

**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,

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
PENNSYLVANIA,

Defendants.

Case No. 3:22-cv-01329-FLW-LHG

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Defendants Jessica K. Altman, as former Rehabilitator (the “Rehabilitator”) of Senior Health Insurance Company of Pennsylvania (“SHIP”)¹, Patrick H. Cantilo, as Special Deputy Rehabilitator (the “Special Deputy Rehabilitator”) of SHIP, and SHIP (collectively “Defendants”) move to dismiss the Complaint filed by Plaintiffs Marline Caride, as Commissioner of the New Jersey Department of Banking and Insurance (“Commissioner Caride”) and the New Jersey Department of Banking and Insurance (“DOBI”) (collectively, “Plaintiffs”). For the reasons set

¹ On February 28, 2022, Michael Humphreys was named Acting Insurance Commissioner for Pennsylvania following the departure of Defendant Altman from that post.

forth in the attached Memorandum of Law in Support of this Motion, the Complaint should be dismissed because:

- (i) Plaintiff has failed to state facts sufficient to constitute a cause of action under Rule 12(b)(6) based on the Full Faith and Credit Clause; and
- (ii) This Court lacks personal jurisdiction under Rule 12(b)(2).

WHEREFORE, Defendants respectfully request, based on the foregoing, the attached Memorandum of Law in Support of this Motion, and the accompanying exhibits, that this Motion to Dismiss the Complaint be granted and that Plaintiffs' claims be dismissed with prejudice.

Respectfully submitted,

/s/ Michael J. Broadbent

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Cantilo, as Special Deputy Rehabilitator of Senior Health Insurance Company of Pennsylvania,
and Senior Health Insurance Company of Pennsylvania*

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Defendants.

Case No. 3:22-cv-01329-FLW-LHG

DEFENDANTS' NOTICE OF MOTION

PLEASE TAKE NOTICE that Defendants Jessica K. Altman, as former Rehabilitator (the “Rehabilitator”) of Senior Health Insurance Company of Pennsylvania (“SHIP”), Patrick H. Cantilo, as Special Deputy Rehabilitator (the “Special Deputy Rehabilitator”) of SHIP, and SHIP (collectively “Defendants”) will move before the Honorable Freda L. Wolfson, U.S.D.J. on May 2, 2022 for an Order granting Defendants’ Motion to Dismiss.

In support of our motion, we will rely on the attached motion, brief, and Exhibits.

Respectfully submitted,

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and Senior Health Insurance Company of Pennsylvania*

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2022, I caused to be served the foregoing Defendants' Motion to Dismiss Plaintiffs' Complaint, and the accompanying Memorandum of Law and Exhibits in support of the Motion via the Court's electronic filing system and via electronic mail:

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of Senior Health Insurance Company of
Pennsylvania, and SENIOR HEALTH
INSURANCE COMPANY OF
PENNSYLVANIA,

Defendants.

ORDER

AND NOW, this ____ day of _____, 2022, upon consideration of the Motion of Defendants Jessica K. Altman, as former Rehabilitator of Senior Health Insurance Company of Pennsylvania (“SHIP”), Patrick H. Cantilo, as Special Deputy Rehabilitator of SHIP, and SHIP to Dismiss Plaintiffs’ Complaint, and any response thereto, it is hereby **ORDERED** that the Motion is **GRANTED**, and Plaintiffs’ Complaint is **DISMISSED with prejudice in its entirety**.

The Hon. Freda L. Wolfson, C.J.

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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,	:	
	:	
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.	:	
	:	

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

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Defendants.

I. INTRODUCTION

Defendants submit that this Court should dismiss the Complaint because Plaintiffs commenced this action improperly seeking to have a New Jersey state court belatedly interject in, enjoin, and derail the acts of Pennsylvania officials and of a Pennsylvania state court insurance receivership proceeding. Specifically, in January 2020, acting pursuant to the authority granted by Pennsylvania law, the Commonwealth Court of Pennsylvania (“Commonwealth Court”) granted a petition by the Rehabilitator to place SHIP in rehabilitation and directed the Rehabilitator to develop a plan for rehabilitating SHIP. The rehabilitation proceedings that followed in Pennsylvania are governed by a comprehensive statutory scheme enacted by the Pennsylvania

General Assembly, and the Pennsylvania statutes are similar to a corresponding statutory scheme adopted in New Jersey. As in New Jersey, Pennsylvania’s framework recognizes that the interests of policyholders, creditors, and the general public are best served by consolidated and comprehensive *in rem* proceedings in the Commonwealth Court because SHIP is domiciled in Pennsylvania and the Pennsylvania Insurance Department (“PID”) serves as its lead regulator.

Following a long court process involving the exchange of voluminous information related to SHIP and the proposed rehabilitation plan, briefing on the legal and factual issues, and a week-long court hearing, the Commonwealth Court approved the Second Amended Plan of Rehabilitation plan for SHIP (“Approved Plan”) by an opinion and order dated on August 24, 2021 (the “Approval Order”) and amended non-substantively on November 4, 2021. Long before the Approval Order, however, SHIP’s policyholders and other interested parties—including insurance regulators across the country such as Plaintiff here—were provided with notice and an opportunity to be heard, including by an order inviting them to intervene in and formally participate in SHIP’s rehabilitation proceedings. Three state regulators intervened and others submitted formal comments, but, despite having been informed of Defendants’ proposal to include policy modifications in the rehabilitation plan under consideration, Plaintiffs elected not to formally participate in SHIP’s rehabilitation or offer any comment on the proposed rehabilitation plan prior to its approval. Notwithstanding, all interested persons have been afforded several means of expressing their views in the Commonwealth Court of Pennsylvania, including the ability to participate as intervening parties, engage in discovery, present evidence, call and examine witnesses, and provide formal and informal comments to the rehabilitation plan. Plaintiff thus had the opportunity to participate in the plan hearing, present her arguments regarding policy

modifications and policyholder interests, and take steps to address what Plaintiff now calls “irreparable harm” to New Jersey policyholders.

Yet instead of taking any such steps to “protect” New Jersey policyholders, Plaintiffs allowed the risk of the harm of which she now (wrongly) complains to remain as the Commonwealth Court considered the Rehabilitator’s proposed plan, then approved the Approved Plan and directed the Rehabilitator to implement it immediately. Plaintiffs deliberately waited *over two years* after SHIP’s rehabilitation proceedings were commenced—and more than six months after the Commonwealth Court first entered the Order approving the Plan, when the Rehabilitator was beginning to take steps to implement the Commonwealth Court’s orders—to engage in blatant forum shopping and improperly commence a collateral attack on the Commonwealth Court’s orders. This Court should not condone such actions.

To the extent Plaintiffs wished to challenge any provision in the Approved Plan, they had ample opportunity to do so in the comprehensive Rehabilitation proceedings: indeed, other state regulators raised identical substantive legal arguments as those now raised by Plaintiffs, all of which were properly rejected by the Commonwealth Court. The time to raise such arguments has long-since passed, and the proper method for doing so was never through a collateral attack in another state court outside of the rehabilitation proceedings after the plan was approved. Implicitly recognizing this very point, Plaintiffs have also sought to obtain relief in Pennsylvania courts by participating as *amici curiae* supporting both the (failed) effort to stay implementation of the Plan and the effort to reverse the Commonwealth Court’s order approving the Plan and to stay implementation of the Plan. Preferring liquidation to rehabilitation, Plaintiffs now seek to substitute their preference for the Pennsylvania Commonwealth Court’s final order.

As developed more fully below, the Complaint must be dismissed for at least three reasons, including because: (a) the Full Faith and Credit Clause of the United States Constitution prohibits precisely this type of collateral attack on the final orders of another state's courts; and (b) New Jersey courts lack personal jurisdiction over the state-agent Defendants charged with implementing the Plan.

