J, p. RSV-5639.

118. Objected to on the same grounds as stated in response to RRFF 117. If Petitioner paid such costs, those expenditures would be reflected in the ledgers, financial statements and other of Petitioner's records in evidence. Respondent was represented by 4 trial attorneys at the trial and had ample opportunity to inquire regarding CIMA.

119. thru 121. Objects to the reference to "insurance services" in RRFF 119 and 121 as misleading. Also, the majority of the documents Respondent subpoenaed had already been provided to Respondent by Petitioner. Entire record. The substantial

evidence in the record includes, among other things, director and shareholder meeting minutes, formation documents, tax returns and other filings with Respondent, books and records, including financial statements and bank records, Petitioner's insurance licenses and applications, Petitioner's policies and documents showing the premiums and the claims paid under the policies. Id. Any documents the insureds had in their possession, custody or control that Petitioner had not already provided to Respondent were also provided in response to Respondent's subpoenas. Tr. 173:9-175:3, 191:6-193:24; Ex. 99-P. Petitioner has no objection to a finding that Respondent issued multiple, overly broad, discovery subpoenas in a desperate search for evidence to support his position, which is inconsistent with the position he took in the 39 favorable tax-exempt determination letters he issued to insurance companies similar in structure and operations to Petitioner. Respondent prefers not to focus on Petitioner's records because they do not support his position. See PRFF 155, 157, 158, 160.

122. and 123. Objects to the use of "recycled" and the apparent implication of RRFF 122 and 123 that a policy that is not manuscripted from scratch is somehow not insurance. There is no requirement that a policy - whether written by a captive or commercial insurer - be wholly or partially customized for a specific insured in order for the insurance arrangement to be

insurance. Nor is there any evidentiary support for such a proposition in the record. Rather, the record unequivocally shows that, notwithstanding Mr. Feldman's inability to recall whether Petitioner's pollution policy had been manuscripted from scratch, Petitioner's policies were directed at the business of Petitioner's insureds and were structured appropriately to address their risks. Tr. 764:19-767:14; see also Tr. 32:12-33:11, 387:13-388:15.

124. No objection.

125. No objection to a finding that Messrs. Zumbaum and Weikel, as Petitioner's directors and officers, had the authority to determine the amount of premiums charged under Petitioner's policies. PRFF 121.

126. No objection to a finding that Mr. Zumbaum did not know how Petitioner's premiums were determined, except he knew that Capstone would have advised on the amounts of such premiums. Tr. 135:7-10; 162:9-12. Mr. Zumbaum testified that he relied on the advice provided by Capstone. Tr. 166:12-15. See infra note 9.

127. Objected to as misleading and inaccurate, as Mr. Snyder participated in the preparation of the feasibility study that suggested the types of coverages that would be appropriate for Peak and its affiliates. Tr. 62:10-17. Otherwise, Mr. Snyder

was not involved in drafting Petitioner's direct written policies or premium pricing for such policies.

128. No objection; PRFF 145 is more complete.

129. Objected to as inaccurate, misleading and unsupported by the record. Mr. Liptz's testimony was that in performing his audit of Petitioner's books, he and his firm were comparing Petitioner's policies' premium amounts with premium amounts reflected in Petitioner's general ledger. Tr. 541:5-15.

130. and 131. No objection.

132. No objection, except that Mr. Zumbaum testified that he was aware that the policies issued by Petitioner contained retroactive or look back provisions, but other than scanning the policies, he never actually read the policies. Tr. 165:12-166:11; see also infra note 9. Mr. Zumbaum was provided with a copy of a draft of the Reserve Feasibility Study before Petitioner was formed, which contained a discussion of the policies (except for punitive wrap) that Petitioner ultimately issued. Tr. 128:3-24; Ex. 16-J, RSV-6015-6017.

133. No objection to a finding that there was ever a claim filed by any of the insureds related to the look back provisions of any of the direct written policies issued by Petitioner.

134. Objected to as misleading and inaccurate. Objects to the citation of Exhibit 136-R for any proposition. See P-Brf., Arg. I.A.6 at pp. 80ff. The premiums stated in Petitioner's

policies are equal to or less than the Mid-Continent pricing indications and the rating worksheets that were prepared by Mr. McNeel. PRFF 110-128. Two independent actuaries who testified as experts at the trial herein testified that the premiums charged by Petitioner were reasonable in amount. PRFF 128.

135. Objected to on the same grounds as set forth in response to RRFF 134. See P-Brf., Arg. 1.A.6 at pp. 80ff. The NAIC specifically does not require actuaries to address loss reserves for small insurance companies. PRFF 137; Ex. 19-J, p. RSV-5792. This Court has held that actuarial loss data is not required to set valid premiums. P-Brf., pp. 79ff.

136. and 137. No objection.

138. No objection. Mr. Solomon confirmed that the premiums charged were reasonable. Mr. Solomon's analysis was not dependent on the manner in which the premiums were set. Exs. 117-P; see also Ex. 113-P.

139. Objected to as misleading. Dr. Doherty testified that to the extent there was loss data available, he "would use them in computing premiums." Tr. 250:13-14.

140. Objected to as misleading and incomplete. Dr. Doherty was testifying about automobile insurance as an example, where there is a lot of loss history available that can be used to set rates according to different circumstances and different features of the policyholders, which he described as "one

extreme." Tr. 262:14-24. Dr. Doherty also testified that the other extreme where there are not large databases of loss data such as satellite insurance or terrorism insurance, where expert judgment is utilized. Tr. 262:24-263:20. Dr. Doherty testified that there is "a whole spectrum in between those two extremes." Tr. 263:19-20. See Crouch on Insurance § 1.1 (2017) (increasing growth and evolution in the types of risks covered by insurance).

141. Objected to as misleading and incomplete. Ms. Mead made it clear that "credibility" in actuarial terms means that there is no volume of claims activity, i.e., there is no claims data or there is low claim activity. Tr. 410:18-25.

142. Objected to as misleading, inaccurate and unsupported by the record. There was insufficient loss data involving Petitioner's policies to determine a premium, but Ms. Mead testified that she considered loss data for all Capstone captives for the policy years 2011-2015 to "be able to build more credibility, because we have more experience there." Tr. 411:12-412:4. Ms. Mead testified that available loss data, although low, did not mean that she could not calculate a premium, because actuaries are "regularly asked to calculate premiums without loss data." Tr. 479:7-480:6. Ms. Mead testified that there was loss data available, and that lower claim

activity is expected for the insurance addressed by her report. Tr. 412:16-413:6.

143. No objection. P-Brf. sets forth in detail how Petitioner's premiums were set. PRFF 110-128. P-Brf. also addresses the law on this issue. P-Brf., pp. 79ff. As set forth therein, this Court has held that an actuarial analysis is not necessary to determine valid insurance premiums. Harper Grp. v. Comm'r, 96 T.C. 45, 50 (1991), aff'd, 979 F.2d 1341 (9th Cir. 1992). Such a requirement would stunt the growth of the insurance industry.

144. No objection.

145. Objected to as inaccurate, misleading and unsupported by the record. See objection to RRFF 140. Dr. Doherty's report states that Petitioner's methodology used to set premiums appeared to be reasonable to him. See Ex. 107-P, pp. 5-7, discussed at P-Brf., p. 80. Moreover, Respondent himself signed off on this methodology 39 times when he issued favorable tax-exempt determination letters to 39 insurance companies similar to Petitioner following the same pricing methodology as used in the present case. PRFF 155-158, 160; Ex. 17-J, RSV-5755-5756.

146. Objected to as misleading and unsupported by the record. Ms. Mead, one of Petitioner's experts, testified that actuaries are often asked to determine premiums where there is no loss data available. See obj. to RRFF 142. The NAIC does not

require that insurers with premium levels similar to that of Petitioner prepare actuarial reports. Ex. 19-J, p. RSV-5762.

147. No objection to a finding that valid insurance premiums can be determined without loss data.

148. Objected to as unsupported by the record. Objects to the citation of Ex. 136-R for any purpose. See P-Brf., Arg. I.A.6 at pp. 80ff. Petitioner's pricing methodology is addressed in its brief at pages 77ff. (Arg. I.A.5) and below in reply to Arguments II.A through II.C.I and II.C.II.

149. Objected to as misleading, inaccurate and unsupported by the record. In connection with advising Petitioner regarding premium rates for 2008-2010, Mr. McNeel used insureds' revenues and personnel headcount as the ratings base to determine the basis for a premium. See Ex. 112-P; see also Exs. 109-P, 110-P. Mr. McNeel also testified that insurance companies can also use property value or some other statistic as a ratings base, since normally a mathematical base is needed for calculating a premium. Tr. 316:15-317:6.

150. Objected to as misleading. Mr. McNeel used revenues and the number of employees as the rating base for Petitioner's insureds for the years at issue. See obj. to RRFF 149, which is incorporated herein by reference.

