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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.	Case No.: 3:22-cv-01329-FLW-LHG [formerly Superior Court of New Jersey, Law Division, Civil Part, Mercer County, Docket No.: MER-L-448-22 and subsequently transferred to Superior Court of New Jersey, Chancery Division, General Equity, Mercer County, Docket No.: MER-C-26-22]

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO REMAND OR, IN THE ALTERNATIVE, TO ABSTAIN

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PRELIMINARY STATEMENT

Before this Court tries to unravel Defendants' flawed legal positions in this action, it must first decide the question of whether or not federal jurisdiction exists. The answer to that question is "no"[1].

Over the course of 28 pages, Defendants resort to "smoke and mirrors" to hide the fallacy of their arguments in opposition to Commissioner Caride's motion to remand. They launch into a parade of arguments including that Commissioner Caride commenced this action for personal reasons, that federal question and diversity jurisdiction exists, and that the doctrine of abstention does not apply. Based on the record before this Court, each layer of Defendants' arguments has decreasing support in the law and lack merit.

The subject matter of this action could not be any clearer. Commissioner Caride did not commence this action in her personal capacity, nor was the same commenced for personal animus. It is specious for Defendants to suggest otherwise. Commissioner Caride commenced this action in her capacity as the appointed Commissioner of Insurance for the State of New Jersey. Commissioner Caride is the alter ego or arm of the State. Therefore, the State of New Jersey is the real party in interest here.

Defendants' opposition papers highlight their struggles to justify removing this action from the Superior Court of New Jersey to federal court in the first place. Starting on page 6 of their opposition brief, Defendants try to convince themselves that the McCarran-Ferguson Act created a federal cause of action relied on by Commissioner Caride in this matter. Defendants argue that "Plaintiffs' claim plainly arises under the laws of the United States." Their argument is legally

[1] Unless otherwise defined, quoted terms as used herein are those as defined in Commissioner Caride's motion to remand.

incongruous. The sole purpose of the McCarran-Ferguson Act is to express Congress' decision to allow the states to regulate the business of insurance. There is nothing in the language of the McCarran-Ferguson Act which regulates insurance, defines the procedure an insurance carrier is required to follow to modify rates of insurance policies, or defines the rate making process (including appeal rights) that are characteristics of New Jersey insurance laws. The only law at issue in this action is New Jersey's Long-Term Care Act.

The remaining arguments of Defendants' opposition lack substance. Defendants' reliance on the Gunn Grable test under 28 U.S.C § 1331 is erroneous because the relief in the complaint can be decided without ever reaching the question of the McCarran-Ferguson Act. Likewise, Defendants' application of the Fitchik test under 28 U.S.C. § 1332 is wrong because focusing solely on the potential impact on the State of New Jersey's treasury to determine whether or not Commissioner Caride is an arm of the State undermines the relevant legal analysis. Based on the statutory language, which created DOBI and defines Commissioner Caride's appointment, it is clear that they are an arm of the State. Therefore, diversity of citizenship does not exist.

Finally, the remaining arguments raised by Defendants under the abstention doctrine and the full faith and credit cause should be rejected. The enforcement of the Plan in New Jersey falls squarely within the scope of Commissioner Caride's ratemaking authority granted to DOBI by the New Jersey Legislature. As such, Commissioner Caride's motion to remand should be granted.

