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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Senior Health Insurance Company of Pennsylvania in Rehabilitation	:	No. 1 SHP 2020

REHABILITATOR'S OPPOSITION TO THE INTERVENOR STATE INSURANCE REGULATORS' APPLICATION TO RECONSIDER ORDER GRANTING REHABILITATOR'S ORAL MOTION REGARDING THE ISSUE STATE RATE APPROVAL OPTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Statutes

Rules

Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania, in her capacity as the Statutory Rehabilitator ("Rehabilitator") of Senior Health Insurance Company of Pennsylvania ("SHIP"), hereby submits this Brief in Opposition to the Intervenor State Insurance Regulators' ("Intervening Regulators") Application to Reconsider Order Granting Rehabilitator's Oral Motion Regarding the Issue State Rate Approval Option ("Reconsideration Application"). This Court should deny the Reconsideration Application; the Intervening Regulators failed to present any supporting evidence on the rate approval issue during the plan hearing, and the Reconsideration Application does not cure that fatal defect.

I. INTRODUCTION

The focus of the Reconsideration Application is the Intervening Regulators' claim that the Plan unlawfully seeks to supersede state regulation by other States (Recon. App. at 2, 2 n.1, 7), and the Court's directed verdict[1] on that objection as to the issue state rate approval option in the Plan. In the Reconsideration Application and in prior filings, the Intervening Regulators have also objected that the Plan fails to meet an alleged feasibility requirement; is not fair and equitable; fails to satisfy

[1] To the extent that the Intervening Regulators suggest that a directed verdict is inappropriate in the absence of a jury (Recon. App. at 8, 12), the assertion is a meritless "form over substance" argument that ignores their fundamental failure. Whether termed "directed verdict", "judgment at the close of the evidence", "judgment", or simply a "decision" of the Court, it was entirely appropriate for the Court to enter an order disposing of the rate approval issue once the Intervening Regulators had failed to adduce any evidence at all that the Plan in that respect had caused them or would cause them any harm, let alone that the opt-out provision would not have cured such harm.

the *Neblett v. Carpenter* test; and is contrary to the interests of policyholders. (*Id.* at 2 n.1, 4 n.2.) They contend that all of these objections—including the rate-setting issue—present purely legal questions because they consist in part of assertions that the Plan violates applicable law by suggesting that the law imposes requirements that the Plan fails to meet. The Intervening Regulators are incorrect. None of their objections are entirely free of factual considerations, and none are purely legal such that the record is immaterial. The mere allegation that the Plan fails to meet a legal requirement is not by itself sufficient to entitle the Intervening Regulators to the relief requested: here, a finding that the Rehabilitator has abused her discretion and the entry of an order disapproving the Plan.

To succeed in convincing this Court to reject the Plan, it was incumbent upon the Intervening Regulators to show that the alleged violations of law result in harm *to their interests*. They failed to demonstrate harm during the hearing, and they cannot do so now. In the absence of any harm *to their interests*, the Intervening Regulators are simply not entitled to the relief they seek. *See, e.g., King v. Pittsburgh Water & Sewer Auth.*, 139 A.3d 336 (Pa. Commw. Ct. 2016) (no relief where party could not show that their interests were harmed by plaintiff's alleged destruction of evidence); *Stiffler v. Ins. Comm'r of the Commonwealth of Pennsylvania*, 786 A.2d 296, 299 (Pa. Commw. Ct. 2001) (no relief where party failed to show, *inter alia*,

that equipment requested from Catastrophic Loss Benefits Continuation Fund would provide party with any rehabilitative benefit).

In this Opposition, the Rehabilitator will address the Intervening Regulators' fatal infirmity as it relates to the first ground for relief cited above—*i.e.*, the suggestion that the Plan's mechanism for setting premium rates unlawfully seeks to supersede state regulation by other States despite the opportunity for states to opt-out. In addition, in her proposed Findings of Fact and Conclusions of Law to be filed in this Court around the same time, the Rehabilitator will demonstrate fully how the Intervening Regulators' failure to present evidence deprives them of any right to relief on this issue or any other assertions made by them as to the Plan.[2]

II. THE COURT PROPERLY ENTERED JUDGMENT AND THE APPLICATION FOR RECONSIDERATION SHOULD BE DENIED.

The Reconsideration Application primarily raises procedural objections, claiming that the Rehabilitators' oral motion for a directed verdict at the close of the evidence was improper and surprising. Those objections are without merit. It was the deliberate and strategic decisions made by the Intervening Regulators that led to the directed verdict. (*See* Tr. 547:13-548:2 (Intervening Regulators' counsel explaining their deliberate choice not to present more evidence or other witnesses at

[2] The Rehabilitator does not concede that the "Background" presented in the Intervening Regulators' Reconsideration Application is accurate or proper, but she assumes the Court is familiar with the record and will address the facts as needed. Moreover, as noted herein, the Rehabilitator will address all open issues in her post-hearing submissions, including the directed verdict, and she will ask the Court to address the rate-setting mechanisms simultaneously with all other issues following the filing of Findings of Fact and Conclusions of Law and responsive briefs.

the hearing).) As a result, the record shows that the Intervening Regulators failed to adduce any evidence in support of their claims on this issue and, especially, of any resulting harm which will be imposed on the Intervening Regulators if the Plan is approved.

