NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

JAMES J. DONELON
IN HIS OFFICIAL CAPACITY
AS COMMISSIONER OF INSURANCE
FOR THE STATE OF LOUISIANA AND
THE LOUISIANA DEPARTMENT OF
INSURANCE
Plaintiff

NUMBER: 713794

SECTION: 22

VERSUS

JESSICA K. ALTMAN, IN HER CAPACITY AS STATUTORY REHABILITATOR OF SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, *AND*
SENIOR HEALT INSURANCE COMPANY OF PENNSYLVANIA, IN REHABILITATION
Defendant

EXHIBITS TO BE INTRODUCED BY PLAINTIFFS

Exhibits Attached to Petition

1. Louisiana Certificate of Authority for SHIP
2. Consent Agreement between LDI and SHIP
3. Application for Rehabilitation
4. Order of Rehabilitation
5. Approved SHIP Plan of Rehabilitation
6. Memorandum Opinion and Order approving the SHIP Plan
7. National Association of Insurance Commissioners – State Insurance Regulation
8. SHIP History of State Approval of Rate Increases
9. Rehabilitator's Notice and Election Form Under Plan

10. Commissioner and LDI Response to Rehabilitator's Notice and Election Form Under Plan

11. Rehabilitator's Response to Exhibit 10.

Exhibits Attached to Plaintiff's Initial Memorandum

12. 40 P.S.§221.16(b) *et seq.*

13. Pennsylvania Rehabilitation Primer

14. SHIP Appointment of LDI as Agent for Service of Process

15. Transcript from SHIP Hearing on Approval of Plan

16. Memo dated 11/22/21 from NAIC Receivership and Insolvency Task Force

Exhibits Submitted with Plaintiff's Reply Memorandum

17. SHIP Election Package Materials posted at

https://www.shipltc.com/election-package-resources?_sm_au_=iVVks2QjrVQQ2JVFFGkQjKQHL7C8J

18. Amici Brief on Merits (71-MAP- 2021, Pennsylvania Supreme Court)

Additional Exhibits Submitted

19. South Carolina Department of Insurance Motion for Temporary Injunction, Court of Common Pleas, Fifth Judicial Circuit (SC)

20. Temporary Restraining Order, November 19, 2021, Court of Common Pleas, Fifth Judicial Circuit (SC)

21. Defendants' (SHIP) Opposition to Motions for Temporary Restraining Order and Preliminary Injunction, Court of Common Pleas, Fifth Judicial Circuit (SC)

22. Order Granting Motion for Injunction issued January 20, 2022, Court of Common Pleas, Fifth Judicial Circuit (SC)

STATE OF SOUTH CAROLINA **RICHLAND COUNTY**	**IN THE COURT OF COMMON PLEAS** **FIFTH JUDICIAL CIRCUIT**
Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance, Plaintiffs, vs. Jessica K. Altman, 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 in Rehabilitation, Respondents.	Civil Action No. 2020-CP-40-05802 **PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION AND MEMORANDUM IN SUPPORT** **A Priority Matter Pursuant To Rule 40(H), SCRCP**

PLEASE TAKE NOTICE that Plaintiffs Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance, by and through the undersigned counsel, hereby move the Court, pursuant to Rule 65, SCRCP, for an Order issuing a temporary injunction prohibiting Defendants Jessica K. Altman, 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 in Rehabilitation from taking any action in furtherance of their expressed plans to, without first obtaining required regulatory approval from the State, raise premium rates and/or reduce benefits under certain binding contracts of insurance issued in the State of South Carolina or held by residents of this State, including, but not limited to, notifying policyholders of proposed rate or benefit changes or requesting that they select rates or benefits different from those authorized by the

Department and called for under the terms of the contract, charging additional premium or withholding, delaying or encumbering benefits in whole or in part.

The grounds for the temporary injunction sought by Plaintiffs are (1) Plaintiffs are likely to prevail on the merits; (2) irreparable injury, loss or damage will result to policyholders and the State in the absence of a temporary injunction; (3) a temporary injunction is necessary to prevent (a) irreparable damage to Plaintiffs' ability to discharge their legislatively-charged duty to enforce the insurance laws of this State, (b) significant disruption of the insurance marketplace within this State and (c) unnecessary confusion among and harm to policyholders; and (4) no adequate remedy at law exists. The following facts and circumstances demonstrate that a temporary injunction is proper and necessary to enforce the insurance laws of this State and to protect policyholders:

1. Plaintiff Raymond G. Farmer is the Director of the South Carolina Department of Insurance (the "Director").

2. Plaintiff South Carolina Department of Insurance (the "Department") is an agency of the State of South Carolina created and charged by the South Carolina General Assembly to regulate the business of insurance in this State. *See generally* S.C. Code Ann. §§ 38-1-10 *et seq*. ("The Insurance Law").