151. Objected to as misleading and inaccurate. Mr. McNeel used all of Capstone's historical premium pricing information,

together with the Mid-Continent pricing indications, in arriving at his recommendation of premium amounts for Petitioner. Tr. 346:6-347:22. Mr. McNeel's process for developing his premium pricing recommendations is described in PRFF 110-128.

152. Objected to as misleading and inaccurate. See response to RRFF 151, which is incorporated herein by reference.

153. Objects to the apparent implication that a Policy Rate Analysis Summary for 2008 and 2009 is required. The Policy Rate Analysis Summary is a compilation of data that Mr. McNeel prepared using the Mid-Continent pricing indications from prior years for all policies issued by insurance companies Capstone managed. PRFF 122. The record does contain the Mid-Continent pricing indications and Mr. McNeel's Rating Worksheets for 2008 and 2009. Exs. 109-P, 112-P. The record also contains a letter dated April 28, 2009 from Mid-Continent and a request for a determination of tax-exempt status sent to Respondent that each contain a detailed description of how the premiums were determined. Stip. ¶ 92, Ex. 94-C; Ex. 19-C, pp. RSV-5755-5756. Moreover, Respondent issued 39 taxpayer-favorable determination letters for 39 insurance companies that utilized the same pricing methodology as Petitioner. RRFF 155-158, 160; see also obj. to RRFF 146. Moreover, two independent actuaries confirmed that the premiums charged by Petitioner were reasonable in amount. See PRFF 128.

154. Objected to as misleading and inaccurate. The premiums charged in the policies at issue are all equal to or less than those in Mid-Continent's pricing indications and very near the premium amounts reflected in Mr. McNeel's rating worksheets. (Exs. 109-P, 112-P). The Policy Rate Analysis Summary was merely a tool Mr. McNeel utilized in arriving at the premium pricing recommendations he made to Petitioner. See PRFF 121, 128.

155. Objected to as misleading. Mr. McNeel testified at length as to how he prepared the 2010 Policy Rate Analysis Summary. Tr. 344:16-356:15.

156. Objected to on the same grounds as set forth in response to RRFF 154.

157. No objection; PRFF 110-128 are more complete and informative.

158. No objection.

159. Objected to as inaccurate and misleading. PRFF 110-128 lay out in detail, Mr. McNeel's involvement in the determination of Petitioner's insurance premiums.

160. Objected to as inaccurate and misleading. Mid-Continent prepared premium pricing indications for each of the insurance policies issued by Petitioner during the years at issue. Ex. 109-P.

161. Objected to as inaccurate and misleading. See obj. to RRFF 160, which is incorporated herein by reference.

162. Objected to as inaccurate, misleading and inconsistent with the record. See obj. to RRFF 154, which is incorporated herein by reference.

163. No objection, except that a description of how the pricing indications were prepared is contained in the record. Stip. ¶ 92, Ex. 94-J; Ex. 19-J, pp. RSV-5755-5756. Moreover, Respondent issued 39 taxpayer favorable tax-exemption determination letters for 39 insurance companies that utilized the same pricing methodology as Petitioner.

164. Objected to as misleading. Neither Janise Selph nor others from Mid-Continent testified at the trial. The pricing indications and testimony concerning how they were prepared is in the record. Tr. 342:3-20; see also obj. to RRFF 163 and record citations therein.

165. Objects to RRFF 165 on the same grounds as stated in response to RRFF 164.

166. Objected to as misleading and inaccurate. Mr. McNeel testified that Exhibit 94-J accurately describes the process of setting Petitioner's premiums. Tr. 324:6-10. See also Ex. 19-J, pp. RSV-5755-5756. Moreover, Respondent had previously issued 39 taxpayer-favorable tax-exempt determination letters to insurance companies similar to Petitioner that had approved the premium pricing methodology utilized by Petitioner.

167. Objected to as misleading, inaccurate and incomplete. Mr. McNeel explained in detail how the pricing indications were utilized and the manner in which Petitioner's premiums were determined. See PRFF 110-128.

168. Objected to as misleading and inaccurate. See also obj. to RRFF 167, which is incorporated herein by reference.

169. Objected to as misleading, inaccurate and incomplete. Ms. Mead, an actuary, testified on behalf of Petitioner as an expert witness.

170. Objected to as misleading. Ms. Mead did not review the pricing indications prepared by Mid-Continent because her methodology was not dependent on such indications. Tr. 414:22-24, Tr. 435:23-436:18; Ex. 113-P.

171. No objection; PRFF 78 is more precise and informative.

172. No objection. This is common practice in the insurance industry for an insurance policy to cover more than one insured, such as commonly-owned companies. See PRFF 78, n.8; Tr. 268:10-269:6; see also Rent-A-Center, Inc. v. Comm'r, 142 T.C. 1, 5-6 (2014) (policy covered multiple insureds).

173. Objected to as inaccurate. The record does not demonstrate how the insurance premiums paid to Petitioner were treated as between the insureds. Entire record. Peak was the primary insured. PRFF 78.

174. Objected to on the same grounds as stated in response to RRFF 173.

175. No objection; PRFF 86 is more complete.

176. Objected to as misleading. CreditRe does not have employees, but it did have officers and its business affairs were conducted by employees of a separate company Mr. Fagg owned. Tr. 439:20-440:4.

177. No objection.

178. Objects to as misleading and inaccurate. Attachment A to these agreements identifies vehicle service contracts that were reinsured by CreditRe, PoolRe and Petitioner.

179. Objects to the use of the word "alleged." These vehicle service contracts were real. PRFF 86-87 are more complete and informative. See also PRFF 152-158, 160.

180. No objection; PRFF 86-87 are more informative.

181. thru 183. Objected to as unsupported by the record. Although the record does not reflect the precise percentages actually ceded (a) to CreditRe, (b) from CreditRe to PoolRe and (c) from PoolRe to all of its reinsurers, the record does demonstrate the precise percentages Petitioner reinsured. Tr. 464:10-464:23; Exs. 52-J, 72-J, 87-J.

184. No objection, except that RRFF 184 is unnecessary.

185. Objected to as unsupported by the record.

186. Objects to the use of the word "alleged" in reference to the vehicle service contracts. The vehicle service contracts were real.

187. Objected to as inaccurate and unsupported by, and actually contradicted by, the record. Petitioner paid claims as a result of reinsuring the vehicle service contracts. PRFF 98; Tr. 722:4-724:23.

188. Objected to as imprecise and uninformative. PRFF 83-84 are more accurate and informative. Capstone administered PoolRe, handled the day-to-day administrative and clerical operations pursuant to the guidelines of PoolRe's board of directors and officers. Tr. 734:15-23.

189. Objected to as inaccurate and unsupported by the record. PoolRe was an insurance company under the law of British Virgin Islands until it was redomiciled in Anguilla as in insurance company under its laws, both such locations being British territories controlled by the United Kingdom. See PRFF 83-84.

190. Objected to on the same grounds as stated in response to RRFF 188. See also obj. to RRFF 189.

191. Objected to as inaccurate and unsupported by the record. Capstone's management role with respect to PoolRe is described in response to RRFF 188 above.

192. No objection to a finding that Capstone maintained books and records for PoolRe. Objects to the suggestion that Capstone maintained "all" of PoolRe's books and records. See obj. to RRFF 188. Capstone is in the business of administering insurance companies. (Entire record).

193. No objection; PRFF 83 is more informative.

194. No objection to a finding that Mr. Snyder was a director of PoolRe as of the date of the trial herein. Tr. 48:24-25.

195. Objected to as inaccurate and misleading. Mr. Snyder testified as a director that he tended to some of PoolRe's affairs. Tr. 49:14-23.

196. Objected to as inaccurate, misleading and unsupported by the record. Mr. Snyder testified that Capstone sometimes provides him with PoolRe documents to sign, not that Capstone "directs" him to sign documents. Tr. 50:3-11.

197. No objection. Tr. 50:10-11.

198. No objection to a finding that PoolRe does not have employees in Anguilla. Tr. 74:25-75:2.

199. No objection. Tr. 75:3-5. Capstone administered PoolRe's insurance operations as PoolRe's officers and directors directed. See obj. to RRFF 188.

200. and 201. No objection; PRFF 83-84 are more complete.

202. thru 204. No objection, except that the participating clients were insurance companies. See also Ex. 27-J, p. RSV-5530; Ex. 125-J, p. 6.

205. Objected to as vague, imprecise and misleading. There were at least two different pools of risks that involved PoolRe. See PRFF 85. The premiums received by Petitioner under these pooling arrangements are set forth in PRFF 89. One pool included many thousands of unrelated risks that were ultimately reinsured in part by Petitioner under the CreditRe Reinsurance Arrangement. See PRFF 85-88. A second pool involved a portion of 429 to 575 (depending on the year) individual insurance policies issued by PoolRe to more than 150 insureds which were then ceded to 53-58 insurance companies, one of which is Petitioner. See PRFF 90-97.

