Received 7/19/2022 6:02:48 PM Commonwealth Court of Pennsylvania

Filed 7/19/2022 6:02:00 PM Commonwealth Court of Pennsylvania
1 SHP 2020

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| In re: Senior Health Insurance Company of Pennsylvania in Rehabilitation | : | No. 1 SHP 2020 |
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**ORDER**

AND NOW, THIS _____ day of _____, 2022, upon consideration of the Rehabilitator's Application and Petition for Issuance of Rule to Show Cause on Intervenors, the Superintendent of the Maine Bureau of Insurance and the Insurance Commissioner of Washington ("Respondents"), the Answer filed by Respondents, and the Rehabilitator's Reply, the Court hereby finds that Respondents have violated this Court's orders, sought to undermine this Court's authority, and taken efforts to invade this Court's exclusive jurisdiction and impair plan implementation.

It is hereby ORDERED that the administrative actions described therein were entered without jurisdiction and are not binding on the Rehabilitator, SHIP, or the Special Deputy Rehabilitator. The Special Deputy Receiver shall continue implementation of the Approved Plan without regard to said administrative actions in accordance with the Orders of the Court and the Supreme Court.

Respondents are hereby ordered to desist and refrain from taking any actions to interfere in any manner with the implementation of the Approved Rehabilitation Plan, the Rehabilitator, the Special Deputy Rehabilitator, or the rehabilitation of SHIP.

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BY THE COURT

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| In re: Senior Health Insurance Company of Pennsylvania in Rehabilitation | : | No. 1 SHP 2020 |
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**REHABILITATOR'S REPLY IN SUPPORT OF HIS APPLICATION AND PETITION FOR ISSUANCE OF RULE TO SHOW CAUSE ON INTERVENORS, THE SUPERINTENDENT OF THE MAINE BUREAU OF INSURANCE AND THE COMMISSIONER OF INSURANCE OF WASHINGTON**

Dated: July 19, 2022

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Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, in his capacity as the Statutory Rehabilitator ("Rehabilitator") of Senior Health Insurance Company of Pennsylvania ("SHIP" or the "Company"), respectfully submits this Reply in support of his Application and Petition for Issuance of Rule to Show Cause on Intervenors, the Superintendent of the Maine Bureau of Insurance and the Insurance Commissioner of Washington ("Respondents"). For the reasons set forth herein, the Court should enter an order finding that the administrative actions and resulting orders in Maine and Massachusetts that are the subject of this proceeding (the "Administrative Actions" and the "Administrative Orders", respectively) are without jurisdiction and are not binding on the Rehabilitator, and directing the Special Deputy Receiver to continue implementation of the Approved Rehabilitation Plan without regard to the Administrative Orders in accordance with the Orders of this Court Court and the Supreme Court. The Court should also order Respondents to desist and refrain from taking any actions to interfere in any manner with the implementation of the Approved Plan, the Rehabilitator, the Special Deputy Rehabilitator, or the rehabilitation of SHIP

## REPLY TO RESPONDENTS

Returning to many of the same arguments, Respondents answer the Rule to Show Cause by advancing meritless claims regarding the Court's authority and the

record before the Court. Respondents suggest that they that they had not been enjoined from pursuing actions against SHIP, that the Maine and Washington Administrative Orders are binding and cannot be reviewed by this Court, and Respondents *must* be allowed to pursue the Administrative Actions to avoid a deprivation of due process because the Rehabilitator contends that the Respondents "cannot be heard to challenge the Approval Order because they lack standing" such that Respondents are being denied their day in court.

What Respondents do not do is offer this Court any reason why the relief sought in the Rehabilitator's Application and Petition for Issuance of Rule to Show Cause should not be granted in its entirety and without a hearing. The Court's August 24, 2021 order and opinion ("Approval Order") approved the Rehabilitator's Second Amended Plan (the "Approved Plan") to rehabilitate SHIP through, *inter alia*, a policy modification mechanism involving centralized rate-setting and a state-based opt-in/out process. The Approval Order automatically triggered implementation of the Plan under Article V of the Insurance Department Act of 1921. By statute, the Rehabilitator may prepare a plan for the Court's consideration and review, and then, "[i]f [the plan] is approved, the rehabilitator shall carry out the plan." 40 P.S. § 516(d). Respondents sought a stay of implementation from this Court and later from the Supreme Court. Both requests were denied, and so Respondents wrongfully purported to overturn this Court's orders on the merits and

the stay denial orders of this Court and the Supreme Court by obtaining substantially the same relief in the Administrative Orders. Having failed to justify their actions, Respondents' collateral challenges cannot be allowed to continue.