Moreover, the Intervening Regulators' claim that the Plan should be rejected because it unlawfully seeks to supersede state regulation by other States is unsupportable as a matter of law. The Intervening Regulators' arguments misinterpret the law governing the relationship between the states, and they did not identify any law that is or could be violated. They likewise did not present evidence of any interest that would be impaired if the Second Amended Plan were approved. Ultimately, and fatally, the Intervening Regulators never showed that the alleged defects in the Plan were not cured by the opt-out provisions provided by the Plan. The Reconsideration Application suffers from the same deficiencies, and it should be denied accordingly.

A. The Rehabilitator's Motion was Procedurally Proper, and the Court's Order was Properly Entered.

In their opening arguments, the Intervening Regulators do not address the record, as would be expected in an Application for Reconsideration. They do not identify any legal question on which the Court might have erred or any evidence in the record which the Court might have overlooked. Instead, the Intervening Regulators' opening arguments are procedural—namely, that the Court should not

have entered judgment in the nature of a directed verdict because the Rehabilitator's Motion was vague, the Court's Order was vague, the Motion was unfairly surprising, and the Court's Order prevents any meaningful review of the Plan. The focus on procedural defects is ironic given that the Intervening Regulators violated this Court's instruction to address the issue in post-hearing briefs. (*See* Tr. at 995:22 ("The Court is going to grant the motion. Mr. Leslie, on behalf of your clients, you may make your case *in your post-hearing filing* on why the Court should reconsider that motion grant.") (emphasis added).)[3] But even on the merits of such claims, each of the Intervening Regulators' arguments fails and would not support reconsideration of this Court's decision.

1. The Rehabilitator's Motion and the Court's Order were Clear.

The Intervening Regulators begin by feigning confusion, complaining that "[t]he nature of the relief sought and the scope of the issues on which the Rehabilitator apparently sought to prevent briefing and decision was [sic] left open" and "the Court's order is ambiguous." (Recon. App. at 7.) The Intervening Regulators are wrong on both points: as the record makes abundantly clear, the Rehabilitator's request for relief was *not* confusing, and the Court's Order was *not* vague.

[3] For this reason, the Intervening Regulators should not be permitted to file a "Reply" to any opposition to their Reconsideration Application outside of the scheduled post-hearing submissions on June 14 and June 28, 2021.

The basis for the Rehabilitator's Motion was clear. As the Rehabilitator's counsel stated, "the state insurance regulators have failed to put on any evidence which would or could support an interest they purport to represent with respect to the issue[] state rate approval option." (Tr. 981:22-982:2.) After describing in detail the basis for the motion and identifying the numerous evidentiary omissions in the Intervening Regulators' case, the Rehabilitator's counsel asserted that "absent any testimony as to the ways in which a regulator is constrained or harmed by that option, the regulators here have no argument to present which would show that [the opt-out] does not sufficiently address the concerns that they have raised at some earlier stage in these proceedings…." (Tr. 986:15-20.)

The Court's reasons for entering the directed verdict were also clear, and not only because the Court agreed with and granted the well-defined motion. The Court explained directly that "there is an opt-out provision that preserves the right of the … state of issue to pursue a rate approval powers and your witness did not address why the plan was deficient in some way on that…." (Tr. 995:22-996:1.) As the Court had noted moments earlier, the Intervening Regulators' counsel previously informed the Court that the opt-out mechanism "was not why [the Intervening Regulators] were presenting evidence." (Tr. 992:23-993:1.)