I. COMMISSIONER CARIDE DOES NOT SEEK DECLARATORY RELIEF UNDER THE MCCARRAN-FERGUSON ACT.

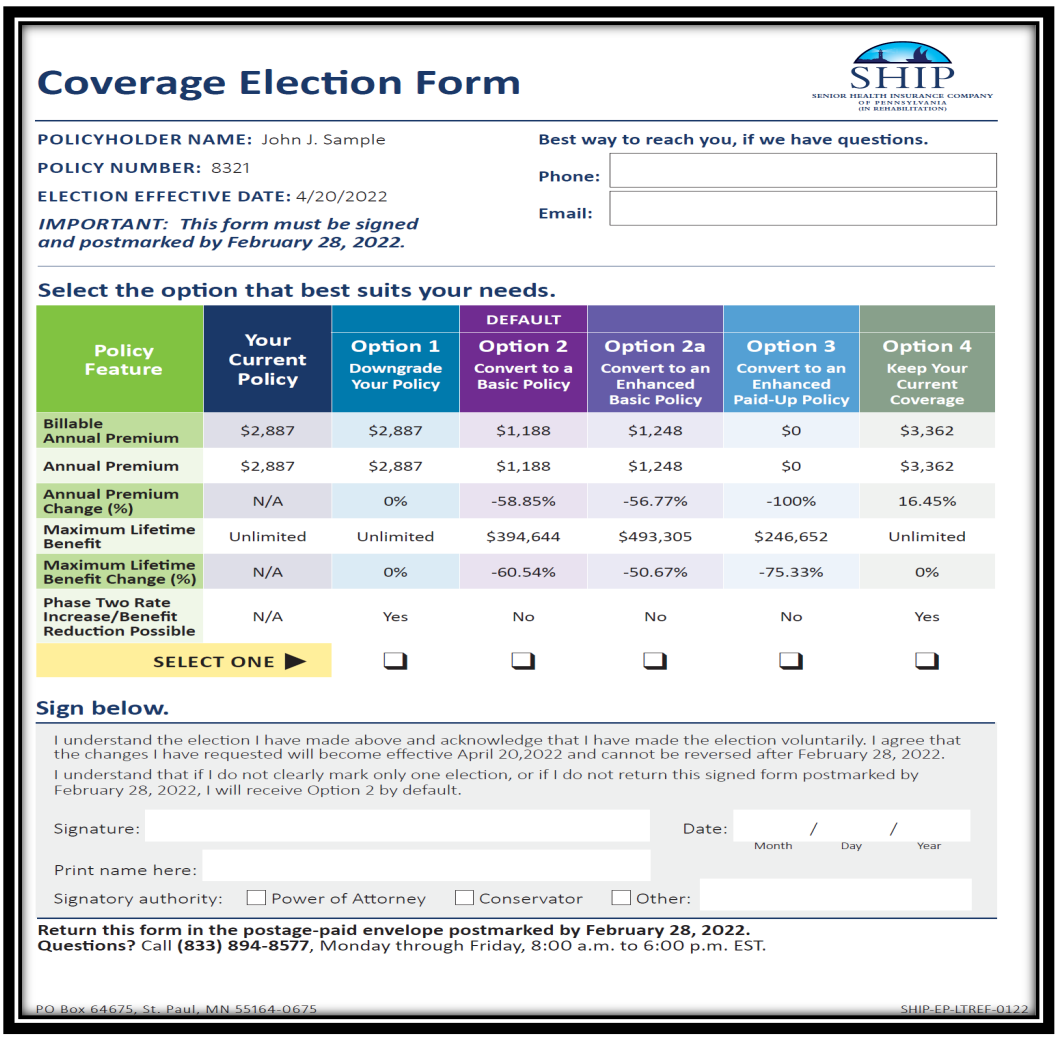
Defendants continue to misstate the substance of Commissioner Caride's verified complaint. Starting on paragraph 1 of page 3 of the verified complaint, Commissioner Caride lays out the foundation for the basis of her claims against Defendants. In paragraph 3 of the verified complaint, Commissioner Caride states:

> Under the authority vested in the Commissioner and DOBI by statute, every long term care insurance policy or contract, including any application, certificate, rider, or endorsement to be issued or delivered, shall be filed with the Commissioner for prior approval. N.J.S.A. 17B:27E-10. An insurer providing long-term care insurance issued on an individual basis in New Jersey is required to file, for the commissioner's approval, its rates, rating schedule, and supporting documentation demonstrating that it is in compliance with the applicable loss ratio standards of New Jersey. All filings of rates, rating schedules, and supporting documentation shall demonstrate to the satisfaction of Commissioner Caride that the benefits are reasonable in relation to the premium charged and the rates are not excessive, inadequate, or unfairly discriminatory.
>
> N.J.S.A. 17B:27E-11.

Verified Complaint, at p. 3, ¶3. The Commissioner Caride adds that the "increased premiums and modification of the benefits selected" by the Rehabilitator were done so without the approval of DOBI, which violates N.S.J.A. 17B:27E-11. Id. at ¶4.