II. **FACTS**

A. **SHIP IS A PENNSYLVANIA LONG-TERM CARE INSURER IN REHABILITATION UNDER THE COURT-ORDERED-AND-SUPERVISED AUTHORITY OF HUMPHREYS AND CANTILO.**

SHIP is a long-term care insurance ("LTCI") company organized and domiciled under the laws of the Commonwealth of Pennsylvania with a closed block of LTCI policies. *See* Complaint at ¶ 17. On January 29, 2020, as a result of its long financial decline, the Commonwealth Court placed SHIP in rehabilitation ("SHIP Rehabilitation Order") under the Pennsylvania Insurance Department Act, 40 P.S. §§ 221.1–221.63 ("PID Act"). *See id.* at ¶ 22 and Exhibit 1. No order of insolvency was entered at that time, nor has one been entered since. By the same SHIP Rehabilitation Order, the Court named Insurance Commissioner of Pennsylvania Jessica K. Altman and her successors as Rehabilitator. *See id.* at ¶ 24. The Commonwealth Court also affirmed the Commissioner/Rehabilitator's authority to appoint a Special Deputy Rehabilitator. *Id.* As alleged in the Complaint, the Rehabilitator appointed Defendant Patrick H. Cantilo as Special Deputy Rehabilitator. *Id.* Defendant Humphreys is the Acting Insurance Commissioner of Pennsylvania and the successor to Jessica K. Altman as Commissioner and as Rehabilitator. *See* Pennsylvania Insurance Department, Meet the Commissioner, Michael Humphreys, <https://www.insurance.pa.gov/Pages/Homepage/MeettheCommissioner.aspx> (Humphreys named Acting Commissioner as of February 28, 2022) (last viewed Mar. 30, 2022); Complaint at introductory paragraph.

The PID Act establishes the Commonwealth Court of Pennsylvania as the proper forum for judicial review of a rehabilitation plan. *See Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1091 (Pa. 1992) (internal quotation omitted); 40 P.S. §§ 221.4–221.5. By law, rehabilitation proceedings are designed “to protect the interests of insureds, creditors, and the public generally.” 40 P.S. §§ 221.4–221.5. New Jersey has enacted a similar statutory scheme. *See generally* N.J.S.A. § 17B:32-31, *et seq.* (“Life and Health Insurance Rehabilitation and Liquidation Act”). Under Pennsylvania law, the Rehabilitator is granted broad powers to effectuate equitably the intent of rehabilitation—that is, “to minimize the harm to *all* affected parties”—under the PID Act. *Foster*, 614 A.2d at 1094 (emphasis in original). In the SHIP Rehabilitation Order, the Commonwealth Court affirmed the authority of the Rehabilitator to “take possession of the assets of the insurer” and “administer them under orders of the [Commonwealth Court of Pennsylvania].” 40 P.S. § 221.15(c).

B. THE COMMONWEALTH COURT IN PENNSYLVANIA APPROVED A REHABILITATION PLAN INVOLVING POLICY PREMIUM AND BENEFIT MODIFICATIONS FOLLOWING MORE THAN A YEAR OF COMMENT AND CONSIDERATION BY THE INTERESTED PARTIES.

Upon being placed in rehabilitation, notice was provided to, *inter alia*, all policyholders—including those residing in or with policies issued in New Jersey—as well as insurance regulators across the country. *See* Form of Notice, attached hereto as Exhibit A. On June 12, 2020, the Commonwealth Court of Pennsylvania ordered that any interested party could offer input on any proposed rehabilitation plans by submitting an Informal Comment or by filing a Formal Comment, and further ordered that any interested party could seek leave to intervene in the proceedings. *See* Scheduling Order, attached hereto as Exhibit B.¹ Plaintiffs elected not to intervene in the proceedings. The state regulators from Maine, Massachusetts, and Washington (the “Intervening

¹ Exhibits A, B, and C are orders appearing on the Commonwealth Court docket.

Regulators”) did elect to intervene and assert arguments regarding the Plan’s alleged usurpation of regulatory authority and the supposed benefits of liquidation compared to rehabilitation.

On May 17, 2021, following a lengthy period in which the Rehabilitator made significant data available to parties and non-party regulators, the Commonwealth Court began a week-long hearing on the Plan which included the Intervening Regulators presenting their arguments that the Plan did not benefit policyholders and usurped regulatory authority. Approval Opinion, attached to Complaint as Exhibit 4. After considering carefully the Intervening Regulators’ arguments and evidence, on August 24, 2021, the Commonwealth Court of Pennsylvania entered its order and opinion approving the proposed rehabilitation plan for SHIP (“Approved Plan”) and authorizing the Rehabilitator to offer policyholders various options for modifying the premium rates and benefits associated with their policies. Complaint at ¶ 26 and Exhibits 4 and 5. Under the Plan, policyholder elections would be effected through one of two mechanism: (1) states could actively or passively “opt-in” to the premium rate setting provisions of the Plan, in which case the Rehabilitator would offer a defined set of policy options determined by the actuarially justified methods described in the Approved Plan; or (2) states could “opt-out” of that portion of the Plan, in which case the chief insurance regulator of that state would be presented with premium rates for review and approval, and the options available to policyholders of policies issued in that state would be determined based on the rates approved by that insurance regulator. *Id.* Plaintiffs did not opt-out of this section of the Plan, effectively rendering New Jersey an Opt-in state and enabling the holders of SHIP policies issued in New Jersey to select from among the preferable opt-in options. Instead, Plaintiff sent the Rehabilitator a letter that she knew did not serve under the terms of the Plan to opt-out of its premium modification provisions. Complaint at ¶ 52.

The Commonwealth Court’s Approval Opinion directed and authorized immediate implementation as any delay to the Approved Plan would cause damage to policyholders. *Id.* The

Commonwealth Court’s order on the Approved Plan is now on appeal to the Supreme Court of Pennsylvania. Complaint at ¶ 27. The Commonwealth Court entertained—but denied—an application seeking to stay implementation pending appeal. *Id.* at ¶ 28; Commonwealth Court of Pennsylvania Stay Denial, attached as Exhibit C. Then, the Supreme Court of Pennsylvania also entertained—but denied—an application seeking to stay implementation of the Approved Plan. *Id.* at ¶¶ 29, 31 and Exhibits 8 and 10. Despite those orders in Pennsylvania, Plaintiffs now seek to procure their own stay, effectively asking this Court to overrule the two Pennsylvania courts. Notably, Plaintiffs do not allege that the modification of policies in accordance with policyholder elections is imminent.

C. PLAINTIFFS MISCHARACTERIZE THE APPROVED PLAN AND ITS EFFECT ON POLICYHOLDERS, BOTH IN NEW JERSEY AND NATIONWIDE.

Plaintiffs’ brief is replete with erroneous assertions of fact which are disproved by the record and documents cited by Plaintiffs themselves, and Defendants address herein the most material error: Plaintiffs’ claim as to the impact of the plan. Plaintiffs incorrectly suggest that if a state opts-out and denies the requested rate increases, then the Rehabilitator will unilaterally adjust the benefits to the level that is determined to be appropriate.” Complaint at ¶ 51. Of course, that matter is irrelevant to Plaintiffs’ claims because they did not opt-out. Moreover, in fact if a state opts-out and denies the requested rate increases, the Rehabilitator will not immediately adjust policy benefits or instruct policyholders to pay the unapproved rate or reduce their policy benefits. Instead, had New Jersey opted out, policyholders currently paying at least the If Knew Premium rate that the Rehabilitator requested—widely accepted as reasonable by regulators nationwide—would have faced no rate increase or other modification. Other policyholders would have been presented with the options to (a) continue paying the current premium and have benefits reduced proportionately, (b) pay the required premium and maintain their current benefits, or (c) select a

non-forfeiture option in which the policyholder stops paying premiums altogether. *See* Approved Plan, attached to Complaint as Exhibit 5, at 113-114. Because New Jersey is treated as an opt-in state under the Plan, its policyholders have been offered even better options. Those paying at least the required premium were not asked to make any modification but were given the option to do so if that suited their needs better. Other policyholders could choose to (a) maintain their current premium and reduce benefits proportionately, (b) select from among two basic policy endorsement options aimed at providing basic coverage at reasonable rates, (c) select an enhanced non-forfeiture option providing up to thirty months of coverage at no cost, and (d) pay the required premium and retain their current benefits. *See id.* at 42 et seq. and table at 67. Thus, while Plaintiffs' Complaint points to rate increases as damaging and unfair to the elderly, not every policyholder would be required to face a rate increase, and many could obtain a policy that better suits their needs at a premium that the policyholder may find more affordable. Moreover, while Plaintiffs assert that policyholders are "punished" by the rate increases or receiving elections of the options available, Plaintiffs provide no evidence showing that the premium rates are not reasonable in relation to the benefits or that it is unfair to ask policyholders to voluntarily reduce benefits or pay an actuarially justified reasonable premium in the course of a rehabilitation. Very importantly, Plaintiffs do not deny that the affected policyholders are currently paying unreasonably low premium rates.

D. PLAINTIFFS ARE PURSUING AN IMPROPER COLLATERAL ATTACK ON THE AUTHORITY OF THE COMMONWEALTH COURT OF PENNSYLVANIA AND COURT-APPOINTED OFFICIALS OPERATING UNDER AUTHORITY GRANTED BY PENNSYLVANIA LAW.