## A. The Administrative Orders invade this Court's jurisdiction and violate this Court's orders.

Respondents improperly seek to create a question as to the enforceability of this Court's Approval Order, claiming it was not preclusive and somehow incomplete because it did not expressly bar Respondents from bringing collateral administrative proceedings against SHIP.[1] This argument is meritless and ignores fundamental principles of American jurisprudence: taken to its conclusion, Respondents' position would mean no court order would ever be enforceable unless

[1] The Rehabilitator's show cause petition seeks relief well within the scope of Pennsylvania Rule of Appellate Procedure 1701, whereby the Court retains authority during the pendency of the appeal to "take such action as may be necessary to preserve the status quo," "take other action . . . ancillary to the appeal," and "[e]nforce any order entered in the matter." By attacking the merits and scope of this Court's Approval Order, Respondents ask this Court to go beyond its retained jurisdiction during the pendency of the appeal, effectively seeking belated reconsideration of the merits and relief from the effect of the Court's decision. Despite Respondents' transparent effort to expand the record, revisit decided issues, and seek new avenues for appeal, however, this Court need not re-examine and reopen the Approval Opinion in addressing the rule to show cause directed to Respondents, because the Court's Approval Order fully resolved the questions and arguments raised now by the Respondents. The only permissible challenge of this Court's Orders lies in the appeal Respondents are already pursuing in the Supreme Court.

it expressly barred disobedience or collateral attack. The Court was not required to enjoin Respondents from seeking to impair the plan or to invade the Court's exclusive jurisdiction, and Respondents cannot show that their Administrative Orders do not violate the Court's Approval Order.

**1. The Administrative Orders violate this Court's exercise of its exclusive jurisdiction over SHIP's assets as reflected in the Order of Rehabilitation.**

There can be no dispute that the Court had original and exclusive jurisdiction over matters concerning the distribution of the company's assets. *See* 42 P.S. §§ 761(a)(3); 761(b). Indeed, in their appellate brief asserting the right to regulate SHIP, Respondents admit that the Rehabilitator has "control over assets and the business of the insurer." (Intervening Regulators' Appellate Brief at 50.) A "rehabilitation proceeding is an in rem action in which the state court generally has exclusive control over the assets of the impaired insurance company. . . . The need for giving one state exclusive jurisdiction over delinquency proceedings has long been recognized in the courts." *Ballesteros v. New Jersey Prop. Liab. Ins. Guar. Ass'n*, 530 F. Supp. 1367, 1371 (D.N.J. 1982), *aff'd sub nom. Appeal of Ballesteros*, 696 F.2d 980 (3d Cir. 1982).[2] Here, in the SHIP Rehabilitation Order, this Court

[2] *See also Matter of Rehab. of Nat'l Heritage Life Ins. Co.*, 656 A.2d 252, 259 (Del. Ch. 1994) ("I concur that a rehabilitation is an in rem proceeding . . . ."); *In re Rehab. of Manhattan Re-Ins. Co.*, No. CIV.A. 2844-VCP, 2011 WL 4553582, at *4 (Del.

exercised that exclusive jurisdiction by directing the Rehabilitator, *inter alia*, "to take possession of the assets of SHIP and to administer the SHIP estate in accordance with the orders of the Court." (SHIP Rehabilitation Order at ¶ 3.)

Thus, this Court ordered that SHIP's assets would be distributed only as otherwise ordered by the Court. The Administrative Orders violate the Order of Rehabilitation by purporting to require the Rehabilitator to distribute SHIP's assets in accordance with the Administrative Orders rather than the orders of this Court. Maine and Washington policyholders cannot receive their existing coverage at their current premiums under the Plan, despite the purported cease and desist orders directed to SHIP.[3] The Court's Approval Order explains that the Plan will "correct