The Intervening Regulators never fully explain what they do not understand beyond contemptuously claiming that "the phrase 'issue state rate approval option'"

is not "meaningful." (App. at 7.) The Intervening Regulators waived any objection on the alleged lack of clarity, never stating once on the record that they were confused by the scope of the motion or the Court's order. But even if that objection were preserved, the Intervening Regulators are not confused. Indeed, the Intervening Regulators clearly understood what those words meant when they submitted their Pre-Hearing Memorandum, which observed that "[t]he Rehabilitator attempted to address the problems presented by the Plan's provisions superseding the rate review statutes of the other States by adding a new 'Issue-State Rate Approval' section to the Amended Plan [filed on October 21, 2020]" and went on address the opt-out provided by that section. (Regulators' Pre-Hearing Memo at 48-51.) Similarly, the Intervening Regulators' argument in their Reconsideration Application claiming the opt-out cannot be addressed "separate[] from the larger concern over superseding State rate approval statutes" is belied by Intervening Regulators' Pre-Hearing Memorandum in which they offered arguments separately addressing the "opt-out." (*Compare* Recon. App. at 7, *with* Intervening Regulators' Pre-Hearing Memo at 48-51.) The Intervening Regulators also seem to understand the issue when discussing the "'Issue State Rate Approval' section's 'opt-out'" later in their Reconsideration Application. (App. at 19.) Based on this record, the Intervening Regulators have no complaint that the motion or order is vague or confusing, and their selective understanding is no basis for reconsideration.

2. The Intervening Regulators were Not Entitled to Notice.

The Intervening Regulators also feign surprise, claiming that they "were not given due notice" of the Rehabilitator's intent to move for a directed verdict. (Recon. App. at 8.)[4] Yet nowhere in the Reconsideration Application do the Intervening Regulators identify any Pennsylvania law which would have required such notice; they cite no statute, rule, or case forcing the Rehabilitator to discuss or disclose her strategy at the hearing with the Intervening Regulators' counsel. Instead, the Intervening Regulators make the dubious claim that this Court lacks the authority to enter a directed verdict or a similar order because there is no jury and because the Rules of Civil Procedure do not apply. Both arguments are without merit.

First, a directed verdict or a similar order or decision may be entered in matters proceeding without a jury. This is obvious. The Intervening Regulators have no authority supporting a different view, and Pennsylvania case law reveals examples of directed verdicts entered by a single judge sitting as the fact finder. *See, e.g.*, *Geschwindt v. Wagner*, 1 A.3d 970 (Pa. Commw. Ct. 2010) (affirming directed verdict entered following bench trial); *Senehi v. Lower Merion Sch. Dist.*, No. 1990

[4] The Intervening Regulators also appear to suggest that the Court is to blame by denying their request to brief the legal issues first, but the Court in fact clearly stated that all issues should be addressed at once during the hearing. In any event, the Court's decisions on the order of events are not conclusive as to the substantive law, and nothing prevented the Intervening Regulators from presenting evidence on the opt-out at the hearing.

C.D. 2015, 2016 WL 2755932 (Pa. Commw. Ct. 2016) (same); *Waite v. CDG Props. LLC*, No. 896 MDA 2015, 2016 WL 5401842 (Pa. Super. Ct. Aug. 15, 2016) (same).

Second, a directed verdict or a similar order or decision may be entered following an evidentiary hearing, and thus was properly entered here. The Intervening Regulators claim that a directed verdict cannot be entered because this is not ordinary litigation, and because the Rules of Civil Procedure do not apply when the hearing "is not an adversarial proceeding under Pa. R.A.P. 3772." (*See* Recon. App. at 8 & 8 n.3 (citing Pa. R.A.P. 3783).) The Intervening Regulators ignore, however, that the "practice and procedure" in *all* matters within this Court's original jurisdiction "shall be in accordance with the appropriate general rules applicable to practice and procedure in the courts of common pleas, so far as they may be applied." Pa. R.A.P. 106. By statute, the Plan hearing was a matter within the Court's original jurisdiction. *See* 42 Pa. Cons. Stat. § 761(a)(3) ("The Commonwealth Court shall have original jurisdiction of all civil actions or proceedings . . . [a]rising under Article V of the act of May 17, 1921….known as 'The Insurance Department Act of 1921'"). The Intervening Regulators also ignore that this Court's consideration and ruling on the Plan is made "after such notice and hearing as the court may prescribe," giving this Court authority to design and control the proceedings as necessary. 40 Pa. Cons. Stat. § 221.16.

A similar situation arose in *Pennsylvania Human Relations Commission v. School District of Philadelphia*, 651 A.2d 177 (Pa. Commw. Ct. 1993). In that case, a single judge of the Commonwealth Court considered the School District of Philadelphia's compliance with a school desegregation order and whether mandatory measures proposed by the Human Relations Commission were feasible. *Pa. Human Relations Comm'n*, 651 A.2d at 178. To fully understand the issues, the Court scheduled "evidentiary hearing[s]" and permitted interested parties to request intervention and participate in those hearings. *Id.* at 179-180. The Commission rested at the end of the fourth evidentiary hearing, and the School District and the intervening parties "moved for a directed verdict on the basis of, inter alia, the Commission's having failed to demonstrate that mandatory desegregation measures were feasible." *Id.* at 180.