As shown in Illustration 1 below, the Coverage Election Forms represent changes made by SHIP, based on the decision by the Commonwealth Court to approve the Plan. The proposed premium and benefit changes were marketed to SHIP's policyholders in New Jersey to solicit their changes to their contractually guaranteed policy. Notwithstanding Defendants' arguments on page 8 of their opposition, they cannot point to any part of the McCarran-Ferguson Action which addresses the specific details and procedure of the rate making authority granted to the States, let alone the procedures in New Jersey. Indeed, all of the cases relied on by Defendants on pages 8 to 9 of their brief raise broad, sweeping and conclusory statements that the business of insurance is "subject to the laws of the several States." 28 U.S.C. § 1012(a). The McCarran-Ferguson Act does not create any cause of action with regard to the rate-making process in New Jersey.

The changes as proposed by SHIP (seen below) are marketed on SHIP stationary and are clearly subject to review by Commissioner Caride.



Coverage Election Form

SHIP
SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA (IN REHABILITATION)

POLICYHOLDER NAME: John J. Sample
POLICY NUMBER: 8321
ELECTION EFFECTIVE DATE: 4/20/2022
IMPORTANT: This form must be signed and postmarked by February 28, 2022.

Best way to reach you, if we have questions.
Phone:
Email:

Select the option that best suits your needs.

Policy Feature	Your Current Policy	Option 1 Downgrade Your Policy	Option 2 (DEFAULT) Convert to a Basic Policy	Option 2a Convert to an Enhanced Basic Policy	Option 3 Convert to an Enhanced Paid-Up Policy	Option 4 Keep Your Current Coverage
Billable Annual Premium	$2,887	$2,887	$1,188	$1,248	$0	$3,362
Annual Premium	$2,887	$2,887	$1,188	$1,248	$0	$3,362
Annual Premium Change (%)	N/A	0%	-58.85%	-56.77%	-100%	16.45%
Maximum Lifetime Benefit	Unlimited	Unlimited	$394,644	$493,305	$246,652	Unlimited
Maximum Lifetime Benefit Change (%)	N/A	0%	-60.54%	-50.67%	-75.33%	0%
Phase Two Rate Increase/Benefit Reduction Possible	N/A	Yes	No	No	No	Yes
SELECT ONE ▶		❑	❑	❑	❑	❑

Sign below.

I understand the election I have made above and acknowledge that I have made the election voluntarily. I agree that the changes I have requested will become effective April 20,2022 and cannot be reversed after February 28, 2022.
I understand that if I do not clearly mark only one election, or if I do not return this signed form postmarked by February 28, 2022, I will receive Option 2 by default.

Signature: Date: / / (Month / Day / Year)
Print name here:
Signatory authority: ☐ Power of Attorney ☐ Conservator ☐ Other:

Return this form in the postage-paid envelope postmarked by February 28, 2022.
Questions? Call **(833) 894-8577**, Monday through Friday, 8:00 a.m. to 6:00 p.m. EST.

PO Box 64675, St. Paul, MN 55164-0675 SHIP-EP-LTREF-0122

See Declaration of G. Glennon Troublefield, Esq., Ex. 11 [D.E. 10-2, p. 368 of 418)].

Because these changes are to SHIP's policies, and SHIP is an insurance carrier which sold long-term care products in New Jersey with prior approval of DOBI, Defendants must now submit the changes to Commissioner Caride for approval consistent with the Long-Term Care Act. N.J.S.A. 17B:27E-10 and -11.

The case law relied on by Defendants to support their argument that Commissioner Caride is raising claims that arise under the McCarran-Ferguson Act are inapposite. Defendants cite to Niblack v. Rutgers Univ., No. CV 16-504 (JMV), 2006 WL 4432682, at *1-2 (D.N.J. Aug. 17, 2016) for the proposition that Commissioner Caride's action invokes federal law. However, in

Niblack, plaintiff filed a civil rights complaint asserting that Defendants violated his constitutional rights by their failure to maintain accurate medical records. Plaintiff's complaint invoked the United States Constitution, 42 U.S.C. § 1983, and other federal statutes. That is not the case here.