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Ch. Oct. 4, 2011) ("I find that . . . this Court does possess original and exclusive jurisdiction over the in rem proceedings of the rehabilitation."); *Garamendi v. Exec. Life Ins. Co.*, 21 Cal. Rptr. 2d 578, 583-90 (Cal Ct. App. 1993) (holding "A State Court Overseeing an Insurance Insolvency Proceeding Has In Rem Jurisdiction Over the Assets of Third Parties Which Have an 'Identity of Interest' With the Insolvent Insurer."); *All Star Advert. Agency, Inc. v. Reliance Ins. Co.*, 898 So. 2d 369, 382–83 (La. 2005) (holding because Pennsylvania is a reciprocal state under Louisiana's receivership statutes, Louisiana courts are deprived of subject matter jurisdiction over matters over which a Pennsylvania receivership court has asserted exclusive control); *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447, 453 (2004) (recognizing "[t]he discharge of a debt by a bankruptcy court is . . . an in rem proceeding", "[b]ankruptcy courts have exclusive jurisdiction over a debtor's property", and "bankruptcy [courts'] in rem jurisdiction allows it to adjudicate the debtor's discharge claim without in personam jurisdiction over [creditors].").

[3] Providing Maine and Washington policyholders with their existing coverage at a premium rate lower than the Plan's If Knew methodology being applied to the vast

SHIP's discriminatory premium rate structure; sets the premium rates to appropriate levels; and employs the If Knew Premium methodology to establish a premium level that is reasonable in relation to the benefits paid." (Approval Order at 57-58.) The benefit payments made to policyholders require a distribution of SHIP's assets: thus, if a Maine or Washington administrative order injunction could prevent policy modifications in accordance with the Plan, that administrative order would alter the distribution of benefit payments to policyholders and prevent the Rehabilitator from complying with the Court's Approval Order. If the administrative orders were effective, Maine and Washington policies would receive benefits consistent with

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majority of policyholders would result in unlawful preferential payments to those policyholders as well. In proposing and implementing the Plan, the Rehabilitator has an obligation to protect the interests of SHIP's policyholders and other stakeholders nationwide consistent with statutory and constitutional requirements to make SHIP's receivership fair and equitable. *See, e.g.*, 40 P.S. § 221.1(c)(iv) (receivership statutes designed to "protect the interests of insureds, creditors, and the public generally . . . through . . . equitable apportionment of any unavoidable loss"); *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1094 (Pa. 1992) (rehabilitation plan should be approved "[s]o long as the rehabilitation properly conserves and equitably administers the assets of the involved corporation in the interest of investors, the public and others, with the main purpose being the public good . . . .") (internal punctuation and citation omitted); *Grode v. Mut. Fire, Marine & Inland Ins. Co.*, 572 A.2d 798, 802 n.5, 804-05 (Pa. Commw. Ct. 1996) (recognizing "the equitable purpose of rehabilitation and liquidation is to protect first of all consumers of insurance"). The Court confirmed these principles in its Approval Order, and Respondents' Administrative Orders cannot require inequitable treatment for the policyholders of Maine and Washington.

their existing policies rather than modified and properly-priced policies as required by the Plan—an impermissible and unfairly preferential result that violates the Court's Approval Order.

**2. The Administrative Orders purport to review and reject this Court's Approval Order, improperly denying full faith and credit to Pennsylvania judgments.**

Respondents' Administrative Orders seek to usurp the Court's role in overseeing SHIP's rehabilitation, a blatant violation of this Court's order approving the Plan. The Maine administrative Decision and Order (Ex. B) reflects Respondent Schott's decision to have the Maine Bureau of Insurance sit as if it had the authority to review the decisions of the Pennsylvania Commonwealth Court. The Maine hearing officer took witness testimony on the fairness of the Plan (p.6), asserted that the Plan was improper because Maine could not "judge the reasonableness" of the actuarial analyses underlying the rehabilitation (p.8), challenged the use of the If Knew premium methodology (*id.*), and declared that he had the authority to overrule this Court's finding that the Rehabilitator had sufficiently complied with any applicable state regulatory requirements on rate increases (p.10). The Washington Order to Cease and Desist (Ex. C) similarly reflects Respondent Kreidler's decision to personally sit in review of this Court's decision-making and jurisdictional authority by, *inter alia*, challenging the use of election packages consistent with the Plan (p.4), asserting that policy modifications during the appeal would be improper

despite this Court and the Supreme Court of Pennsylvania finding otherwise (pp.4-5), and attacking the differential premium approved by this Court (pp.5-6).