Plaintiffs have not contested the Pennsylvania courts' jurisdiction over SHIP's rehabilitation generally. Plaintiffs did not file formal comments in the rehabilitation proceedings or seek to intervene despite receiving notice of their right to do so, and have instead elected to file the Complaint and requests for injunctive relief as an unlawful collateral attack on the jurisdiction and authority of the Pennsylvania courts. Despite asserting that they are not parties, however,

Plaintiffs have sought to surreptitiously obtain relief in the Pennsylvania courts by signing *amici* briefs, first supporting the now-denied application for a stay implementation of the Approved Plan, and later on the merits of the Intervening Regulators arguments seeking to reverse plan approval.

III. PROCEDURAL POSTURE

Plaintiffs commenced this case on March 9, 2022 with the filing of a Complaint in the New Jersey Superior Court for Mercer County. (Doc. 1 at Exhibit 1.) On March 11, 2022, Defendants timely removed this action to this Court with the filing of a Notice of Removal. (Doc. 1.)

IV. ARGUMENT

A. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure should be granted when the Complaint fails to state a claim upon which relief may be granted. F.R.C.P. 12(b)(6). To survive a motion to dismiss, a plaintiff must be able to plead sufficient facts to state a claim for relief that is “plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Conclusory,” “bare-bones” allegations and “threadbare recitals” are insufficient to survive a motion to dismiss.” *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). The Court need not accept as true legal conclusions. *Id.* See also *Twombly*, 550 U.S. at 555 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”).

A plaintiff must plead the existence of personal jurisdiction. Under New Jersey’s Long-Arm Statute, N.J.R. 4:4-4, the exercise of personal jurisdiction over non-residents must not exceed the limits of the United States Constitution. *Blackwell v. Winwood Hospitality Grp., Inc.*, No. 20-20339, 2021 U.S. Dist. LEXIS 130153, **2-3 (D.N.J. July 12, 2021) (“the New Jersey long-arm

statute permits the exercise of personal jurisdiction to the fullest extent permissible under the Due Process Clause”).

As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings. *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997). Courts in this jurisdiction make an exception to this general rule for documents integral to or explicitly relied upon in the Complaint. *Id.*; *see also Arcand v. Brother Int’l Corp.*, 673 F. Supp. 2d 282, 291-92 (D.N.J. 2009) (“public documents and prior judicial proceedings may be considered in deciding a motion to dismiss” and consideration of such public documents or documents relied upon in the complaint does not warrant converting a motion to dismiss to a motion for summary judgment).

The specific standards for each argument in favor of dismissal are addressed in turn below.

B. THE COMPLAINT FAILS TO STATE A CLAIM FOR INJUNCTIVE RELIEF BECAUSE THE FULL FAITH AND CREDIT CLAUSE PROHIBITS THIS COLLATERAL ATTACK ON THE FINAL ORDERS OF ANOTHER STATE’S COURTS.

Plaintiffs’ collateral attack on the Pennsylvania Commonwealth Court’s orders violates bedrock constitutional principles. Under the United States Constitution, “Full Faith and Credit shall be given in each state to the public acts, records and judicial proceedings of every other state.” U.S. CONST. ART. 4, § 1. Whether the Commonwealth Court’s final order bars Plaintiff’s claims “is determined by the Full Faith and Credit Statute,” 28 U.S.C. § 1738. *See Sec’y U.S. Dep’t of Labor v. Kwasny*, 853 F.3d 87, 94 (3d Cir. 2017). “[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.” *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *accord Bernardsville Quarry v. Bernardsville*, 929 F.2d 927, 929-30 (3d Cir. 1991) (citation

omitted); *Mann v. Estate of Meyers*, 61 F. Supp. 3d 508, 517 (D.N.J. 2014) (the Full Faith and Credit Statute “commands that federal courts recognize and honor state court judgments”).

“Res judicata includes the legal concepts of claim preclusion and issue preclusion.” *Sec’y U.S. Dep’t of Labor*, 853 F.3d at 94. Moreover, “[u]nder res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *U.S. v. Millstone Enters., Inc.*, 864 F.2d 21, 23 (3d Cir. 1988) (citations omitted). The validity and preclusive effect of a state-court judgment must be determined by the laws of the state which rendered the judgment—*i.e.*, Pennsylvania. *See McNasby v. Crown Cork & Seal Co.*, 888 F.2d 270, 271 (3d Cir. 1989) (“In determining the preclusive effect of a state court judgment, we apply the rendering state’s law of res judicata”).

Pennsylvania law recognizes the Commonwealth Court’s approval order as a binding final order, and thus, it must be given full faith and credit in courts throughout the country. Under Pennsylvania law, the Plan approval is final for purposes of full faith and credit: the Pennsylvania Supreme Court has made clear that “[a] judgment is deemed final for [preclusive] purposes unless or until it is reversed on appeal.” *Shaffer v. Smith*, 543 673 A.2d 872, 874 (Pa. 1996). Thus, unless and until enforcement of the Commonwealth Court’s Approved Plan is stayed or otherwise overturned by the Pennsylvania Supreme Court (or United States Supreme Court) on appeal, it must be considered final and “qualifies for recognition throughout the land.” *V.L. v. E.L.*, 577 U.S. 404, 407 (2016). It is likely for this very reason that Plaintiffs are now actively seeking to participate as *amicus curiae* in the Pennsylvania Supreme Court alongside their proxies, the Intervening Regulators.

Nor would it help Plaintiffs to assert that the Pennsylvania court lacked jurisdiction over Plaintiffs and policyholders to enter its order. Any such argument is without merit, because any

“jurisdictional inquiry” on full faith and credit questions “is a limited one.” *V.L.*, 577 U.S. at 407. “[I]f the judgment on its face appears to be a ‘record of a court of general jurisdiction, such jurisdiction over the cause and the parties is to be presumed unless disproved by extrinsic evidence, or by the record itself.’” *Id.* (quotations omitted). The Commonwealth Court’s order approving the Plan “is entitled to full faith and credit even as to questions of jurisdiction if those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.” *See Underwriters Nat. Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guar. Ass’n*, 455 U.S. 691, 706 (1982) (quotations omitted); *id.* at 706–07 (once Indiana rehabilitation court “fully considered and finally determined [the question of subject matter jurisdiction] in the rehabilitation proceedings, the judgment was entitled to full faith and credit in the North Carolina courts”).

Here, the Commonwealth Court fully considered and finally determined the precise jurisdictional issues raised by Plaintiff—whether the Rehabilitator may implement a national plan of rehabilitation for SHIP without state-by-state approval of rate increases and/or policy modifications, subject to the opt-out provisions in the Plan. Indeed, Plaintiffs cannot seriously dispute that the Commonwealth Court considered this issue *at length*, and repeatedly. (*See* Approval Order, Complaint at Exhibit 4, at 48–61, 74; Exhibit C, Order Denying Application for Stay at Pending Appeal, at 7–10.) Once these issues were fully and fairly litigated “in the rehabilitation proceedings, the judgment [is] entitled to full faith and credit in the [New Jersey] courts.” *Underwriters Nat. Assur. Co.*, 455 U.S. at 706.

Moreover, even on the merits of this inquiry, SHIP’s rehabilitation proceeding is an *in rem* proceeding that is necessarily binding on all policyholders. *See, e.g., Ballesteros v. New Jersey Prop. Liab. Ins. Guar. Ass’n*, 530 F. Supp. 1367, 1370-71 (D.N.J. 1982) (collecting cases), *aff’d*

sub nom. Appeal of Ballesteros, 696 F.2d 980 (3d Cir. 1982) (“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.”); *In re Rehab. of Manhattan Re-Ins. Co.*, No. 2844-VCP, 2011 Del. Ch. LEXIS 146, at *12 (Del. Ch. Oct. 4, 2011) (“[T]his Court does possess original and exclusive jurisdiction over the in rem proceedings of the rehabilitation.”); *Garamendi v. Exec. Life Ins. Co.*, 21 Cal. Rptr. 2d 578, 583–90 (Cal Ct. App. 1993) (holding “A State Court Overseeing an Insurance Insolvency Proceeding Has In Rem Jurisdiction Over the Assets of Third Parties Which Have an ‘Identity of Interest’ With the Insolvent Insurer.”). Because of the *in rem* nature of the proceedings, it is well established that “[a]s a general rule, a court’s decree approving the rehabilitation plan for an insolvent insurer domiciled in its state has a res judicata effect upon out-of-state policyholders so as to preclude a subsequent attack upon the plan in another state.” 1 COUCH ON INS. § 5:31.