The court granted the motion for directed verdict by treating it as a motion for a compulsory nonsuit because it came at the close of the Commission's evidence rather than at the close of all of the evidence. *See id.* at 180 (citing Pa. R.C.P. Rule 226 (directed verdict at the close of all evidence); Pa. R.C.P. 230.1 (compulsory nonsuit permitted if, at the close of plaintiff's evidence and before any evidence is submitted by defendants, plaintiff has failed to establish a right to relief); Pa. R.C.P. 126 (rules to be applied liberally)). Thus, as is true with the Rehabilitator' motion for a directed verdict, *Pennsylvania Human Relations Commission* involved an oral

motion asking a single judge presiding over evidentiary hearings to find that a party had failed to present evidence supporting their arguments on the issues at hand. Moreover, *Pennsylvania Human Relations Commission* confirms that, to the extent there was any minor procedural defect in the description or characterization of the Rehabilitator's motion, this Court can and should treat any such defect as immaterial.

B. The Intervening Regulators Did Not Address the Rate-Setting and Opt-Out Issues on which the Directed Verdict Was Entered.

Even assuming the Intervening Regulators had a convincing legal argument—which they do not—they have not come close to showing that the Plan will actually harm them or any interest which they properly represent.

1. The Intervening Regulators' Evidence was Limited to Comparing the Impact of the Plan to the Impact of Liquidation.

During the hearing, the Intervening Regulators offered no evidence whatsoever that any provision of the Plan, let alone the rate-setting provision or the opt-out, harms in any way some interest held or represented by the Intervening Regulators. In fact, apart from the Rehabilitator's own documents and testimony, the only affirmative evidence offered in support of their claims as intervenors was the testimony and calculations of a fact witness named Frank Edwards, but his testimony and calculations were focused exclusively on the Intervening Regulators' (misguided) analysis of the allegedly-adverse impact of the Plan on policyholders as compared to liquidation. (*Cf.* Tr. 540:14-541:12 (identifying comparison to liquidation as the "core question").)

That testimony was entirely irrelevant to the issue before this Court on the directed verdict, because nowhere does Mr. Edwards even remotely suggest that the Plan's asserted violation of law causes Maine, Massachusetts and Washington (or their regulators) any harm. (Tr. 553-598.) Indeed, Mr. Edwards has never even spoken to the chief regulators of those states, and the Intervening Regulators readily conceded that Mr. Edward's testimony only addresses whether policyholders would be better off in liquidation. (Tr. 540:14-25.) In ruling on the directed verdict, the Court rightly recognized that Mr. Edwards "did not address why the plan was deficient in some way" on an issue state's rate approval powers. (Tr. 994:7-12.) This was the full extent of the evidence presented by the Intervening Regulators, and it is not enough to support a finding that the Plan is unlawful on the opt-out question or the rate-setting mechanism generally.

2. The Intervening Regulators Never Presented Evidence of their Alleged Interests or the Risk of Harm to Them under the Plan.

The Intervening Regulators appeared on their own behalf as regulators, not in any *parens patriae* or other representative capacity for policyholders. (Tr. 541-547; *see also* Intervening Regulator's Pre-Hearing Memo at 50 (Intervening Regulators did not appear as "some sort of agent for the policyholders in their States")). Critically, however, the Regulators never presented evidence on how the Plan might harm them as regulators—*i.e.*, harm their interests in the capacity in which they appear. While the Intervening Regulators' counsel has argued that their clients have

a right to approve rate modifications, there was no factual evidence showing how the Intervening Regulators are or could be harmed by the Plan even if it deprives them the opportunity to review and approve rate modifications through the standard methods employed for a solvent insurer. Similarly, the Intervening Regulators failed to present any evidence showing that the rate methodology or benefit analyses proposed by the Plan are (a) inappropriate; (b) inconsistent with the requirements of Maine, Massachusetts, and Washington laws with respect to long-term care policies; or (c) unfairly discriminatory—nor was there any evidence that the Intervening Regulators would refuse to approve rates calculated by an If Knew methodology as proposed by the Rehabilitator.[5] Similarly, the Intervening Regulators never identified any other way in which not being able to set rates for SHIP's long-term

