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71 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 71 MAP 2021

In re: Senior Health Insurance Company of Pennsylvania (In Rehabilitation)
Appeal of: The Superintendent of Insurance of the State of Maine, The Commissioner of Insurance of the Commonwealth of Massachusetts and the Insurance Commissioner of the State of Washington

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REHABILITATOR'S RESPONSE IN OPPOSITION TO APPELLANTS' APPLICATION FOR LEAVE TO SUPPLEMENT RECORD

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Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, in his capacity as the Statutory Rehabilitator ("Rehabilitator") of Senior Health Insurance Company of Pennsylvania ("SHIP"), hereby submits this Response in Opposition to the State Insurance Regulators' Application for Leave to Supplement Record with Rehabilitator's April 12, 2022 Letter Concerning Phase One Results and Effect on the Funding Gap (the "Application to Supplement").

The Application to Supplement filed by Appellants, the Intervening State Insurance Regulators ("Intervening Regulators"), is an improper effort to expand and reframe the issues before this Court through facts not in the record, and this Court must deny the Application to Supplement accordingly.

ARGUMENT IN OPPOSITION

A. The record on appeal is the record before the Commonwealth Court at the time it entered its decision.

By rule, the record before this Court on appeal is and must be the record before the Commonwealth Court sitting in its original jurisdiction at the time it approved the Rehabilitator's Plan of Rehabilitation for SHIP. Pa. R.A.P. 1921 provides:

> The original papers and exhibits filed in the lower court, paper copies of legal papers filed with the prothonotary by means of electronic filing, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases.

The appellate rules also identify the circumstances under which the record may be corrected or modified, beginning with an application to the trial court. Those

circumstances are (a) "[i]f any difference arises as to whether the record truly discloses what occurred in the trial court," or (b) "[i]f anything material to a party is omitted from the record by error, breakdown in processes of the court, or accident or is misstated therein." Pa. R.A.P. 1926. Similarly, this Court has held that "[o]nly the facts that appear in this record may be considered by a court," *Commonwealth v. Young*, 256 Pa. 102, 115, 317 A.2d 258, 264 (1974).

None of these rules or principles are cited or acknowledged in the Application to Supplement, an omission providing sufficient grounds to deny the relief sought by the Intervening Regulators under Rule 123. The Intervening Regulators' argument appears to be only that the Court should accept the document because it post-dates the order on appeal—*i.e.*, the Commonwealth Court's August 24, 2021 decision approving the Rehabilitator's Plan of Rehabilitation for SHIP—and thus could not be part of the record. However, this fact is not, standing alone, enough to warrant supplementing the appellate record: absent extraordinary circumstances neither alleged nor present here, the record is set by the Commonwealth Court and this Court sits in review, not as a fact-finder in the first instance. *See, e.g.*, *Berg v. Nationwide Mut. Ins. Co., Inc.*, 235 A.3d 1123, 1230 (Pa. 2020) ("an appellate court's assessment of the evidence is not to be premised upon how the members of the court would have resolved the case had they been sitting as fact-finder"); *Commonwealth*

v. Council, 491 Pa. 434, 437, 421 A.2d 623, 624 (1980) ("It is essential to the fair administration of justice that appellate tribunals not sit as second fact-finders").

The Intervening Regulators cannot avoid these fundamental appellate principles, and the proposed supplement may not be added to the record simply because it was unavailable to the Commonwealth Court. *See Commonwealth v. Rainey*, 593 Pa. 67, 928 A.2d 215 (2007); *Rost v. Ford Motor Co.*, 637 Pa. 625, 151 A.3d 1032 (2016). In *Rainey*, this Court refused to consider a letter that post-dated the trial court decision and thus was not before the trial court at the time it ruled. *Rainey*, 593 Pa. at 99 n.20, 98 A.2d at 235 n.20. In *Rost*, the Court denied an "Application to Supplement the Record on Appeal" and refused to consider certain documents allegedly withheld from discovery and, as in *Rainey*, was not before the trial court at the time it ruled. *Rost*, 637 Pa. at 666 n.18, 151 A.3d at 1056. This Court should reach the same conclusion here.