The mere fact that Plaintiff or all of New Jersey’s policyholders did not appear in the rehabilitation proceedings after receiving notice regarding the matter and having an opportunity to intervene is simply not a basis to overcome the exacting full faith and credit requirements. Importantly, the due process clause does not provide the same protections for potential claimants—such as policyholders here—as it would for potential defendants. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (addressing due process rights of absent class-action plaintiffs and finding that “the plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”) (internal quotations omitted).

To the extent Plaintiffs suggest that Plan approval is ineffective unless every state insurance department and chief official voluntarily appears as a party, that argument runs counter to the very nature of an *in rem* proceeding, and in any event would be immaterial even if accepted. The Commonwealth Court does not need to bind state regulators having no actual interest in the proceedings—only policyholders, the real parties in interest holding contracts with SHIP. Moreover, *even if* regulators must be bound, notice and an opportunity to be heard would be sufficient. *See, e.g., Phillips Petroleum*, 472 U.S. at 812 (due process does not require affirmative “opt-in” for potential claimants in state class action proceedings).

Like policyholders, Plaintiffs cannot voluntarily choose to forego formally participating in the Rehabilitation proceedings and then raise the same arguments as the Intervening Regulators in a separate (and improper) forum based on the alleged rights of those policyholders. Plaintiffs cannot avoid the preclusive effect of any final judgment in the Commonwealth Court of Pennsylvania, and the constitutional requirement that any such final judgment be given full faith and credit, simply by electing not to formally participate in the rehabilitation proceedings as parties. *See United States v. Obaid*, 971 F.3d 1095, 1098–105 (9th Cir. 2020) (recognizing “minimum contacts” is not a required component of *in rem* jurisdiction); *United States v. Real Prop. Located in Los Angeles*, No 4:20-cv-2524, 2020 U.S. Dist. LEXIS 228585, at *8-*10 (S.D. Tex. Dec. 4, 2020) (same); *F.D.I.C. v. De Cresenzo*, 616 N.Y.S.2d 638, 639 (N.Y. App. Div. 1994) (recognizing a judgment stemming from application of *in rem* jurisdiction is entitled to full faith and credit); *Denny v. Searles*, 143 S.E. 484, 493 (Va. 1928) (same). This is especially true where Plaintiffs tactically avoided the rehabilitation proceedings during the review phase only to appear as purported *amici* on appeal.

Finally, to the extent Plaintiffs seeks to attack the merits of the Commonwealth Court approval order, any such effort is misguided for purposes of the full faith and credit analysis. “[T]he full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based.” *Milliken v. Meyer*, 311 U.S. 457, 462 (1940); *accord V.L.*, 577 U.S. at 407 (“A State may not disregard the judgment of a sister State because it disagrees with the reasoning underlying the judgment or deems it to be wrong on the merits.”). Thus, there is no basis for Plaintiffs to ask this Court to revisit the issues already decided in the rehabilitation proceedings.²

Accordingly, because the Full Faith and Credit Clause precludes this collateral attack on the Commonwealth Court’s final order approving SHIP’s rehabilitation, Plaintiffs cannot to state a claim for relief, and the Complaint must be dismissed with prejudice.

C. THIS COURT LACKS PERSONAL JURISDICTION OVER THE REHABILITATOR AND SPECIAL DEPUTY REHABILITATOR, BOTH OF WHOM ARE GOVERNMENT OFFICERS EXERCISING THEIR STATUTORY AUTHORITY UNDER PENNSYLVANIA LAW AND UNDER THE SUPERVISION AND APPOINTMENT OF THE PENNSYLVANIA COURTS.

Dismissal of the claims against the Rehabilitator and SDR is separately necessary pursuant to Rule 12(b)(2) for lack of personal jurisdiction. Plaintiff bears the burden of establishing personal jurisdiction upon a challenge by Defendants. *O’Connor v. Sandy Lane Hotel Co.*, 496

² In any event, there is no merit to Plaintiffs’ underlying claims—it is well established that a rehabilitation plan may modify policy benefits and increase premiums through a centralized plan. *See, e.g., Underwriters Nat’l Assurance Co.*, 455 U.S. at 696-97 (discussing approved rehabilitation plan where rehabilitation court increased premiums and reduced benefits despite state regulatory requirements); *Brooks v. AIG SunAmerica Life Assur. Co.*, 480 F.3d 579, 581 (1st Cir. 2007) (New Jersey rehabilitator could offer out-of-state policyholders the option to receive cash value or have their policies restructured); *Ballestros*, 530 F. Supp. at 1372 (overruling objections to policy restructuring in rehabilitation by out-of-state policyholder).

F.3d 312, 316 (3d Cir. 2007). “Personal jurisdiction can be specific or general.” *Ontel Prods. Corp. v. Mindscope Prods.*, 220 F. Supp. 3d 555, 559 (D.N.J. 2016), citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984). “Specific jurisdiction arises from the acts that give rise to the particular claim asserted; general jurisdiction exposes the defendant to jurisdiction for any and all claims.” *Ontel Prods.*, 220 F. Supp. 3d at 559. For an individual, “the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.” *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). Because New Jersey’s long-arm statute “permits the exercise of personal jurisdiction to the fullest extent permissible under the Due Process Clause,” the specific jurisdiction inquiry collapses into the single question of whether the exercise of personal jurisdiction comports with due process. *Blackwell v. Winwood Hospitality Grp., Inc.*, No. 20-20339, 2021 U.S. Dist. LEXIS 130153, **2-3.

Due process requires that a non-resident have “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Id.*, at **2-3. That is, the defendant’s “conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (citations omitted), cited by *Stevens v. Welch*, No. 16-882, 2011 U.S. Dist. LEXIS 12142, **14-15 (D.N.J. Feb. 7, 2011). Courts in the Third Circuit consider three factors in determining whether there is specific jurisdiction: 1) whether the defendants purposely directed its activities at the forum, 2) whether the litigation arises out of or relates to one of those activities, and 3) whether the exercise of jurisdiction “otherwise comports

with fair play and substantial justice.” *Donnenfeld v. Petro Home Servs.*, No. 16-882, 2017 U.S. Dist. LEXIS 43945, *11 (D.N.J. Mar. 24, 2017).

i. This Court cannot enjoin Pennsylvania officials.

As a threshold matter, the proper exercise of power by a state court or state officer does not and cannot equate to minimum contacts upon which personal jurisdiction over the Rehabilitator can be grounded. *Cf. Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (describing exercise of jurisdiction over “commercial actor” directing actions to resident of another state); *Trump v. Committee on Ways and Means*, 415 F. Supp. 3d 98 (D.D.C. 2019) (state official engaged in official business was not conducting the type of commercial or business-related activities within the meaning of the phrase “transacting business” under District of Columbia long-arm statute).

Plaintiffs’ suggestion of personal jurisdiction has also been rejected in analogous cases involving nonresident state officials performing official duties because exercising jurisdiction in such circumstances would exceed constitutional limits. For example, the Fifth Circuit found insufficient contacts for a Texas federal court to exercise jurisdiction over the commissioner of the Arizona Department of Real Estate. *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 480–81, 484 (5th Cir. 2008). Even the Arizona commissioner’s act of reaching out to Texas and directing communications to Texas to identify violations of Arizona law were insufficient to reasonably anticipate being hauled into the forum state’s federal court to defend the non-forum state’s statutes. *Id.* at 484–86.

Other courts addressing this question have reached similar results. *See, e.g., Shotton v. Pitkin*, No. CIV-15-0241, 2015 U.S. Dist. LEXIS 114242, at *10 (W.D. Okla. Aug. 28, 2015) (no personal jurisdiction over Connecticut officials sending communications to plaintiff in Oklahoma); *Berry Coll., Inc. v. Rhoda*, No. 4:13-cv-0115, 2013 U.S. Dist. LEXIS 203102, at **31-32 (N.D.

Ga. June 12, 2013) (Tennessee officials were not “nonresidents” because they were functional equivalent of Tennessee and the officials’ “attempt[] to perform their regulatory duties” was not purposeful availment of Georgia’s benefits and laws, notwithstanding communications directed at plaintiff in Georgia); *Newman v. Holter*, No. A3-00-143, 2001 U.S. Dist. LEXIS 8907, at *5 (D.N.D. Mar. 14, 2001) (“[This Court does not have personal jurisdiction over a Minnesota state official who lives in Minnesota and is sued for actions occurring entirely within the scope of his Minnesota employment and within the state of Minnesota.”); *Steelman v. Carper*, 124 F. Supp. 2d 219, 223–24 (D. Del. 2000) (holding that “subjecting out of state officials to personal jurisdiction for actions taken out of state, even if done at the request of [in-state] officials,” would violate “traditional notions of fair play and substantial justice”).