In sum, the Administrative Orders violate the Approval Order by purporting to reject and overrule this Court's decisions in favor of the opinions of Respondents and their agencies. These decisions violate the Approval Order by "set[ting] aside Pennsylvania's primacy in SHIP's receivership" despite the Court's express finding that they could not do so. (Approval Order at 53.) Moreover, Respondents are not entitled to enter emergency orders and seek permanent orders from their agencies (Maine) or to personally issue such orders (Washington) because the Approval Order is entitled to full faith and credit. As this Court found, "[a] final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land." *Baker ex rel. Thomas v. General Motors Corp.*, 522 U.S. 222, 232 (US 1998) (internal quotations omitted). In contrast, this Court found it was not obligated to give full faith and credit to the "insurance rate regulatory laws of Maine, Massachusetts, and Washington," although the Plan did so through the Issue-State Rate Approval Option. (Approval Order at 53, 61.)

Under Pennsylvania law, the Approval Opinion is final for purposes of full faith and credit, because the Pennsylvania Supreme Court has made clear that "[a] judgment is deemed final for [preclusive] purposes unless or until it is reversed on

appeal." *Shaffer v. Smith*, 543 673 A.2d 872, 874 (Pa. 1996). Respondents lost both applications for a stay, and thus Plan implementation can and must move forward consistent with the Approval Order's directives and findings. Unless and until the Approval Order is overturned by the Pennsylvania Supreme Court (or the Supreme Court of the United States) on appeal, it must be considered final and "qualifies for recognition throughout the land." *V.L. v. E.L.*, 577 U.S. 404, 407 (2016).

### 3. The Administrative Orders are not binding on the Rehabilitator and are not entitled to full faith and credit.

Respondents go further than denying the full faith and credit of the Approval Order; they declare that the Administrative Orders obtained in violation of this Court's orders are valid, binding, and entitled to full faith and credit, effectively overruling the Approval order. This claim is plainly without merit. Full faith and credit applies to final judgments by tribunals "with adjudicatory authority over the subject matter and persons governed by the judgment." *Baker*, 522 U.S. at 232. The Maine Bureau of Insurance and Respondent Kreidler lacked both adjudicatory authority over the rehabilitation and lacked authority over those persons and entities purportedly governed by their orders.

*First*, as noted herein, the Approval Order fully resolved the issues between the parties and was entitled to full faith and credit in Maine and Washington, and neither the Maine Superintend nor the Washington Commissioner has the authority

to unilaterally disregard those principles. *Second*, SHIP is not bound by orders entered in derogation of this Court's exclusive *in rem* jurisdiction over SHIP's assets. *See* 42 P.S. §§ 761(a)(3); 761(b) (exclusive jurisdiction); *see also Ballesteros*, 530 F. Supp. at 1371 (same). *Third*, Respondents cannot simply give notice of a hearing to SHIP and declare that due process requirements are satisfied. *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807-808 (1985) (observing and explaining that, unlike the process required for class plaintiffs, the due process protections applicable to out-of-state defendants are significant). *Fourth*, despite claiming the right to regulate SHIP, Respondents admit that jurisdiction cannot be exercised over SHIP, its business, and its assets because this Court has exclusive jurisdiction. (Intervening Regulators Appellate Brief at 50.) *Fifth*, even if the Respondents could exercise jurisdiction over SHIP, they make no showing—and in fact make no effort to show—that their respective agencies have jurisdiction over the Rehabilitator or Special Deputy Rehabilitator. The Maine and Washington orders name only SHIP as a respondent (Ex. B, C), and they admit in their Answer that they did not name the Rehabilitator or Special Deputy Rehabilitator or "attempt to assert jurisdiction over either of them" (*see* Answer at 9 n.2 (Maine); *see also* Answer at 10 (Washington order limited to SHIP)) despite asserting that the Administrative Orders are binding on the Rehabilitator. (Answer at 19.)

Respondents never explain how a regulatory order directed to SHIP can control the conduct of this Court, the Rehabilitator, or the Special Deputy Rehabilitator—because there is no such authority. Because the Administrative Orders are not binding and lack the necessary predicates for full faith and credit, the Rehabilitator was not obligated to appear and defend the Plan, nor was he required to participate in the proceedings to ensure that this Court's Approval Order was granted the full faith and credit to which it is entitled by law.