In Kindered Hospitals East, LLC v. Local 464A United Food and Commercial Union Welfare Service Benefit Fund, 2021 WL 4452495 (D.N.J. Sept. 29, 2021), also relied on by Defendants, the Court addressed defendants' refusal to pay plaintiff for medical services that plaintiff provided to unnamed beneficiaries of the defendant Welfare Fund. The court found that the plaintiff's complaint presented a federal question because plaintiff seeks a judicial declaration that the [Welfare] Fund must comply with the Patient Protection and Affordable Care Act mandates. Kindered Hospital is distinguishable because SHIP's obligation to submit a request for a rate change arises under the Long-Term Care Act, not the McCarran-Ferguson Act.

The Gunn-Grable factors relied upon by Defendants do not require federal question jurisdiction. McCarran-Ferguson is not "necessarily raised" by Commissioner Caride – rather, the same was not raised at all. Defendants' analysis rests on the fiction that the Commissioner Altman, Commissioner Humphrey and Special Deputy Cantilo (collectively, the "PA Commissioners") are acting as the "Commonwealth of PA" in seeking rate increase. That is not true. As explained in Point III, infra, the PA Commissioners are merely setting in the shoes of SHIP and are not acting under state authority. SHIP is a private company before the rehabilitation order and its obligations to comply with a given state's rate approval process was never in doubt. The PA Commissioners' remain subject to SHIP's obligations. Accordingly, the declaratory and injunctive relieve requested by Commissioner Caride's Complaint can be decided in its entirety without ever reaching the question of whether McCarran-Ferguson Act offers a cause of action, which it does not.

Defendants' arguments that "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 . . ." is wrong. First, Commissioner Caride's claims arise under New Jersey's Long Term Care Act. Second, Commissioner Caride, though disagreeing with the approach taken in Pennsylvania, respects the process and is requiring the implementation/enforcement of the Plan to follow the procedure in New Jersey. Similar to the enforcement of foreign judgments, the forum state still retains the right to control enforcement of the Plan in the forum state. That is especially so given that the Plan seeks to impact senior citizens in New Jersey who had faithfully paid for their SHIP policies for decades and also impacts the guaranteed association system in New Jersey.

II. DIVERSITY JURISDICTION IS ABSENT BECAUSE COMMISSIONER CARIDE AND DOBI ARE ALTER EGOS OF NEW JERSEY AND, THUS, NOT CITIZENS FOR DIVERSITY OF CITIZENSHIP PURPOSES

Under 28 U.S.C. § 1332, there should be no question that Commissioner Caride is the alter ego or arm of the state, she did not commence this action for any personal animus or gains, and she is simply enforcing the laws of the State of New Jersey. In Fitchik v. New Jersey Transit Rail Operations, the Third Circuit set forth a three-part test to evaluate whether an entity is an arm of the state entitled to Eleventh Amendment immunity. 873 F.2d 655, 659 (3d Cir. 1989). 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) (quoting Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 546 (3d Cir. 2007), amended on reh'g (Mar. 8, 2007)); see Fitchik, 873 F.2d at 659. After identifying each factor points, the Circuit Court balanced them to determine whether an entity amounts to an arm of the State. Fitchik, 873 F.2d at 664.

Here, the first factor is not helpful to Defendants because it is more suited to litigation in which an agency is a defendant. Commissioner Caride is the plaintiff in this matter.

The second Fitchik factor requires this Court to ascertain the "status of the agency under state law," which includes such considerations as "how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation." Fitchik, 873 F.2d at 659. In this matter, DOBI is not a separately incorporated agency. DOBI was originally established by an act to establish a Department of Banking and Insurance" (1891) which is now contained in Title 17, Section 1-1 of the New Jersey State Statutes. Commissioner Caride's authority and appointment is at the pleasure of the Governor with the advice and consent of the state Senate:

