

1 ROGER J. BROTHERS, BAR NO. 118622  
rbrothers@bpbsllp.com  
2 HORACE W. GREEN, BAR NO. 115699  
hgreen@bpbsllp.com  
3 CONNOR M. DAY, BAR NO. 233245  
cday@bpbsllp.com  
4 BUCHMAN PROVINE BROTHERS SMITH LLP  
2033 N. Main Street, Suite 720  
5 Walnut Creek, California 94596  
Telephone: 925 944 9700  
6 Facsimile: 925 944 9701

7 Attorneys for Plaintiff Mike Rose’s Auto Body, Inc.

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10 MIKE ROSE’S AUTO BODY, INC.,

11 Plaintiff,

12 v.

13 APPLIED UNDERWRITERS CAPTIVE  
14 RISK ASSURANCE COMPANY, INC.,

15 Defendant.

Case No.

**COMPLAINT FOR DECLARATORY  
RELIEF; RESCISSION; FRAUD; BREACH  
OF CONTRACT; AND UNFAIR BUSINESS  
PRACTICES**

16 Plaintiff Mike Rose’s Auto Body, Inc. (“MAB”), by and through counsel, hereby alleges:

17 **PARTIES, JURISDICTION AND VENUE**

18 1. MAB is a corporation organized and existing under the laws of California, which  
19 maintains its principal place of business in Concord, California.

20 2. MAB is informed and believes, and based thereon alleges, that Applied  
21 Underwriters Captive Risk Assurance Company, Inc. (“Applied Underwriters”) is a corporation  
22 organized and existing under the laws of the British Virgin Islands, which maintains its principal  
23 place of business in Omaha, Nebraska and which does business in California.

24 3. This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332 (a),  
25 because complete diversity of citizenship exists between the parties and the amount in  
26 controversy exceeds \$75,000.00.  
27  
28

COMPLAINT FOR DECLARATORY  
RELIEF; RESCISSION; FRAUD; BREACH  
OF CONTRACT AND UNFAIR BUSINESS

BUCHMAN PROVINE BROTHERS SMITH LLP  
ATTORNEYS AT LAW  
WALNUT CREEK, CA

1           4. Pursuant to 28 U.S.C. § 2201 (a), this court may declare the rights and other legal  
2 relations between MAB and Applied Underwriters that are in actual controversy.

3           5. Venue is proper in the Northern District of California pursuant to 28 U.S.C. § 1391  
4 (b) because a substantial part of the events giving rise to the claims alleged in this action occurred  
5 in this District.

6           **FACTS COMMON TO ALL CAUSES OF ACTION**

7           6. MAB is a business which specializes in automobile body repair. MAB is subject  
8 to the laws of the State of California, which require MAB to maintain worker's compensation  
9 insurance.

10          7. In September 2009, MAB received from Applied Underwriters a proposal to  
11 provide worker's compensation insurance coverage to MAB through Applied Underwriters'  
12 "Equity Comp" program. This proposal included a Workers' Compensation Program Summary  
13 and Scenarios worksheet.

14          8. The proposal included the following representation:

15               "Guaranteed cost workers' compensation insurance policies will be issued by  
16 admitted companies in conjunction with this program, and the rating factors for  
17 these policies are listed below. All issuing companies are part of the North  
18 American Casualty Group, rated A by A.M. Best, and are affiliates of Applied  
19 Underwriters Inc. a member of Berkshire Hathaway Inc. A Profit Sharing Plan,  
20 effected through a reinsurance transaction that is separate from the guaranteed  
21 costs policies and independently rated, also applies."