### B. The Court has the authority to stop Respondents from taking efforts to impair the Plan.

Pennsylvania law authorizes the Rehabilitator to request and the Court to enter all orders "necessary and proper" to prevent, *inter alia*, "the institution or further prosecution of any actions or proceedings;" "waste of the insurer's assets," "the obtaining of preferences, judgments, attachments, garnishments, or liens against the insurer, its assets or its policyholders," "interference with the receiver or with the proceeding," or "any other threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors, or shareholders, or the administration of the proceeding." 40 P.S. § `. As the Rehabilitator argued in his show cause petition, Respondents' actions interfere with the Plan, waste SHIP's assets, invade the Court's jurisdiction, seek to manufacture

preferences, lessen SHIP's assets, prejudice SHIP's policyholders, and prejudice the proceedings.

As noted, the Administrative Orders assert jurisdiction over SHIP's assets, purport to require SHIP to distribute assets in violation of this Court's Approval Order, and purport to review and reject this Court's decisions on the Plan. Respondents fail to overcome the overwhelming evidence that their actions impair Plan implementation and cause harm to SHIP's rehabilitation and its policyholders. Respondents claim that their administrative efforts to stop or slow Plan implementation are merely regulatory efforts to protect policyholders, and that they have not harmed or impaired Plan implementation. This argument ignores the obvious: the Administrative Orders and coordinated attacks on the Plan are designed to prevent implementation of the Plan because Respondents believe the Plan is bad for policyholders. The Maine and Washington orders purport to bar SHIP from sending election packages (despite that packages had been mailed already), modifying policies in accordance with the Plan, or informing policyholders of these changes without the approval of Respondents Schott and Kreidler. (Exs. B, C). The only possible purpose of Respondents' Administrative Orders and related coordinated attacks is to impair Plan implementation after they failed—twice—to obtain a stay of implementation, and they offer no valid alternative explanation for taking steps that challenge the Court's authority or violate the Court's orders.

While Respondents try to downplay their role in impairing implementation of the Plan through the Administrative Orders and other actions, they cannot escape their responsibility for manufacturing and pursuing the improper administrative proceedings during the pendency of their appeal and while they were parties before this Court. On February 8, 2022, former Maine Superintendent of Insurance Eric Cioppa—the predecessor to Respondent Schott who made the decision to intervene and participate in the rehabilitation proceedings—personally signed and issued an *ex parte* "Emergency Cease and Desist Order & Notice of Pending Proceeding Hearing" after reviewing a "Verified Complaint" submitted that same day by "the Staff of the Maine Bureau of Insurance" (*i.e.*, Superintendent Cioppa's staff), finding that "good cause exist[ed] for [him] to issue the requested Emergency Cease and Desist Order. (Ex. B; Respondents' Ex. 22.)[4] Superintendent Cioppa then directed his staff to conduct a hearing that led to his desired result—a cease and desist order rejecting this Court's authority and jurisdiction.[5] Then, on March 1,

[4] Respondent Schott has never disavowed or dissolved this order and, as Respondents' Answer shows, Respondent Schott appears to endorse and support the decision to pursue the Maine Administrative Orders.

[5] The role of Superintendent Cioppa's Cease and Desist Order in impairing Plan implementation cannot be understated, as it led many other states to issue similar orders soon thereafter, reflecting a significant degree of coordination in the challenges to this Court's jurisdiction and authority. (*See* Respondents' Exs. 11-20.) Superintendent Cioppa issued a press release two days after issuing the improper

2022, Respondent Commissioner Kreidler personally signed an Order to Cease and Desist rejecting this Court's authority and jurisdiction and purporting to bar SHIP from sending election packages, implementing modifications in accordance with the Plan, and communicating with policyholders regarding Plan options. (Ex. C.)

Respondents' actions are particularly egregious because they are parties before the Court, and they cannot escape responsibility by claiming a right to exercise regulatory authority however they please. Respondents repeatedly declared that they appeared as regulators in the rehabilitation proceedings. By doing so, Respondents "submit[ted] to the jurisdiction of the court over their person." *See Bannard v. N.Y. State Nat. Gas. Corp.*, 172 A.2d 306, 312 (Pa. 1961) (finding that Commonwealth agency could not "intervene and participate in the action and yet retain its immunity and avoid any adverse determination in the action"). As intervenors, Respondents chose to have their "rights and liabilities" decided by this Court, "the tribunal having original jurisdiction" *Citizens Against Gambling Subsidies, Inc. v. Pa. Gaming Control Bd.*, 916 A.2d 624, 628 (Pa. 2007), and they were required to "raise claims in subordination to and in recognition of the propriety

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Emergency Cease and Desist Order (Respondents' Ex 35 dated 2/10/2022), and both Superintendent Cioppa and Respondent Commissioner Kreidler were part of the coordinated mailing of a letter sent the next day opposing implementation and threatening future action by other state regulators. (Respondents' Ex. 34 dated 2/11/2022.)

of the original action." *Appeal of Municipality of Penn Hills*, 546 A.2d 50, 52 (Pa. 1988).