3. Defendant Jessica K. Altman is the Commissioner of Insurance for the Commonwealth of Pennsylvania and has been appointed Rehabilitator of Senior Health Insurance Company of Pennsylvania (the "Rehabilitator") by order of the Commonwealth Court of Pennsylvania ("Commonwealth Court") dated January 29, 2020 (the "Rehabilitation Order").

4. Defendant Patrick H. Cantilo was appointed by the Rehabilitator as Special Deputy Rehabilitator (the "SDR") of Senior Health Insurance Company of Pennsylvania. He generally has the power to act on behalf of the Rehabilitator, subject to the control and direction of the

Rehabilitator.

5. Defendant Senior Health Insurance Company of Pennsylvania ("SHIP") is a stock limited life and health insurance company that administers a closed block of long-term care ("LTC") insurance policies. It is domiciled in the Commonwealth of Pennsylvania.

6. SHIP was issued a certificate of authority to conduct the business of insurance in South Carolina on April 8, 1988. Its book of business consists almost entirely of policies covering long-term care services. SHIP has not sold new policies since 2003, and only a fraction of its original LTC business remains in force.

7. The average SHIP LTC policyholder age is approximately 87 years of age, and the average claimant is approximately 90 years old. At present, there are approximately 300 policies issued in South Carolina by SHIP, and Plaintiffs are informed and believe that there may be other SHIP policyholders residing in South Carolina whose policies were issued in other states.

8. SHIP has been insolvent since at least December 31, 2018, when it reported a deficit of approximately a half-billion dollars as of that date. (Exhibit A, Transcript of Pa. Proceedings (excerpt) at p. 46 ln. 9-10.) Since then, SHIP's financial condition has continued to deteriorate, and the current deficit is approximately $1.2 billion. (Exh. A at p. 45 ln. 2-5, p. 240 ln 17-25, p. 292 ln. 11-12.)

9. Despite SHIP being hopelessly insolvent, the Pennsylvania Insurance Department ("PID") has not sought a declaration of insolvency, which would have triggered guaranty association coverage and protection for policyholders in the affected states.

10. PID did file an application to place SHIP into rehabilitation in the Commonwealth Court of Pennsylvania on January 23, 2020. *See generally* https://www.shipltc.com/court-documents.

11. Neither Plaintiffs nor SHIP policyholders were parties to these proceedings, and policyholders were not represented by class representatives or counsel.

12. A Second Amended Rehabilitation Plan (Plan) was filed on or about May 3, 2021 and approved by a single judge of the Commonwealth Court of Pennsylvania by order filed on August 24, 2021, which was amended by order entered on November 4, 2021. An appeal is pending before the Pennsylvania Supreme Court, as is an application for stay.

13. Central to the Plan is a scheme under which Defendants will impose rates for use nationwide, bypassing individual state regulatory approval statutes. These increases are extreme, in some cases more than doubling the amount of premium to be paid and can reasonably be expected to force unnecessary policy lapses. Policyholders may be able to avoid some of the increases, but only if they agree to lower their contractually-guaranteed benefits. (Exhibit B, Rehab. Plan (excerpt)).

14. The Plan contains a so-called "opt-out" process under which SHIP submits rates to individual states that "opt-out" of the nationwide rate under those states' respective rate approval statutes. However, it also contains the coercive proviso that if an "opt-out" state does not approve the rate demanded, that state's policyholders will be punished in the form of a further downgrade to their benefits. (Exh. B at p. 108-118.)

15. The punitive nature of the "opt-out" provision not only renders this feigned deference to state laws meaningless, but it also increases the already adverse effect of the Plan on affected policyholders. Moreover, the benefit reduction strategy described in the amended plan will adversely impact policyholder rights when the plan fails, and SHIP is eventually placed into liquidation.