206. No objection to a finding that all risk covered by PoolRe under the stop loss agreements and quota share agreements were ceded by PoolRe to the participating insurance companies such as Petitioner. PoolRe retained from 23 to 25% ($1.224 to $1.541 million), depending on the year, of the quota share premiums to satisfy claims under the stop loss/quota share arrangements and to pay any net amounts due to the participating insurance companies after paying claims that were due for the period. See Exs. 51-J, 53-J, 71-J, 73-J, 86-J, 88-J. Otherwise

objects to RRFF 206. The referenced portions of the record do not support RRFF 206.

207. Objected to as indefinite, unclear and misleading. Under the CreditRe Reinsurance Arrangement, Petitioner reinsured risks that had been ceded to PoolRe by CreditRe. PRFF 85-88 more accurately and completely describe the CreditRe Reinsurance Arrangement.

208. Objected to as misleading and inaccurate. Capstone, which managed PoolRe's day-to-day operations, and the Feldman Firm were familiar with the reinsurance arrangements concerning the members in the two pooling arrangements managed by PoolRe. The Feldman Firm had acted as counsel in receiving 39 taxpayer-favorable tax-exemption determination letters from Respondent for similarly situated insurance companies that had participated in the PoolRe pooling arrangements. See, e.g., Ex. 19-J, pp. RSV-5778-RSV-5779; see also PRFF 154-158.

209. Objected to as misleading and unsupported by the record. Respondent's counsel asked Dr. Doherty "[d]id you review all of the captives in the underlying companies in PoolRe?" Tr. 274: 8-9. Dr. Doherty answered "no" to this question. Tr. 274:10. Respondent interprets this to mean that Dr. Doherty said he did not review all of the captives, or their underlying risks. The cited portion of the record does not support this requested finding. Dr. Doherty testified that he "reviewed the

Capstone program in general." Tr. 275:16-18. Dr. Doherty was sufficiently familiar with the underlying risks in the Capstone program to render the opinions that he rendered. Ex. 104-P; Tr. 253:2-255:18 (discussing Dr. Doherty's review of the policies in pool by policy type for 2008, 2009 and 2010, set forth in Ex. 106-R), 255:25-266:15.

210. Objected to as inaccurate, misleading unsupported by the referenced portion of the record. Dr. Doherty testified that "all the captive programs [he had] seen have all been different" and "tailor-made to specific circumstances," and that while he did not know "how frequent" it was for a captive insurance company and a reinsurer to have the same manager, it did not "strike [him] as being an unusual solution, given the circumstances [they were] trying to solve here, the risk management problems [they were] trying to solve." Tr. 276:1-5, 276:15-20. Given the circumstances, he considered this "a sensible arrangement" and the fact that Capstone managed both PoolRe and Petitioner did not impact his opinion that the insurance arrangements here "are compatible with [his] definition of insurance." Tr. 246:19-248:3, 277:5-278:8.

211. Objected to as misleading. PoolRe is an unrelated party with respect to Petitioner. The premiums that Petitioner received under the Stop Loss Endorsements were equal in amount to the premiums that Petitioner's insureds paid under the part

of the direct written policies that were subject to the Stop Loss Endorsements, net of a reinsurance commission. PRFF 89, 92-93. Myron Steves, an insurance consulting firm, and an independent actuary, Mr. Glicksman, concluded that the premium splits between PoolRe and Petitioner during the years at issue were reasonable. PRFF 93, 94.

212. Objected to as inaccurate, misleading and inconsistent with the record. Petitioner paid claims under the direct written policies that it issued and under the other insurance arrangements with PoolRe. PRFF 98.

213. Objected to as inaccurate and misleading. Dr. Doherty testified that the absence of loss data impacted his ability to quantify the amount of risk reduction, but his opinion was that the level of risk reduction was more than sufficient to satisfy the risk distribution requirement. Ex. 104-P, pp. 14-15. Dr. Doherty opined that the level of risk distribution present in this case sailed past the standard set forth in Harper and might satisfy the 49/51% allocation standard endorsed by Rev. Rul. 2002-89, 2002-2 C.B. 984. Ex. 104-P, p. 15.

214. Objected to as inaccurate and unsupported by the record. Capstone did maintain records for Petitioner, but Messrs. Zumbaum and Weikel also maintained records for Petitioner. Tr. 133:3-13, 164:4-19, 726:3-12. Atlas and CIMA also maintained records for Petitioner in Anguilla while these

entities were the resident insurance managers in Anguilla for Petitioner. Tr. 508:1-509:20; Exs. 119-R, 121-R; PRFF 108-109; see also obj. to RRFF 215.

215. Objected to as misleading, inaccurate and unsupported by the record. Mr. Liptz testified that he understood that Petitioner's books and records were maintained in Houston, Texas, but he did not testify that there were no books and records maintained in Anguilla. Tr. 574:15-19; see also Ex. 14-J, pp. 12-13, regarding Anguilla resident insurance manager and record maintenance requirements; obj. to RRFF 214.

216. Objected to on the same grounds as set forth in the objection to RRFF 214. Mr. Zumbaum clearly testified that he maintained records related to Petitioner. Petitioner also was required by Anguilla law to maintain some records in Anguilla. See objs. to RRFF 214-215. Respondent cherry picks Mr. Zumbaum's response to a confusing question as support for RRFF 214, while ignoring his other testimony. Tr. 164:20-23.

217. No objection.

218. Objected to as confusing, inaccurate, misleading and unsupported by the record. Mr. Feldman did not testify that Capstone received only copies of Petitioner's bank statements "to compile petitioner's general ledger."

219. and 220. Objects to the implication that RRFF 219 and 220 are somehow meaningful or relevant.

220. Objects to the implication in RRFF 220 that this is somehow meaningful or relevant to some issue in this case.

221. Objected to as misleading, inaccurate and unsupported by the record. Petitioner did not pay reinsurance premiums to PoolRe for assuming risks under the PoolRe Quota Share Reinsurance Arrangement or the CreditRe Reinsurance Arrangement. See PRFF 85. This would make no sense and demonstrates Respondent's fundamental misunderstanding of the evidence, since Petitioner was reinsuring additional risk as a result of these arrangements. PoolRe was ceding and thereby paying reinsurance premiums to Petitioner for taking on the additional risk. PRFF 85-97; see also Reply to Arg. III.B.I.

222. No objection. Petitioner complied with this requirement. See PRFF 144-149.

223. No objection to a finding that Petitioner prepared financial statements for 2008, 2009 and 2010. These statements when prepared and prior to being audited are by definition "unaudited" financial statements.

224. Objected to as misleading, inaccurate and incomplete. Mr. Liptz also prepared an Independent Auditor's Report for the period from Petitioner's inception through 2009, dated May 3, 2010. Ex. 125-P. Moreover, Anguilla waived the requirement for filing an audited financial statement for the period ended December 31, 2008. See PRFF 144, n.12.

225. Objected to as misleading, inaccurate and incomplete. Much of the financial information maintained by Capstone for Petitioner was not "prepared by" Capstone.

226. Objected to as misleading, inaccurate and incomplete. Mr. Liptz, as a California-licensed CPA, also met the other requirements imposed by the Anguilla Financial Services Commission ("Anguilla Regulator"), which approved Liptz serving as an independent auditor. See PRFF 146.

227. Objected to as misleading, inaccurate and incomplete. Mr. Feldman testified that "including disbursements where we paid all the disbursements for them, the auditors and the regulators and that, probably $15,000 a quarter" for the work performed for Petitioner and the insureds. Tr. 761:6-761:25.

228. No objection.

229. Objected to as inaccurate and misleading. Petitioner's general ledgers, financial statements, income tax returns, bank statements and other records are in the record. See, e.g., Exs. 2-J, 3-J and 4-J. The manner in which these payments were treated for income tax and accounting purposes was not developed by Respondent and is not at issue here. The income tax returns of the insured affiliates are also not at issue.

230. Objected to as irrelevant. The income tax returns of the insured affiliates are not at issue here.

231. No objection.

232. Objected to as irrelevant and immaterial. RRFF 232 shows Respondent's willingness to waste the Court's time with trivial and meaningless points.

233. Objected to as irrelevant and immaterial. See also obj. to RRFF 232.

234. Objected to as inaccurate, misleading and inaccurate. PRFF 99-101 are more accurate, complete and informative.

235. Objected to as vague and misleading. The claim was filed under the 2009 Loss of Major Customer Insurance policy. See PRFF 99.

236. Objected to as inaccurate, misleading and inaccurate. Mr. Liptz followed all the procedures that he was required to follow in auditing Petitioner's books and records. See PRFF 147-148. Mr. Liptz obviously verified that the claim was made and paid. The record does not demonstrate that it was Mr. Liptz's obligation to verify the validity of the claim itself.