Even outside of its authority under 40 P.S. § 221.5, this Court is empowered to enforce its own orders and control the conduct of the parties before it. *See Com., Dep't of Envtl. Protection v. Cromwell Twp.*, 32 A.3d 639, 653 (Pa. 2011). Here, the Rehabilitator does not seek contempt or other sanctions—only an order returning to the *status quo*, before Respondents improperly took matters into their own hands.

## C. Respondents cannot declare themselves exempt from full faith and credit principles.

Respondents admit that the Approval Order is generally considered a final order but nevertheless claim the Approval Order is not binding on them and is not preclusive of their Administrative Actions. Respondents advance an absurd view of full faith and credit that must be rejected. In their Answer, Respondents assert that they were free to bring administrative proceedings through their own agencies because there was no express prohibition against such actions, and that the Administrative Orders themselves are now entitled to full faith and credit because SHIP refused to re-litigate the issues decided by this Court. Respondents cannot be permitted to lure the Rehabilitator into Maine and Washington to relitigate the issues already conclusively adjudicated by this Court and entitled to full faith and credit throughout the nation. Under the Respondents' view, a final decision is entitled to

only *potential* full faith and credit that is subject to and can be limited by another tribunal asserting authority regardless of its lack of jurisdiction to do so. Respondents identify no law or precedent requiring the Court to enjoin the parties before it from relitigating the issues decided in its orders; if that were the case, no judgment or order could have full faith and credit unless it were also accompanied by a separate order enjoining parties from relitigating and challenging the issues decided in the underlying order. This approach would lead to the issuance of orders *ad infinitum*; under Respondents' argument, the full faith and credit injunction order barring challenges to the merits order would not be effective absent a separate order requiring compliance, and the compliance order would require a separate order directing the parties to conform to the court's authority, and so on.

Respondents also claim that the Approval Order is not entitled to full faith and credit here because Respondents "did not have a full and fair opportunity to litigate the matter and giving the order preclusive effect would deprive the State Insurance Regulators of Due Process." (Answer at 6, 26.) In support of this claim, Respondents incorrectly assert that "the Rehabilitator is contending that the State Insurance Regulators cannot even be heard to challenge the Approval Order because they lack standing." (*Id.* (citing Rehabilitator's Brief at 15-17).) As the Court knows, of course, Respondents previously informed this Court that they do not speak for policyholders. (Tr. 541-545.) This argument misrepresents the record, and

Respondents' reliance on those misrepresentations reflects the lack of merit in their argument. Citing Respondents' own arguments and evidence, the Rehabilitator has argued that Respondents lacked standing *to speak for policyholders* and present arguments *on behalf of policyholders*. (*See* Rehabilitator's Brief at 15 (noting that the Intervening Regulators "expressly disavowed acting in a representative capacity for even the policyholders in their own states".) The Rehabilitator also observed that the Intervening Regulators never presented any harm to themselves *as regulators*, the capacity in which they purported to appear, but did not claim they lacked standing to appear and present arguments *as regulators*. (*Id.* at 16-17.)

In fact, Respondents had a full and fair opportunity to participate in and litigate their objections to the Plan. The Rehabilitator did not object to the Respondents' participation, and the Court permitted Respondents to intervene in the nascent stages of the case. Respondents participated in all pre-hearing conferences, submitted requests for information to the Rehabilitator, submitted pre-hearing briefing, attended the hearing, presented the only witness they offered for testimony, cross-examined the Rehabilitator's witnesses, and offered argument on the issues before the Court. Respondents submitted post-hearing briefing, a motion for reconsideration, a Notice of Appeal, a stay application in this Court, a stay application in the Supreme Court, merits briefing before the Supreme Court, and an application to supplement the Supreme Court's appellate record. Indeed, consistent

with Respondents' request, the Supreme Court will hold oral argument on the appeal on September 15, 2022, and Respondents will attend and present argument without objection from the Rehabilitator.

