

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

MARLENE CARIDE, as Commissioner of the New Jersey Department of Banking and Insurance, and
THE NEW JERSEY DEPARTMENT OF BANKING
AND INSURANCE,

Plaintiffs,

v.

JESSICA K. ALTMAN, as Rehabilitator of Senior Health Insurance Company of Pennsylvania and her successors in office, in their capacity as Rehabilitator of Senior Health Insurance Company of Pennsylvania, PATRICK H. CANTILO, as Special Deputy Rehabilitator of Senior Health Insurance Company of Pennsylvania, MICHAEL HUMPHREYS, as Successor Rehabilitator of Senior Health Insurance Company of Pennsylvania, and SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA,

Defendants.

No. 3:22-cv-01329-FLW-LHG
[formerly Superior Court of New Jersey, Law Division, Civil Part, Mercer County, Docket No. MER-L-000448-22]

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

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Defendants Michael Humphreys, Acting Insurance Commissioner for the Commonwealth of Pennsylvania (and successor to named defendant Jessica K. Altman); Patrick H. Cantilo, in his capacity as Special Deputy Rehabilitator (the “SDR”); and Senior Health Insurance Company of Pennsylvania (“SHIP,” and, together with the Rehabilitator and SDR, “Defendants”) respectfully submit this Brief in Opposition to the Motion for Remand filed by Plaintiffs Marlene Caride (“Commissioner Caride”) and the New Jersey Department of Banking and Insurance (“DOBI,” and, together with Commissioner Caride, “Plaintiffs”).

I. INTRODUCTION

This case was properly removed to this Court based on federal question jurisdiction under 28 U.S.C. § 1331 and diversity of citizenship under 28 U.S.C. § 1332(a). Notwithstanding, Plaintiffs request that this Court remand this case to New Jersey state court, the forum where Plaintiffs instituted this improper collateral attack on the orders of the Commonwealth Court of Pennsylvania and its *in rem* jurisdiction over SHIP’s rehabilitation proceedings more than six months after it had issued a final judgment that is otherwise entitled to full faith and credit. Plaintiffs’ attempts to have this case remanded in the hopes of securing a favorable forum—and to deprive the non-resident Defendants of the assurance of “courts free from susceptibility to potential local bias,” *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 111 (1945)—should be rejected on their face.

Plaintiffs’ claims plainly arise under the laws of the United States and raise significant questions of federal law. Plaintiffs’ own *Complaint* expressly invokes a federal statute, the McCarran-Ferguson Act, 15 U.S.C. § 6701 *et seq.*, as the basis for their right to relief. Indeed, while Defendants’ disagree with Plaintiffs’ legal position, the Complaint reflects Plaintiffs’ affirmative allegations that Defendants’ actions violate the McCarran-Ferguson Act and that the

McCarran-Ferguson Act authorizes Plaintiffs' effort to stop the Plan. Plaintiffs' attempt to trivialize their own pleadings in order to avoid this Court's jurisdiction should be rejected, and the Motion to Remand should be summarily denied on this basis alone.

Plaintiffs' efforts to defeat this Court's diversity jurisdiction are equally meritless. *First*, the State is not the real party in interest in this litigation, and thus there is complete diversity. Plaintiffs tersely assert that because they are purporting to bring suit in their official capacities, they are necessarily acting as the alter ego of the State of New Jersey. Notably, Plaintiffs fail to cite the applicable test for determining whether a state-related actor is the alter ego of the state for purposes of diversity jurisdiction, let alone demonstrate how they satisfy it. Any judgment in this case has no potential to affect the State whatsoever; it will affect only a small group of SHIP's policyholders who hold historically underpriced policies that led to other groups of policyholders subsidizing their coverage. Accordingly, the State is not the real party in interest. *Second*, the amount in controversy plainly exceeds \$75,000, as is well documented in Plaintiffs' own Complaint and accompanying exhibits. As just one example, Plaintiffs allege that there are well over 500 policies in force in New Jersey, and that each policyholder could pay thousands of dollars in increased premiums or reduced benefits each year, placing at least \$500,000 at issue every year under Plaintiffs' own allegations. As such, the cost of complying with the prospective equitable relief sought by the Complaint easily eclipses \$75,000.

Finally, Plaintiffs seek to turn principles of abstention on their head by asking this Court to abstain from exercising jurisdiction in favor of a local forum so that they may continue an improper collateral attack on the Commonwealth Court of Pennsylvania's *in rem* jurisdiction over SHIP's rehabilitation proceedings. The Commonwealth Court has issued a final judgment approving SHIP's Rehabilitation Plan, and that order is entitled to full faith and credit under the

U.S. Constitution. Allowing Plaintiffs to collaterally attack that final judgment in an out-of-state forum is anathematic to the very principles of abstention and comity they invoke.¹

II. FACTUAL BACKGROUND²

SHIP is a long-term care insurance (“LTCI”) company domiciled in the Commonwealth of Pennsylvania, and has been under the Commonwealth Court of Pennsylvania’s supervision for well over two years now as part of ongoing Rehabilitation proceedings. (See ECF #1-1, Compl. Ex. ¶¶ 11, 22–24.) After conducting an extensive evidentiary hearing and considering voluminous briefing from all interested parties, the Commonwealth Court approved a proposed rehabilitation for SHIP (the “Approved Plan”) on August 24, 2021. (See *generally* ECF #1-1, Compl. Ex. 4, Commonwealth Court Approval Opinion (ECF p. 225).)³ The Commonwealth Court’s order authorized the Rehabilitator to offer policyholders various options for modifying the premium rates and benefits associated with their policies, in an effort to improve SHIP’s financial condition and correct historical underpricing of certain policies (which in turn had caused other groups policyholders to subsidize the costs of these underpriced policies). (See *id.*) The Complaint alleges that SHIP has 592 active policies in New Jersey. (ECF #1-1, Compl. ¶¶ 4, 39.) Plaintiffs further

¹ Defendants’ motion for consolidation in a multidistrict litigation court remains pending, with argument set for May 26, 2022. Defendants still contend that the Motion to Remand should be stayed until the Judicial Panel on Multidistrict Litigation issues its decision on consolidation. Defendants reserve the right to seek leave to amend this response if the matter returns to this Court.

² A detailed recitation of the factual and procedural background of this case is contained in Defendants’ recently filed Motion to Dismiss Plaintiffs’ Complaint. (See ECF #3.) In the interest of avoiding unnecessary duplication, Defendants describe only the facts and procedural history pertinent to Plaintiffs’ Motion to Remand.

³ The Commonwealth Court amended its original opinion in ways not material to the outcome. (See ECF #7-4, Ex. B, Commonwealth Court Approval Opinion as amended.)

allege that each of these policyholders could pay thousands of dollars in additional premiums each year or receive reduced benefits under the Approved Plan. (*Id.*; See ECF #1-3, Ex. 11 at 3.)