[5] Importantly, even if the Intervening Regulators had presented evidence on this issue, the record evidence is so one-sided that a directed verdict would still be proper. The Rehabilitator's witnesses testified that the lifetime loss ratio used by states nationwide as a "minimum threshold" for rate increases would be satisfied *both* on the seriatim basis used by the Rehabilitator to calculate rate increases *and* on the aggregate basis ordinarily used by state regulators in reviewing rate increase proposals. (Tr. 456:6-457:15.) Moreover, any meaningful differences between the Rehabilitator's process and the standard method all favor the Rehabilitator's approach. For example, the Rehabilitator's plan moves quickly and efficiently to avoid allowing the Plan to be "ground to a halt by inaction . . . on state rate increase requests." (Tr. 162:17-163:5.) As another example, the seriatim method "eliminate[s] the subsidies and restore[s] a level playing field" by removing the possibility that some policyholders must pay *more* than the If Knew premium for their policy (because the rate approval requests were made in the aggregate) so that other policyholders can pay *less* than the If Knew premium. (*Id.* at 163:6-14; *see also* Tr. 818:8-20.) During the hearing, Maine, Massachusetts, and Washington never presented evidence showing that they are harmed if they cannot slow and impede the rehabilitation or impose premium rates higher than required on some policyholders to subsidize the premiums of other policyholders receiving the same coverage.

care policies harms them or any cognizable interest they may have—let alone set the rates through the opt-out.

That failure, by itself, is fatal to their request that the Plan be rejected. The Intervening Regulators may well have opinions as to the law and other matters that differ substantially from those of the Rehabilitator, but that difference in opinion cannot serve as the basis for rejecting the Plan when the Intervening Regulators cannot present evidence on which this Court can rely in reaching such a finding. Indeed, despite seeking relief by way of an order disapproving the plan, the Intervening Regulators' counsel explained that the Intervening Regulators were "not seeking to impose our views" on the Court. (Tr. 540:11-12.) This tacit admission of their lack of interest is revealing, and, together with the lack of evidence on this issue, it confirms that the Intervening Regulators have no basis on which to demand that this Court refuse to approve the Plan.

C. The Intervening Regulators Have Never Addressed Substantively Why the Issue-State Rate Approval Section of the Plan and its Opt-out Provisions Do Not Cure Entirely Any Alleged Defect.

Among the many defects in the Intervening Regulators' description of the record is their assertion that evidence exists showing "the Plan removes State insurance regulators from their role in reviewing rates." (Recon. App. at 15.) This statement is demonstrably false. As the issue-state rate approval option shows, the Intervening Regulators—and other regulators—have an opportunity to opt-out of the rate setting provision of the Plan, effectively retaining their regulatory authority.

During the hearing, the Intervening Regulators presented no evidence undermining the effect of this provision or demonstrating that it denied or impaired some right held by those regulators. Thus, even if the State Insurance Regulators had (1) established that the Plan violates some applicable law; (2) explained how such violation could result in harm to them; and (3) adduced any competent evidence that such harm would actually result from the Plan's rate-setting provisions—none of which they have done, of course—they have failed entirely to show why the Plan's issue-state rate approval opt-out provision does not cure the alleged defect entirely. The Court raised this issue in ruling on the directed verdict (Tr. at 994:7-13), yet the Intervening Regulators cannot identify any record evidence showing that the opt-out is not a cure for their complaints as regulators.[6] The only possible evidence cited by the Intervening Regulators on this issue in their Reconsideration Application is that the opt-out states must act within sixty days and must review the rates on a seriatim basis. (Recon. App. at 16.) Neither one forms a legitimate complaint: there is no evidence in the record demonstrating that sixty days is insufficient or harmful to the Intervening Regulators, and there is similarly no evidence that reviewing the rates on a seriatim basis—which plainly benefits policyholders and which nevertheless

[6] To the extent the Intervening Regulators were ever concerned for policyholders, their counsel disavowed that notion by asserting that his clients appeared as regulators and not in any *parens patriae* capacity. If the Intervening Regulators wanted to be heard directly on this issue rather than rely on their counsel, they could have appeared, but they chose not to do so, and thus they must bear the consequences of that decision.

results in an aggregate lifetime loss ratio satisfying state law—will be difficult or harmful to the states' interests.