16. Although Defendant Cantilo has characterized the receivership as involving a "workout plan," by definition, such plans are a negotiated agreement between the debtor (which in

this case would be SHIP) and its creditors (which would be policyholders). (Exh. B at p. 79 ln. 3-6.) Here, however, the so-called "workout plan" consists of the debtor *unilaterally* (a) dictating the new terms in a contract under which the creditors have fully performed, (b) imposing draconian terms on the creditors in the form of extreme premium increases and reduced benefits, both of which are likely to force policy lapses and (c) stripping out of those policies the statutory protections relating to those polices that became part and parcel of the contract at the time of its formation. *E.g., Nakatsu v. Encompass Indem. Co.*, 390 S.C. 172, 700 S.E.2d 283 (Ct. App. 2010) (statutory provisions relating to an insurance contract are part of the contract as a matter of law); *see also* S.C. Code Ann. § 38-61-10 (2015) (contracts of insurance on property, lives, or interests in this State and all contracts of insurance the applications for which are taken within the State are made within this State and are subject to its laws).

17. The Defendants have given states only until November 15, 2021, to provide written notice, under oath, of their decision to "opt-out" of a Plan they never opted in. (Exhibit C, SHIP Notice & FAQs, Notice at p.2 & State Opt-Out Election Form.)

18. Like all LTC insurers licensed in this State, SHIP has always submitted proposed rate increases to the South Carolina Department of Insurance for review and approval in accordance with South Carolina law. Over the past decade, SHIP has submitted proposed rate increases to the South Carolina Department of Insurance in 2011, 2012, 2013, 2017, and 2018, all of which were approved. The sole exception is the 2018 rate increase, which the Department disapproved in 2019 after it was clear that SHIP was hopelessly insolvent.

19. The Defendants acknowledge that the Plan places additional burdens on policyholders and is intended to decrease SHIP's deficit by increasing premium revenue and reducing policyholder benefits. (Exhibit B at p. 11-21).

20. Defendant Cantilo has admitted under oath that, "it is not likely that we will magically restore SHIP to solvency, but it is likely that the plan . . . would substantially reduce the deficit." (Exhibit A at p. 80 ln. 6-12.). The sole purpose of the Plan is not to honor its policyholder obligations but to reduce the liabilities of the Plan before it goes into liquidation.

21. The Defendants have also admitted that SHIP will benefit at the expense of policyholders and that the opt-out provision further harms policyholders: "In general, the Rehabilitator believes that states opting out is likely to help reduce SHIP's deficit more than states opting in. This is because it is anticipated that Opt-out States will approve lower rate increases than the Rehabilitator seeks. This will result in *additional downgrades which reduce the deficit faster than additional premium*. However, the Rehabilitator DOES NOT recommend that states *opt out* because that *is generally expected to be disadvantageous to affected policyholders*." (Italics supplied.) (Exhibit C, FAQ 9.)

22. The Defendant Cantilo has also admitted that the purpose of the Plan is to transfer the burden of insolvency from legislatively-crafted guaranty associations and their member insurers. (Exh. A at p. 78 ln. 19-23, p. 79 ln. 4, p. 83-84 ln. 20-18, p. 289 ln. 9-18 & p. 292 ln. 11-25.) Specifically, he spoke in terms of "taxpayers," however, this is a euphemistic and tangential reference to tax offsets for guaranty association assessments on large insurers. Provisions in some state guaranty association statutes provide for partial premium tax offsets for member insurers that are assessed by their guaranty association to pay claims against insolvent insurers. *E.g.*, 40 Pa. Stat. § 991.1711 (credits for assessments paid); S.C. Code Ann. § 38-29-160. The larger an insurer's market share in total premium, the larger its assessment. The larger the assessment, the larger the offset to premium tax. In attempting to disguise their desire to limit assessments on large insurers as anxious concern for taxpayers, Defendants make the unspoken (and speculative) assumption that

other taxpayers will be required to make up for any revenue lost to such premium tax offsets. Thus, Defendants have crafted a plan to circumvent not only state laws regulating rates and forms, but also legislatively-crafted mechanisms for the distribution of the costs of paying claims against insolvent insurers. In doing so, they elevate the interests of large insurance companies over those of policyholders and usurp the policy decisions of democratically-elected legislatures.

23. In other words, despite SHIP's inevitable liquidation, or perhaps because of it, Defendants are attempting to use the rehabilitation proceedings to coerce vulnerable elderly policyholders into paying confiscatory rates, accepting substantially less benefits than what they are entitled to under their contracts, or even lapsing on their policies altogether, all while skirting the laws of other states. The purpose of this otherwise feckless exercise is to permanently reduce the amount of guaranty association protection benefits each policyholder would receive in a liquidation, resulting in savings to large insurers in the form of substantially smaller guaranty association assessments.