Ignoring the rules and well-settled law on these issues, the Intervening Regulators cite only two cases in their Application to Supplement: *Dincer v. Dincer*, 545 Pa. 171, 680 A.2d 873 (1996) and *Cohen v. Allen*, 744 A.2d 810 (Pa. Commw. Ct. 2000). Neither case aids the Intervening Regulators' efforts to expand the record and issues on appeal. *Dincer* is a *per curium* decision on a petition for review of a child custody dispute, with no discussion of the Court's reasoning for the admission of a Belgian custody court's order post-dating the trial court opinion. 545 Pa. at 172,

680 A.2d 873. Other decisions in that case reveal extraordinary circumstances not present here: the matter was before the courts on an emergency basis due to an international custody dispute, and the court order in question decisively recognizing Belgian jurisdiction was entered after the matter was remanded to the trial court for further fact-finding but before the Supreme Court had accepted the matter on appeal. *See Dincer v. Dincer*, 549 Pa. 309, 311, 701 A.2d 210, 211 (1997) (noting trial court's September 1995 "remand for additional findings of fact" and entry of October 1995 Belgian court order). *Cohen* was similarly extraordinary, as it arose out of a request for an emergency injunction to block a ballot question. The appellants' Complaint was filed on October 27, 1999; the injunction was denied on October 29, 1999; the Notice of Appeal was filed on November 1, 1999; the ballot question appeared and was approved by voters on November 2, 1999; and the matter was scheduled for argument on December 7, 1999. On this extremely tight timeline, the Commonwealth Court's decision to consider whether the appeal was mooted by the ballot results provides a unique set of circumstances not analogous or comparable to those presented by the Intervening Regulators.

Consistent with well-settled rules governing the record on appellate review, this Court should deny the Application to Supplement promptly and allow the appeal to proceed.

B. The proposed supplementation, if accepted, would require this Court to sit as a fact finder in the first instance and take extensive additional evidence.

The supplemental evidence cannot be considered in a vacuum , and thus even if the Court were inclined to grant the Application to Supplement, further supplementation and briefing. The proposed supplement is an April 12, 2022 letter from the Rehabilitator to other state insurance regulators: it is not sworn testimony, and the Intervening Regulators do not offer the Court any context, such as National Association of Insurance Commissioners' rules governing communications amongst Commissioners or whether other communications were sent before or after the Rehabilitator's April 12, 2022 letter. The Intervening Regulators seek to admit the letter for its truth at a time when the Rehabilitator cannot offer any evidence—testimonial or otherwise—to aid the Court in understanding the purpose and meaning of the letter.[1] Similarly, the letter is forward-looking and predictive: the language quoted by the Intervening Regulators refers to the Rehabilitator's expectations and beliefs on deficit reduction and duration of Phase One, without extensive discussion of the basis for those expectations or how they might change in one direction or another. This is because the letter is not a formal declaration of the Rehabilitator's view of the results of Phase One—and, indeed, the Rehabilitator has

[1] The Intervening Regulators also appear to challenge the Rehabilitator's credibility, an issue best addressed by the Commonwealth Court sitting as the initial court with original jurisdiction in this matter.

yet to make such a declaration by approaching the Commonwealth Court to consider Phase Two or through the Annual Report (cited by the Intervening Regulators) filed on March 31, 2022.

The Intervening Regulators' citations to *Dincer* and *Cohen* are again ineffective, as both involved questions of the legal effect of public acts and records (a court order and a ballot result) for which there was no factual dispute to be had or considered. Here, even assuming *arguendo* that the record can be supplemented, the Intervening Regulators' proposed supplementation is a letter that invites a complete reopening of the record—an invitation this Court should refuse.

C. The facts cited by the Intervening Regulators in their proposed supplement to the record do not address the issues before this Court.

The Application to Supplement suffers from additional defects, including that it seeks to reframe the issues before the Court and ignores the grounds on which the Commonwealth Court approved the Plan. The Intervening Regulators make no secret of their improper effort to change the scope of this appeal long after it has been submitted and briefed. The Application to Supplement explains:

> The letter is relevant to this appeal in that it moves the basis for evaluating whether the Plan is feasible from the realm of prognosis to the realm of the concrete. It reveals that there will be a very substantial deficit – about $600 million – remaining at the end of Phase One, and that the Rehabilitator now intends to wait at least five years before deciding whether to proceed to Phase Two or liquidation.