SHIP provided all policyholders and state insurance regulators with notice of the *in rem* rehabilitation proceedings in the Commonwealth Court. (See ECF #3-4, Exhibit A, Notice.) Three state regulators from Maine, Massachusetts, and Washington elected to intervene and assert arguments regarding the Plan’s alleged usurpation of regulatory authority and the purported benefits of liquidation compared to rehabilitation (the “Intervening Regulators”). (See *id.*, Exhibits B (Case Management Order), C (Opinion Denying Stay).) Plaintiffs supported those efforts by joining an *amicus* brief in support of the Intervening Regulators, but chose not to intervene in the proceedings. (See ECF #1-3, Exhibit 9.) Instead, more than six months after the Commonwealth Court issued its order approving SHIP’s Plan, Plaintiffs filed a Complaint in the New Jersey Superior Court for Mercer County, seeking declaratory and injunctive relief against Defendants for the express purpose of nullifying any Pennsylvania court’s orders. Specifically, Plaintiffs seek declaratory relief that “any order or decree entered in the Rehabilitation Proceeding or that is entered by the Pennsylvania Supreme Court that approves the Plan ... is void and unenforceable in New Jersey,” and to enjoin Defendants from “communicating, implementing, or enforcing the Plan in the State of New Jersey.” (ECF #1-1, Compl. ¶¶ 77(A.), 80(A.)). Plaintiffs’ entire case is thus a transparent collateral attack on the final judgment of the Commonwealth Court and its *in rem* jurisdiction over SHIP’s rehabilitation proceedings.

Defendants removed this matter on March 11, 2022, and timely filed an Amended Notice of Removal on March 31, 2022. (ECF #1, #6.) Original jurisdiction exists pursuant to 28 U.S.C. § 1331 because the Complaint expressly invokes the McCarran-Ferguson Act, 15 U.S.C. § 6701 *et seq.*, as the basis for Plaintiffs’ right to relief. (ECF #1-1, Compl. ¶ 65 (“[U]nder the McCarren-

Ferguson Act [sic] ... New Jersey has the exclusive authority and right to govern the business of insurance.”.) Plaintiffs’ own brief filed with their Complaint alleges that: “As a matter of federal law, the authority to control and regulate the business of insurance in a given state reside with insurance regulators of the state” and that any state powers to regulate insurance are “in addition to the McCarren-Ferguson Act [sic].” (*See* ECF #1-1, Brief filed with Complaint at 20 (ECF p. 73).) As such, Plaintiffs allege that Defendants’ efforts to implement the Approved Plan are an invasion of Plaintiffs’ regulatory rights under the federal McCarran-Ferguson Act. Plaintiffs’ action arises at least in part under the laws of the United States by raising a substantial federal question that must be necessarily resolved—*i.e.*, whether the McCarran-Ferguson Act provides Plaintiffs with an affirmative right of regulation, and, if so, whether the McCarran-Ferguson Act creates the right for Plaintiffs to bring an action to stop the implementation of the Approved Plan as an invasion of that right.

Original jurisdiction also exists pursuant to 28 U.S.C. § 1332 because this is a civil action in which the amount in controversy exceeds \$75,000, exclusive of interest and costs, and the action is between citizens of different States. *See* 28 U.S.C. § 1332(a). Complete diversity is present here. Plaintiffs are citizens of New Jersey: Plaintiffs allege that Commissioner Caride is the Commissioner of DOBI, and that both her office and DOBI’s office are located in Trenton, New Jersey. (ECF #1-1, Compl. ¶¶ 6–7.) SHIP is a Pennsylvania-domiciled insurer in rehabilitation under the supervision of the Commonwealth Court of Pennsylvania, with its principal place of business in Carmel, Indiana. (*See id.* ¶ 11.) Defendant Acting Insurance Commissioner of Pennsylvania Humphreys is the Rehabilitator of SHIP acting under the authority of the Commonwealth Court of Pennsylvania. (*Id.* at ¶ 9, 24–26.) Both Commissioner Humphreys and named defendant Jessica K. Altman, his predecessor, are citizens and residents of Pennsylvania.

(See *id.* at ¶¶ 8, 9.) Defendant Cantilo is the Special Deputy Rehabilitator of SHIP appointed by the Rehabilitator, and a citizen and a resident of the State of Texas. (See *id.* ¶ 10.)

The amount in controversy requirement of 28 U.S.C. § 1446(c)(2)(A)(ii) is satisfied as well. Plaintiffs’ own allegations and exhibits indicate that the Approved Plan that they seek to enjoin involves over 500 New Jersey policyholders with insurance coverage exceeding \$100,000, thousands of dollars in premiums each year, and potential premium increases or benefit reductions of thousands of dollars or more. Thus, according to Plaintiffs’ own pleadings, the actual value of this litigation far exceeds \$75,000. (See ECF #1-1, Compl. ¶ 39; ECF #1-3, Ex. 11 at 3.)

Notwithstanding that this Court plainly has original jurisdiction under both 28 U.S.C. §§ 1331 and 1332, and removal was proper under § 1441, Plaintiffs filed a Motion to Remand on April 8, 2022. Should this Court entertain the Motion to Remand now, it must be denied.

III. **ARGUMENT**

A. **Plaintiffs’ Motion to Remand should be denied because Plaintiffs’ allegations create federal question jurisdiction under Section 1331.**

Federal question jurisdiction under § 1331 may arise in two ways. *First*, “a case arises under federal law when federal law creates the cause of action asserted.” *Goldman v. Citigroup Glob. Markets Inc.*, 834 F.3d 242, 249 (3d Cir. 2016) (citing *Gunn v. Minton*, 568 U.S. 251, 257 (2013)). *Second*, even if the cause of action is based on state law, “federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.” *Id.* (quoting *Gunn*, 568 U.S. at 258). Looking only to Plaintiffs’ allegations and arguments, federal question jurisdiction is proper here under both tests.

1. Plaintiffs expressly seek declaratory relief under the McCarran-Ferguson Act.

Plaintiffs invoke federal law on the face of their Complaint as the basis their asserted relief. That is, Plaintiffs’ cause of action for declaratory relief expressly alleges that Defendants efforts to implement the Approved Plan violate Plaintiffs’ regulatory rights under and as provided by the federal McCarran-Ferguson Act. (See ECF #1-1, Compl. ¶ 65 (seeking declaratory relief because “under the McCarran-Ferguson Act, the Act, and the Police Powers of New Jersey, New Jersey has the exclusive authority and right to govern the business of insurance in New Jersey); *see also* ECF #1-1, Brief with Complaint at 20 (ECF p. 73).) While Defendants’ disagree, by basing their claim for declaratory judgment on the purported violation of federal law—at least in part—Plaintiffs’ Complaint necessarily arises under federal law.