D. The State Insurance Regulators Cannot Establish that the Plan Creates Any Patent Violation of Governing Law.

The Intervening Regulators have repeatedly asserted that the opt-out and the rate-setting issue are purely legal questions. This is clearly untrue, as the opt-out mechanism involves a number of factual components, as do the Intervening Regulators' alleged interests and their complaints about the opt-out. Ultimately, however, the Intervening Regulators' legal arguments are also without merit, even if they could be considered. They claim, without proofs or evidence, that the Plan's rate-setting provisions (a) are not authorized by Pennsylvania law, (b) violate the Full Faith and Credit Clause of the United States Constitution, and (c) should not be approved as a matter of comity to other States. (Recon. App. at 3; *see also id.* at 13 (Intervening Regulators instructing the Court to "expressly address" those three issues).)[7] The Court should reject each of these arguments, both in addressing the Reconsideration Application and in its own review of the Plan, because they do not establish that the Plan is unlawful. Importantly, each of these arguments also requires a factual underpinning which the Intervening Regulators never presented to

[7] For reasons that remain unclear, the Intervening Regulators seem to believe that this Court will be unable to consider whether the Plan is lawful unless the Intervening Regulators are available to issue-spot for the Court's eventual opinion. That assumption is plainly false, but having failed to present any evidence showing that the issue-state rate approval option or rate-setting mechanism caused any harm or impairment, the Intervening Regulators lost the right to argue that the Court should disapprove of the Plan on this issue at their request.

this Court, thus demonstrating that the directed verdict was properly entered and should be upheld.

First, with respect to Pennsylvania law, the Intervening Regulators have never identified any statute, regulation, or common-law rule in Pennsylvania that prohibits the rate-setting mechanism proposed by the Plan. Neither the Reconsideration Application, nor the Pre-Hearing Memorandum or the Rebuttal Pre-Hearing Memorandum identify a controlling Pennsylvania law which will be ignored or disregarded by the Plan's rate mechanism if implemented as proposed. (Recon. App. at 10-13; Pre-Hearing Memo at 37-51; Rebuttal Memo at 11-14.) Indeed, across more than seventeen pages of briefing on the issue of Pennsylvania law, the Intervening Regulators never once identify a single Pennsylvania law that could be violated by this section of the Plan—or any other section for that matter. Instead, the Intervening Regulators at most have argued that Pennsylvania law does not authorize the Rehabilitator to "disregard state rate regulation," a specious position which in truth does not align with the Plan or the record evidence presented in the hearing, highlighting the need for a factual record which the Intervening Regulators chose not to present. (Recon. App. at 13.) Of course, the Plan does not "disregard state rate regulation" as the Intervening Regulators claim: quite to the contrary, the Plan permits state insurance regulators to consent to the proposed rate increases and

policy modifications or to refuse to grant their consent by opting out and thus exercising rate-review authority.[8]

Without any reference to controlling Pennsylvania law on this issue—and thus without any evidence which would bring the policy modification proposal and issue-state rate approval option within that controlling law, even if it existed—the Intervening Regulators arguments on this issue must fail, both as a matter of law generally and on the question of the directed verdict.

Second, the Intervening Regulators seem to misapprehend the applicable law, particularly on how to proceed when state laws could be in conflict as the Intervening Regulators claim to be the case here. Under Pennsylvania law, the placement of SHIP in rehabilitation vests in the Rehabilitator the power to "take such action as [she] deems necessary or expedient to correct the condition or conditions which constituted the grounds for the order of the court to rehabilitate the insurer." 40 Pa. Cons. Stat. § 221.16. As will be addressed in greater detail in the Rehabilitator's

[8] Notably, the Intervening Regulators' Pre-Hearing Memorandum did not claim that the Rehabilitator lacked the authority to modify benefits in a rehabilitation, and in fact this Court previously looked favorably on the question of policy modifications in rehabilitation as part of its analysis of the Penn Treaty and American Network insolvencies. *See Consedine v. Penn Treaty Network Am. Ins. Co.*, 63 A.3d 368, 454 (Pa. Commw. Ct. 2012). Instead, the Intervening Regulators appear to claim that the policies that will be offered to opt-out states will be worse in some way than those offered to states that approve the requested rates, but this is a complaint on behalf of the very policyholders whom the Intervening Regulators repeatedly affirmed they do not represent. Moreover, if a state wants to set its own rates, it must take the good with the bad, and to the extent the benefits available to an opt-out state's policyholders are not as attractive as those available to others under the Plan, it is because the policyholders in other states should not be compelled to subsidize the policies of the opt-out states.

post-hearing submissions, the Rehabilitator has determined that all aspects of the Plan are necessary and expedient to any effort to rehabilitate SHIP, and the policy modifications and opt-out process are part of that analysis.