Respondents rely on Section 28 of the Restatement (Second) of Judgments, which describes certain exceptions to the general rule of issue preclusion, specifically citing §§ 28(1) and 28(5).[6] Section 28(1) and the related *comment a* refer to a party's inability to obtain review for the correction of errors, but the Restatement makes clear that it applies *only* "when review is precluded as a matter of law." Here, review is available and underway, and Respondents exercised that right by filing their Notice of Appeal, submitting briefs, requesting oral argument, and, soon, presenting oral argument. The Rehabilitator's argument that Respondents failed to establish a right to present arguments *on behalf of policyholders*—an argument separate and apart from their claim that the Plan usurps their regulatory authority and thus permits the Administrative Orders—does not preclude review as

[6] Respondents also rely on two inapposite cases. *Hansberry v. Lee*, 311 U.S. 32 (1940) involved a question of *in personam* jurisdiction and the lack of notice and an opportunity to be heard in a class suit. *Keating v. Keating*, 855 A.2d 80 (Pa. Super Ct. 2004) refused to grant full faith and credit to the decision of a Guam divorce court entered without giving one of the spouses notice or an opportunity to be heard. Here, in the *in rem* proceedings over SHIP's rehabilitation, there is no dispute that the Intervening Regulators had notice and an opportunity to be heard by way of their intervention.

a matter of law. Section 28(5) and the related *comment j* address a "[l]ack of opportunity to litigate in the initial action," ordinarily arising out of one party concealing information from another party, mental or physical disability, or a compromise or unfair jury verdict. Respondents offer no basis for concluding that they "did not have an adequate opportunity or incentive to obtain a full and fair adjudication" when they participated at every stage of the proceedings and continue to do so today as the only parties appealing Plan approval. Respondents' claim that the Approval Order is not entitled to full faith and credit based on the Rehabilitator's arguments on appeal must be rejected.

**D. <u>The issues decided in the Approval Order fully cover the issues presented in the Administrative Orders, and Respondents cannot rely on principles of claim preclusion or issue preclusion to defend their actions.</u>**

The Court's show cause order is not based on claim preclusion (*res judicata*) or collateral estoppel (issue preclusion); it is based on irrefutable violations of this Court's Order of Rehabilitation and Approval Order. Nonetheless, the requirements of claim and issue preclusion also apply here, and those doctrines also bar the defective ME and WA proceedings.

Claim preclusion "bars action on a claim, or any part of a claim, which was the subject of a prior action, or could have been raised in that action." *In re Coatesville Area School District*, 244 A.3d 373, 378 (Pa. 2021). Issue preclusion bars relitigation of an issue decided in a prior action even if the claim is not the same.

*Id.* at 379. Both doctrines are designed to "avoid[] the cost and vexation of repetitive litigation, conserving judicial resources, and, by preventing inconsistent decisions, encourage[] reliance on adjudication." *Id.* (quotation marks and citation omitted).

Respondents claim that claim and issue preclusion cannot apply here because not all of the "four identities" are present—*i.e.*, "identity of issues, … identity of causes of action, identity of persons and parties to the action, and identity of the quality or capacity of the parties suing or being sued." *In re Coatesville Area School District*, 244 A.3d 373, 379 (Pa. 2021). All three proceedings plainly involve the validity and merits of the Plan, the modification of SHIP policies, and the authority of the Rehabilitator. The Administrative Actions also involve the same parties in the same capacity for purposes of preclusion, having been brought by the Respondents in their capacity as regulators against SHIP in rehabilitation. Respondents do not appear to contest those conclusions and instead focus on the issues and causes of action, asserting that their administrative proceedings involve "enforcement of state law" raising different claims because the Approval Order did not decide whether the Plan as it is being implemented complied with the law of Maine and Washington. This argument lacks merit and takes a deliberately—and improperly—narrow view of the Approval Order.

Respondents claim that their actions involve the exercise of their authority to investigate rate and benefit modifications to policies to determine if those rates and

benefits comply with state law, and that the Approval Order did not determine this issue. (Answer at 16.) The record proves otherwise. During the Plan proceedings, Respondents argued that the rate and benefit modification provisions of the Plan violated state law and the state regulatory process by "overrid[ing] the insurance laws of other [s]tates." (Approval Order at 52 (quoting Intervening Regulators)). The Court found that the Rehabilitator did not need to comply with the state regulatory processes on rates and benefits (Approval Order at 53), thus precluding any investigation by Maine and Washington into whether the Plan complies with their state insurance laws with respect to rates and benefits. Even if some level of compliance was required, the Court found that the Plan's Issue-State Rate Approval Option sufficiently complied with state laws regarding insurance regulation of rates and benefits because it "provides the issue state with a meaningful way to control the mix of benefit reductions and premium rate increases." (Approval Order at 58.)