> The head of the reconstituted department, to be denominated the Commissioner of Banking and Insurance and hereinafter in Title 17 of the Revised Statutes and Title 17B of the New Jersey Statutes, designated the "commissioner," shall be appointed by the Governor, with the advice and consent of the Senate, and shall serve at the pleasure of the Governor during the Governor's term of office and until the appointment and qualification of the commissioner's successor. The person in office as the Commissioner of Insurance on June 30, 1996, shall at the pleasure of the Governor hold the office of Commissioner of Banking and Insurance reestablished by this 1996 amendatory and supplementary act for the unexpired term for which the commissioner was appointed, and until a successor is appointed and qualified. No person shall be appointed commissioner who is in any way connected with the management or control of any corporation, firm, association, institution, or licensee affected by Title 17 of the Revised Statutes or Title 17B of the New Jersey Statutes . . . . [N.J.S.A. 17:1-2].

As to the third Fitchik factor, enforcement of an insurance carrier's obligation to comply with the insurance laws of the State of New Jersey is a public interest required to be protected. Sadly, Defendants conveniently ignore that these policyholders are senior citizens who are at a vulnerable age (*i.e.*, 89) and desire protection for predatory actions. "The principle that 'the

insurance business is strongly affected with a public interest and therefore properly subject to comprehensive regulation in protecting the public welfare' is long-settled and well-established." R.J. Gaydos 21 A-0653-20 Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 280-81 (2001) (quoting Sheeran v. Nationwide Mut. Ins. Co., 80 N.J. 548, 559 (1979)). To safeguard that public welfare, DOBI has "broad and comprehensive regulatory authority . . . over the business of insurance." In re Twin City Fire Ins. Co., 129 N.J. 389, 407 (1992). Accordingly, Under N.J.S.A. 17:1-15, Commissioner Caride is authorized, among other things, to:

> c. Perform, exercise and discharge the functions, powers and duties of the department through those divisions established by law or as the commissioner deems necessary;
>
> . . .
>
> g. Institute or cause to be instituted the legal proceedings or processes necessary to enforce properly and give effect to any of the commissioner's powers or duties …

The breadth of Commissioner Caride's authority encompasses all expressed and implied powers necessary to fulfill the legislative scheme that the agency has been entrusted to administer." In re Virtua-W. Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422- 23 (2008).

Based on the breadth of DOBI's function and the function performed by Commissioner Caride, it is clear that the State of New Jersey is the real party in interest. Commissioner Caride does not seek relief in the form of a particular result for policyholders, but rather seeks adherence to the administrative process that New Jersey follows under New Jersey law and insurance regulation, which would allow the Commissioner to give "prior approval" of "premium increases and policy modifications. Therefore, the complaint seeks relief that is directed at Commissioner Caride's functions in executing the insurance laws and regulations of the state. Even if the complaint seeks in part benefits for New Jersey, it is consistent with plaintiff's statutory obligations as Insurance Commissioner to protect such New Jersey citizens from allegedly injurious conduct.

Finally, as Defendants concede, Commissioner Caride is not seeking to recover money damages from Defendants. In their own words, "[n]otably, Plaintiffs do not assert any judgment will have any impact on New Jersey's treasury." Defendants' Brief, at p. 12. With that said, Defendants have not carried their burden to prove that the value of Commissioner Caride's action exceeds the $75,000 threshold. The only calculation relied on by Defendants speculates that the approximately 500 SHIP policyholders in New Jersey each have insurance coverage exceeding $100,000 and may pay a thousand or so dollars in additional premiums, which is completely speculative. See Defendants' Brief, at p. 24. Critically, "**mere speculation that a claim will exceed the jurisdictional amount is not enough to confer federal jurisdiction**." Russ v. Unum Life Ins. Co., 442 F.Supp.2d 193, 198 (D.N.J. 2006) (citing Flannery v. Cont'l Cas. Co. 2003 WL 21180724, at *5, 2003 U.S. Dist. LEXIS 8493, at *13 (S.D.Ind. March 11, 2003)).

As a result, diversity jurisdiction under 28 U.S.C. § 1332 does not exist.