Accordingly, jurisdiction should be rejected at the outset as a result of Plaintiffs’ efforts to control the actions of the Pennsylvania Commissioner implementing a court-approved plan.

ii. Plaintiff Cannot Establish Minimum Contacts for Personal Jurisdiction.

Plaintiffs contend that Defendants have availed themselves of New Jersey law because they are “doing business in New Jersey and have consented to jurisdiction.” Complaint at ¶ 12. They claim that SHIP has engaged and continues to engage in “substantial continuous, and systematic business with residents of the State of New Jersey,” including the marketing, selling, and servicing of long-term care policies and the requesting of rate increases over time from the Commissioner, *id.* at ¶ 13, but they allege no facts supporting general or specific personal jurisdiction as to the Rehabilitator or the SDR. Even if this argument were valid against SHIP, it would not be so as against Humphreys and Cantilo, state agents who never undertook any such activity.

With respect to general jurisdiction, there are no allegations against the Rehabilitator or the SDR outside of them performing their state-sanctioned jobs. (*See* Section IV.C.i above.) With

respect to specific jurisdiction, none of the allegations relate to the implementation of the Rehabilitation plan. Rather, the allegations relate to SHIP conducting its business in general, including marketing and selling long-term care policies in New Jersey and in 46 other states across the country. Complaint at ¶¶ 12-13, 20.

At most, Plaintiffs allege that Rehabilitator mailed “Coverage Election Packages” to New Jersey policyholders that contained the election options for continued coverage. Complaint at ¶ 54. The Rehabilitator, in fact, mailed thousands of these election packages to policyholders across the country, and there is nothing specific or unique about New Jersey that would warrant haling the Rehabilitator or SDR into court in New Jersey as a result of being one place where policyholder mail was sent. *See Stevens*, 2011 U.S. Dist. LEXIS 12142, at **14-15, citing *World-Wide Volkswagen*, 444 U.S. at 297. The Rehabilitator and SDR should be dismissed for lack of personal jurisdiction.

V. CONCLUSION

For all the foregoing reasons, Defendants respectfully request that this Court dismiss the Complaint in its entirety, with prejudice.

Respectfully submitted,

/s/ Michael J. Broadbent

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/s/ Leslie Miller Greenspan

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*Counsel for Jessica K. Altman,
former Insurance Commissioner of the Commonwealth of Pennsylvania,
as Statutory 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*

March 30, 2022

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2022, I caused to be served the foregoing Defendants' Motion to Dismiss Plaintiffs' Complaint, and the accompanying Memorandum of Law and Exhibits in support of the Motion via the Court's electronic filing system and via electronic mail:

G. Glennon Troublefield, Esquire
Brian H. Fenlon, Esquire
Sean Kiley, Esquire
Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C.
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/s/ Michael J. Broadbent
Michael J. Broadbent

EXHIBIT A

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: Senior Health Insurance :
Company of Pennsylvania :
In Rehabilitation : No. 1 SHP 2020

**NOTICE OF APPLICATION FOR APPROVAL OF PLAN OF
REHABILITATION**

TO: All Interested Parties

PLEASE TAKE NOTICE that Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania, in her capacity as the statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania (SHIP), has filed with the Commonwealth Court of Pennsylvania in the above-captioned matter an Application for Approval of a Plan of Rehabilitation for SHIP (Application), including the proposed Plan of Rehabilitation (Plan) attached thereto.

THE PROPOSED PLAN IS SUBJECT TO REVIEW BY THE COURT AND THE COURT'S APPROVAL, DISAPPROVAL OR MODIFICATION. NEITHER THE PROPOSED PLAN NOR ANY MODIFICATION TO THE PROPOSED PLAN WILL BE EFFECTIVE OR IMPLEMENTED UNLESS APPROVED BY THE COURT. IF APPROVED BY THE COURT, THE PROPOSED PLAN WILL AFFECT THE RIGHTS AND BENEFITS AFFORDED TO SHIP'S POLICYHOLDERS, CREDITORS AND OTHERS. ALL PERSONS WHO MAY BE INTERESTED IN THE

REHABILITATION OF SHIP SHOULD READ THE PLAN CAREFULLY AND CONSULT WITH THEIR LEGAL, BUSINESS, FINANCIAL AND TAX ADVISORS ABOUT THE PLAN DOCUMENTS.

Copies of the Application and the proposed Plan are available for viewing, downloading and/or printing at <https://www.shipltc.com/court-documents> (Site), which is also accessible under the “Rehabilitation” section of the website. The Site contains a link to all documents filed with the Court by the Rehabilitator in portable document format (PDF).

If any person receiving this Notice does not have access to a computer or is otherwise unable to view, download or print the Application, the proposed Plan or other court documents at the Site, they may be placed on the “hard copy” service list and receive copies of all Court orders and filings by the Rehabilitator in this matter by making a written request, together with an affirmation to the Court as described below that they either do not have regular access to a computer or adequate device or are unable to view, download or print the applicable documents. Requests for placement on the “hard copy” service list should be made by writing to the following address: Senior Health Insurance Company of Pennsylvania (In Rehabilitation), Attention: Rehabilitation Administrator, 550 Congressional Boulevard, Suite 200, Carmel, IN 46032; or by facsimile to the attention of Senior Health Insurance Company of Pennsylvania (In Rehabilitation), Attention: Rehabilitation Administrator, at the following number: (317) 566-7588; or by email to rehabilitation@shipltc.com. The request should be signed and contain the following statement:

In making this request, I hereby affirm to the Commonwealth Court of Pennsylvania that I do not have regular access to a computer or other device providing me internet access to the

Site or I am otherwise unable to view, download or print documents from the Site related to this matter.

The Court will conduct a pre-hearing conference on the proposed Plan of Rehabilitation on October 20, 2020 at 10:00 a.m. in Courtroom 3002 in the Pennsylvania Judicial Center, 601 Commonwealth Avenue, Harrisburg, Pennsylvania, or by telephonic or other means established by the Court and posted to the Site. The hearing to consider approval of the proposed Plan of Rehabilitation will be scheduled by the Court by separate order.

Informal Comments in support of or in objection to the proposed Plan of Rehabilitation may be sent to Patrick H. Cantilo, Special Deputy Rehabilitator, at the following address: Senior Health Insurance Company of Pennsylvania (In Rehabilitation), 550 Congressional Blvd., Suite 200, Carmel, IN 46032; or by email to: plan.comments@shipltc.com.

Formal Comments in support of or objecting to the proposed Plan of Rehabilitation shall be filed with the Court on or before September 15, 2020. Formal Comments shall be identified at the top of the document as being filed in “In re: Senior Health Insurance Company of Pennsylvania (In Rehabilitation), No. 1 SHP 2020.” Formal Comments shall state with specificity the facts on which the comments are based and any suggested modifications to the proposed Plan of Rehabilitation. A person may submit Formal Comments without participating in the hearing on the proposed Plan of Rehabilitation.

A Commenter who intends to participate in the hearing must notify the Court of that intention in his Formal Comments. Additionally, any Commenter who intends to call or cross examine witnesses or introduce exhibits at the Hearing or participate in any discovery that may be allowed by the Court must file an application with the Court to intervene in the proceeding under the Pennsylvania

Rules of Appellate Procedure on or before July 31, 2020, and must also file their Formal Comments in accordance with this Order. Any response to an application to intervene shall be filed and served on or before August 21, 2020. Any Commenter who is permitted to intervene shall file with the Court and serve on the Rehabilitator on or before September 30, 2020, (i) a narrative or other description of the substance of the direct testimony of each witness the Commenter intends to call at the Hearing and (ii) the exhibits the Commenter intends to introduce at the Hearing.

Formal Comments to the proposed Plan of Rehabilitation shall be filed with the Court at the following address:

Office of Prothonotary of the Commonwealth Court of Pennsylvania
ATTN: 1 SHP 2020
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 2100
Harrisburg, PA 17106

Service by Commenters on the Rehabilitator shall be made by electronic delivery to the Rehabilitator's counsel and the Special Deputy Rehabilitator at the following addresses:

Counsel

Cozen O'Connor
shipcomments@cozen.com

SDR

Patrick Cantilo
service@cb-firm.com

A Commenter who is unable to make service on the Rehabilitator by electronic delivery may serve the Rehabilitator by first-class mail or overnight delivery service to the Rehabilitator's counsel and the Special Deputy Rehabilitator at the following physical addresses:

James R. Potts
Cozen O'Connor
One Liberty Place
1650 Market Street
Suite 2800
Philadelphia, PA 19103

Patrick Cantilo
Cantilo & Bennett, L.L.P.
11401 Century Oaks Terrace
Suite 300
Austin, Texas 78758

Any materials served by this method must contain an affirmation to the Court that the Commenter is unable to serve the Rehabilitator by electronic delivery. Commenters who fail to comply with the requirements of this Notice shall be prohibited from submitting objections to the proposed Plan of Rehabilitation or participating in the hearing.