Plaintiffs now conveniently attempt to disavow their own pleadings, in order to circumvent this Court’s jurisdiction. (See ECF #10-1, Pltfs’ Brief in support of Motion to Remand at 23 (arguing that Defendants are “making vague references to McCarran-Ferguson Act to conjure a federal cause of action, where none exists”).) But it is Plaintiffs’ own allegations which assert that Defendants are in violation of federal law and thus Plaintiffs are entitled to declaratory and equitable relief based on those purported violation. Plaintiffs cannot invoke federal law as the basis for their claims while simultaneously denying this Court’s original jurisdiction. *See Niblack v. Rutgers Univ.*, No. CV 16-504 (JMV), 2016 WL 4432682, at *1–*2 (D.N.J. Aug. 17, 2016) (the district court had original jurisdiction where the Complaint “clearly invokes” federal statutes and the Constitution, notwithstanding that the Plaintiff later appeared “to disavow any federal claims in the Complaint”); *Kindred Hosps. E., LLC v. Loc. 464A United Food & Com. Workers Union Welfare Serv. Benefit Fund*, No. CV 21-10659, 2021 WL 4452495, at *5 (D.N.J. Sept. 29, 2021) (federal question jurisdiction exists where the plaintiff’s claim “would require the Court to

interpret and apply the terms of a federal statute”). That is so irrespective of whether Plaintiffs’ claims ultimately lack merit. *Kindred Hosps. E., LLC*, 2021 WL 4452495, at *5 (“Whether or not the underlying claim is meritorious is not a consideration at this stage.”). On this basis alone, the Court has subject matter jurisdiction under Section 1331.

2. Plaintiffs’ state law claims necessarily raise substantial and disputed issues of federal law under the McCarran-Ferguson Act.

Even setting aside the fact that Plaintiffs’ claims expressly invoke federal law, the Court also has subject matter jurisdiction under § 1331 because the state law claims necessarily raise substantial and disputed issues of federal law under the McCarran-Ferguson Act. *See Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 313–14 (2005). The McCarran-Ferguson Act was enacted in order to “restore the supremacy of the States in the realm of insurance regulation.” *U.S. Dep’t of Treasury v. Fabe*, 508 U.S. 491, 500 (1993). The Supreme Court has further observed that Congress’s purpose in enacting the McCarran-Ferguson Act “was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.” *Id.* (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946)). Congress did so, in part, by “declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it ‘shall be subject to’ the laws of the several states in these respects.” *Id.* (quoting *Prudential Ins. Co.*, 328 U.S. at 430); *accord* 15 U.S.C. § 1012(a) (“The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.”).

Here, Plaintiffs’ claims satisfy each of the requirements of the four-part *Gunn-Grable* test. *First*, Plaintiffs’ claims necessarily raise federal questions under the McCarran-Ferguson Act because Plaintiffs expressly allege that the McCarran-Ferguson Act provides Plaintiffs with an

“exclusive authority and right to govern the business of insurance in New Jersey.” (ECF #1-1, Compl. ¶ 65.) Accordingly, the merits of Plaintiffs’ claims necessarily raise federal questions of: (1) whether the McCarran-Ferguson Act provides Plaintiffs with an affirmative right of regulation in this instance, and if so, (2) whether the McCarran-Ferguson Act creates the right for Plaintiffs to bring an action to stop the implementation of the Approved Plan as an invasion of that right. *See PharmaCann Penn, LLC v. BV Dev. Superstition RR, LLC*, 318 F. Supp. 3d 708, 712–13 (E.D. Pa. 2018) (state law claim seeking declaratory judgment regarding a property deed’s restrictions on unlawful uses necessarily raised substantial questions of federal law regarding what constitutes “unlawful use” under the Controlled Substances Act); *see also Hammer v. U.S. Dep’t of Health & Hum. Servs.*, 905 F.3d 517, 532 (7th Cir. 2018) (“to the extent state law overcomes contrary general federal law under the McCarran-Ferguson Act, that determination is itself a question of federal law”); *Blackfeet Nat. Bank v. Nelson*, 171 F.3d 1237, 1245 (11th Cir. 1999) (“The meaning of ‘insurance’ in the context of McCarran–Ferguson is a federal question.”).

Second, the parties plainly dispute whether federal law creates a right in Plaintiffs to regulate Defendants and to regulate the rehabilitation of an insurer domiciled in another state and under the supervision of that other state’s court.

Third, the federal issues are substantial “to the federal system as a whole” and “not only to the particular parties in the case.” *PharmaCann Penn*, 318 F. Supp. 3d at 713. Plaintiffs’ claims allege that the McCarran-Ferguson Act provides them with the right to regulate SHIP and disregard the final orders of the Commonwealth Court (notwithstanding that it is overseeing SHIP’s rehabilitation) and the Pennsylvania Supreme Court. The federal questions placed in dispute by Plaintiffs thus implicate fundamental issues raised by Congress’s passage of

the McCarran-Ferguson Act, as well as basic principles of federalism, comity, and the framework of the Constitution. These issues are plainly substantial.

Fourth, resolution of Plaintiffs' claims will not disrupt the federal-state balance. Quite the contrary, resolution of these federal questions will preserve this balance by determining whether Plaintiffs are correct that federal law authorizes one state to regulate an insurer and its court-appointed state-officer actors while it is under the supervision of another state's rehabilitation court, and to disregard the rehabilitation court's final orders. Adjudication in federal court, rather than a New Jersey state court, is appropriate.

Because federal courts have original jurisdiction to resolve necessarily raised, disputed, and substantial questions related to and arising under the McCarran-Ferguson Act, Plaintiffs' Motion to Remand should be denied.

B. Separately, Plaintiffs' Motion to Remand should be denied because the parties are diverse under Section 1332(a)(1).

Plaintiffs are citizens of the State of New Jersey, and thus this Court also has diversity jurisdiction because Plaintiffs do not act as the alter ego of New Jersey in pursuing this action. Plaintiffs argue that states are not citizens for purposes of diversity jurisdiction—standing alone, an unremarkable assertion—but fail to demonstrate how the claims and Complaint here fall within the alter ego analysis required by Third Circuit precedent. Indeed, Plaintiffs fail to even identify the applicable test. Plaintiffs cannot demonstrate that they are acting as the alter ego of New Jersey in this case, and their arguments regarding remand must be denied on this additional basis.

1. Plaintiffs are not the alter ego of New Jersey for purposes of diversity jurisdiction in this action.

Not every state-related actor is the alter ego or an arm of the state for purposes of diversity jurisdiction. As set forth *Fitchik v. New Jersey Transit Rail Operations*, there is a three-part test for evaluating whether an entity is an arm of the state. 873 F.2d 655, 659 (3d Cir. 1989) (applying

the test to evaluate Eleventh Amendment immunity); *see also Blake v. Kline*, 612 F.2d 718, 723–25, 726 n. 16 (3d Cir. 1979) (applying same test to diversity jurisdiction analysis). Under *Fitchik*, a court must consider: “(1) whether the payment of the judgment would come from the state; (2) what status the entity has under state law; and (3) what degree of autonomy the entity has.” *Karns v. Shanahan*, 879 F.3d 504, 513 (3d Cir. 2018). These factors are afforded equal weight. *See Karns*, 879 F.3d at 513–15. “[T]he aim of the [*Fitchik*] test is simply to determine the ultimate question of whether ‘the state is the real party in interest’ when suit is brought against a state entity.” *Hilburn v. Dep’t of Corr.*, No. 2:07-CV-06064, 2010 WL 703202, at *5 (D.N.J. Feb. 23, 2010) (citing *Fitchik*, 873 F.2d at 659). As set forth below, these factors weigh against finding that Plaintiffs are acting as the alter ego of New Jersey in bringing this action.