24. Defendants estimate that the costs of administration of the rehabilitation plan are approximately $200,000,000, which costs are paid from SHIP's assets; however, the Pennsylvania proceedings do not provide for an accounting. (Exhibit B at p.28, Table 1, ln. 2.).

25. With the passage of the McCarran–Ferguson Act, 15 U.S.C. §§ 1011-1015, in 1945, "Congress . . . declare[d] that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

26. "The primary state insurance regulatory functions remain as they have been since the enactment of [the] McCarran-Ferguson [Act]. This allows . . . states to perform solvency oversight of

the U.S. insurance industry and to regulate insurer behavior in the marketplace." *State Insurance Regulation*, National Association of Insurance Commissioners (NAIC), Center for Insurance Policy and Research (CIPR) (2011), https://www.naic.org/documents/topics_white_paper_hist_ins_reg.pdf.

27. "State legislatures are the public policymakers that establish . . . broad policy for the regulation of insurance by enacting legislation providing the regulatory framework under which insurance regulators operate. They establish laws which grant regulatory authority to regulators and oversee state insurance departments and approve regulatory budgets." *Id*.

28. "State insurance regulatory systems are accessible and accountable to the public and sensitive to local social and economic conditions. State regulation has proven that it effectively protects consumers and ensures that promises made by insurers are kept. Insurance regulation is structured around several key functions, including insurer licensing, producer licensing, product regulation (review and approval of rates (including benefits) and forms), market conduct, financial regulation and consumer services." *Id*.

29. "State regulators protect consumers by ensuring that insurance policy provisions comply with state law, are reasonable and fair, and do not contain major gaps in coverage that might be misunderstood by consumers and leave them unprotected. The nature of the regulatory reviews of rates, rating rules and policy forms varies somewhat among the states depending on their laws and regulations." *Id*.

30. The South Carolina General Assembly has properly delegated regulatory authority under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, to the Department, prescribing and approving detailed and extensive statutes and regulations governing LTC policies and rates, including provisions for the approval of rates by the Department. S.C. Code Ann. §§ 38-72-10 *et seq.*; S.C. Code Regs. § 69-44.

31. In S.C. Code Ann. § 38-25-10, the South Carolina General Assembly makes the following Declaration:

> (a) The General Assembly declares that it is concerned with the protection of residents of this State against acts by insurers not authorized to conduct an insurance business in this State, by the maintenance of fair and honest insurance markets, by protecting authorized insurers which are subject to regulation from unfair competition by unauthorized insurers, and by protecting against the evasion of the insurance regulatory laws of this State. In furtherance of this state interest, the General Assembly herein provides . . . [for] proceeding[s] by the director or his designee to enforce or effect full compliance with the insurance laws of this State. In so doing, the state exercises its powers to protect residents of this State and to define what constitutes transacting an insurance business in this State and also exercises powers and privileges available to this State by virtue of Public Law 79-15, 79th Congress of the United States, Chapter 20, 1st Session, S. 340, 59 Stat. 33; 15 U.S.C., Sections 1011 to 1015, inclusive, as amended [the McCarran-Ferguson Act], which declares that the business of insurance and every person engaged therein are subject to the laws of the several states.

32. Pursuant to S.C. Code Ann. § 38-3-10 (2015), the General Assembly "established a separate and distinct department of this State, known as the Department of Insurance. The department must be managed and operated by a director appointed by the Governor upon the advice and consent of the Senate."

33. Pursuant to S.C. Code Ann. § 38-3-60 (2015), "The director or his designee must follow the general policies and broad objectives enacted by the General Assembly regarding the operation of the insurance industry in this State."

34. S.C. Code Ann. § 38-3-110 (2015) sets forth the Director's responsibilities, which include the duty to:

> (1) supervise and regulate the rates and service of every insurer in this State and fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be observed and followed by every insurer doing business in this State. Nothing contained in this title authorizes or requires a review by the department or the director of any order of the director's designee or the deputy director under the Administrative Procedures Act. This item does not grant any additional authority to the director or his designee with regard to insurance rates

> other than the ratemaking authority specifically granted to the director or his designee, or the Department of Insurance for certain kinds of insurance in other provisions of this title;
>
> and to:
>
> (2) see that all laws of this State governing insurers or relating to the business of insurance are faithfully executed and make regulations to carry out this title and all other insurance laws of this State, the enforcement or administration of which is not otherwise specifically provided for.

35. Pursuant to S.C. Code Ann. § 38-61-10 (2015), "All contracts of insurance on property, lives, or interests in this State are considered to be made in the State and all contracts of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State."