All other dates and requirements established by the Court relevant to the proceedings concerning the proposed Plan, including any changes to the dates and procedures set forth in this notice, will be posted to the Site and will not be delivered by mail or other means except as provided herein.

The Rehabilitator may, in her discretion, provide policyholders and other interested parties supplemental information concerning the proposed Plan and the proceedings relating thereto, including clarifications or amendments of the proposed Plan, and summaries and Questions and Answers concerning the proposed Plan and the proceedings, by mail or by posting information on the Site and by operating a call center. ALL INTERESTED PARTIES ARE ADVISED TO CHECK THE SITE FREQUENTLY FOR UPDATED INFORMATION AND DEADLINES.

EXHIBIT B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

**CASE MANAGEMENT ORDER FOR COMMENTS AND
HEARING ON THE PROPOSED PLAN OF REHABILITATION**

AND NOW, this 12th day of June, 2020, upon consideration of the Application of Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania, in her capacity as Statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania (In Rehabilitation) (SHIP), for approval of Form and Distribution of Notice of Application for Approval of Plan of Rehabilitation for SHIP (Application), and any objections filed thereto, it is hereby **ORDERED** as follows:

1. The Court directs the Statutory Rehabilitator to use the Notice attached to this Order as Exhibit A to advise the Interested Parties (as defined below) of the filing in this Court by the Rehabilitator of the Application for Approval of the Plan of Rehabilitation for SHIP (Plan Application) and the procedures for offering comments on the proposed Plan of Rehabilitation and participating in the hearing thereon, which will be scheduled by the Court by separate order.

2. As soon as reasonably practical, the Rehabilitator shall send by U.S. mail a copy of the attached Notice to all Interested Parties, defined as: all persons identified on the Master Service List; all known policyholders and certificate holders having policies or other coverage in force with SHIP on the date of the mailing; all known SHIP insurance agents and all known creditors of SHIP (in each

case, addressed to their last known address as shown on the electronic books and records of SHIP); the insurance regulatory authorities in each jurisdiction in which SHIP issued policies that remain in effect; the state life and health insurance guaranty associations; the taxing authorities of the various states where SHIP has policies or other coverage in force at the time of mailing the notice; the National Association of Insurance Commissioners; the National Organization of Life and Health Insurance Guaranty Associations; and the Senior Health Care Oversight Trust and its Trustees.

3. Notice is not required to be mailed to persons who have changed their addresses without notifying SHIP and for whom the Rehabilitator, after good effort, has been unable to establish a current address.

4. The Rehabilitator shall continue to maintain the website addressed at <https://www.shipltc.com/court-documents> (Site) and post thereon the Application for Approval of the Plan of Rehabilitation for SHIP, a copy of this Order and such other documents that are from time to time required by Pa. R.A.P. 3779 or provide a link thereon to such documents. Absent further order by this Court, updates to the Site shall serve as official notice of filings, orders, deadlines and hearings.

5. As soon as reasonably practical, the Rehabilitator shall cause a copy of the attached Notice, in substantially the same form, to be published in The Wall Street Journal, USA Today, The Indianapolis Star, The Philadelphia Inquirer, and The Harrisburg Patriot-News, twice a week in each publication for two weeks.

6. The Rehabilitator shall maintain a “hard copy” service list for those Interested Parties requesting hard copies of relevant documentation. Interested Parties who affirm that they either do not have regular access to a computer or are unable to view, download or print the applicable documents may be placed on the “hard copy” list and receive copies of all Court orders and filings by the Rehabilitator

in this matter by making a request for placement on the “hard copy” service list. Requests for placement on the “hard copy” service list shall be made by sending a written request by mail to Senior Health Insurance Company of Pennsylvania (In Rehabilitation), Attention: Rehabilitation Administrator, 550 Congressional Boulevard, Suite 200, Carmel, IN 46032; or by facsimile to the attention of Senior Health Insurance Company of Pennsylvania (In Rehabilitation), Attention: Rehabilitation Administrator, at the following number: (317) 566-7588; or by email to rehabilitation@shipltc.com. The request should be signed and contain the following statement:

In making this request, I hereby affirm to the Commonwealth Court of Pennsylvania that I do not have regular access to a computer or other device providing me internet access to the Site or I am otherwise unable to view, download or print documents from the Site related to this matter.

7. Informal Comments in support of or in objection to the proposed Plan of Rehabilitation may be sent to Patrick H. Cantilo, Special Deputy Rehabilitator at the following address: Senior Health Insurance Company of Pennsylvania (In Rehabilitation), 550 Congressional Blvd., Suite 200, Carmel, IN 46032; or by email to: plan.comments@shipltc.com.

8. Formal Comments in support of or in objection to the proposed Plan of Rehabilitation shall be filed with the Court on or before September 15, 2020. Formal Comments shall be identified at the top of the document as being filed in “In re: Senior Health Insurance Company of Pennsylvania (In Rehabilitation), No. 1 SHP 2020.” Formal Comments shall state with specificity the Commenter’s identity and interest in the proceeding, the facts on which the comments are based, and any suggested modifications to the proposed Plan of Rehabilitation. A person may

submit Formal Comments without participating in the hearing on the proposed Plan of Rehabilitation. A Commenter who intends to participate in the hearing must notify the Court of that intention in his Formal Comments.

9. Any Commenter who intends to call or examine witnesses or introduce exhibits at the hearing on the proposed Plan of Rehabilitation or participate in any discovery that this Court may permit must file an application with the Court to intervene in the proceeding under the Pennsylvania Rules of Appellate Procedure on or before July 31, 2020, and must also file their Formal Comments in accordance with this Order. Any response to an application to intervene shall be filed and served on or before August 21, 2020. Any Commenter who is permitted to intervene shall file with the Court and serve on the Rehabilitator on or before September 30, 2020, (i) a narrative or other description consisting substantially of the direct testimony of each witness the Commenter intends to call at the hearing and (ii) the exhibits the Commenter intends to introduce at the hearing.

10. Formal Comments to the proposed Plan of Rehabilitation shall be filed with the Court at the following address:

Office of Prothonotary of the Commonwealth Court of Pennsylvania
ATTN: 1 SHP 2020
Pennsylvania Judicial Center
601 Commonwealth Avenue, Suite 2100
Harrisburg, PA 17106.

11. Service by Commenters on the Rehabilitator shall be made by electronic delivery to the Rehabilitator's counsel and the Special Deputy Rehabilitator at the following addresses:

Counsel

Cozen O'Connor
shipcomments@cozen.com

SDR

Patrick Cantilo
service@cb-firm.com

12. A Commenter who is unable to make service on the Rehabilitator by electronic delivery may serve the Rehabilitator by first-class mail or overnight delivery service to the Rehabilitator's counsel and the Special Deputy Rehabilitator at the following physical addresses:

James R. Potts	Patrick Cantilo
Cozen O'Connor	Cantilo & Bennett, L.L.P.
One Liberty Place	11401 Century Oaks Terrace
1650 Market Street, Suite 2800	Suite 300
Philadelphia, PA 19103	Austin, Texas 78758

Any materials served by this method must contain an affirmation to the Court that the Commenter is unable to serve the Rehabilitator by electronic delivery.

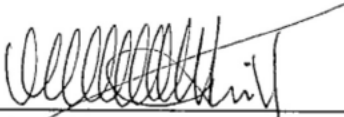
13. A Commenter who has complied with the procedures set forth in this Order and been granted intervenor status by this Court shall have the right to participate in the hearing, including the examination of witnesses proffered in support of or opposition to the proposed Plan of Rehabilitation. Evidence presented by the Commenter may be subject to cross-examination by the Rehabilitator and any other party to the proceeding. The Court may limit such participation to ensure an orderly proceeding.

14. The Rehabilitator shall not be required to respond to Formal or Informal Comments or other filings by Commenters pursuant to this Order and any failure to respond shall not constitute an admission or waiver by the Rehabilitator.

15. All other dates and requirements established by the Court relevant to the proceedings concerning the proposed Plan of Rehabilitation,

including any changes to the dates and procedures set forth in this Order, will be posted to the Site and will not be delivered by mail or other means except as otherwise provided herein.