22          9. The proposal described the "Profit Sharing Plan" as follows:

23               "The Profit Sharing Plan is a reinsurance transaction separate from the guaranteed  
24 cost policies. Your risk retention is created by your participation in, and cession of  
25 allocated premiums and losses to our facultative reinsurance facility, Applied  
26 Underwriters Captive Risk Assurance Company (AUCRA). AUCRA is a  
27 subsidiary of Applied Underwriters Inc., a member of Berkshire Hathaway Inc.  
28 Your retention is held in a segregated, protected cell which is not liable for the

BUCHMAN PROVINE BROTHERS SMITH LLP  
ATTORNEYS AT LAW  
WALNUT CREEK, CA

1 debts and liabilities of any other AUCRA cell. This Profit Sharing Plan is not a  
 2 filed retrospective rating plan or dividend plan, and nothing contained herein is to  
 3 be so construed. This Profit Sharing Plan requires a minimum three year  
 4 contractual commitment from you with significant penalties for early cancellation.  
 5 Based upon the annual payroll by class code information you provided, if you have  
 6 no claims, your total net, three-year cost will be \$ 308,796. If you have claims,  
 7 your final, net three-year cost will vary between this minimum cost and a three-  
 8 year, maximum possible cost of \$ 1,150,887.

9  
 10 Your actual, final net cost will be determined using the ultimate costs of your  
 11 client's claims along with the factors and tables set forth in your client's  
 12 Reinsurance Participation Agreement (Final Agreement) which specifies how a  
 13 portion of the premiums and losses occurring under the guaranteed cost policies  
 14 are ceded to AUCRA for further credit to your client's cell account."

15 10. The Reinsurance Participation Agreement ("RPA") referred to in the proposal was  
 16 not provided to MAB with the proposal. Applied Underwriters did not provide MAB with the  
 17 RPA until after MAB agreed to purchase a policy of workers' compensation insurance from  
 18 Applied Underwriters. However, at the time the proposal was submitted to MAB, Applied  
 19 Underwriters made the following representations to MAB;

- 20 • The program allowed for efficient use of collateral, because risk funding was paid  
 21 in real time based on MAB's individual developed loss experience;
- 22 • Based on MAB's individual claims experience, the program could provide  
 23 immediate cash flow benefits and financial reward, unlike other plans that require  
 24 waiting for cumbersome retrospective or uncertain dividend calculations that can  
 25 run for years beyond policy expiration;
- 26 • MAB could terminate its agreement with Applied Underwriters and liquidate the  
 27 cell account if all claims were closed and three years had elapsed since the  
 28 expiration of all of the policies;

- Upon liquidation of the cell account, Applied Underwriters would refund to MAB any funds remaining in the cell account.

11. Based upon these representations, MAB purchased worker's compensation insurance from Applied Underwriters through the Equity Comp program. The period of this coverage was October 1, 2009 – September 20, 2012.

12. Subsequently, MAB entered into a RPA with Applied Underwriters. The RPA provided, in pertinent part, as follows:

- The initial term of the RPA was for three (3) years (the "Active Period");
- All existing obligations would remain in force from the end of the Active Period until Applied Underwriters no longer had any potential or actual liability to the "issuing insurers" with respect to the policies reinsured by Applied Underwriters;
- Applied Underwriters would calculate "Loss Development Factors" for each loss which would be incurred or continuing after the end of the Active Period;
- Applied Underwriters would establish a segregated "cell" for payment of claims for workers' compensation benefits by MAB employees;
- MAB's "cell" would not be liable for the debts and obligations of any other "cell";
- MAB would pay a basic annual premium, referred to as the "Estimated Annual Loss Pick Containment Amount" and calculated based on rates per \$100 of payroll;
- MAB would also pay into the "cell" an amount equal to the Estimated Annual Loss Pick Containment Amount multiplied by ten percent (10%) in year one, multiplied by another ten percent (10%) in year two, and by another ten percent (10%) thereafter;
- MAB would also maintain in its "cell" an additional capital deposit equal to the lesser of the "Ultimate Loss" or the "Cumulative Aggregate Limit";
- MAB, through the funds in the "cell" would be responsible for all payments of worker's compensation benefits up to a cumulative annual limit calculated as 0.9500 of the Loss Pick Containment Amount;