(*See* App. to Supplement ¶ 15.) In this telling admission, the Intervening Regulators acknowledge their view (albeit mistaken) that the letter "moves the basis" for evaluating feasibility, but the Application to Supplement offers this Court no basis to skip over the Commonwealth Court's review process, even if the letter were relevant.

The Commonwealth Court was clear in its holdings regarding feasibility, finding first that feasibility was not required for approval, and rejecting the Intervening Regulators' argument that the Plan must be "'reasonably likely to succeed in restoring the company to solvency.'" (Appellants' Appendix, Opinion at 66.) Among the reasons cited were the company-specific (and thus fact-specific) nature of a solvency analysis), this Court's prior decisions regarding the purpose of rehabilitation, and the public policy favoring rehabilitation. (*Id.* at 66-67.) Moreover, the Commonwealth Court found that the Second Amended Plan *did* meet any required feasibility test, stating:

> The Plan will eliminate or reduce the Funding Gap, which is a legitimate purpose. The ultimate goal of the Second Amended Plan is to return SHIP to the level of solvency needed to run-off its long-term care insurance business.

(*Id.* at 67.) The partial information available in the letter in question does not alter this analysis, as it neither assures a return to solvency (thus satisfying the Intervening Regulators' proposed standard of review) nor deviates from the Rehabilitator's acknowledgment that a return to solvency may not occur despite accomplishing

other significant goals of the Plan (thus satisfying the Commonwealth Court's standard).

It appears the Intervening Regulators' true purpose is to expand the scope of the issues on appeal, an outcome both impermissible and inefficient given the additional briefing that would be required at this late stage. The Intervening Regulators sought appeal solely on what they called a legal question: "Whether the Commonwealth Court erred *as a matter of law* in holding that the Plan is not required to be feasible and in approving the Plan that the Rehabilitator acknowledges is not reasonably likely to restore SHIP to solvency." (*See* Appellants' Jurisdictional Statement at 5.A (emphasis added).) In their merits brief, the Intervening Regulators similarly noted that "the questions presented regarding the Plan *are questions of law*" and included verbatim the question on this issue as posed in their Jurisdictional Statement. (*See* Appellants' Brief at 3, 4.)[2] Should this Court find error in the Commonwealth Court's analysis, the remedy is remand to the Commonwealth Court for further analysis, not the entry of a *sua sponte* finding that the Plan is not feasible

[2] The Intervening Regulators' view of the questions presented is relevant to understanding the deficiencies in their Application to Supplement, but the Rehabilitator notes that the Intervening Regulators have misstated the scope of review on appeal of a decision regarding a rehabilitation plan. As this Court has held, its review in such cases is "specific and limited in order to remain consistent with the principles . . . that restrict judicial discretion to those instances where the agency has abused its discretion," further confirming the need for the Commonwealth Court to address these issues in the first instance. *Foster v. Mut. Fire, Marine, and Inland Ins. Co.*, 531 Pa. 598, 610-11, 614 A.2d 1086, 1092 (1992).

because, as of April 12, 2022, before Phase One was even complete, the Rehabilitator made forward-looking predictions in an out-of-court letter seeking resolution of a dispute amongst various state regulators.

D. On its face, the proposed supplementation, if accepted, supports the Rehabilitator's arguments regarding the importance of rehabilitating SHIP.

This Court should deny the Application to Supplement without hesitation, but, in the event the Court disagrees, it must recognize at a minimum that the facts cited by the Intervening Regulators support the Rehabilitator's position before the Commonwealth Court and now on appeal. As the Commonwealth Court found, the Approved Plan is designed, *inter alia*, to serve the public good and to address SHIP's financial distress through "meaningful choices for coverage in lieu of rate increases, without placing the cost of SHIP's historical policy underpricing upon the public through the guaranty association system." (Appellants' Appendix, Approval Opinion at 43.) The Plan is also designed to achieve outcomes that an immediate liquidation could not, such as "provid[ing] greater flexibility for policyholders than they would have in liquidation by offering meaningful policy modification alternatives that will also alleviate the Funding Gap and inequitable rate structure." (*Id.* at 48.)