What the Intervening Regulators refer to as a legal question is instead a manufactured controversy without any factual basis. The Intervening Regulators seem to believe that the mere assertion by their counsel that the Plan violates the laws of their states is enough to require the Rehabilitator to comply with those laws or face disapproval of the Plan. Contrary to the claims of the Intervening Regulators, however, the Full Faith and Credit Clause of the United States Constitution does not create automatic extra-territorial jurisdiction for the laws of Maine, Massachusetts and Washington (or of any other state) that can overcome the law governing rehabilitation in Pennsylvania, or that otherwise would require the Rehabilitator to satisfy the laws of those states in all respects.[9] U.S. CONST. ART. IV, § 1. The Supreme Court of the United States has long recognized that "a State need not substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 496 (2003) ("*Hyatt I*") (quotation marks omitted); *see also Franchise Tax Bd.*

[9] The issue of the Rehabilitator's authority will be addressed in further detail in her post-hearing submissions. Although the Rehabilitator has created an opt-out to resolve the regulators' concerns, and while the Court need not reach such a result in ruling on the Reconsideration Application or on the Plan itself, the statutory grant of authority in 40 Pa. Cons. Stat. § 221.16 is broad enough to enable the Rehabilitator to fashion a rehabilitation plan that is not constrained by the provisions of other states' laws on rate regulation and other matters.

v. Hyatt, 136 S.Ct. 1277, 183 (2016) (same) ("*Hyatt II*"). In contrast, what the Intervening Regulators seek is "[a] rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum…." *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935). The Intervening Regulators do not cite any authority supporting their misguided view of the Full Faith and Credit Clause, and there can be no violation of the Full Faith and Credit Clause if the Plan's provisions do not accord with the laws of Maine, Massachusetts, and Washington.

Moreover, even assuming that such a violation *could* exist and that this Court *could* be compelled to apply foreign law, nowhere do the Intervening Regulators explain *how* the Plan would violate the laws of their respective states if implemented or *why* they would be entitled to any remedy if the Plan did effect such a violation, a fatal omission of evidence which precludes any finding in their favor.[10] What the Intervening Regulators want is the right to exercise their judgment to set rates and policy benefits, even if it conflicts with the judgment of the Rehabilitator tasked by statute with correcting SHIP's financial condition and protecting and balancing the

[10] According to their counsel, the Intervening Regulators appeared "through their official capacity as chief insurance regulators," yet throughout the proceedings Intervening Regulators never identified any adverse effect on them *as regulators* or as *representative of their states' regulatory interests* as a result of the Plan's rate and benefit modification proposal. (Tr. 544:6-8.) Indeed, during the hearing the Intervening Regulators' counsel never claimed or presented evidence at the hearing that the Plan usurped their authority, even when prodded by the Court to do so, focusing instead on their belief that "this plan is a bad deal for policyholders" as "what principally drives us to be here" despite moments earlier denying that the Intervening Regulators appeared on behalf of policyholders. (Tr. 543-544.)

interests of all stakeholders, and even if it causes harm to the interests of policyholders in approximately forty other states.

Critically, however, there is no statute in Maine, Massachusetts, or Washington which gives the Intervening Regulators the right to dictate what happens in a rehabilitation proceeding in Pennsylvania. The laws to which the Intervening Regulators have referred thus far control the issuance and modification of policies in those states by insurers; they do not even remotely address the extraordinary circumstance of rehabilitation, nor do they suggest that *only* those state regulators may review and approve an insurer's rates. In fact, while the Intervening Regulators point to these laws as protective of their residents, that is not the effect of such laws. As the Rehabilitator demonstrated during the hearing, without contravention, that application of the rule espoused by the Intervening Regulators—even as to those states alone—would result in approximately 400 policyholders having rates set by regulators in states in which they do not reside. (Tr. at 157-158.)

Third, and finally, the State Insurance Regulators resort to comity as the basis for outlawing the Plan, but that argument is merely derivative of—and no more persuasive than—their resort to the Full Faith and Credit Clause. Giving comity to the laws of Maine, Massachusetts and Washington does not require that they be given extra-territorial effect; even the Intervening Regulators must admit that Pennsylvania is required only to "consider and acknowledge the statutes of sister

States." (Intervening Regulators Pre-Hearing Memo at 51.) There was no evidence showing that standard had not been met here.

For example, nothing in the record does or could establish a "policy of hostility to the public Acts" or suggests that the Plan and Pennsylvania law do not "sensitively appl[y] comity principles with a healthy regard for [other states'] sovereign status," particularly when states are presented with the opportunity to opt-out. *Hyatt I*, 538 U.S. at 489. Indeed, the Supreme Court has found that "relying on the contours of [the forum states' law] . . . as a benchmark" will clearly satisfy any comity requirement imposed on that state. *Id.* The uncontroverted evidence presented at the hearing is that Pennsylvania relied on its own rate and benefit laws as well as those of other states. In truth, despite their lofty rhetoric of cooperation and comity, it is the Intervening Regulators who seek to override the laws of Pennsylvania and the authority of the statutorily-appointed Rehabilitator, based on laws in their home states which neither invalidate the Plan nor serve the interests they purport to serve through this argument, and to the detriment of the Plan and policyholders nationwide.