- 1 • These amounts were subject to change in Applied Underwriters' sole discretion;
- 2 • Applied Underwriters had the ability to liquidate a cell if i) all claims were closed
- 3 and three (3) years had elapsed since the expiration of the RPA; ii) MAB's
- 4 maximum liability had been reached and three (3) years had elapsed since the
- 5 expiration of the RPA; iii) the amount of paid losses allocated to the cell exceeded
- 6 MAB's maximum liability; iv) seven (7) years had elapsed since the expiration of
- 7 the RPA; or v) Applied Underwriters deemed itself insecure with respect to
- 8 MAB's ability or willingness to fulfill its obligations under the RPA.

9 13. Accordingly, under the RPA, MAB was not participating in a risk pooling  
10 arrangement with other Applied Underwriter insureds. Instead, MAB was solely responsible for  
11 depositing sufficient amounts into its "cell" to pay all claims submitted by any and all MAB  
12 employees.

13 14. Accordingly, any purported "coverage" under any guaranteed cost worker's  
14 compensation insurance policy issued by an admitted company was nullified and superseded by  
15 the RPA.

16 15. MAB is informed and believes, and based thereon alleges, that the RPA has never  
17 been submitted to the California Department of Insurance for approval and use within the State of  
18 California.

19 16. As of September 30, 2012, MAB had paid Applied Underwriters well over  
20 \$800,000. As of that same date, the Loss Pick Containment Amount totaled approximately  
21 \$780,000. The total dollar amount of claims made under the coverage as of September 30, 2012  
22 was \$269,075.

23 17. The program in which MAB participated starting in 2009 expired in 2012, and all  
24 claims made under that coverage were paid. All claims under the plan were closed as of February  
25 28, 2013. MAB has made a demand on Applied Underwriters for the amount of money  
26 remaining in the "cell," approximately \$70,000. Applied Underwriters has failed and refused to  
27 remit this amount or any portion thereof.

28 18. In September 2012, MAB received another Producer's Quote for participation in

1 the Equity Comp program for the period 2012-2015. This proposal included a “Scenario  
2 Worksheet” which projected, for the three (3) - year period, a lowest cost of \$403,553 and a  
3 highest cost of \$1,524,494.

4 19. MAB entered into another contract for worker’s compensation insurance with  
5 Applied Underwriters in 2012. The decision was based on the producer’s quote estimating the  
6 three (3) year minimum cost as \$403,554 and the three (3) - year maximum costs as \$1,524,495.  
7 The quote stated that “[s]ince the ultimate cost of claims cannot be known in advance with  
8 certainty, loss development factors as set forth in the Final Agreement will be applied to all  
9 claims to estimate their ultimate cost.” However, the quote did not include the methodology for  
10 calculation of the loss development factors, and at the time of the quote MAB did not receive the  
11 “Final Agreement” or any other documents setting forth this calculation.

12 20. As before, this policy was also modified and superseded by a RPA between MAB  
13 and Applied Underwriters (“the 2012 RPA”). The stated purpose of the 2012 RPA was to allow  
14 MAB to “share in the underwriting results of the Worker’s Compensation policies of insurance  
15 issued for the benefits of [MAB] . . .” The 2012 RPA had a three (3) year term (the “Active  
16 Term”). However, MAB’s obligations under the 2012 RPA did not end upon expiration of the  
17 Active Term, but instead continued until Applied Underwriters “no longer has any potential or  
18 actual liability . . . with respect to the Policies reinsured by [Applied Underwriters] . . .” MAB’s  
19 obligation to make capital deposits into the “cell” also did not end with the expiration of the  
20 contract. Instead, Schedule 1 of the 2012 RPA provided that “[d]uring the Run-Off Term, capital  
21 deposits will be calculated using the [loss development factors] titled ‘Run-Off’ at a schedule  
22 determined by [Applied Underwriters] but no less frequently than annually beginning nine  
23 months after the expiration of all Policies.”

