

**UNITED STATES DISTRICT COURT
FOR THE 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,	:	Case No. 3:22-cv-01329-FLW-LHG
	:	
Plaintiffs,	:	Motion Date: May 16, 2022
	:	
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, and SENIOR HEALTH	:	
INSURANCE COMPANY OF	:	
PENNSYLVANIA,	:	
	:	
Defendants.	:	
	:	

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

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New Jersey Department of Banking and
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DEPARTMENT OF BANKING AND
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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, and SENIOR HEALTH
INSURANCE COMPANY OF
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Case No. 3:22-cv-01329-FLW-LHG

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ARGUMENT IN REPLY

Plaintiffs’ Opposition to Defendants’ Motion to Dismiss misses the mark, cites inapposite case law, and fails to salvage Plaintiffs’ claims because (1) the Full Faith and Credit Clause prohibits the instant collateral attack on the Pennsylvania Commonwealth Court’s binding Order approving the rehabilitation plan, and (2) this Court lacks personal jurisdiction over the Rehabilitator and Special Deputy Receiver (“SDR”).¹

¹ Plaintiffs’ apparent reliance on the Eastern District of North Carolina’s recent order to remand is misplaced. In that case, the sole issue decided by the court was whether the plaintiff, the Commissioner of Insurance of the State of North Carolina, was the alter ego of the State and, therefore, not a “citizen” for purposes of a diversity of citizenship analysis in support of subject matter jurisdiction. No such issue is before this Court with respect to the instant Motion to

1. The Full Faith and Credit Clause Bars Plaintiffs' Claims.

Plaintiffs attack Defendants' Full Faith and Credit argument by disingenuously relying on the fact that Plaintiffs did not participate in the Pennsylvania Commonwealth Court's proceeding. (Doc. 16 at 11.) It was *Plaintiffs' choice*, however, not to participate in the Pennsylvania proceedings, despite receiving notice of the opportunity to participate multiple times. Upon SHIP being placed in rehabilitation in late January 2020, notice was provided to all policyholders (including those in New Jersey) and insurance regulators (including those in New Jersey). (See Exhibit A to Motion to Dismiss, Doc 3-4.) Subsequently, on June 12, 2020, the Pennsylvania Commonwealth Court ordered interested parties to offer input on the proposed rehabilitation plans or seek leave to intervene in the proceedings. (See Exhibit B to Motion to Dismiss, Doc. 3-4.) While certain state regulators did seek intervention and participation in the rehabilitation proceeding, Plaintiffs did not. Nor did Plaintiffs participate during the weeklong evidentiary hearing in May 2021 before the Commonwealth Court. Plaintiffs cannot be permitted to knowingly sit on their hands for more than two years and then assert the instant collateral attack in lieu of proper participation in the Pennsylvania Commonwealth Court proceedings.

The very nature of rehabilitation (and liquidation) proceedings confirms that the Commonwealth Court's Order is entitled to Full Faith and Credit protection. In *Ballesteros v. New Jersey Property Liability Ins. Guaranty Assoc.*, 530 F. Supp. 1367 (D.N.J. 1982), the plaintiff unsuccessfully challenged the rehabilitation efforts of a New York Court-appointed Superintendent when the Superintendent sent notices of cancellation of policies to a New Jersey insured. This Court recognized that 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...

Dismiss. Whether this Court has subject matter jurisdiction may be relevant to the remand issues currently pending before this Court, but it is not relevant to the instant Motion to Dismiss.

The need for giving one state exclusive jurisdiction over delinquency proceedings has long been recognized in the courts.” *Id.* at 1370-71. Further noting the “benefits of centralizing the management over delinquency proceedings in the courts of one state,” this Court continued that, for the sake of economy, efficiency, and order:

it is essential that the title, custody, and control of the assets be intrusted [sic] to a single management under the supervision of one court. Hence other courts, except when called upon by the court of primary jurisdiction for assistance, are excluded from participation.

Id. at 1371 (citation omitted). *See also Motor Club. of Am. v. Weatherford*, 841 F. Supp. 610 (D.N.J. 1994) (this Court abstained in favor of the Oklahoma insolvency proceedings because the plaintiff’s claims were “really part and parcel of the liquidation proceedings pending in Oklahoma” and Oklahoma’s regulatory scheme provided for exclusive jurisdiction over delinquency proceedings in Oklahoma).

While Plaintiffs would prefer to litigate this matter in this Court, there is no question that the Pennsylvania Commonwealth Court is the court of primary jurisdiction with respect to the rehabilitation of SHIP. As such, that Court’s Order approving the rehabilitation plan is entitled to Full Faith and Credit and should not be undermined by the present collateral attack.