237. Objected to as misleading. The record demonstrates that the claim was made, settled and paid. PRFF 99-105. As Petitioner's administrator, Capstone dealt with administration of the claim.

238. No objection.

239. Objected to as inaccurate, misleading and inconsistent with the record. See PRFF 99-105.

240. Objected to as inaccurate, misleading and inconsistent with the record. See PRFF 99-105. Respondent could have questioned Petitioner's witnesses, including Messrs. Zumbaum, McNeel, and Feldman, at the trial about the claim, but declined to do so. (Entire record).

241. and 242. No objection, except that PRFF 101 is more complete and informative.

243. Objects to the implication that there is anything improper about the $150,000 payment.

244. Objects to the pettifoggery of PRFF 244. The $164,820 was paid through the issuance of two checks. See PRFF 101.

245. Objected to as misleading. See obj. to RRFF 244, which is incorporated herein by reference.

246. Objected to as incomplete. PRFF 99-104 explains clearly and completely how the claim, including the reopening and amendment of the claim, were handled.

247. thru 250. No objection.

251. No objection, except that PRFF 99-104 explains clearly and completely how the claim, including the reopening and amendment of the claim, were handled.

252. Objected to as misleading. As demonstrated by his testimony, Mr. Kinion is a very experienced and knowledgeable captive regulator. Respondent continues to try to make mountains out of molehills.

253. No objection. Mr. Kinion's report clearly sets forth what he was asked to address.

254. No objection, except that this does not necessarily identify who ultimately bore the cost for Mr. Kinion's services.

255. No objection, except that this does not necessarily identify who ultimately bore the cost for Dr. Doherty's services.

256. No objection. Dr. Doherty is a well-known and highly regarded expert regarding insurance.

257. No objection. Ms. Mead's report is in evidence and sets forth the information she considered in preparing her report. Ex. 113-P.

258. No objection.

259. No objection. Ms. Mead was not asked, nor did she need, to address the Mid-Continent methodology. Ex. 113-P.

260. No objection, except that this does not necessarily identify who ultimately bore the cost for Ms. Mead's services.

261. No objection. Ms. Mead is a licensed, experienced actuary who demonstrated her capability and professionalism in her report and her testimony.

262. No objection. Mr. Solomon was not asked to address the Mid-Continent methodology. Exs. 117-P, 147-P.

263. No objection. Mr. Solomon's reports are in evidence and set forth the information he considered in preparing his reports. Ex. 113-P.

OBJECTIONS TO ULTIMATE FINDINGS OF FACT

264. thru 275. Objected to as inaccurate and unsupported by the record.

CORRECTION/AMENDMENT OF PRFF 96

PRFF 96 should be corrected to read as follows (two separate requested findings of fact):

96.A. During each of the tax years at issue, PoolRe received approximately from $5.039 to $6.639 million in premium payments under all of its joint underwriting stop loss agreements for that year with more than 150 different insureds participating in the PoolRe Quota Share Reinsurance Arrangement covering 429 to 575 insureds (depending on the year).[2] Tr. 753:13-754:12, 811:5-21; Ex. 51-J, pp. RSV-4141-4142; Ex. 71-J, pp. RSV-4293-4294; Ex. 86-J, pp. RSV-4428-4429; Ex. 27-J, pp. RSV-5530-5531; Ex. 125-P, p. 6.[3]

96.B. During 2008 and 2009, 22.972973%, and during 2010, 25%, of the PoolRe Quota Share Reinsurance Premiums were

[2] The number of insureds in 2010 exceeded 200. Ex. 27-J, p. RSV-5530; Ex. 125-P, p. 6.

[3] These record references demonstrate that the combination of the direct written premiums paid to all the participating captive insurance companies and the stop loss premiums paid to PoolRe averaged a little over $30 million per year.

retained by PoolRe under the joint underwriting stop loss endorsements and quota share reinsurance agreements for the policy year until after the claims reporting period had expired and any claims had been paid, at which time, PoolRe would then pay any retained amounts remaining to the participating insurance companies, such as Petitioner. Ex. 27-J, pp. RSV-5530-5531; Ex. 28-P, p. 1; Ex. 29-P, p. 3; Ex. 30-P, p. 4; Ex. 51-J, pp. RSV-4137-4139, ¶ 4; Ex. 71-J, pp. RSV-4289-4291, ¶ 4; Ex. 73-J; Ex. 86-J, pp. RSV-4424-4426;[4] Ex. 88-J; Ex. 125-P, p. 6.

REPLY TO ARGUMENT

Respondent, at pages 49-50 of his brief ("R-Brf.") summarizes his arguments, which for the most part, he later addresses in the specific sections of his brief. Petitioner will address those arguments where they are reiterated and addressed. The law applicable to whether an insurance arrangement constitutes insurance is discussed in P-Brf. at pp. 63-65.

Respondent alleges without support that Petitioner "lacked transparency."[5] R-Brf., p. 50. This makes no sense. In its Form 1024 application, Petitioner disclosed the transactions at issue

[4] Exhibit 86-J was revised at trial to add a missing page, but was not otherwise revised, which had pages ending in 4424-4426 are out of order. The correct sequence is 4424, 4426, 4425.

[5] Respondent uses the word "transparency" in his brief at page 53, but only in the context of discussing this Court's opinion in Rent-A-Center. 142 T.C. 1. As used in Rent-A-Center, "transparency" is a factual reference to Rent-A-Center seeking to achieve a better understanding of the cost of its risk management function. Id. at pp. 11 and 13.

in detail to Respondent. PRFF 152, 153. Moreover, Respondent previously had issued favorable tax-exempt rulings to 39 insurance companies similar to Petitioner, all of which the Feldman Firm had assisted with the preparation of their Form 1024 applications. PRFF 155, 158. As of the date of Petitioner's Form 1024 application, the Feldman Firm had not received any adverse determinations. Id. If there is any so-called lack of transparency, it is on the part of Respondent, who has yet to explain his reasons (if any) for reversing his rulings position from that taken with the 39 favorable rulings. PRFF 160.

REPLY TO ARGUMENT I

To the extent that Petitioner has the burden of proof, Petitioner has met its burden. See P-Brf.

REPLY TO ARGUMENT II

Petitioner has addressed the economic substance issue in P-Brf., Arg. I.A.1 at pp. 64-68. Respondent cites a number of cases at pages 52-53 of R-Brf., but only Rent-A-Center addressed the existence of insurance for tax purposes.[6] Rent-A-Center held

[6] Most of the cases cited by Respondent addresses one or more transactions Respondent identified as "listed" transactions. See ASA Investerings P'ships v. Comm'r, 201 F.3d 505 (D.C. Cir. 2000), cert. denied, 531 U.S. 871 (2000) (addressing a contingent installment sale transaction that resulted in an allocation of basis to early installment payments); Frank Lyon Co. v. U.S., 435 U.S. 561 (1978) (involving a sale-leaseback transaction); Coltec Indus., Inc. v. U.S., 454 F.3d 1340 (Fed. Cir. 2000) (addressing the treatment of contingent liabilities in a corporate restructuring transaction); New Phoenix Sunrise

that: (i) the captive insurance company involved there was formed to better manage Rent-A-Center's insurance program; (ii) there was no impermissible circular flow of funds and nothing unusual about the manner in which premiums and claims were paid; and (iii) the captive was adequately capitalized. As set forth in P-Brf., Petitioner met all of these elements.

REPLY TO ARGUMENT II.A

Petitioner's insurance policies were not intended to replace the existing commercial coverage for Petitioner's insureds, as alleged at page 53 of R-Brf., but rather were intended to supplement existing coverage and fill gaps in such coverage.[7] See PRFF 80 and record references cited therein; see also obj. to RRFF 19.

Similarly, Respondent's argument that Peak's continuance of its commercial insurance somehow suggests that Petitioner's insurance arrangements lack substance is predicated on the flawed premise that Peak intended to replace its existing

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Corp. v. Comm'r, 132 T.C. 161 (2009) (involving a currency loss transaction that generated a $10 million tax loss although the economic loss was slightly more than $100,000); Palm Canyon X Invs., LLC v. Comm'r, T.C. Memo. 2009-288 (addressing a marked linked deposit transaction described in Notice 2000-44, 2000-36 I.R.B. 255). These cases merely set forth the economic substance doctrine, which provides that generally a transaction must have a non-tax purpose to be respected.

[7] To be sure, Petitioner potentially could have provided replacement coverage at some point after its formation, but this was not the purpose of Petitioner's policies during tax years 2008, 2009 and 2010.

commercial insurance after Petitioner's formation. See obj. to RRFF 19. But Petitioner's policies were intended to supplement or gap-fill, not replace, Peak's existing commercial insurance. Id. Peak's continuance of its commercial coverages after the loss in 2008 related to the roof does not mean that Petitioner was not formed for valid reasons. See obj. to RRFF 30.