- (a) Any potential recovery by Plaintiffs will have no impact on the State of New Jersey’s treasury because the State is not the real party in interest.

The Third Circuit has articulated three subfactors relevant to the assessment of the first *Fitchik* factor: “(1) a state’s legal obligation to pay a money judgment entered against the entity; (2) whether the agency has money to satisfy the judgment; and (3) whether there are specific statutory provisions that immunize the state from liability for money judgments.” *Patterson v. Pennsylvania Liquor Control Bd.*, 915 F.3d 945, 950 (3d Cir. 2019) (citing *Fitchik*, 873 F.2d at 659). If “both legally and practically” a money judgment will have no effect on a State’s treasury, then the entity is not an arm of a State. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 51 (1994).

Here, the lack of any potential impact on the State of New Jersey’s treasury reveals that Plaintiffs are not acting as an arm of the State in bringing this action and that the State is not the real party in interest. To be clear, although Plaintiffs do not seek monetary damages, the actual value of the object of this litigation is significant and far exceeds the \$75,000 diversity

jurisdictional threshold. *See* Section III.C., *infra*. But any judgment will only potentially affect a small group of SHIP’s policyholders, not the State of New Jersey. The actual “beneficiaries” of any judgment in this action are thus a subset of SHIP’s policyholders—and Plaintiffs’ own *personal* preference on the value of liquidation over rehabilitation—and this can have no potential impact on the State of New Jersey’s treasury.⁴

Notably, Plaintiffs do not assert that any judgment will have any impact on New Jersey’s treasury, and rightfully so: any judgment cannot affect the State treasury as both a legal and practical matter because the State is not the real party in interest. As the Supreme Court has explained:

It is true that the state has a governmental interest in the welfare of all its citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the state, as an organized political community, a party in interest in the litigation, for if that were so the state would be a party in interest in all litigation; because the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the state, either statute or common.

Missouri, K. & T. Ry. Co. of Kansas v. Hickman, 183 U.S. 53, 60 (1901); *accord Ramada Inns, Inc. v. Rosemount Mem’l Park Ass’n*, 598 F.2d 1303, 1308 (3d Cir. 1979).

This litigation is focused primarily on the benefit of a smaller number of SHIP policyholders. Indeed, the Complaint has an extremely narrow focus with respect to New Jersey, as Plaintiffs allege that there over 500 New Jersey SHIP policyholders. (ECF #1-1, Compl. ¶¶ 4, 39.) Plaintiffs’ efforts to recast these personal proceedings as the mere enforcement of New Jersey

⁴ Defendants accept Plaintiffs’ views of the Plan and its impact on policyholders for purposes of responding to the Motion to Remand, but Defendants dispute Plaintiffs’ characterization because it is plainly untrue that *anyone* will benefit from Plaintiffs’ suit. Indeed, Plaintiffs’ effort to stop implementation of the Plan creates material risk of harm to policyholders in New Jersey and elsewhere: if Plaintiffs are successful in enjoining implementation or forcing liquidation, policyholders would lose rights provided by the Plan.

law is unavailing. As a preliminary matter, SHIP is no longer selling insurance policies, meaning that implementation of the Approved Plan and Plaintiffs' claims seeking to stop that Plan can have only a limited and definable effect in New Jersey—*i.e.*, the future treatment of approximately 500 policyholders and no one else in the past, present, or future.⁵ (*Id.* ¶¶ 11, 13.)

In addition, even aside from the extremely narrow scope of policyholders covered by the Complaint, Plaintiffs make only a cursory attempt at tying their claims to New Jersey statutes and regulations. Plaintiffs assert that they are enforcing their right to regulate SHIP by citation to general language in a statute providing for review of policy forms and premium increases. (*See id.* ¶¶ 28–29.)⁶ However, none of the cited provisions purport to apply to modifying policies *in rehabilitation*, where the court overseeing the rehabilitation of an insolvent insurer retains exclusive control over matters concerning the distribution of its assets—and this necessarily extends to the distribution of SHIP's assets through its policies. *See Ballesteros v. New Jersey Prop. Liab. Ins. Guar. Ass'n*, 530 F. Supp. 1367, 1371 (D.N.J.) (“The need for giving one state exclusive jurisdiction over delinquency proceedings has long been recognized in the courts.”), *aff'd* 696 F.2d 980 (3d Cir. 1982).⁷ The Commonwealth Court of Pennsylvania has already

⁵ This is not to say that Plaintiffs' Complaint will not have a deleterious effect on the Approved Plan or on policyholders outside of New Jersey, but neither the Plan itself nor the future of those other policyholders is a matter of state-wide interest for New Jersey. Similarly, the limited scope of Plaintiffs' Complaint does not mean the matter fails to satisfy the jurisdictional minimum analysis set forth in the Amended Notice of Remand and as discussed below.

⁶ Although Plaintiffs vaguely assert that they have regulatory authority to approve of any increase in premium rates and changes in benefits, they fail to identify any specific regulatory authority to support the latter. In fact, New Jersey's LTCI regulations make clear that “[a] reduction in benefits shall not be considered a premium change.” N.J. Admin. Code § 11:4-34.4(f).

⁷ *Accord Consedine v. Penn Treaty Network Am. Ins. Co.*, 63 A.3d 368, 455, 460 (Pa. Commw. Ct. 2012) (Commonwealth Court has the authority to “restructur[e] rates” and “modify policyholder benefits as part of an approved rehabilitation plan.”), *outcome aff'd sub nom. In re Penn Treaty Network Am. Ins. Co.*, 119 A.3d 313 (Pa. 2015); *Foster v. Mut. Fire, Marine, and Inland Ins. Co.*, 614 A.2d 1086, 1094 n.4, 1105 (Pa. 1992); *Koken v. Legion Ins. Co.*, 831 A.2d

rejected this precise argument, finding “no merit” to the assertions that SHIP’s Plan unlawfully displaces the rate setting authority of other states. (*See* ECF #1-1, Compl. Ex. 4, Approval Opinion at 52 (ECF p. 225, 279).) In any event, and while not conceding that Plaintiffs have any specific supervisory authority over SHIP in rehabilitation, their claim to act as an alter ego is undermined by their failure to take any of the administrative steps contemplated by the laws they purport to be enforcing. *See, e.g.*, N.J. Stat. § 17B:27E-10(e) (requiring “an opportunity for a hearing held in accordance with the ‘Administrative Procedure Act’”).

No part of the Complaint seeks relief for the public generally or for the benefit of the State of New Jersey, strongly supporting the conclusion that the State of New Jersey is not the real party in interest.

(b) Plaintiffs’ status under state law appears to be neutral.