24 21. The 2012 RPA also included a binding arbitration provision. This provision did  
25 not comply with Insurance Code § 11658.5. The arbitration provision that Applied Underwriters  
26 provided to MAB with the producer’s quote did not indicate that the terms were negotiable  
27 between the insurer and the employer.

28 22. The three (3) - year term of the 2012 RPA expired September 30, 2015. Applied

1 Underwriters sent MAB a statement, dated October 7, 2015. As of that date, MAB had paid into  
2 the program a total of \$1,534,203. Under the calculations that Applied Underwriters had  
3 provided, the projected plan costs as of September 30, 2015 were \$1,403,354, and the total  
4 amount owed by MAB was \$1,442,742; so, as of the expiration of the Active Term MAB had  
5 overpaid by \$91,461. However, due to other charges, Applied Underwriters showed a balance  
6 due from MAB of \$70,572.41.

7 23. The next month, Applied Underwriters sent MAB a statement, dated November 9,  
8 2015. This statement showed “new charges” allegedly owned by MAB under the worker’s  
9 compensation program in the amount of **\$290,452.00**, and a total balance due from MAB of  
10 \$361,000. All of these new charges were assessed *after* the expiration of 2012 RPA. The  
11 statement explained that “[t]he contractual amount due is based on [MAB’s] actual claims  
12 applying run-off Loss Development Factors (LDF’s) and an additional capital deposit of  
13 \$44,441.” However, the actual calculation was not set forth in the statement or in any other  
14 documentation provided by Applied Underwriters to MAB. MAB refused to pay this amount,  
15 and Applied Underwriters instituted arbitration proceedings against MAB seeking recovery of the  
16 foregoing amount.

17 24. The 2012 RPA states that Applied Underwriters will calculate LDF’s by using the  
18 loss development factors published by the governmental rating bureau in the state where the  
19 exposure occurred. MAB is informed and believes, and based thereon alleges, that the LDF  
20 calculation employed by Applied Underwriters is inconsistent with the methodology employed by  
21 the Workers’ Compensation Insurance Rating Bureau of California.

22 **FIRST CLAIM FOR RELIEF – DECLARATORY RELIEF AND**  
23 **RESCISSION**

24 25. MAB realleges and incorporates by reference paragraphs 1 – 24, above, as though  
25 fully set forth herein.

26 26. Applied Underwriters has sold an insurance policy in the State of California  
27 without first obtaining a certificate of qualification from the California Secretary of State or  
28 submitting the RPA for approval from the California Insurance Commissioner.

1           27.     Applied Underwriters' sale of the RPA to MAB in the State of California without  
2 the certificate of qualification or approval from the Insurance Commissioner is in violation of  
3 Corporations Code § 2105 and California Insurance Code § 11658.

4           28.     Because Applied Underwriters has sold an unapproved policy to MAB without the  
5 proper registration and approval of the Insurance Commissioner, the RPA is void.

6           29.     Accordingly, MAB is entitled to a declaration from this Court that:

7                   (a) The RPA is not a reinsurance agreement issued by Applied Underwriters;

8                   (b) Applied Underwriters' actions in soliciting the RPA; billing, collecting, and  
9 demanding premiums thereunder; and handling claims, constitute transacting insurance business  
10 in California as defined in the Insurance Code;

11                   (c) Applied Underwriters is not qualified or authorized to sell the Equity Comp  
12 program in the State of California by the Insurance Commissioner;

13                   (d) Applied Underwriters' solicitation of the RPA, and collection of premiums and  
14 other assessments from MAB under the RPA are illegal;

15                   (e) The 2012 RPA is void;

16                   (f) the RPA is a collateral agreement which is required to be filed and approved by  
17 the appropriate regulatory agencies before it can be offered for sale:

18                   (g) The RPA is an illegal retrospective rating insurance policy; and

19                   (h) As a consequence of Applied Underwriters' violations of the California  
20 Corporations Code and Insurance Code as provided for herein, MAB is entitled to rescission of  
21 the RPAs and any/all other agreements between MAB and Applied Underwriting, and return of  
22 all premiums paid pursuant to the 2012 RPA less any amounts paid for claims against the MAB  
23 "cell."