That Petitioner issued no automobile coverage or that Mr. Zumbaum did not explain dropping the weather-interruption coverage in 2009 are irrelevant. R-Brf., p. 54; see obj. to RRFF 83. Respondent could have developed these issues at trial if they were somehow relevant.

Respondent repeatedly argues that Petitioner's policies focused on risks that were not real. See, e.g., R-Brf., p. 55. As stated in the Reserve Feasibility Study, Peak faced "significant risks to continued growth and profitability from multiple sources, which [were] not adequately covered by conventional insurance." Ex. 16-J, p. RSV-6015. Except for one policy (i.e., punitive wrap), the Reserve Feasibility Study also describes all of the policies Petitioner ultimately issued for each of the tax years at issue. Id.; see also PRFF 77, 79.

Respondent, without any basis, asserts that if Peak really was trying to avoid catastrophic losses, it should have sought more insurance than that provided by its commercial insurers and Petitioner. See R-Brf., p. 55. Messrs. Zumbaum and Weikel,

however, were not seeking to have Petitioner cover every potential catastrophic loss, as this likely would have been impractical or impossible in the dangerous environment that Peak operated. Entire record. Simply because an insured does not have insurance that would cover every potential loss - catastrophic or not - does not mean that the coverage that was obtained is no less insurance.

Respondent criticizes the Reserve Feasibility Study for not addressing the coverage amounts that should be employed. R-Brf., p. 55. But, that was not the Reserve Feasibility Study's purpose. PRFF 69. Nor is there any evidence to suggest that any captive feasibility study would provide an indication "regarding the coverage amounts that should be employed" if a captive were to be formed. Entire record. Notably, Respondent's expert provides no support for Respondent's argument. See P-Brf., pp. 86-87. Nor did he have any opinion concerning the Reserve Captive Feasibility Study. Id.

Respondent's argument about the amount of the premiums paid to Petitioner is addressed in reply to Argument II.C.

REPLY TO ARGUMENT II.B

Respondent alleges Petitioner received a full-year premium for policies that covered December 2008. Respondent overlooks the fact that the pricing indications that were provided by Mid-Continent were expressly for the period covered by the policies

issued for that period. Ex. 109-P (policy period 12/1/08 thru 12/31/08). Mr. McNeel also adjusted his premium recommendations for the shorter policy period. See Ex. 112-P, p. 1; Tr. 366:2-6. Also, Ms. Mead and Mr. Solomon, Petitioner's actuarial experts, also took into account the fact that the policies in 2008 were for a shortened period. See Ex. 113-P, p. 16, ¶ 3; Ex. 117-P, pp. 16-18. Mr. Solomon's expert witness report addresses the look back periods involved in the policies that he reviewed. Ex. 117-P, pp. 16-18. The 7 policies for 2008 that were addressed by Ms. Mead contained look back provisions in 4 instances.[8] See also objs. to RRFF 69, 71-76, 81, 101, 110. Thus, Respondent's assertion that there is nothing in the record explaining or documenting the premiums for 2008 is false.

Respondent also criticizes Mr. Zumbaum for not being conversant with the provisions of Petitioner's insurance policies. Mr. Zumbaum relied on the advice of Capstone and other members of his advisory team in selecting and pricing the

[8] See Ex. 36-J, p. RSV-5876 to RSV-5877 (retroactive to January 1, 2005 with an extended reporting period of four years for excess D&O liability policy); Ex. 43-J, p. RSV-5938 (retroactive to January 1, 2005 with an extended reporting period of four years for excess intellectual property package policy); Ex. 46-J, p. RSV-5890 (retroactive to January 1, 2005 with an extended reporting period of four years for excess employment practices liability policy); Ex. 47-J, p. RSV-5853 (retroactive to January 1, 2005 with an extended reporting period of three years for excess cyber risk policy).

policies that Petitioner ultimately issued.[9] PRFF 68; Tr. 166:12-15. Mr. Zumbaum's friend and mentor, Mr. Pope at MEL, had recommended Capstone to him. PRFF 58.

Respondent also reiterates his argument that Petitioner's insureds should have incurred losses before Messrs. Zumbaum and Weikel decided to form Petitioner and enter into the insurance arrangements at issue. R-Brf., pp. 7, 59. But the issue is not whether there were prior year losses; rather, it is whether there were risks present that explain the need for the insurance that was obtained. See R-Brf., p. 93 (discussing Respondent's expert's testimony that risks, not losses, are what matter). This argument has been addressed in detail in the arguments (i.e., Arg. I.A.1 at pp. 64ff., and Arg. I.A.5 at pp. 77ff.) and PRFF in P-Brf. and also in Petitioner's responses to RRFF.

Respondent also falsely asserts that there is only one document in the record regarding the claim that was filed by Peak with respect to the drop in sales to Stillwater Mining Company. See PRFF 99-104 and record references therein. The record does not reflect that there was no due diligence done on

[9] See Mich. Mut. Liab. Co. v. Hoover Bros., Inc., 237 N.E.2d 754, 757 (Ill. App. Ct. 1968), wherein the Court observed: "Insurance policies are unique in that while no contract is more commonly used, few are less frequently read. . . . It may be . . . that a document designed to cover a vast variety of risks is desirable since the cost of the insurance may then be dispersed throughout a larger group of policyholders, but it also results in a document which can be deciphered only by an expert."

whether there had been an adequate drop in sales to meet the terms of the policy. Indeed, the record reflects to the contrary that there was an investigation of the claim. See Ex. 128-P; see also PRFF 99-104. Respondent makes no mention of the fact that the payment made to Peak under the claim was included in Peak's taxable income, which is inconsistent with Respondent's theory that Petitioner was created solely to shelter taxable income. PRFF 105. Respondent asserts that Petitioner did not act like an insurance company in connection with the Peak claim and its payment, but does not cite any evidence or lack thereof that would support his unsubstantiated theory. This claim is explained in detail in P-Brf. See PRFF 99-104; see also objs. to RRFF 239-243, 246-250.

Respondent seeks to distinguish the Reserve Feasibility Study from the captive feasibility study in Rent-A-Center, suggesting that this latter study was an "extensive feasibility study." This Court in Rent-A-Center did not describe the feasibility study in that case as "extensive." 142 T.C. 1. Respondent also takes issue with the timing of the completion of the Reserve Feasibility Study. R-Brf., p. 27. These issues are addressed in the objections to RRFF 86 and 87. Mr. Zumbaum reviewed a draft of the Reserve Feasibility Study before Petitioner was formed, and conclusions contained in the study are set forth in Petitioner's application for an insurance

License in Anguilla, which was signed by Mr. Zumbaum on October 21, 2008. Tr. 128:3-23; Ex. 9-J, RSV-5633, 5684-5687. Respondent further suggests that the Reserve Feasibility Study should have addressed insurance coverage for less than 1 year. There is no evidence to support this suggestion, nor is there any evidence that there is any deficiency with the Reserve Feasibility Study. Notably, Respondent's own expert had no opinion concerning the Reserve Feasibility Study. R-Brf., p. 58; P-Brf., p. 87.

While Respondent criticizes Petitioner's documentation regarding the business operations of RocQuest and ZW, there is some documentation concerning these entities that is in evidence. See Exs. 16-J, 34-J. Moreover, even Respondent agrees that the operations of ZW were insignificant. See RRFF 18 and obj. to RRFF 18; see also PRFF 16. Also, most of RocQuest's operations primarily consisted of real estate utilized in Peak's operations. PRFF 17, 18. Peak was the primary insured under the policies at issue. PRFF 78. The record does not address how Peak, RocQuest and ZW accounted for the premiums received by Petitioner. As set forth in the objections to RRFFs, the tax returns of Peak, RocQuest and ZW are not at issue here. See objs. to RRFF 229-230.

REPLY TO ARGUMENT II.C

Respondent argues that Petitioner failed to establish that the premiums for the policies it issued were properly

determined. Petitioner has addressed the manner in which its premiums were determined in PRFF 110-128, its arguments in its brief (P-Brf., Arg. I.A.1, pp. 77ff), in reply to Argument II.B above and in its objections to RRFF 69, 81, 101, 134-135, 138, 142-143, 145-146, 149, 154, 163-164, 166, 172. Moreover, both Mr. Solomon and Ms. Mead, actuaries who testified for Petitioner as experts, made it clear that premiums can be determined without actuarial loss data. Ex. 147-P, p. 2; Tr. 479:7-480:6; see also obj. to RRFF 142. Respondent's expert, Mr. Riggin, also conceded this point on cross-examination. P-Brf., pp. 81-84; see also PRFF 137. Moreover, Respondent on at least 39 occasions has issued tax-exempt rulings to insurance companies similar to Petitioner that utilized the same premium pricing methodology utilized here. PRFF 155-158.