The proposed supplemental evidence confirms these facts and confirms the success of the Rehabilitator's efforts to communicate with policyholders and collect

their election results. The Rehabilitator obtained an 85% response rate to the election packages, with more than 60% of those policyholders choosing elections that would have been unavailable in a liquidation. (*See* Ex 1 to Application to Supplement.) While the outcome of Phase One is not yet certain,[3] the elections will eliminate hundreds of millions of dollars of SHIP's deficit *based on the decisions made by policyholders* to pay the required premium or relinquish coverage they no longer wanted or needed. (*Id.*) In short, while the Intervening Regulators seem to believe the letter proves the Plan is not feasible, it appears the opposite is true: the Rehabilitator can successfully implement Phase One of the Plan through policyholder elections designed to provide meaningful choices while still reducing the deficit.

E. <u>Conclusion</u>

Thus, for the reasons set forth herein, the Application to Supplement should be denied.

[3] The Intervening Regulators misleadingly argue that the "results of Phase One are known to the Rehabilitator as the Commonwealth Court anticipated," and thus Rehabilitator can "credibly estimate the impact of Phase One." (App. to Supp. ¶¶ 9, 11.) But the results of Phase One are *not* known because Phase One is not complete: thousands more policyholders in opt-out states (those that approved rates and those that did not approve rates) are scheduled to receive election packages in Phase One. (*See* App. to Supp. ¶ 10 (noting that 21,000 of 26,000 packages have been mailed).)

RESPONSE TO APPLICATION

Application Paragraph 1

This is an appeal from the August 24, 2021 order of the Commonwealth Court approving the Plan. The approval order issued after a hearing in May 2021. One of the issues on appeal is whether the Plan is required to be feasible – meaning reasonably likely to restore SHIP to solvency – and whether it is, in fact, feasible. This requires an assessment of the Plan's impact on SHIP's deficit. *See* Brief for Appellants at 4 (Question #1), 25-28 (filed December 27, 2021); Reply Brief for Appellants at 3-6 (filed February 22, 2022).

Response to Paragraph 1

The scope of this appeal is set forth in the parties' briefs and the Intervening Regulators' Notice of Appeal and Jurisdictional Statement. Those documents and the Approval Opinion are in writing and speak for themselves, and any mischaracterization or belated effort to expand the scope of this appeal is denied. Specifically, whether SHIP's rehabilitation is feasible, as a return to solvency or otherwise, is not before this Court, as the Intervening Regulators appealed only (what they called) the legal issue of whether a return-to-solvency feasibility test is required. (Appellants' Jurisdictional Statement at 5.A.) By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 2

On April 12, 2022 the Rehabilitator sent a letter to state insurance regulators across the county, including the Appellant-Intervenor State Insurance Regulators. The letter is attached as Exhibit 1 hereto. The April 12, 2022 letter summarizes the initial results of the policyholder elections in Phase One of the Plan. The letter

describes the effect of the Phase One results on SHIP's deficit and is directly relevant to the threshold "feasibility" issue on appeal.

Response to Paragraph 2

The April 12, 2022 letter attached as Exhibit 1 to the Application to Supplement is in writing and speaks for itself, and any mischaracterizations are denied. By way of further response, Exhibit 1 is clearly not a definitive and final statement of the results or length of Phase One. It is "[b]ased on current data" and notes the Rehabilitator is "still working to quantify [the Phase One] window more specifically." (App. to Supp., Ex. 1.) It is not relevant to the question of "feasibility" on appeal because whether SHIP's rehabilitation is feasible, as a return to solvency or otherwise, is not before this Court, as the Intervening Regulators appealed only (what they called) the legal issue of whether a return-to-solvency feasibility test is required. (Appellants' Jurisdictional Statement at 5.A.) By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 3

In these unusual circumstances, the Court should allow supplementation of the record to include the letter reflecting actual Phase One results. In appropriate cases, the Court may allow supplementation of the record with matters that occurred after entry of the order appealed from and are relevant to the issues on appeal. *See Dincer v. Dincer*, 680 A.2d 873 (Pa. 1996) (granting petition to supplement record in child custody case to include a final custody order entered by a Belgian court); *Cohen v. Allen*, 744 A.2d 810, 812 (Pa. Cmwlth. 2000) (granting motion to

supplement the record in challenge to ballot question concerning amendment to Home Rule Charter with affidavit certifying election results).