III. DEFENDANTS ARE NOT ALTER EGOS OF PENNSYLVANIA BECAUSE THE HAVE STEPPED IN THE SHOES OF SHIP AND THEIR ACTIVITIES DO NOT CONSTITUTE STATE ACTION

Under Pennsylvania law, insurance officials acting in a statutory capacity as an appointed Rehabilitator are not agents of the court and are neither free agents with unfettered discretion. Koken v. Legion Ins. Co., 831 A.2d 1196, 1232 (Pa. Commw. Ct. 2003). In other words, when the Insurance Commissioner is acting as a liquidator or rehabilitator, he or she is acting in a different capacity from the position as head of the Pennsylvania Department of Insurance. See Greenberger v. Pennsylvania Insurance Department, 39 A.3d 625 (Pa. Commw. Ct. 2012). The Pennsylvania courts have referred to this theory as the "separate capacities doctrine." See, e.g., Koken v. One Beacon Ins. Co., 911 A.2d 1021, 1028–29 (Pa. Commw. Ct. 2006) ("Under the separate capacities doctrine, a governmental entity . . . is treated as a separate entity when acting in another capacity").

This doctrine applies equally when the Commissioner is acting in the capacity of either a Rehabilitator or a Liquidator. See One Beacon Ins. Co., 911 A.2d at 1029.

Therefore, the PA Commissioners are not performing regulatory functions as the State; rather, they are agents of SHIP with authority to operate SHIP until the end of rehabilitation and cannot escape compliance. The Court in Foster v. Monsour Medical Foundation, held that, once the Insurance Commissioner is appointed as the Statutory Liquidator, she "steps into the shoes of the insurer" such that "[a]ny actions commenced by the Liquidator are on behalf of the insurance company." 667 A.2d 18, 19 (Pa. Commw. Ct. 1995). The same holds here. The PA Commissioners as the Rehabilitators are agents of SHIP, not Pennsylvania. Id. at 20; See also One Beacon Ins. Co., 911 A.2d at 1029.

IV. ABSTENTION IS THE APPROPRIATE REMEDY IN THIS DECLARATORY AND INJUNCTIVE RELIEF ACTION

Abstention is proper in cases requesting injunctive relief, particularly where the issues involve issues of state concern. Burford v. Sun Oil Co., 319 U.S. 315 (1946) (remanding a claim for injunctive relief where the State's interest in the case were strong); Lac D'Amiante Du Quebec, Ltd., 864 F.2d 1033 (3d Cir. 1988) (permitting Burford abstention in a case for declaratory relief involving insurance liquidation, and opining that "a refusal to abstain simply because the federal court is not sitting in equity makes no sense"). Abstention is appropriate here, especially given then highly regulated field of changes to insurance premiums and benefits of which the States have the primary role in setting. See Lac D'Amiante Du Quebec v. American Home Assurance Co., 864 F.2d 1033, 1039 (3d Cir.1988). Federal review in this matter threatens to "frustrate the purpose of the complex administrative system that [New Jersey] ha[s] established." See Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 725, 116 S. Ct. 1712, 1725, 135 L. Ed. 2d 1 (1996).

Defendants' reliance on Motor Club of Am. V. Weatherford, 841 F.Supp. 610 (D.N.J. 1994) is misplaced. That case presented a unique dispute regarding a liquidation proceeding by the Oklahoma Commissioner over an Oklahoma domestic property and casualty insurance company, the transfer of stock held by a subsidiary New Jersey insurance company, and a question of whether the initial transfer of stock was void under Oklahoma law. The Commissioners of Insurance of Oklahoma and New Jersey reached an agreement to allow the question whether the transfer was void to be litigated in Oklahoma. The Court abstained under Burford to allow the issues to be decided in in Oklahoma and dismissed the action because there was no vehicle known to either parties or the Court to effectuate a proper remand.

Abstention is appropriate here because Commissioner's Caride's has authority to "determine all matters of policy within the commissioner's jurisdiction" and to "institute or cause to be instituted the legal proceedings or process necessary to enforce properly and give effect to any of the commissioner's powers or duties. N.J.S.A. 17:1-15(f) and (g). There is no need for this Court to hamper the State's development of coherent regulatory policy with statewide implications, under N.J.S.A. 17:1-2 and 17:1-15.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this matter be remanded back to the Superior Court of New Jersey.

Dated: May 9, 2022

Respectfully submitted,

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