REPLY TO ARGUMENT II.C.1

Respondent's arguments that Mid-Continent's pricing indications are unreliable do not have merit. Mid-Continent - a large, independent, reputable managing general insurance company with seasoned underwriting professionals familiar with premium pricing methodologies - provided a pricing indication for each of Petitioner's policies for each of the years at issue.[10] PRFF

[10] At page 62 of R-Brf., Respondent erroneously asserts that there is no indication for the 2009 and 2010 "Legal Expense Reimbursement" policy. But the indication numbers for that policy are stated in each of the pricing indications under

107, 115, 116, 120-122; Ex. 94-J; Tr. 324:6-10. The record further reflects that Mid-Continent had a long history of working closely with Capstone, periodically reviewing available information at Capstone's offices and meeting with and discussing pricing issues with Mr. McNeel. Tr. 342:17-343:12; see also Ex. 94-J; Ex. 19-J, p. RSV-5756-5757; Tr. 324:6-10. The record further reflects that Mr. McNeel also carefully analyzed the pricing information that Mid-Continent had historically provided.[11] PRFF 111-114, 122. Petitioner's 2009 Form 1024 filed with Respondent also described in detail the premium pricing methodology Petitioner utilized. PRFF 152-153; see also Ex. 19-J, pp. RSV-5755-5756. Also, Respondent had already approved the same pricing methodology when he issued 39 tax-exempt determination letters to insurance companies similar to Petitioner, also utilizing this same methodology. PRFF 154-156, 158, 160. Petitioner also presented the expert testimony and reports of two actuaries who testified that the premiums charged by Petitioner in the years in issue were reasonable. PRFF 128. Against this backdrop, Respondent complains that Petitioner's premium pricing methodology is unreliable.

"Special Risk - Expense Reimbursement" because the coverage that policy provided was previously provided under the 2008 Expense Reimbursement Policy. PRFF 77, 79; Ex. 109-P.

[11] The premiums charged by Petitioner were always equal to or less than the premiums set forth in the pricing indications provided by Mid-Continent. PRFF 121.

Respondent argues that the Mid-Continent pricing indications for excess cyber risk, pollution liability and intellectual property package policies assume that there is underlying coverage for this pricing indication. R-Brf., p. 61. The record does not demonstrate that the pricing indications make any incorrect assumptions. Petitioner's insureds had no pollution liability coverage other than that provided by Petitioner. See Ex. 16-J, p. RSV-6021. Assuming arguendo Respondent were correct, this would mean that Petitioner did not charge enough for this insurance, since any underlying coverage logically should reduce the cost of this insurance.

REPLY TO ARGUMENT II.C.II

Respondent asserts that Petitioner's premium pricing methodology is deficient notwithstanding that Respondent issued 39 favorable tax-exempt determinations for insurance companies that used the same methodology. See PRFF 109-128. Mr. McNeel and Capstone with the assistance of others made a significant effort to recommend correct premiums to Petitioner. Id. Mr. McNeel's underwriting efforts would certainly be a way of evaluating Mid-Continent's pricing indications in a manner that would reflect whether such indications were substantially different from the pricing advice previously provided for similar coverage.

Mr. McNeel explained in detail how he prepared the rating worksheets that are in the record. See PRFF 110-128. Respondent

quibbles with these worksheets because the premiums set forth thereon do not precisely match the premiums that were ultimately charged in all cases. But Respondent knows why the premiums did not precisely match: in setting premiums, after considering the input and advice from Capstone and others, Petitioner sometimes made downward (but never upward) adjustments from what was recommended in Mid-Continent's pricing indications. PRFF 121.

Not surprisingly, there is no evidence that will satisfy Respondent's now overly stringent and unworkable view of what is required to set premiums in the absence of substantial amounts of loss data from which actuarial projections can be made to predict losses at a high level of confidence.[12]

REPLY TO ARGUMENT II.D

Respondent asserts that the documentation presented at trial is de minimis or deficient, but he does not demonstrate how the documentation is deficient. Mr. Zumbaum did testify that by setting up Petitioner he would be able to process claims quicker and get better service. Tr. 183:17-25. Mr. Zumbaum also

[12] At the conclusion of the trial, the Court asked the parties to address two issues. One of those issues was whether premiums could be determined in the absence of loss data. Respondent appears to concede that loss data is not required because other methods can be used to compute a premium, and yet in the same breath, he confusingly states that all methods use historical loss data. R-Brf., p. 45, 55, 59, 60. Respondent's position on this issue is thus unclear. In the absence of loss data, premiums can be computed (e.g., autonomous vehicle liability). See, e.g., Ex. 147-P; Tr. 271:24-272:22, 1038:5-1039:4.

testified that Peak was growing and had more exposure as a result of having more mining equipment in deep underground mines. Tr. 185:5-10. The Reserve Feasibility Study also set forth that there was insurance coverage that Petitioner's insureds' commercial insurers did not provide. Ex. 16-J, pp. RSV-6014-6017. Peak was operating in a dangerous business and was located in an environmental superfund site and a flood plain, which Respondent would prefer to ignore. See, e.g., PRFF 43-45. Against this backdrop, Respondent quixotically argues that there should be an adverse inference drawn against Petitioner for some unknown reason.

Respondent argues that Petitioner's policies are "cookie-cutter" policies produced by Capstone for its clients, although there is no evidence to support that statement. Even if the policies were similar to other policies, they are still insurance policies. If the 2008 D&O policy is somehow deficient simply because it does not have a schedule completed after it was in force, this would not mean that Petitioner did not have such coverage or that Petitioner is not an insurance company. See obj. to RRFF 93. Unsurprisingly, disputes between insureds and their commercial insurers involving policies with missing schedules or drafting mistakes have been extensively litigated.[13]

[13] See Crouch § 1.1 ("[T]he law of insurance . . . is now a massive composition of both common law and an ever-growing

Respondent further argues that the clerical errors in the schedules to Petitioner's 2008 tax liability and regulatory changes policies somehow invalidate these policies. R-Brf., p. 65. This is a ridiculous argument. The clerical errors aside, the policies and the accompanying binder clearly identify the insureds by name (i.e., Peak, RocQuest and ZW) and the policy numbers (i.e., RSRV-TAX-081 and RSRV-REG-081), and the errors have been corrected. Exs. 35-J, 42-J, 44-J, 49-J, 50-J; Stip. ¶¶ 55-57; Tr. 5:20-8:1; entire record. See objs. to RRFF 94-99.[14]

As discussed in reply to Arguments II.C.I and II.C.II, contemporaneous underwriting documentation in the record, together with testimony, demonstrates how Petitioner's premiums were determined; Petitioner's insurance binders and policies are in evidence; the record establishes the amount of reinsurance premiums that Petitioner received/earned each year;[15] the record

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number of statutes and administrative regulations."); id. § 242.43 (policy issued in wrong name); see also 44 C.J.S., Insurance §§ 392 ff. (interpretation of policy), 537ff. (reformation of insurance contracts), and § 2069ff.(actions on policies) (2017); 43 Am Jur. 2d, Insurance § 358ff. (reformation of insurance contract)(2017).

[14] Even assuming arguendo these policies were somehow deficient because of the issues Respondent raises, Petitioner and the other parties to such policies intended such policies to be insurance policies, and such policies are thus not invalid. Alternatively, if such policies were invalid, more than 50% of Petitioner's gross receipts would still be insurance premiums.

[15] See Reply to Arg. III.B.I regarding Respondent's argument that Petitioner failed to establish that it paid reinsurance premiums

establishes the premiums charged and the claims paid; and the changes in the coverage are easy to determine from the record. Respondent further complains that there are no engagement letters, or invoices, or other contracts describing the services provided by Capstone or CIMA to Petitioner. There is substantial testimony and documentation concerning the services that Capstone, Atlas and CIMA and others provided to Petitioner. See Ex. 9-J, 13-J, 17-J, 19-J, 22-J thru 27-J, 28-P, 29-P, 30-P, 119-R, 121-R, 122-R, 125-P; entire record. There is substantial testimony regarding the fact that Capstone and CIMA administered Petitioner's insurance-related activities. There can be little question that Capstone maintained records for Petitioner; worked with an independent auditor in connection with the auditor's preparation of audited financial statements; assisted with insurance-regulatory filings, the preparation of insurance policies and related documentation, the determination of premiums to be charged, the administration of claims; and provided additional assistance that allowed Petitioner to conduct its activities as a bona fide insurance company. Respondent also overlooks all of the filings with Respondent that provides substantial information concerning Petitioner's operations, including tax returns, the application for tax-

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to PoolRe. As set forth therein, Petitioner was the recipient, not the payor, of reinsurance premiums.

exempt status and the election under § 953(d). (Exs. 2-J, 3-J, 4-J, 18-J, 19-J). Moreover, Respondent completely ignores that he had issued 39 determination letters affirmatively determining that 39 similarly situated insurance companies operated in a similar fashion and issuing similar insurance policies with premiums determined in the same manner as Petitioner, were insurance companies for tax purposes. Respondent's complaints about the evidence are disingenuous and lack substance and merit. Respondent's unsupported allegation that Petitioner was created for the sole purpose of avoiding federal income tax is also bogus and unsupported. The evidence demonstrates that Petitioner operated as a bona fide insurance company.