Plaintiffs fail to identify any particular status under state law that would warrant finding them to be acting as the alter ego of the State in this case. Instead, and as explained above, Plaintiffs appear to be bringing suit to enforce their own personal preference on the value of liquidation over efforts to rehabilitate SHIP. Moreover, Plaintiffs are apparently authorized to file lawsuits in their own name, even those completely divorced from any interest to the State of New Jersey, as here. “An entity is more likely to be an arm of the State ... if it lacks the ability to sue and be sued in its own name.” *Maliandi v. Montclair State Univ.*, 845 F.3d 77, 94 (3d Cir. 2016). Accordingly, Plaintiffs’ ability to bring suit on their own behalf in order to pursue their own personal preferences supports the conclusion that they are not acting as the alter ego of New Jersey.

To the extent Plaintiffs attempt to point to any immunity from suit under New Jersey’s Tort Claims Act as a basis for supporting the assertion that they are acting as the State in bringing suit,

1196, 1241–42 (Pa. Commw. Ct. 2003), *aff’d sub nom. Koken v. Villanova Ins. Co.*, 878 A.2d 51 (Pa. 2005).

the Third Circuit has repeatedly recognized that this does “little to tip the scales” because New Jersey’s Tort Claims Act also applies to entities that “do not benefit from Eleventh Immunity. *See Maliandi*, 845 F.3d at 93 (3d Cir. 2016) (discounting pertinence of immunity inquiry of New Jersey’s Tort Claims Act). Although DOBI is not separately incorporated as an entity, this second factor is, at most, neutral.

(c) Plaintiffs have a sufficient degree of autonomy and control over their own affairs.

Plaintiffs retain a significant degree of autonomy and control over their own affairs. This includes, *inter alia*, the power to “[appoint] and remove” all officers and personnel within the department, formulate and adopt regulations, initiate legal proceedings, appoint advisory committees, and maintain a headquarters and “such other quarters as the commissioner shall deem necessary to the proper functioning of the department.” N.J. Stat. § 17:1-15. Similarly, “the commissioner may appoint such deputy commissioners and assistant commissioners as the commissioner as the commissioner shall deem necessary, to serve at the pleasure of the commissioner,” and “shall have the authority to establish, engage, organize, and maintain in the department administrative personnel and structure as the commissioner deems necessary[.]” *Id.* § 17:1-14. Plaintiffs also retain significant financial independence and autonomy under New Jersey law by having their own funding mechanisms. *E.g.*, N.J. Stat. § 17:1C-19 (establishing special purpose funding mechanism for the Department of Insurance); N.J. Stat. § 17:1C-33 (establishing dedicated funding mechanism for the Division of Banking).

On balance, even if New Jersey retains some level of control over Plaintiffs, that fact alone cannot make Plaintiffs the arm of the State in this case.

(d) New Jersey is not the real party in interest.

Although not yet presented to this Court for decision, the weaknesses in the merits of Plaintiffs' claims further show that this matter does not involve significant questions of New Jersey law and that the State is not the real party in interest. For example, Plaintiffs claim that implementation of the Approved Plan violates N.J. Stat. § 17B:27E-10 and the commissioner's authority to approve policy forms, but Plaintiffs never allege facts showing that this rate-regulation statute must or does apply in rehabilitation—or that the solicitation of policyholder elections as part of a rehabilitation plan actually violates the terms of that statute. To the contrary, the rate-regulation laws clearly depend upon and reflect an assumption that the insurer making the requested rate increase is operating in the ordinary course rather than in receivership. Whatever New Jersey's state-level interest as to enforcement of policy forms may be in the ordinary course, that interest is not implicated by offering election packages under the policy modification provisions of the plan, making Plaintiffs' suit a matter of personal interest rather than a suit on behalf of the State of New Jersey.

In contrast to the superficial discussion of alleged regulatory errors, Plaintiffs' allegations in seeking to stop implementation of the Approved Plan *qua* Approved Plan dominate the Complaint. Plaintiffs takes issue with the Pennsylvania Commissioner's decision to seek rehabilitation rather than liquidation, a question as to which New Jersey has no cognizable interest whatsoever. (See *e.g.*, ECF #1-1, Compl. ¶ 43 (asserting that "New Jersey policyholders would be in a better position if SHIP is liquidated than they would be if the plan of rehabilitation is implemented"); *id.* ¶ 44 (disagreeing with the "strategy" and "policy judgment by the Rehabilitator" because "[r]ather than deem SHIP insolvent, the Rehabilitator has proposed the Plan as a means of curing SHIP's insolvency"); *id.* ¶ 45 (disagreeing with Rehabilitator's policy decision to attempt rehabilitation of SHIP as "unacceptable to DOBI").) With respect to the

decision to rehabilitate or liquidate an insurance company, New Jersey’s interest is limited to the receivership of insurers domiciled in New Jersey, not other states. See N.J. Stat. § 17:30C-8 (grounds for liquidation); § 17:30C-9 (grounds for rehabilitation). Moreover, the State of New Jersey has no reason—or jurisdiction—to overrule Pennsylvania courts’ interpretation of their own laws, and yet Plaintiffs’ Complaint seeks exactly that result by challenging the findings of the Commonwealth Court of Pennsylvania with respect to its interpretation of *Pennsylvania’s own receivership statutes* and the scope of authority granted to the Rehabilitator and to the Commonwealth Court under Pennsylvania law. (See ECF #1-1, Compl. ¶ 74 (seeking declaratory judgment that “any order entered in Pennsylvania by the Commonwealth Court ... is void” as to SHIP’s policyholders in New Jersey); *id.* ¶ 77(A.) (seeking declaratory judgment that “any order or decree entered in the Rehabilitation Proceeding or that is entered by the Pennsylvania Supreme Court that approves the Plan ... is void an unenforceable in New Jersey.”).) The Complaint never offers any legal authority granted to Plaintiffs to seek such relief or to enjoin implementation of the Plan.

Notably, neither the cited statutes nor the Complaint provide support for a finding that Plaintiffs have the supreme authority and final say over the affairs of an insurer already under the supervision of a court of competent jurisdiction (which Plaintiffs acknowledge the Pennsylvania courts have, ECF #1-1 Compl. ¶¶ 22–26), or that Plaintiffs have authority over the actions of the defendant Rehabilitator or Special Deputy Rehabilitator. Plaintiffs cite no statute that would provide supervisory authority over the Pennsylvania Commissioner as Rehabilitator, the Commissioner’s appointed Special Deputy Rehabilitator, or the receivership court. Nor do Plaintiffs cite any New Jersey law establishing a rule or principle of public policy holding that

Plaintiffs have and should have exclusive and permanent control over “New Jersey policyholders” regardless of any future receivership.