16. This Case Management Order governs the procedures for the presentation of comments to, and the hearing on, the proposed Plan of Rehabilitation. All other orders, injunctions, and stays issued by this Court in this matter shall continue in full force and effect except as modified by this Order.



MARY HANNAH LEAVITT, President Judge

EXHIBIT C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: Senior Health Insurance :
Company of Pennsylvania :
In Rehabilitation : No. 1 SHP 2020

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: November 4, 2021

Before the Court is an application for a stay pending appeal (Stay Application) filed by Intervenor Superintendent of Insurance of the State of Maine, Commissioner of Insurance of the Commonwealth of Massachusetts and Insurance Commissioner of the State of Washington (collectively, Intervening Regulators). The Intervening Regulators seek a stay of this Court's August 24, 2021, order granting the application of Jessica K. Altman, Insurance Commissioner of Pennsylvania, in her capacity as the Statutory Rehabilitator (Rehabilitator) of Senior Health Insurance Company of Pennsylvania (SHIP), for approval of the Second Amended Plan of Rehabilitation for SHIP. The Intervening Regulators also seek a stay of the Court's May 21, 2021, ruling granting the Rehabilitator's motion in the nature of a directed verdict regarding issue state rate approval and the Court's August 25, 2021, order denying reconsideration of that ruling. Because the Intervening Regulators fail to meet the requirements for a stay pending appeal, the Court denies the Stay Application.

On August 24, 2021, this Court approved the Rehabilitator's Second Amended Plan of Rehabilitation (Plan)¹ for SHIP, a long-term care insurer that currently has an operating deficit of approximately \$1.2 billion. In broad terms, the Plan seeks to reduce or eliminate SHIP's deficit by increasing premium revenue and modifying the existing terms of most of the approximately 39,000 policies in force. The multi-phased Plan does so by offering policyholders an array of options to either maintain their coverages and pay an actuarially justified premium or reduce their coverages to avoid or temper a premium increase. The Plan also seeks to correct SHIP's discriminatory premium rate structure, whereby policyholders whose state of issue has approved requested rate increases over the years are paying more for the same coverages than policyholders whose state of issue has disapproved requested rate increases. The Plan contains an Issue State Rate Approval Option, by which a state may opt out of the rate approval section of the Plan.²

The Intervening Regulators objected to the Plan in its totality. One of their principal objections to the Plan was that, in their view, it unlawfully allows premium rates to be set by the Rehabilitator and this Court rather than by state-of-issue regulators. The Intervening Regulators asserted that the Plan's deviation from the ordinary state-by-state rate review process violated the Full Faith and Credit

¹ The Second Amended Plan of Rehabilitation is now known as the "Approved Plan." *See* Praecipe to Substitute Approved Plan of Rehabilitation, filed September 30, 2021, and the Court's order filed October 28, 2021, approving the substitution.

² If a state opts out, the Rehabilitator will file an application to increase rates for policies issued in that state to an actuarially justified level. The regulator for the opt-out state will render a decision on the Rehabilitator's rate increase application; if it is only partially approved, the Rehabilitator will downgrade the benefits under the affected policies accordingly. The Rehabilitator's unrefuted evidence established that policyholders in an opt-out state will, like their counterparts in opt-in states, have four options for adjusting their coverages and premium rate. Their choices will not, however, be exactly the same as those offered in the Plan.

Clause of the United States Constitution³ and was inconsistent with the principle of comity. They argued that the Plan's Issue State Rate Approval Option did not cure these infirmities because it is coercive and provides them with no meaningful review of the rate filings.

At the close of the hearing on the Plan on May 21, 2021, the Rehabilitator made an oral motion for judgment in the nature of a directed verdict on the claim of the Intervening Regulators that the Issue State Rate Approval Option was unlawful. In support, the Rehabilitator argued that the Intervening Regulators had not presented any evidence that their interests would be harmed by the Issue State Rate Approval Option, and as such, their objection to that aspect of the Plan could not serve as a basis for the Court to disapprove the Plan. The Court granted the Rehabilitator's motion from the bench. The Intervening Regulators sought reconsideration of the Court's ruling, which the Court denied by order dated August 25, 2021. In doing so, the Court reasoned, *inter alia*, that the Intervening Regulators had not presented any evidence to support their challenge to the opt-out provision.

The Intervening Regulators have appealed the Court's orders approving the Plan, granting the directed verdict and denying reconsideration of that verdict. Pursuant to Pa. R.A.P. 1732,⁴ they seek a stay of those orders pending a decision by the Pennsylvania Supreme Court. Under Pennsylvania law,

³ It states:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. CONST. art. IV, §1.

⁴ Rule of Appellate Procedure 1732(a) provides, in relevant part, that an "[a]pplication for a stay of an order of a trial court pending appeal ... must ordinarily be made in the first instance to the trial court. Pa. R.A.P. 1732(a).

on an application for a stay pending appeal the movant is required to make a substantial case on the merits and to show that without the stay, irreparable injury will be suffered. Additionally, before granting a request for a stay, the court must be satisfied the issuance of the stay will not substantially harm other interested parties in the proceedings and will not adversely affect the public interest.

Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz, 573 A.2d 1001, 1003 (Pa. 1990) (citing *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805, 808-09 (Pa. 1983)).

Under the first prong of the *Process Gas* standard, the Intervening Regulators must establish a substantial case on the merits of their appeal. In summary, the Intervening Regulators argue on appeal that the Plan is not feasible as required by law; constitutes an abuse of discretion because it does not serve the best financial interests of policyholders; fails to place policyholders in at least as good a position as in a liquidation, as required under *Neblett v. Carpenter*, 305 U.S. 297 (1938); exceeds the Rehabilitator's authority under Article V of the Insurance Department Act of 1921 (Article V);⁵ and violates the Full Faith and Credit Clause of the United States Constitution by superseding the regulatory authority of other states over premium rates.

The first impediment to the Intervening Regulators' case on appeal is their lack of standing to assert claims on behalf of policyholders. The Intervening Regulators' position in SHIP's rehabilitation proceedings is uncontroverted: they do not represent any policyholders, even those with policies issued in their own

⁵ Act of May 17, 1921, P.L. 789, added by Section 2 of the Act of December 14, 1977, P.L. 280, as amended, 40 P.S. §§221.1 – 221.63.

respective states.⁶ The Court granted the Intervening Regulators’ request for limited intervention in the hearing on the Plan based on their purported interests as regulators, and not in any *parens patriae* or other representative capacity for policyholders. Indeed, at the hearing, counsel for the Intervening Regulators expressly disavowed that they are acting in any “sort of a *parens patriae* capacity on behalf of . . . policyholders [from their respective states] who have chosen not to intervene.” Notes of Testimony (N.T.), 5/19/2021, at 543. As a result, the Court held that the Intervening Regulators lacked standing to assert claims on behalf of policyholders that they do not purport to represent.

The Court’s opinion in this matter addressed at length the substance of the Intervening Regulators’ arguments. *See generally In Re: Senior Health Insurance Company In Rehabilitation* (Pa. Cmwlth., No. 1 SHP 2020, filed August 24, 2021) (*In Re: SHIP*). For purposes of the *Process Gas* analysis, the Court will summarize the portions of its analysis relevant to the Intervening Regulators’ likelihood of success on the merits.

First, the Intervening Regulators continue to assert that the Plan is not “feasible.” They are not likely to prevail on this argument, however, because, as the Court explained, Article V does not require that the Plan be “feasible” in order to be approved. *Id.* at 68. In any event, the Court also held that the Plan is feasible to the extent such a requirement exists, because the Plan will materially reduce the Funding Gap, significantly improve SHIP’s financial condition, and if successful, will restore SHIP to its pre-receivership condition of an insurer winding down its long-term care insurance business. The Intervening Regulators have not offered any evidence in support of a different conclusion.

⁶ Notably, the number of policies issued in Maine, Massachusetts and Washington, 1,405, is approximately 4% of the policies in force as of January 21, 2021. *See* Exhibit RP-30.