REPLY TO ARGUMENT III

The introduction to Respondent's argument appears merely to recite the elements of insurance, although Respondent's brief changes the order of the elements of insurance from how they are referenced in Respondent's cited cases. See, e.g., Rent-A-Center, 142 T.C. 1 at 12-13.

REPLY TO ARGUMENT III.A

Contrary to Respondent's argument, Petitioner's insurance arrangements satisfy the commonly accepted notions of insurance. See P-Brf., Arg. I.A.5 at pp. 77ff.

Respondent argues that Petitioner's premiums were not determined at arm's length and were not reasonable in relation

to the risk of loss. R-Brf., p. 70. Petitioner's premiums were properly determined. See Reply to Args. II.B, II.C.I and II.C.II.

Respondent also complains that there was no feasibility study as to why RocQuest and ZW needed excess insurance. However, the feasibility study that was performed included RocQuest and ZW. Ex. 16-J, RSV-6013. ZW's only activity was its small lending operation, and RocQuest owned the real estate that Peak utilized to conduct its operations. PRFF 16-18; RRFF 18. Also, the record shows that Peak was the primary insured and that RocQuest and ZW were added as additional named insureds consistent with insurance industry treatment, which includes commonly owned businesses in the same policies. PRFF 78.

Nowhere does Respondent address this Court's holding in Harper that premiums that were not determined by reference to actuarial determined loss projections were nevertheless insurance premiums. 96 T.C. at 50. This Court expressly stated that "[s]uch rates were not determined by reference to actuarially determined loss projections." Id.

Nowhere does Respondent address his issuance of 39 favorable tax-exempt determinations for insurance companies similarly situated to Petitioner that utilized the same insurance management structure, premium pricing methodology, reinsurance arrangements, and participated in the same risk

pools, all of which was meticulously described in the underlying ruling requests. See PRFF 152-160; see Ex. 19-J (289 pages). Petitioner's operations were described in detail in a ruling request filed with Respondent in 2009. PRFF 152-153. The other applications in which Respondent issued 39 favorable tax-exempt determinations contained similar descriptions. PRFF 158. If Respondent now believes that the manner in which the premiums were determined is inconsistent with the common notions of insurance, he should be required to offer something more than ipse dixit to support his 180° shift. Transco Exploration Co. v. Comm'r, 949 F.2d 837, 840 (5th Cir. 1992) ("Although the Commissioner is entitled to change his mind, he ought to do more than stride to the dais and simply argue in the opposite direction.").

Respondent further suggests that because Messrs. Zumbaum and Weikel were officers and direct or indirect owners of the insureds and Petitioner that somehow the contracts between the insureds and Petitioner were invalid. Respondent's position directly contravenes the Supreme Court's holding in Moline Properties v. Commissioner, 319 U.S. 436 (1943). See also Kidde Indus., Inc. v. U.S., 40 Fed. Cl. 47, 50, 55, 81 (1997), and Respondent's own published rulings. See, e.g., Rev. Rul. 2002-90, 2002-2 C.B. 985. Moreover, this is the case with many captive insurance company arrangements that have been approved

by this and other Courts. See, e.g., Rent-A-Center, 142 T.C. 1 (insurance company and insureds owned by the same parent corporation); Securitas Holdings, Inc. v. Comm'r, T.C. Memo. 2014-225. Also, Respondent publicly stated long ago that he would no longer follow his much maligned and discredited economic family doctrine.[16]

Respondent also assails Petitioner's capitalization arguing that Petitioner was inadequately capitalized during the years at issue, while at the same time inconsistently arguing that Petitioner's insureds did not have a practical risk exposure that would warrant the need for Petitioner's insurance. Compare R-Brf. p. 71, ¶ 2 with R-Brf., p. 76, ¶ 3. Respondent's rudderless position herein is arbitrary and capricious.

The record demonstrates that Petitioner satisfied the statutory capitalization requirements imposed by Anguilla and also satisfied Mr. Kinion's rule-of-thumb that regulators often use, which is that Petitioner's premium-to-surplus ratio was at least 3 to 1 during the years at issue. PRFF 150. As this Court has recognized, satisfaction of the insurance regulatory capital requirements is sufficient to meet the capitalization requirement for purposes of addressing the commonly accepted notions of insurance. See Avrahami v. Comm'r, 149 T.C. No. 7

[16] See Rev. Rul. 77-316, 1977-2 C.B. 53, obsoleted by Rev. Rul. 2001-31, 2001-1 C.B. 1348.

(slip. op. at 80-81) (Aug. 21, 2017). Moreover, Petitioner was solvent at all times during the years in issue and did not have any difficulty in meeting its obligations.[17]

Respondent is correct that Petitioner did not have any employees or officers or directors who were not also officers and directors of Peak. As Mr. Snyder made clear, this is common for captive insurance companies, large and small. Tr. 76:24-77:14. See Securitas, T.C. Memo. 2014-225 at T.C.M. (RIA) at pp. 1625 and 1632 finding that an insurance company with no employees nevertheless met the commonly accepted notions of insurance. Contrary to Respondent's assertion, however, this did not leave just Messrs. Zumbaum and Weikel to manage Petitioner's insurance operations. As Mr. Snyder further testified, the vast majority of captive insurance companies manage their affairs through a contracted manager. Tr. 76:24-77:14; see Rent-A-Center, 142 T.C. at 4-6 (captive insurance company contracted for management services and claims administration provided by third parties specializing in providing such services). Also, because of the broad nature of some of the issues facing captive insurance companies, owners of such companies are heavily

[17] Respondent also appears to assert that Petitioner could not have satisfied the maximum amount of claims that could be asserted under Petitioner's policies. R-Brf., p. 71, ¶ 1. Even Respondent's own expert does not espouse such a ridiculous position, which would defeat the purpose of insurance. Tr. 944:24-945:24; Ex. 140-P, p. 3 ("The premiums cannot match the maximum limit of liability.").

dependent on outside service providers (e.g., underwriters, adjusters, managers, etc.). Ex. 16-C, p. RSV-6011, ¶ 3; see Tr. 266:24-267:18. To suggest that Messrs. Zumbaum and Weikel themselves needed to have such skills is ludicrous.

The record is clear that Petitioner was a validly formed insurance company, existing and operating under the laws of Anguilla. See PRFF 151; see also P-Brf., pp. 77ff.

REPLY TO ARGUMENT III.B

Respondent argues that Petitioner did not distribute risk. Respondent cites Harper but fails to comprehend its significance as it relates to the present case. Harper held that risk distribution is present when an insurer receives 29% or more of its total premiums from unrelated insureds. P-Brf., pp. 74ff. The reinsurance premiums received from PoolRe represented more than 30% of the total premiums received by Petitioner in each tax year at issue. See PRFF 89. Respondent fails to address why there is no risk distribution here under Harper.

REPLY TO ARGUMENT III.B.1

Respondent argues that Petitioner failed to substantiate any payment to PoolRe for Petitioner's participation in the PoolRe Quota Share Reinsurance Arrangement. This demonstrates Respondent's fundamental misunderstanding of the evidence: Petitioner did not pay, but rather, received the PoolRe Quota Share Reinsurance Premiums in exchange for assuming a certain

amount of blended or pooled risks that PoolRe ceded to Petitioner.[18] PRFF 88-97; see also obj. to RRFF 221. The premiums Petitioner received are reflected in its revenue for each of the years at issue. PRFF 89.

REPLY TO ARGUMENT III.B.II

Respondent incorrectly suggests that there is insufficient evidence in the record regarding the CreditRe Reinsurance Arrangement. The Co-Insurance Contracts with PoolRe under which the reinsurance premiums were paid to Petitioner during the tax years 2008, 2009 and 2010 are stipulated exhibits. Stip. ¶¶ 60, 74, 81, Exs. 51-J, 72-J, 87-J. Other evidence in the record establishes that Petitioner received premiums of $69,500; $76,500 and $66,000 for each of the tax years 2008, 2009 and 2010. See PRFF 85-89. Petitioner also paid losses under the reinsurance arrangement during the years at issue. PRFF 99. The underlying risk coverages that Petitioner reinsured through PoolRe as part of the CreditRe Reinsurance Arrangement were risks insured by Lyndon as the original ceding company. See PRFF 86. This reinsurance is also described in detail in Petitioner's Application for Recognition of Exemption under § 501(a) filed with Respondent in 2009. See PRFF 152-153. Id. Similar reinsurance had been the subject to 39 favorable rulings by

[18] Respondent devotes an entire section in his brief, complete with a heading summarizing his misguided argument.