Response to Paragraph 3

Paragraph 3 is a set of legal conclusions that the Rehabilitator denies. The Intervening Regulators fail to offer any legal or factual reason why this Court should permit an expansion of the record and issues on appeal, and the cited cases do not support such a proposition. By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 4

One of the issues presented to the Commonwealth Court by the State Insurance Regulators was whether the Plan was "feasible," that is, whether it could reasonably be expected to eliminate the $1.2 billion funding gap and restore SHIP to solvency. The Rehabilitator objected, contending that feasibility in this sense was not required and positing that the Plan could "reduce or eliminate" the funding gap. The Rehabilitator also contended that feasibility was a matter to be assessed over time as the Plan was implemented.

Response to Paragraph 4

The arguments presented and considered by the Commonwealth Court are matters of the record and in writing; the Intervening Regulators do not cite the record in Paragraph 4, and any mischaracterizations are denied. Moreover, the feasibility question presented to the Commonwealth Court is not the same question presented on appeal, as the Intervening Regulators appealed only (what they called) the legal issue of whether a return-to-solvency feasibility test is required. (Appellants'

Jurisdictional Statement at 5.A.) By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 5

The Plan provided that in Phase One the Rehabilitator would mail election packages to policyholders so they could decide among five options regarding premium and benefit modifications to their policies.

Response to Paragraph 5

The Plan is in writing, as is the Court's Approval Opinion, and both are in the record; the Intervening Regulators do not cite the record in Paragraph 5, and any mischaracterizations are denied. It is admitted that the Rehabilitator intended to—and has—mailed election packages. By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 6

The evidence at the hearing was that the Plan was not reasonably likely to eliminate the funding gap through the premium increases and benefit reductions provided for in the Plan. *See* Brief for Appellants at 18-19. That evidence included the concession from the Special Deputy Rehabilitator on cross examination that the Plan, including both Phases One and Two, was not likely to eliminate the funding gap. R.1923a.

Response to Paragraph 6

The cited testimony is in writing and speaks for itself as a matter of record evidence. Any mischaracterization of the evidence is denied, and reliance on the Intervening Regulators' briefing as "evidence at the hearing" must be refused. By

way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 7

In its decision, the Commonwealth Court nonetheless referred to the possibility that the Plan "will eliminate or reduce" the deficit as if elimination was a realistic possibility. Opinion at 67. *See id.* at 78. The Commonwealth Court rejected the State Insurance Regulators' contention that feasibility focused on a return to solvency and that the Plan was not feasible.

Response to Paragraph 7

The Commonwealth Court's decision is in writing and speaks for itself, and any mischaracterizations are denied. By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 8

On appeal, the Rehabilitator similarly contends that the Plan "will reduce or eliminate" SHIP's deficit. Brief of Appellee-Statutory Rehabilitator at 1 (filed February 4, 2022). *See id.* at 23 (citing Opinion at 67). The Rehabilitator also states the Plan "could even eliminate the deficit altogether." *Id.* at 14, 29. *See id.* at 30 n.13.

Response to Paragraph 8

The Rehabilitator's brief is in writing and speaks for itself, and any mischaracterizations are denied. The Rehabilitator admits that the Plan will reduce the deficit and may eliminate the deficit altogether. By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 9

The Commonwealth Court noted that the Plan was expected to be implemented quickly, and that "within eight months of approval the Rehabilitator anticipates receiving policyholder elections which will enable [him] to measure the precise impact of Phase One on SHIP's Funding Gap." Opinion at 88. Now, eight months later, the initial results of Phase One are known to the Rehabilitator as the Commonwealth Court anticipated.

Response to Paragraph 9

The Commonwealth Court's decision is in writing and speaks for itself, and any mischaracterizations are denied. Moreover, the results of Phase One are not known because Phase One is not complete: thousands more policyholders in opt-out states (those that approved rates and those that did not approve rates) are scheduled to receive election packages in Phase One. (*See* Application to Supplement ¶ 10 (noting that 21,000 of 26,000 packages have been mailed).) By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 10

As recently reported by the Rehabilitator, in January 2022, the Rehabilitator mailed "election packages" to approximately 21,000 of 26,200 policyholders intended to receive such packages. The Rehabilitator has received responses from over 85% of those policyholders. See Appellee Rehabilitator's Application for Expedited Appellate Consideration Exhibit B to the Annual Report of the Rehabilitator on the Status of the Rehabilitation of Senior Health Insurance Company of Pennsylvania (the "Rehabilitator's Annual Report") filed March 31, 2022 *in In Re: Senior Health Insurance Company of Pennsylvania in Rehabilitation*, No. 1 SHP 2020 (Pa. Cmwlth.).[4]