Second, the Intervening Regulators contend that the Plan is not in the best financial interests of policyholders. Setting aside that the Intervening Regulators lack standing to assert such an argument, their position reflects only that “they would have exercised their discretion differently” than the Rehabilitator, which the Court held “is not a basis for the Court to disapprove the Plan.” *Id.* at 80. The Intervening Regulators favor an immediate liquidation of SHIP because that will trigger guaranty association coverage. The Intervening Regulators cannot establish that they are likely to prevail on the merits simply because they disagree with the Rehabilitator’s exercise of her discretion in deciding that a rehabilitation is to be preferred for several sound policy reasons. Moreover, they do not address the Court’s finding that in a liquidation, some policyholders will pay less than the actuarially justified premium for their coverage and other policyholders will, as a result, pay more for identical coverage. Nor do the Intervening Regulators address the fact that in a liquidation, policyholders will have little or no choice over their coverage once their policies are terminated, as is required by a liquidation order. Their replacement policy from the guaranty association will cap the limits of coverage.

Third, the Intervening Regulators continue to misconstrue *Neblett v. Carpenter*, 305 U.S. 297 (1938). Even accepting their interpretation, however, 85% of SHIP’s policyholders will be offered at least one option with a value equal to or higher than the value of the policy that they might have in liquidation. Accordingly, the Court held that even if the Plan substantially impairs policies, under any measure created by *Carpenter* “it serves a legitimate and significant public purpose, and the policy modifications are reasonable and appropriate to that purpose.” *In Re: SHIP* at 63. The Stay Application offers no basis for overturning the Court’s findings.

Finally, the Intervening Regulators argue that the Plan exceeds the Rehabilitator's authority under Article V and violates the Full Faith and Credit Clause. The Stay Application does not identify any specific statutory provision that the Plan violates, and this Court's opinion approving the Plan explained at length how the Plan's provisions fully comport with Pennsylvania law. The Court also explained why the Full Faith and Credit Clause does not require the Rehabilitator to submit premium rate increase requests to 46 states, the District of Columbia, and the U.S. Virgin Islands for their review and approval. To the contrary, such a requirement "would fracture Pennsylvania's 'own legitimate public policy' in the rehabilitation of SHIP," in contravention of the Full Faith and Credit Clause. *Id.* at 61. The Intervening Regulators cannot satisfy their burden under *Process Gas* by simply repeating these failed arguments.

Having determined that the Intervening Regulators cannot make a substantial case on the merits of their appeal, the Court could deny the Stay Application without considering the remaining three *Process Gas* factors. *See Maritrans*, 573 A.2d at 1004 ("In view of that failure [to show a substantial case on the merits, the court] need not scrutinize compliance with the remaining three criteria."). Even so, the Intervening Regulators cannot satisfy the remaining factors.

Under the second *Process Gas* factor, the Intervening Regulators must establish that without the stay, they will suffer irreparable injury. They allege here that a stay is necessary to prevent "harm [to] both policyholders and regulators because both will be forced to make decisions that may not be reversible even if the Court's decision is reversed on appeal." Stay Application at 29. This argument fails for several reasons.

First, the Intervening Regulators cannot request a stay based on hypothetical harm to third parties, *i.e.*, policyholders and other state regulators. When our Supreme Court adopted the federal law on supersedeas, it defined the second factor as requiring “the petitioner [to] show[] that without the requested relief, *he* will suffer irreparable injury.” *Process Gas*, 467 A.2d at 808 (emphasis added). In granting the stay in that case, the Supreme Court found a “sufficient showing of irreparable harm likely to result to the [movants],” a group of industrial gas consumers directly impacted by the surcharge allocation at issue. *Id.* at 809. Thus, a stay can only be entered upon a showing of irreparable harm to the moving party. To the extent the Intervening Regulators allege that other regulators or policyholders will be harmed absent a stay, such allegations are immaterial to the *Process Gas* analysis.

Second, to the extent the Intervening Regulators argue they will themselves be harmed absent a stay, the Court notes that their asserted right to regulatory authority over policies issued in their states and the rate review process is preserved by the Issue State Rate Approval Option. To date, the Intervening Regulators have offered no evidence to support their challenge to the legality of this opt-out provision in the Plan. For this reason, the Court entered a directed verdict in favor of the Rehabilitator on that issue.

Third, the alleged harms cited by the Intervening Regulators are not irreparable or imminent. The only alleged injury to the Intervening Regulators themselves, *i.e.*, the decision to participate in the Plan or opt out, is reparable because if the Court’s approval of the Plan is reversed, then the decision to participate or opt out will be rendered moot. Even if the Intervening Regulators are correct that it may be “administratively difficult and confusing . . . to undo” implementation of the Plan,

Stay Application at 30, that situation would not constitute irreparable harm under *Process Gas*.⁷

Regarding the final two *Process Gas* factors, harm to other parties and harm to the public interest, the Intervening Regulators' arguments are unpersuasive. They assert that a stay will not cause injury to other parties before the Court because it will maintain the status quo, *i.e.*, policyholders will continue to receive coverage, the agents and brokers have settled, and the guaranty associations have not been triggered. With respect to the public interest, the Intervening Regulators claim their appeal is designed to benefit policyholders and other regulators, and that the requested stay supports that mission.

The record before this Court established that delay itself is damaging to the rehabilitation of SHIP and, thus, to policyholders. The Court emphasized that rehabilitation is preferable to liquidation in part because it avoids delay: "a plan can be implemented quickly, thereby addressing the causes of SHIP's financial distress, preserving assets, and reserving flexibility." *In Re: SHIP* at 47. In reaching that conclusion, the Court noted that the Rehabilitator could learn the impact of Phase One and the potential scope of Phase Two within a year of approval, which is a favorable timeline over liquidation, where rate approvals could take as long as two years, and in which there would be little certainty as to the impact on policyholders for some time. The Plan is designed to be implemented as quickly as possible so that policyholders can minimize any potential loss or burden from SHIP's receivership by allocating the premiums and coverages available to best suit their individual

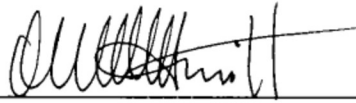
⁷ The Intervening Regulators also argue that a stay should be entered because, if the Plan is implemented before the appeal is heard and decided, the Rehabilitator may contend that the appeal should be dismissed under the doctrine of equitable mootness. *See In re Tribune Media Co.*, 799 F.3d 272 (3d Cir. 2015). The question of mootness is not before the Court at this time, and the mere possibility that the Rehabilitator may raise an argument in the future is not an imminent harm.

needs. The Court notes, further, that any harm to policyholder interests caused by a delay in implementing the Plan will be irreparable.⁸

The Intervening Regulators' arguments with respect to the public interest are similarly unpersuasive. They point to the various state legislatures' allocation of the burden of policyholder losses through the guaranty association system, claiming that a deeper deficit cannot harm the public because using guaranty association funds to cover SHIP's deficit, regardless of its size, is simply the system functioning as intended. But SHIP is not yet in liquidation, and the Pennsylvania legislature, like that of many other states, has enacted a law that favors meaningful efforts at rehabilitation over immediate liquidation. As this Court has previously observed, "[t]he legislatively stated purpose of Article V, to which the Court must give effect, is 'the protection of the interests of insureds, creditors, and the public generally' and the 'equitable apportionment of any unavoidable loss' through, *inter alia*, 'improved methods for rehabilitating insurers. . . .'" *Grode v. Mutual Fire, Marine and Inland Insurance Co.*, 572 A.2d 798, 803 (Pa. Cmwlth. 1990) (quoting Section 501 of Article V, 40 P.S. §221.1). Similarly, "[t]he benefits of rehabilitation—its flexibility and avoidance of inherent delays—are preferable to the static and cumbersome procedures of statutory liquidation." *Id.* Thus, recognizing the legislative interest in effective and meaningful efforts at rehabilitation, allowing estate assets to be depleted during an appeal can only harm the public interest by making the rehabilitation process more difficult.

⁸ In addressing the need for a bond in the event a stay is granted, the Rehabilitator estimates that the irreparable damage from a one-year delay would be between \$55 and \$70 million. The Rehabilitator posits that such damage equates to one year of the most costly long-term care services for approximately 500 policyholders.

For all of the above reasons, the Court denies the Intervening Regulators' application for a stay pending appeal.

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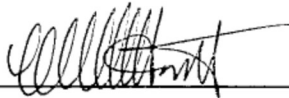
MARY HANNAH LEAVITT, President Judge Emerita

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: Senior Health Insurance :
Company of Pennsylvania :
In Rehabilitation : No. 1 SHP 2020

ORDER

AND NOW, this 4th day of November, 2021, the Application for Stay Pending Appeal filed by Intervenors Superintendent of Insurance of the State of Maine, Commissioner of Insurance of the Commonwealth of Massachusetts and Insurance Commissioner of the State of Washington is DENIED. The Intervenors' Application for Expedited Ruling on Application of Stay Pending Appeal is DISMISSED as moot.



MARY HANNAH LEAVITT, President Judge Emerita