For these reasons, Plaintiffs’ heavy reliance on *New Jersey Dep’t of Env’t Prot. v. Nestle USA, Inc.*, No. CIV. 06-4025 (FLW), 2007 WL 703539 (D.N.J. Mar. 2, 2007) and *Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749, 755 (D.N.J. 2005) is misplaced. (See ECF #10-1, Pltfs’ Brief in support of Motion to Remand at 16–17.) As courts have recognized, “[t]he mere fact that a state, state agency or its officers have been named as parties ‘is not dispositive of this question because such a determination can only be derived from the essential nature and effect of the proceeding.’” *Nestle USA, Inc.*, 2007 WL 703539, at *2 (quoting *Ramada Inns, Inc.*, 598 F.2d at 1306). For example, in *Nestle USA*, the State of New Jersey was the real party in interest because the New Jersey Department of Environmental Protection was seeking money damages to pay for environmental damages caused by the defendant’s plant in New Jersey, and the District Court expressly found that “the state’s interest in this matter is **not** a general desire to secure compliance with state laws.” 2007 WL 703539, at *2. In contrast, a general desire to secure compliance with state laws is, *at most*, what Plaintiffs purport to seek here.⁸ In fact (and as explained above), Plaintiffs merely seek to impose with their own personal preferences on another state’s insurance commissioner that are utterly divorced from New Jersey law and have no benefit to New Jersey or its nearly nine million residents.

Harvey is equally inapposite. There, the New Jersey Attorney General and Director of Division of Consumer Affairs brought suit to recover penalties against a retailer under the New

⁸ Plaintiffs’ brief all but concedes this very point. (See Pltfs’ Brief in support of Motion to Remand at 18 (“[T]he purpose of both the declaratory and injunctive relief from Plaintiffs’ perspective is to preserve the procedures contemplated by the Long-Term Care Act to prevent Defendants from implementing their Plan without first complying with the Long-Term Care Act.”).)

Jersey Consumer Fraud Act for fraudulent and misleading advertising. 384 F. Supp. 2d at 751. Importantly, the plaintiffs in *Harvey* brought suit “based on the State’s *parens patriae* power” (*id.* at 754) and seeking to “directly benefit *all* New Jersey consumers” (*id.* at 756), and thus were acting as an arm of the state. Here, in contrast, Plaintiffs are *not* bringing suit in a *parens patriae* capacity for all consumers⁹ and a decision in their favor can impact only a fraction of SHIP’s policyholders—all of whom received notice and had the opportunity to participate in SHIP’s rehabilitation.¹⁰

This Court can look to *Ballesteros* to guide its understanding of receivership law. In a decision affirmed by the Third Circuit, the court considered and rejected a collateral attack on a rehabilitation plan by a purported claimant against the holder of an insurance policy within a plan of rehabilitation. As the *Ballesteros* court noted, the New York rehabilitation court did not need personal jurisdiction over the policyholder to modify the policy because “[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.” 530 F. Supp. at 1371. Indeed, the Court found that

⁹ All of the Intervening Regulators in SHIP’s rehabilitation proceedings similarly did not participate in any *parens patriae* capacity. (See ECF #1-1, Compl. Ex. 4, Approval Opinion at 68 (ECF p. 225, 295).) Instead, just like Plaintiffs, the Intervening Regulators sought merely to impose their own personal preferences on the Rehabilitator under the guise of preserving their own respective regulatory authority.

¹⁰ Although not cited by Plaintiffs, the unpublished opinion in *Online Exp., Inc. v. Tri-State Gen. Ins. Co.*, No. CIV.A. 13-1888 SRC, 2013 WL 1867053 (D.N.J. May 2, 2013) is not controlling, and it is unpersuasive and inapposite here. There, a *pro se* federal prisoner convicted of murder for hire and extortion brought suit against a host of insurance carriers, as well as DOBI and the Federal Deposit Insurance Corporation, vaguely alleging that he was due refunds from the insurance carriers and seeking “formal investigation and prevention of future fraud.” *Id.* at *1 (brackets omitted). The District Court, without any analysis of the *Fitchik* factors, concluded that it lacked diversity jurisdiction because DOBI is a state agency. *Id.* at *2. Plaintiffs likely failed to cite this case with good reason: the district court’s terse dismissal of a patently frivolous lawsuit on this basis is wholly irrelevant.

New Jersey’s public policy favoring “centraliz[ed] management over delinquency proceedings in the courts of one state”—principles reflected in current law as well¹¹—meant that the decisions of an out-of-state rehabilitation court “have the sanction of New Jersey law.” *Id.* at 1371.

Plaintiffs’ decision to commence this collateral attack on the Commonwealth Court’s orders is borne out of their own personal interests and personal views regarding whether liquidation is preferable to rehabilitation. The State of New Jersey is not the real party in interest.

2. If this Court finds that Plaintiffs are the alter ego of New Jersey, then under Plaintiffs’ reasoning Defendant Commissioner Humphreys must be the alter ego of Pennsylvania, and only the Supreme Court of the United States could have jurisdiction over these claims.

To be clear, Defendants believe Plaintiffs are not the alter ego of New Jersey. Nevertheless, the Plaintiff Commissioner Caride and the Defendant Commissioner Humphreys are very similarly situated in the context of this litigation, meaning that following Plaintiffs’ analysis as to alter ego status would lead to this Court finding that Defendant Commissioner Humphreys is the alter ego of Pennsylvania as well, creating exclusive jurisdiction in the Supreme Court of the United States.

First, if the Court were to find that the State of New Jersey somehow could be considered the beneficiary of this litigation, then, by the same reason, Pennsylvania would also be the beneficiary if Commissioner Humphreys were to prevail on the merits. Just as Commissioner Caride purportedly is enforcing New Jersey insurance law, Defendant Commissioner Humphreys is here acting under and enforcing Pennsylvania insurance law. Moreover, with regards to operational autonomy, Defendant Commissioner Humphreys, like Plaintiff Commissioner Caride, is the top executive of the Department of Insurance, with budget and salary set by the General

¹¹ As the legislature has stated, the purposes of the New Jersey Life and Health Insurers Rehabilitation and Liquidation Act include, *inter alia*, “improved methods of rehabilitation n insurers” and “[l]essening the problems of interstate rehabilitation and liquidation . . . by extending the scope of personal jurisdiction over debtors of the insurer outside this State.” N.J. Stat. § 17B:32-31.

Assembly. Both enjoy considerable autonomy in their official capacities. As Rehabilitator, Defendant Commissioner Humphreys is *less* autonomous than Plaintiff Commissioner Caride in some ways: many of Defendant Commissioner Humphreys' actions as Rehabilitator are subject to the approval of the Commonwealth Court. Moreover, just like Plaintiff Commissioner Caride purports to do here, Commissioner Humphreys is acting for the protection of the policyholders. If this fact makes Plaintiff Commissioner Caride the arm of the State of New Jersey, Defendant Commissioner Humphreys must also be the arm of the Commonwealth of Pennsylvania.