24                   **SECOND CLAIM FOR RELIEF – DECLARATORY RELIEF**

25           30.     MAB realleges and incorporates by reference paragraphs 1 – 24, above, as though  
26 fully set forth herein.

27           31.     An actual controversy has arisen and exists between the parties. Applied  
28 Underwriters asserts that MAB owes Applied Underwriters \$361,000 under the 2012 RPA. MAB



1 denies that MAB owes Applied Underwriters this amount, or any amount. MAB asserts that  
2 Applied Underwriters owes MAB \$70,000 under the 2009-2012 program, which came due upon  
3 the expiration of the three (3) - year run off term. Applied Underwriters denies that it owes MAB  
4 this amount.

5 32. A judicial determination resolving this actual controversy is necessary and  
6 appropriate at this time.

7 **THIRD CLAIM FOR RELIEF – FRAUD**

8 33. MAB realleges and incorporates by reference paragraphs 1 – 24, above, as though  
9 fully set forth herein.

10 34. Applied Underwriters, by and through its agents and representatives, made the  
11 following misrepresentations and failures to disclose material facts:

12 (a) Applied Underwriters failed to disclose that the RPA was not approved for sale  
13 in California by the Department of Insurance in violation of California Insurance Code Section  
14 11658;

15 (b) Applied Underwriters failed to disclose that the RPA is an unfiled collateral  
16 agreement to a worker's compensation policy which violates California Code of Regulations, title  
17 10, Section 2268;

18 (c) Applied Underwriters failed to disclose prior to the inception of the contract  
19 that MAB's obligations under the RPA continue long after the end of the three (3) - year program  
20 term;

21 (d) Applied Underwriters misrepresented the Equity Comp program as a "profit  
22 sharing" program;

23 (e) Applied Underwriters misrepresented the "maximum costs" of the program,  
24 both in terms of the actual three (3) - year cost of the program, and in failing to disclose that  
25 Applied Underwriters intended to continue to charge and collect premiums long after the  
26 expiration of the Active Term; and

27 (f) Applied Underwriters misrepresented to MAB that upon expiration of the three  
28 (3) - year term of the program, MAB could obtain a refund of the premiums paid in excess of the

1 actual claims and costs incurred.

2 35. Applied Underwriters made these misrepresentations with actual knowledge of  
3 their falsity.

4 36. The true facts were that:

5 (a) the RPA is illegal under California law;

6 (b) the RPA's provisions allow for Applied Underwriters to charge and collect  
7 amounts far in excess of the actual claims and costs incurred;

8 (c) Applied Underwriters has never shared "profits" with any California insured;

9 (d) the calculations that Applied Underwriters used to charge MAB are  
10 inconsistent with the methodology employed by the Workers' Compensation Insurance Rating  
11 Bureau of California; and

12 (e) the RPA's provisions allow Applied Underwriters to charge and collect  
13 premiums and other payments long after the expiration of the three (3) - year program.

14 37. MAB reasonably relied on Applied Underwriters' assertions and omissions in  
15 entering into the RPA and the Equity Comp program in 2009 and again in 2012. MAB had no  
16 way of ascertaining the true facts with respect to the Equity Comp program. MAB did not learn  
17 the truth until 2015, when Applied Underwriters refused to return the amounts remaining in  
18 MAB's "cell" relating to the 2009 RPA, and asserted that upon expiration of the 2012 RPA that  
19 MAB owed an additional \$361,000.

20 38. MAB has been harmed by the misrepresentations in that it has paid excessive and  
21 unearned premiums, surcharges, costs, and fees to Applied Underwriters in connection with the  
22 Equity Comp program. Applied Underwriters' demand for an additional payment of \$361,000  
23 constitutes excessive insurance rates in violation of the California rate commission. MAB is  
24 therefore entitled to rescind the RPAs and to a return of all amounts paid to Applied  
25 Underwriters, less any amounts actually paid to worker's compensation claimants.