[4] The Application to Supplement contains a Footnote 1 inviting the Court to take Judicial Notice of SHIP's Annual Report. For purposes of this Response, the

Response to Paragraph 10

The Annual Report is in writing and speaks for itself, and any mischaracterizations are denied. The Rehabilitator admits that the Plan has been extremely successful to date in collecting policyholder election responses and in providing policyholders with choices they would not have in liquidation. By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 11

Based on these election returns, the Rehabilitator is now able to credibly estimate the impact of Phase One of the Plan, specifically the effectiveness of Phase One in reducing or eliminating SHIP's deficit.

Response to Paragraph 11

The Annual Report and proposed letter supplement are in writing and speak for themselves, and any mischaracterizations are denied. The Rehabilitator admits that the Plan has been extremely successful to date in collecting policyholder election responses and in providing policyholders with choices they would not have in liquidation. Whether the Rehabilitator can "credibly estimate the impact of Phase One" is a question for the Commonwealth Court, not this Court, and the results of

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Rehabilitator does not object to the Court taking notice of the response rate on election mailed packages to date.

Phase One are not "known" because Phase One is not complete: thousands more policyholders in opt-out states (those that approved rates and those that did not approve rates) are scheduled to receive election packages in Phase One. (*See* Application to Supplement ¶ 10 (noting that 21,000 of 26,000 packages have been mailed).) By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 12

The April 12, 2022 letter from the Rehabilitator to state insurance regulators nationwide reports the results of the Rehabilitator's analysis of Phase One election results to date:

> Based on current data, we expect to reduce SHIP's deficit of approximately $1.3 Billion, by at least half after modifying policies in Phase 1. That will still leave an obviously sizeable deficit . . . .

Exhibit 1 at 1 (emphasis added). The letter then refers to "halving the deficit." *Id.*[5]

Response to Paragraph 12

The Annual Report and proposed letter supplement are in writing and speak for themselves, and any mischaracterizations are denied. The Rehabilitator admits that the Plan has been extremely successful to date in collecting policyholder election responses and in providing policyholders with choices they would not have

[5] The Application to Supplement contains a footnote describing SHIP's deficit as of December 31, 2021. The documents cited therein are in writing and speak for themselves, and any mischaracterizations are denied.

in liquidation. Whether the Rehabilitator's expectation will come to pass is not yet known because Phase One is not complete: thousands more policyholders in opt-out states (those that approved rates and those that did not approve rates) are scheduled to receive election packages in Phase One. (*See* Application to Supplement ¶ 10 (noting that 21,000 of 26,000 packages have been mailed).) By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 13

Where Phase One is expected to "halve the deficit" of $1.3 billion, this means that a deficit of approximately $600 million will remain at the end of Phase One but with many fewer policyholders (only those selecting Options 1 or 4) to bear the impact of the self-sustaining premium in Phase Two.

Response to Paragraph 13

The Annual Report and proposed letter supplement are in writing and speak for themselves, and any mischaracterizations are denied. The Rehabilitator admits that the Plan has been extremely successful to date in collecting policyholder election responses and in providing policyholders with choices they would not have in liquidation. Whether the Rehabilitator's expectation will come to pass is not yet known because Phase One is not complete: thousands more policyholders in opt-out states (those that approved rates and those that did not approve rates) are scheduled to receive election packages in Phase One. (*See* Application to Supplement ¶ 10

(noting that 21,000 of 26,000 packages have been mailed).) By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 14

The April 12, 2022 letter also advises that the Rehabilitator now intends to stay in Phase One for "several years" before Pennsylvania "must decide on Phase 2 or perhaps liquidation." Exhibit 1 at 1. Specifically, the letter states:

> While we are still working to quantify that window more specifically, we currently believe "several" to mean at least five years and maybe longer before we would have to decide any next steps.

Id.