Respondents also claim that the Court did not decide that the rates and benefits complied with Maine and Washington law, and similarly that the Court did not specifically approve the rates and benefits used by the Rehabilitator. (Answer at 29.) Respondents are wrong again. The Court found that Maine and Washington shared Pennsylvania's interest in avoiding excessive, unfairly discriminatory, or unreasonable rates, and that those shared interests are advanced by the Plan. (Approval Order at 57.) The Court specifically rejected Respondents' view that their

review processes—the claims addressed in part by the Administrative Orders—trumped the substantive rate and benefit requirements. (*See* Approval Order at 58-59 (noting that Maine and Washington raised complaints regarding the rate and benefit regulation "procedure"). Moreover, having approved the rate and benefit modification process and the use of If Knew methodology, there was no need for the Court to approve specific rates. If Respondents believed otherwise, they needed to raise that argument in this Court, not in the Administrative Actions.

Respondents focus as well on the election materials sent to policyholders, but this argument is similarly baseless. As noted, the Court found that the Rehabilitator did not need to comply with state rate and benefit modification processes, and Respondents could have argued during the plan approval phase that specific disclosure requirements must be met even if rates and benefits are set using the plan provisions. Indeed, Respondents raised the issue of disclosures and election packages during the hearing, specifically eliciting testimony from the Special Deputy Rehabilitator regarding disclosures and the Rehabilitator's plan intentions regarding certain disclosures. Counsel asked:

> Q. Okay. I mean, we are here to deal with the plan as it is, to deal with it as the order stands, and that order doesn't provide for any judicial review. It also doesn't provide for any judicial review of disclosure to the policyholders. Yesterday you testified about trend-setting disclosure, I believe. Do you envision the Court approving that disclosure?

The Special Deputy Rehabilitator answered: "We had not contemplated coming back to the Court separately for that, no." (Tr. 313:15-25.) Respondents either raised the disclosure issue or could have raised it; in either case, they are precluded from relitigating the disclosure question in this Court or in any administrative proceedings.[7]

Importantly, this Court need not find that the Approval Order preempts or blocks *all* regulation of SHIP by other state regulators. SHIP could not, for example, begin taking actions not approved by the Plan, such as selling new policies in those states. The question of regulatory authority generally is not before the Court, and instead the Court must find only that the Administrative Orders and other actions by the intervenor Respondents were jurisdictionally deficient and violated this Court's orders and authority.

**E. <u>Conclusion</u>**

This Court should enter the relief requested herein, finding that the Administrative Orders are not binding on the Rehabilitator, and that Respondents

[7] Even if the issue were not part of the initial proceedings, Respondents could have raised the issue in this Court. Election materials were available to Respondents—and all other regulators and parties—on the Secure Data Site beginning in December 2021. If Respondents believed that the materials were deficient or violated the Approval Order, they could have sought relief from this Court. They elected not to do so, pursuing their improper collateral attacks instead.

cannot continue any further impairment of the Plan. Respondents raise legal objections to the show cause order but effectively admit all of the allegations against them, obviating the need for any hearing and permitting the Court to decide the issues on the papers. Thus, and for the reasons set forth herein and in the Rehabilitator's initial show cause petition, the Court should enter the order attached herewith.

Dated: July 19, 2022

Respectfully submitted,

/s/ Michael J. Broadbent

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Received 7/19/2022 6:02:48 PM Commonwealth Court of Pennsylvania

Filed 7/19/2022 6:02:00 PM Commonwealth Court of Pennsylvania
1 SHP 2020

## CERTIFICATE OF SERVICE

I, Michael J. Broadbent, hereby certify that on July 19, 2022, I caused to be served the foregoing REHABILITATOR'S REPLY IN SUPPORT OF HIS APPLICATION AND PETITION FOR ISSUANCE OF RULE TO SHOW CAUSE ON INTERVENORS, THE SUPERINTENDENT OF THE MAINE BUREAU OF INSURANCE AND THE COMMISSIONER OF INSURANCE OF WASHINGTON through the Court's PACFile system and on all parties listed on the Master Service List. In addition, I hereby certify that an electronic copy of the foregoing document will be posted on SHIP's website at https://www.shipltc.com/court-documents.

*/s/ Michael J. Broadbent*