26 39. Applied Underwriters' conduct in the marketing, sale, and administration of the  
27 Equity Comp program is fraudulent and has resulted in millions of dollars of profit to Applied  
28 Underwriters and its parent company. Accordingly, MAB also seeks punitive damages, in an

BUCHMAN PROVINE BROTHERS SMITH LLP  
ATTORNEYS AT LAW  
WALNUT CREEK, CA

1 amount to be determined at trial, to punish Applied Underwriters for its fraudulent conduct and to  
2 deter such conduct in the future.

3 **FOURTH CLAIM FOR RELIEF – BREACH OF CONTRACT**

4 40. MAB realleges and incorporates by reference paragraphs 1 – 24, above, as though  
5 fully set forth herein.

6 41. To the extent that the Court determines that the RPA is a valid contract, MAB  
7 asserts that Applied Underwriters breached the RPA by failing to return the excess funds in  
8 MAB’s “cell” resulting from the 2009 RPA, and in charging and attempting to collect an  
9 additional \$361,000 from MAB in connection with the 2012 RPA.

10 42. At all times material hereto, MAB performed all of its obligations under the RPAs,  
11 except for those obligations that were excused by the parties or unenforceable as a matter of law.

12 43. Applied Underwriters’ conduct as described herein constitutes a breach of the  
13 contracts between Applied Underwriters and MAB.

14 44. MAB has suffered damages as a result of Applied Underwriters’ breach of  
15 contract, including but not limited to the amount remaining in MAB’s “cell” under the 2009 RPA;  
16 payment of excessive premiums and other charges; and attorneys’ fees.

17 **FIFTH CLAIM FOR RELIEF – UNFAIR BUSINESS PRACTICES**

18 45. MAB realleges and incorporates by reference paragraphs 1 – 24, above, as though  
19 fully set forth herein.

20 46. The conduct alleged above constitutes unfair, unlawful, fraudulent and/or  
21 deceptive business practices under California Business & Professions Code Section 17200 *et seq.*  
22 Under § 17203, the Court is empowered to enjoin acts of unfair competition, and may make such  
23 order or judgment as may be necessary to prevent the use or employment of any practice which  
24 constitutes unfair competition, and to restore any money or property which may have been  
25 acquired by such means of unfair competition.

26 47. MAB seeks an order requiring Applied Underwriters to disgorge all monies  
27 collected pursuant to the void and illegal RPA and Equity Comp program less any amounts paid  
28 for claims against MAB’s “cell” and for attorneys’ fees.

BUCHMAN PROVINE BROTHERS SMITH LLP  
ATTORNEYS AT LAW  
WALNUT CREEK, CA

**PRAYER FOR RELIEF**

WHEREFORE, MAB prays for judgment as follows:

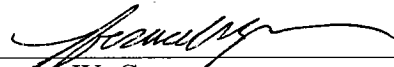
1. For a declaration that the RPAs are void and unenforceable;
2. For rescission of the RPAs;
3. For disgorgement of all sums obtained by Defendant as a result of unlawful conduct, less any amount paid in claims against MAB's "cell";
4. For actual and consequential damages according to proof at trial;
5. For general and special damages according to proof at trial;
6. For punitive damages according to law and proof at trial;
7. For attorneys' fees and costs of suit; and
8. For such other and further relief as the Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a jury trial with respect to any and all issues triable by jury.

Dated: April 8, 2016

**BUCHMAN PROVINE BROTHERS SMITH LLP**  
Roger J. Brothers  
Horace W. Green  
Connor M. Day

By:   
\_\_\_\_\_  
Horace W. Green  
Attorneys for Plaintiff Mike Rose's Auto Body, Inc.

BUCHMAN PROVINE BROTHERS SMITH LLP  
ATTORNEYS AT LAW  
WALNUT CREEK, CA

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28