Response to Paragraph 14

The Annual Report and proposed letter supplement are in writing and speak for themselves, and any mischaracterizations are denied. The Rehabilitator admits that the Plan has been extremely successful to date in collecting policyholder election responses and in providing policyholders with choices they would not have in liquidation. Whether the Rehabilitator's expectation will come to pass is not yet known because Phase One is not complete: thousands more policyholders in opt-out states (those that approved rates and those that did not approve rates) are scheduled to receive election packages in Phase One. (*See* Application to Supplement ¶ 10 (noting that 21,000 of 26,000 packages have been mailed).) By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 15

The letter is relevant to this appeal in that it moves the basis for evaluating whether the Plan is feasible from the realm of prognosis to the realm of the concrete. It reveals that there will be a very substantial deficit – about $600 million – remaining at the end of Phase One, and that the Rehabilitator now intends to wait at least five years before deciding whether to proceed to Phase Two or liquidation.

Response to Paragraph 15

Paragraph 15 is a set of legal conclusions that the Rehabilitator denies. The April 12, 2022 letter attached as Exhibit 1 to the Application to Supplement is in writing and speaks for itself, and any mischaracterizations are denied. By way of further response, the letter in Exhibit 1 is clearly not a definitive and final statement of the results or length of Phase One. It is "[b]ased on current data" and notes the Rehabilitator is "still working to quantify [the Phase One] window more specifically." (App. to Supp. Ex. 1.) It is not relevant to the question of "feasibility" on appeal because whether SHIP's rehabilitation is feasible, as a return to solvency or otherwise, is not before this Court, as the Intervening Regulators appealed only (what they called) the legal issue of whether a return-to-solvency feasibility test is required. (Appellants' Jurisdictional Statement at 5.A.) Moreover, whether the Rehabilitator's expectation will come to pass is not yet known because Phase One is not complete: thousands more policyholders in opt-out states (those that approved rates and those that did not approve rates) are scheduled to receive election packages in Phase One. (*See* Application to Supplement ¶ 10 (noting that 21,000 of 26,000

packages have been mailed).) By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

Application Paragraph 16

The Rehabilitator's letter should be added to the record and considered on appeal. The letter provides definition to a matter that was the subject of projection at the time of the hearing as reflected in the record. It is a statement of one of the parties – the Rehabilitator – based upon the process provided for by the Plan and anticipated by the Commonwealth Court. With the letter in the record, this Court will be more readily able to consider the question whether the Plan is feasible and whether it should be approved.

Response to Paragraph 16

Paragraph 16 is a set of legal conclusions that the Rehabilitator denies. The April 12, 2022 letter attached as Exhibit 1 to the Application to Supplement is in writing and speaks for itself, and any mischaracterizations are denied. The Intervening Regulators fail to show any legal or factual reason why this Court should permit an expansion of the record and issues on appeal, and the cited cases do not support such a proposition. Moreover, the letter in Exhibit 1 is clearly not a definitive and final statement of the results or length of Phase One. It is "[b]ased on current data" and notes the Rehabilitator is "still working to quantify [the Phase One] window more specifically." (Ex. 1.) It is not relevant to the question of "feasibility" on appeal because whether SHIP's rehabilitation is feasible, as a return to solvency or otherwise, is not before this Court, as the Intervening Regulators appealed only (what they called) the legal issue of whether a return-to-solvency feasibility test is

required. (Appellants' Jurisdictional Statement at 5.A.) Moreover, whether the Rehabilitator's expectation will come to pass is not yet known because Phase One is not complete: thousands more policyholders in opt-out states (those that approved rates and those that did not approve rates) are scheduled to receive election packages in Phase One. (*See* Application to Supplement ¶ 10 (noting that 21,000 of 26,000 packages have been mailed).) By way of further response, the Rehabilitator incorporates his Argument in Opposition set forth herein.

WHEREFORE, for the reasons set forth herein, the Application to Supplement should be denied.

Dated: May 10, 2022

Respectfully submitted,

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71 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA

In Re: Senior Health Insurance Company of Pennsylvania (In Rehabilitation) Appeal of: The Superintendent of Insurance of the State of Maine, The Commissioner of Insurance of the Commonwealth of Massachusetts and the Insurance Commissioner of the State of Washington	:	71 MAP 2021

PROOF OF SERVICE

I hereby certify that this 10th day of May, 2022, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

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IN THE SUPREME COURT OF PENNSYLVANIA

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(Continued)

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IN THE SUPREME COURT OF PENNSYLVANIA

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(Continued)

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Courtesy Copy

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/s/ Michael John Broadbent

(Signature of Person Serving)

Person Serving:	Broadbent, Michael John
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Representing:	Appellee Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of PA Appellee Senior Health Insurance Company of Pennsylvania