Respondent to the effect that the insurance companies that wrote such reinsurance were considered to be insurance companies by Respondent. PRFF 155-160. Mr. Fagg, CreditRe's owner and an actuary, also testified at the trial herein. Contrary to Respondent's statements, and as outlined herein, Petitioner did not just present only testimony on this issue. Respondent did not offer any evidence to suggest that the reinsurance arrangements with CreditRe through PoolRe were anything other than valid reinsurance arrangements.

Respondent's alternative argument that the risk involved in the CreditRe Reinsurance Arrangement is de minimis also misses the mark. As Respondent knows, the amount of risk has substance because he issued favorable tax-exempt rulings to 39 similarly situated insurance companies that used the same or similar pooling arrangement. PRFF 155-160. Respondent ignores this Court's decision in Harper, in which this Court held that a captive insurance company receiving 29% of its premiums from unrelated parties had sufficient risk distribution such that its insurance arrangements constituted insurance for tax purposes. Despite recognizing that Securitas and Rent-A-Center both favorably cited Harper, Respondent inexplicably fails to address Harper in this context.

Respondent's suggestion that RocQuest and ZW were not insured under Petitioner's policies is inconsistent with the policies themselves and other evidence herein. PRFF 78.

REPLY TO ARGUMENT III.C

There is no support for Respondent's argument that risk shifting is not present on the grounds that Petitioner's capital was not established based on contingent historical losses or unexpected future losses. There is no such legal requirement, and there is no evidence in the record to support Respondent's newly created, vague and unworkable test. Petitioner addresses the existence of risk shifting in its brief at pages 73-74 (Arg. I.A.3). See also P-Brf., Arg. I.A.5, pp. 77-80.

REPLY TO ARGUMENT III.D

Respondent asserts that Petitioner's policies did not cover an insurance risk on the grounds that such coverage was unnecessary or overpriced. Thus, Respondent appears to concede that such risks are the type of risks that constitute insurance risks. Petitioner addressed whether its policies covered insurable risks in P-Brf. Id. at Arg. I.A.2, at pp. 68-73; see also PRFF 80; obj. to RRFF 19 concerning the fact that Petitioner's coverages were supplemental to and not duplicative of the insureds' existing coverages. Petitioner addressed the reasonableness of the premiums that were paid to Petitioner in PRFF 128 and in reply to Arguments II.B and II.C. See also PRFF

110-128. As set forth in PRFF 128, the reasonableness of the premiums was independently confirmed by two actuaries who testified at the trial herein. Id. Respondent offered no evidence to refute Petitioner's evidence. Indeed, Respondent's own expert admits the vast majority of policies written cover the type of risks that are insurable risks. See Ex. 136-R.

REPLY TO ARGUMENT IV

Respondent concedes that Petitioner's gross receipts were less than $600,000 per year. See R-Brf., p. 78. At pages 61-98 of its brief, Petitioner addresses Respondent's argument that none of Petitioner's gross receipts constituted insurance premiums and that more than 50% of its gross receipts were not insurance premiums. At page 98 of its brief, Petitioner addresses Respondent's argument that Petitioner's § 953(d) election is invalid.

REPLY TO ARGUMENT V

Respondent's argument that Petitioner's premium income is taxed as income even if it is not premium income is addressed in P-Brf. at Argument I.A.7 at pp. 96ff.

RECENT CASE LAW

Petitioner expects that Respondent will cite Avrahami as support for his position. That case is inapposite.

In Avrahami, this Court held that premiums paid by the Avrahamis' companies to Feedback, a company Mrs. Avrahami

wholly-owned, were not deductible as business expenses because Feedback was not an insurance company, based on a finding of no risk distribution and no commonly accepted notions of insurance in the arrangements at issue. Id. (slip. op. at 65, 86-87).

This Court held that Feedback's receipt of premiums from Pan American for reinsuring terrorism insurance policies written by Pan American did not provide risk distribution for Feedback under Harper because Pan American was not an insurance company.[19] Id. (slip. op. at 75). To the Court, the reinsurance premiums Feedback received approximated the amount Feedback could receive and still remain under the then-applicable $1.2 million premium ceiling in § 831(b) for Feedback's underwriting income to be tax-exempt. Id. (slip. op. at 85). The Court found the premium for Feedback's insured's terrorism coverage was approximately 80 times the premium rate charged for the underlying primary commercial terrorism coverage bought by the same insured. Id. (slip. op. at 70). It also found that the Pan American policy exclusions rendered the policy virtually certain to never respond to any loss event, and that the policy gave the insurer the right to pay claims with a promissory note payable over

[19] Respondent has ruled that the existence of risk distribution is to be determined by looking through to the underlying risks that are reinsured in the case of reinsurance. Rev. Rul. 2009-26, 2009-38 I.R.B. 366. Here, this would mean evaluating the risks that Petitioner reinsured for the existence of risk distribution, not whether PoolRe was an insurance company (even though it was). See Ex. 19-J, p. RSV-5778.

three years. Id. It also was unconvinced that Pan American could respond to a claim if the reinsurers did not pay the claim because Pan American paid 97.5% of the premiums to the reinsurers midway through the policy period and otherwise lacked sufficient funds to pay any such claim. Id. (slip. op. at 73, 75). Based on these findings, the Court held that Pan American was not a bona fide insurance company. Id. (slip. op. at 75).

This Court further held that Feedback's arrangements were not within the commonly accepted notions of insurance because Feedback had more than 65% of its assets in long-term unsecured loans to an entity Mrs. Avrahami owned with no required interest payments for several years. Those loans were not timely disclosed to insurance regulators, in violation of the insurance domicile's regulations. Id. (slip. op. at 79-80). It also noted that there were no claims made until after Respondent began his examination, and some of the claims were paid even though they were untimely under the policies. Id. (slip. op. at 78-79, 85-86). It also held that the Avrahamis had failed to support the premiums Feedback charged on its direct written policies. Id. (slip. op. at 84-85).

Here, Petitioner was created for a legitimate purpose and complied with all Anguilla regulatory requirements. There is substantial evidence supporting the premiums that were charged and no evidence to the contrary. The reinsurance arrangements

are fully supported by the evidence. Petitioner paid claims under both the direct written policies and the reinsurance arrangements, and did not do so with promissory notes. Nor did Petitioner make any loans. Respondent issued tax-exempt determinations for 39 insurance companies similar to Petitioner with insurance arrangements similar to Petitioner's. PRFF 155-160. Multiple experts also testified that Petitioner's insurance arrangements constituted insurance from accounting, insurance industry and regulatory perspectives. PRFF 170-173. These experts directly addressed the pooling or risk distribution effects under these insurance arrangements.[20] Exs. 97-P, 103-P; Ex. 104-P, pp. 3-4, 11-12, 14-19, 26-28, Figs. 1, 2 and 3; Exs. 114-P, 130-P. One of Petitioner's experts, Dr. Doherty (who also testified for the prevailing party in Harper), opined that the level of risk distribution present in this case sailed past the standard set forth in Harper. Ex. 104-P, p. 15. He also testified that such risk pooling arrangements are normal insurance industry arrangements. Tr. 255:25-266:15. Petitioner's other experts, Mr. Snyder, who served as a director of PoolRe,

[20] See also PLR 201219011 (May 11, 2012) and PLR 201224018 (Jun. 15, 2012) (Respondent approved the use of quota share pooling arrangements to blend risks where the premiums ceded were roughly equivalent to the premiums for the blended risk assumed); cf. I.R.C. § 6110(k)(3)(rulings generally not precedential). But see Transco Exploration Co., supra (Respondent cannot ignore rulings since they are reflective of his legal position and interpretations).

and Mr. Fagg, who was the owner of CreditRe, were also very familiar with the pooling arrangements. Ex. 96-J, 97-P, 114-P; Tr. 48:24-25. Under the reinsurance arrangements, PoolRe maintained millions of dollars to pay any claims until well after the time for making such claims had expired, which itself was six months after the respective policies expired. Revised PRFF 96A and 96B. Respondent did not seriously challenge any of this evidence. Avrahami has nothing to do with the present case.

CONCLUSION

Petitioner is an insurance company for Federal income tax purposes and is exempt from tax under § 501(c)(15).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Reply Brief for Petitioner was served on counsel for Respondent by delivering the same by eService and United States Postal Service, first class mail, addressed as follows:

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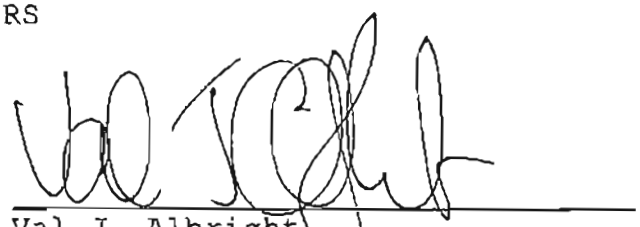

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