Nor can Plaintiffs meaningfully distinguish Commissioner Humphreys' role here by attempting to claim that, as Rehabilitator, he merely stands in the shoes of SHIP. (*See* ECF #1-1, Compl. ¶ 64.) Although the Commissioner as Rehabilitator has all the powers of the directors, officers, and managers of SHIP, he “cannot be strictly compared to similarly situated persons controlling a financially stable insurance company conducting normal business.” *Vickodil v. Com., Ins. Dep't*, 559 A.2d 1010, 1013 (Pa. Commw. Ct. 1989). As the Commonwealth Court has explained, that is because “the General Assembly has imposed specific obligations on the Commissioner as rehabilitator and on her appointed deputies in this context”—including “the duty to act with a broader view toward minimizing inevitable financial harm to *all* policyholders, creditors and the general public.” *Id.* (citing 40 P.S. § 221.1 and explaining that “[i]mplicit is the realization that when an insurance company is under threat of insolvency, or in a financially ‘hazardous’ condition ... individual interests may need to be compromised in order to avoid greater harm to a broader spectrum of policyholders and the public.”); *accord LeBlanc v. Bernard*, 554 So. 2d 1378, 1381 (La. Ct. App. 1989) (explaining that the rehabilitator “does not stand precisely in the shoes of [the insurer]” because “[t]he Commissioner’s responsibilities as

rehabilitator or liquidator include, additionally, protection of the policyholders, creditors, and the insurer itself” and “must be performed with the public interest foremost in mind”).

Plaintiffs are challenging the Rehabilitator’s statutory authority and the Commonwealth Court’s jurisdiction to order and implement any rehabilitation plan that seeks to modify premiums or benefits of any out-of-state policies. Plaintiffs are not seeking to enjoin any power that the directors, officers, and managers of SHIP would ordinarily possess, absent Commissioner Humphreys being appointed Rehabilitator. Plaintiffs’ claims have little bearing with respect to SHIP as an individual insurer, but rather broadly challenge whether Pennsylvania’s legislature and courts may empower Commissioner Humphreys to implement a national plan of rehabilitation for any insurer. Thus, Commissioner Humphreys does not merely stand in the shoes of SHIP with respect to Plaintiffs’ challenge that goes to the very heart of his statutory authority as Rehabilitator and seeks to override the Commonwealth Court’s orders and final judgment.

If Plaintiffs’ line of reasoning leads to the conclusion that both Plaintiff Commissioner Caride and Defendant Commissioner Humphreys are alter egos of their respective states, then the Supreme Court of the United States has exclusive jurisdiction over the claims in the Complaint. It is well settled that if parties on both sides of a lawsuit are the alter egos of different states, then the suit is a suit between the states. By law, the Supreme Court of the United States has original and exclusive jurisdiction of civil suits between states. U.S. CONST. ART. III, § 2; *Rhode Island v. Massachusetts*, 37 U.S. 657, 722 (1838).¹² As a result, the Supreme Court of the United States—not New Jersey courts—would be the only court with jurisdiction over this suit.

¹² Similarly, recent Supreme Court precedent makes clear that a state may not be sued in another state’s court. *See Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1495 (2019) (“[T]he only forums in which the States have consented to suits by one another . . . are Article III courts.”).

C. The Amount in Controversy test is easily satisfied.

Pliantly misstating the law, Plaintiffs assert that the amount in controversy does not exceed \$75,000 because they are seeking equitable relief, rather than damages. As explained in Defendants' Amended Notice of Removal and as evidenced in Plaintiffs' pleadings and exhibits, however, the amount in controversy easily satisfies the \$75,000 requirement in § 1332.

In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the "value of the object of the litigation." *Columbia Gas Transmission Corp. v. Tarbuck*, 62 F.3d 538, 541 (3d Cir. 1995) (citation omitted). In determining the value of an injunction or declaration, "the court may look not only at past losses but also at potential harm." *Excel Pharm. Servs., LLC. v. Liberty Mut. Ins. Co.*, 825 Fed. App'x 65, 68 (3d Cir. 2020). In removal cases, determining the amount in controversy "begins with a reading of the complaint." *Samuel-Bassett v. Kia Motors Am., Inc.*, 357 F.3d 392, 398 (3d Cir. 2004). Where a complaint is open-ended and "fails to plead a specific amount of damages," *Lamond v. Pepsico, Inc.*, No. 06-3043, 2007 WL 1695401, at *4 (D.N.J. June 8, 2007), a defendant's removal notice "serves the same function as the complaint would if filed in the district court." *Frederico v. Home Depot*, 507 F.3d 188, 197-198 (3d Cir. 2007). Courts in the Third Circuit measure the amount in controversy "by a reasonable reading of the value of the rights being litigated." *Angus v. Shiley, Inc.*, 989 F.2d 142, 146 (3d Cir. 1993); *accord Auto-Owners Ins. Co. v. Stevens & Ricci Inc.*, 835 F.3d 388, 401 (3d Cir. 2016). Where the complaint is "open-ended" and does not allege a specified amount, the district court should perform its "own independent appraisal of the value of the claim." *Angus*, 989 F.2d at 145–46.

Under any measure, the value of the object of the litigation—the premiums paid by and benefits owed to over 500 New Jersey policyholders—far exceeds \$75,000. (See ECF #6, Amended Notice of Removal at ¶¶ 22–28.) Indeed, Plaintiffs themselves allege the existence of

over 500 SHIP policyholders who could each pay thousands of dollars in additional premiums (or a corresponding decrease in benefits) under the Approved Plan of Rehabilitation *each year*. (See ECF #1-1, Compl. ¶¶ 4, 39; ECF #1-3, Ex. 11 at 3.) Thus, the actual value of the proposed modifications easily eclipses the \$75,000 minimum according to the face of Plaintiffs’ own Complaint.

Moreover, Plaintiffs’ Complaint expressly seeks a declaratory order finding that any orders in the Pennsylvania courts (including its Supreme Court) are void, unenforceable, and not entitled to full faith and credit. (See ECF #1-1, Compl. ¶¶ 59–77.) As such, Plaintiffs appear to seek to force SHIP into liquidation, effectively placing the entire \$1 billion deficit, as well as SHIP’s assets (\$1.4 billion) and all policies and policyholders at issue. Thus, the direct value of the relief Plaintiffs seek also exceeds \$75,000 for this separate reason.

It is not “speculative” that the value of the object of the litigation far exceeds the \$75,000. (See ECF #10-1, Pltfs’ Brief in support of Motion to Remand at 19.) As explained above, there are well over 500 policyholders in New Jersey impacted by the Approved Plan, each of whom have insurance coverage exceeding \$100,000 and may pay thousands of dollars in additional premiums. Any conservative estimate of the amount in controversy easily surpasses the jurisdictional threshold several fold. Accordingly, the amount in controversy is satisfied and the Court should deny Plaintiffs’ Motion to Remand.