2. This Court Lacks Personal Jurisdiction Over the Rehabilitator and SDR.

Plaintiffs also mistakenly focus their personal jurisdiction argument on SHIP itself (doc. 16 at 19-20), when Defendants never argued that this Court lacked personal jurisdiction over SHIP itself. The lack of personal jurisdiction argument pertains only to Defendants Altman and Cantilo.

Plaintiffs contend that SHIP’s consent to service of process on November 19, 2008 binds the Rehabilitator and SDR, who were appointed by Order of the Pennsylvania Commonwealth Court nearly 12 years later, on January 29, 2020. Plaintiffs’ argument asks the Court to connect

far-flung dots to give this argument viability. Indeed, Plaintiffs' argument assumes several layers of facts not in evidence and not legally or factually supported, including but not limited to:

- That a consent form signed by SHIP on November 19, 2008 binds a Rehabilitator appointed nearly 12 years later;
- That the Commissioner and SDR are the "agents" of SHIP; and
- That the Commissioner and SDR are agents of SHIP specifically for service of process.

While it is true that the Pennsylvania Insurance Commissioner wears multiple hats in his role as (Acting) Commissioner, this does not mean that he and the SDR are SHIP's "agents" or that they are SHIP's agents for all things. For the proposition that the Rehabilitator and SDR are the agents of SHIP, Plaintiffs cite to the case of *Foster v. Monsour Medical Foundation*, 667 A.2d 18 (Pa. Commw. Ct. 1995). A word search of that case confirms that the word "agent" does not appear even once in the case. More significantly, that case holds that the pre-litigation actions of the liquidator may not be used against the liquidator in the form of affirmative defenses in litigation. If anything, that holding supports Defendants' position here – that a consent to service of process that pre-dates this litigation cannot bind the Rehabilitator and SDR now.

Plaintiffs' argument, if accepted, would turn the rules of personal jurisdiction on their head. Any agent of SHIP – no matter where they were located or the scope of their agency – could be required to consent to jurisdiction in the State of New Jersey, without any regard to due process, minimum contacts, or any other well-established notions of law and fairness. This simply cannot be the case.

Plaintiffs' attempted invocation of the "separate capacities" doctrine fails, and the case law they cite is inapposite. Under the separate capacities doctrine, "a governmental entity ... when

acting in one capacity, is treated as a separate entity when acting in another capacity." *Koken v. OneBeacon Ins. Co.*, 911 A.2d 1021, 1028 (Pa. Commw. Ct. 2006).² Pre-rehabilitation, regulatory conduct of a Commissioner should not be used against a Statutory Liquidator or Rehabilitator. *Id.* Here, the Rehabilitator and SDR have one capacity, as Statutory Rehabilitators, where they stand in SHIP's shoes only for purposes of recouping SHIP's assets "in order to protect the rights of its creditors, policyholders and shareholders," *Monsour Medical Foundation*, 667 A.2d 18, 19 (Pa. Commw. Ct. 1995), *not* for all possible purposes. The Rehabilitator's and SDR's pre-rehabilitation capacity is not at issue, but, if anything, the case law cited by Plaintiffs support the notion that pre-rehabilitation conduct (here, SHIP signing of a consent to service of process) should not be used against a Statutory Rehabilitator.

CONCLUSION

For all the foregoing reasons, and the reasons set forth in Defendants' initial moving papers, Defendants respectfully request that this Court dismiss the Complaint in its entirety, with prejudice.

² *Greenberger v. Pennsylvania Ins. Dep't*, 39 A.3d 625 (Pa. Commw. Ct. 2012) does not hold otherwise. In *Greenberger*, a Pennsylvania Right to Know Law ("RTKL") case, the party requesting production of documents argued, as Plaintiffs argue here, that the Statutory Liquidator "stands in the shoes of Reliance such that they are one and the same entity for purposes of liquidation, correspondence and/or communications." *Id.* at 628. The court, however, did not address the separate capacities doctrine, ruling instead that the Office of Open Records did not have jurisdiction to address the RTKL issues before the *Greenberger* court because the "Statutory Liquidator, and the Department, when aiding the Statutory Liquidator, and Reliance are acting pursuant to a court order and under the supervision of this court." *Id.* at 629.

Respectfully submitted,

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and Senior Health Insurance Company of Pennsylvania*

Dated: May 9, 2022

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2022, I caused to be served the foregoing Defendants' Reply Brief in Support of Defendants' Motion to Dismiss Plaintiffs' Complaint via the Court's electronic filing system and via electronic mail:

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