E. The Reconsideration Application Offers No Law or Facts Which Could Compel this Court to Find It Committed Any Error.

Against this backdrop, the Intervening Regulators face a heavy burden in seeking reconsideration. In general, the party seeking reconsideration of a decision by a single judge must show that the governing law was "materially affected during

the pendency of the matter" without notice to the Court, or that "the court has overlooked or misapprehended" either "a fact of record material to the outcome of the case" or "a controlling or directly relevant authority." Pa. R.A.P. 2543 cmt.[11]

As this response has demonstrated, the Reconsideration Application is devoid of any facts or law which might have been overlooked by the Court in reaching its decision. Judgment in the nature of a directed verdict was appropriate and necessary because the Intervening Regulators "failed to put on any evidence which would or could support an[y] interest they purport to represent with respect to the issue[] state rate approval option." (Tr. 981:24-982:2.) *See also Pa. Human Relations Comm'n v. Sch. Dist. of Phila.*, 681 A.2d 1366, 1388 n.12 (Pa. Commw. Ct. 1996) (directed verdict proper in Commonwealth Court's original jurisdiction where "evidence clearly and unambiguously supports judgment in favor of the moving party.") The evidence at the hearing was entirely one sided because the Intervening Regulators

[11] The Rules of Appellate Procedure do not provide for reconsideration, but the grounds on which reconsideration may be granted align with those on which reargument will be granted. *See, e.g.*, *Babb v. Estate of Pershad*, 930 A.2d 1251 (Pa. 2007) (granting reconsideration by citation to Pa. R.A.P. 2543, which governs "Considerations Governing Allowance of Reargument"); *see also Krasco Financial, LLC v. Johnson*, No. 03260, 2018 WL 5498553 (Pa. Ct. Com. Pls. Phila. Cnty. Oct. 25, 2018) ("A motion for reconsideration should be granted sparingly. . . . The only proper grounds for granting reconsideration are new and material evidence of facts, a change in the controlling law or a clear error in applying the facts or law to the case at hand so that it is necessary to correct a clear error and prevent a manifest injustice from occurring. Mere disagreement with the court's conclusion is not a basis for reconsideration.") The Intervening Regulators appear to agree, invoking Pa. R.A.P. 2542, which governs the time for and manner for applications for reargument.

failed to present any evidence that the issue-state rate approval option—including the opt-out—harmed or violate any of their interests.

The Intervening Regulators discussion of the record does not cite any witness or documentary evidence presented by them on this issue because they did not offer any. This omission alone should be fatal but, to the extent they rely on testimony of other witnesses or evidence from the documents presented by other parties, the Intervening Regulators' efforts are insufficient to establish a record of any harm to any of their alleged interests. Faced with the Court's directed verdict, and perhaps realizing finally that they cannot prevail without at least *some* evidence supporting their claims, the Intervening Regulators rely on the Plan itself and the Special Deputy Rehabilitator's testimony as providing that evidence. Even a cursory review of the Plan references and the testimony on which they rely makes clear that this reliance is misplaced, and nothing in the Plan and in Mr. Cantilo's testimony—and certainly not the sections they identify—provides any evidence of harm to the Intervening Regulators resulting from the alleged and unproven violations of law. None of the citations offered by the Intervening Regulators show that the rates proposed in the plan are unlawful or that opt-out mechanism usurps their powers as regulators, and similarly none of the citations establish any interest which must be protected by this Court through disapproval of the Plan.

III. CONCLUSION

For the reasons set forth herein, and for the reasons stated during the hearing on the Plan and in any subsequent post-hearing submission, the Rehabilitator respectfully asks that this Court deny the Application for Reconsideration. The Rehabilitator further respectfully requests that this Court enter that denial as part of and together with any order approving or modifying the Plan.

Dated: June 14, 2021

Respectfully submitted,

/s/ Michael J. Broadbent

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CERTIFICATE OF SERVICE

I, Michael J. Broadbent, hereby certify that on June 14, 2021, I caused to be served the foregoing REHABILITATOR'S OPPOSITION TO THE INTERVENOR STATE INSURANCE REGULATORS' APPLICATION TO RECONSIDER ORDER GRANTING REHABILITATOR'S ORAL MOTION REGARDING THE ISSUE STATE RATE APPROVAL OPTION through the Court's PACFile system and on all parties listed on the Master Service List. In addition, I hereby certify that an electronic copy of the foregoing document will be posted on SHIP's website at https://www.shipltc.com/court-documents.

/s/ Michael J. Broadbent