D. Plaintiffs cannot escape this Court’s jurisdiction.

Plaintiffs also misleadingly argue that Defendants previously “acknowledged” that federal courts lack subject matter jurisdiction in what they describe as an “eerily similar” dispute involving South Carolina’s Department of Insurance. (See ECF #10-1, Pltfs’ Brief in support of Motion to

Remand at 11.)¹³ Plaintiffs intentionally omit a critical detail: at the time the South Carolina plaintiffs filed suit, the Commonwealth Court of Pennsylvania had not yet issued its final order approving the Plan. It was on *this basis* that the South Carolina plaintiffs lacked standing—their claims were plainly not ripe for review at the time because the Commonwealth Court could have modified or disapproved of the Plan, rendering the dispute moot. (See ECF #10-2, Ex. 6 at 13 (ECF p. 403) (“[I]t is important to reiterate that Plaintiffs lack standing to bring their claims precisely because the Commonwealth Court of Pennsylvania has not yet approved, modified, or disapproved of the Amended Rehabilitation Plan. It would defy logic and fairness if Plaintiffs could have their claims remanded because the Commonwealth Court of Pennsylvania has not yet approved any rehabilitation plan, only to then seek to prevent the Commonwealth Court from doing just that in a South Carolina state court.”).) Now, in contrast, the Commonwealth Court has approved the Plan—a final order that must be given full faith and credit by this Court. Accordingly, this Court has subject matter jurisdiction over this action, and as such can dismiss Plaintiffs’ improper collateral attack for failure to state a claim under the Full Faith and Credit Clause.

Plaintiffs also cannot look to a recent decision in North Carolina as supporting a decision on remand prior to a decision on the motion to consolidate, or to remand the case at all. (See ECF #14 (notice), #14-1 (decision entered in *Causey v. Altman*, No. 5:22-cv-89-FL).) Unlike this matter, the remand motion in the *Causey* case cited by Plaintiffs was scheduled for full briefing

¹³ As Plaintiffs know, the lawsuit filed by the South Carolina plaintiffs is not “eerily similar” to Plaintiffs’ action; they are copycat lawsuits, and part of a coordinated effort by the state insurance regulators who filed *amicus* briefs in support of the Intervening Regulators in SHIP’s rehabilitation proceedings to improperly collaterally attack those proceedings in their own state courts. This merely underscores the need to have this matter stayed pending a decision on consolidation.

before Defendants filed their motion to consolidate, briefing had closed accordingly, and the Court had informed the parties that it would enter a decision before April 28, 2022. (See ECF #14-1 at 5.)¹⁴ Moreover, the *Causey* decision cited by Plaintiffs’ in their notice included no reference to McCarran-Ferguson and included a far more limited set of factual allegations than those included in Plaintiffs’ Complaint here. (See ECF #14-1 at 3-4 (describing facts).) Plaintiffs’ reliance on federal law is, standing alone, enough to refuse to remand this case, but even on the question of diversity *Causey* is neither controlling nor persuasive based on the allegations set forth by Plaintiffs here.

E. Abstention principles do not warrant remanding to New Jersey state court.

In a last-ditch effort, Plaintiffs requests that this Court abstain from exercising jurisdiction in favor of the New Jersey state court where Plaintiffs improperly commenced this action as an unlawful collateral attack on the jurisdiction and authority of Pennsylvania’s courts. Plaintiffs’ request turns principles of abstention on their head. As explained in Defendants’ Motion to Dismiss, the Commonwealth Court of Pennsylvania has already issued a final order approving SHIP’s Plan of Rehabilitation, and the Full Faith and Credit Clause of the Constitution prohibits such a collateral attack on another state court’s final orders. If applied, the rationale underlying the abstention doctrines and principles of comity that Plaintiffs invoke would dictate that this Court *dismiss* Plaintiffs’ claims with prejudice in recognition of the Commonwealth Court’s final orders, not refrain from exercising jurisdiction simply to permit that same improper collateral attack to proceed in a different forum.

¹⁴ The Court in *Causey* also relied on Plaintiffs’ (outdated and incorrect) allegation that plan modifications would occur before May 1, providing the Court with an additional sense of urgency—even if misguided—not present here. (See ECF #14-1 at 5.)

Moreover, abstaining in favor of the New Jersey state court, the forum Plaintiffs improperly chose to commence a collateral attack on the Commonwealth Court’s final order approving the Plan more than six months after it was issued, would itself “be disruptive of [Pennsylvania’s] efforts to establish a coherent policy with respect to a matter of substantial public concern.” *Chiropractic Am. v. LaVecchia*, 180 F.3d 99, 104 (3d Cir. 1999). Abstention in favor of the improper New Jersey forum would lead to perverse results. That is, it would *facilitate* Plaintiffs’ transparent attempt to “disrupt the ability of the state officers of [Pennsylvania]” in conjunction with the [Commonwealth Court of Pennsylvania] to devise and efficiently operate a complex system of administrative and judicial interrelationships which makes up the statutory scheme for [rehabilitating] insolvent insurers in [Pennsylvania].” *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 706 (10th Cir. 1988).

The facts in *Motor Club of Am. v. Weatherford*, 841 F. Supp. 610 (D.N.J. 1994) closely parallel this action, and the district court’s decision is highly instructive. There, the plaintiff commenced a state court action in New Jersey against the Oklahoma Commissioner of Insurance, who was acting as receiver for an insolvent insurer undergoing liquidation proceedings in Oklahoma. *See id.* at 616. The Oklahoma Commissioner then removed the New Jersey state court action to federal court, and both parties argued that abstention was appropriate: the Oklahoma Commissioner argued that abstention in favor of the Oklahoma liquidation proceedings was proper, and the plaintiff argued in favor of remand to New Jersey state court. *See id.* at 628–29. Finding that plaintiff’s claims were “really part and parcel of the liquidation proceedings pending in Oklahoma,” the district court concluded that abstention in favor of the Oklahoma insolvency proceedings was warranted. *Id.* at 629. Importantly, the court explained that “remand to the New

Jersey state courts would create an illogical result” because it “would not place this matter back in the court in which the insolvency proceedings are pending.” *Id.* at 628.

Just as in *Motor Club*, Plaintiffs seeks this same “illogical result”: remand to an improper out-of-state court, rather than the Commonwealth Court overseeing SHIP’s rehabilitation proceedings.¹⁵ The Court should reject Plaintiffs’ flawed reasoning and improper attempts to collaterally attack the final judgment of the Commonwealth Court overseeing SHIP’s rehabilitation, and deny the Motion to Remand.

IV. CONCLUSION

For the reasons set forth herein, Plaintiffs’ Motion to Remand should be denied.

Dated May 2, 2022

Respectfully submitted,

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¹⁵ Because the Commonwealth Court has already issued an order and approved SHIP’s Plan of Rehabilitation—a final judgment that is entitled to full faith and credit, and thus warranting dismissal with prejudice of Plaintiffs’ claims—Defendants have not sought dismissal based on abstention grounds. Nevertheless, and to the extent necessary, Defendants reserve the right to seek dismissal based on abstention in favor of the rehabilitation proceedings in the Commonwealth Court of Pennsylvania, for the same reasons articulated by the district court in *Motor Club*. See *Gray v. Pagano*, 287 Fed. App’x 155, 157 n.1 (3d Cir. 2008) (abstention may be raised *sua sponte*).

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2022, I have caused to be filed Defendants' Brief in Opposition to Plaintiffs' Motion to Remand using the Court's ECF system and that copies were served by ECF email on the below counsel:

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