36. Pursuant to the Long-Term Care Insurance Act, S.C. Code Ann. §§ 38-72-10 *et seq.*, "All premium rate schedules for long-term care insurance must be filed with the [South Carolina Department of Insurance] and are subject to the prior approval of the director or his designee." S.C. Code Ann. § 38-72-75(A). An insurer may not charge a premium to an insured under a policy or contract of long-term care insurance before the applicable premium rate is filed and approved, and an insurer may not change the premium charged to an insured under a policy or contract of long-term care insurance until the applicable premium rate change has been filed with and approved by the Director or his designee. *Id.*

37. In addition, "the director or his designee may hold a public hearing or solicit public comments as a part of the process to review long-term care insurance rate filings received by the director or his designee." S.C. Code Ann. § 38-72-75(C). Each decision of the Director or his designee about premium rates is subject to review under the Administrative Procedures Act (APA), S.C. Code Ann. § 38-72-75(D).

38. S.C. Code Regs. 69-44 provides for the comprehensive regulation of LTC policies, including rates, forms and required market practices.

39. The public policy of this State is that because the authority to determine what insurance premium rates are just and reasonable is vested in the Department, not even courts should adjudicate what a reasonable rate might be in a collateral proceeding. *Cf. Temporary Services, Inc. v. American Intern. Group, Inc.*, 388 S.C. 348, 351, 697 S.E.2d 527, 529 (2010); § 2:34. Rates—Judicial review, 1 Couch on Ins. § 2:34 ("Ratemaking is generally not a judicial function. Indeed, many jurisdictions have adopted the filed rate doctrine which expressly prohibits courts from imposing rates different than those approved by the state insurance department.")

40. Pennsylvania's highest court has made clear that as a creature of statute, an insurance commissioner acting as a rehabilitator "'can only exercise those powers which have been conferred upon it by the Legislature in clear and unmistakable language.'" *Aetna Cas. and Sur. Co. v. Com., Ins. Dept.*, 638 A.2d 194 (Pa. 1994) (quoting *Commonwealth, Human Relations Commission v. Transit Casualty Insurance Company*, 478 Pa. 430, 438, 387 A.2d 58, 62 (1978)0. *See also Koken v. Legion Ins. Co.*, 831 A.2d 1196 (Pa. Commw. 2003), *aff'd sub nom. Koken v. Villanova Ins. Co.*, 878 A.2d 51 (Pa. 2005).

41. Defendants Rehabilitator and SDR have only those powers conferred upon them by 40 Pa. Stat. Ann. §§ 221.1 *et seq*., which are limited and equivalent to those of new management, and they and insurance companies in rehabilitation, including SHIP, must therefore obey the insurance laws of each the states in which they conduct the business of insurance. *See id*. ((Rehabilitator has "full power to direct and mange" the insurer"). Nowhere in the rehabilitation statutes is there "clear and unmistakable language" permitting a rehabilitator to unilaterally set new rates and policy terms.

42. Although "liquidation" contemplates the end of corporate existence, "rehabilitation" involves the continuance of corporate life and activities and is an effort to restore and reinstate the corporation to its former condition of successful operation and solvency. *Smalls v. Weed*, 293 S.C. 364, 360 S.E.2d 531 (Ct. App. 1987).

43. The Insurers Rehabilitation and Liquidation Act "provides for one procedure in actions involving a rehabilitator, and for a different procedure against a liquidator." *Id*.

44. Another state's rehabilitation proceedings do not grant that state jurisdiction over "the whole field." *See id*.

45. Although the Pennsylvania Commonwealth Court exercises in rem jurisdiction in the rehabilitation proceedings, the res over which that jurisdiction is exercised is the corporation itself, the fictitious entity, not all of the corporation's property for all purposes and certainly not the rights of all persons wherever situated. The Commonwealth Court may not, simply by reason of the *in rem* nature of the Pennsylvania rehabilitation proceedings, adjudicate the rights of South Carolina policyholders and claimants who are neither parties in the Pennsylvania proceedings nor subject to the jurisdiction of the Commonwealth Court.

46. "Before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree" and "[i]f that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given." *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n.*, 455 U.S. 691, 705 (1982).

47. Neither policyholders nor South Carolina were parties in the proceedings giving rise to this Plan, nor are they bound by the ruling of the Commonwealth Court.

48. The constitutional command of full faith and credit does not compel South Carolina

to defer to a Pennsylvania court's exercise of jurisdiction where, as here, the issue was neither fully and fairly litigated nor involved the same parties as the Pennsylvania litigation.

49. No state, including Pennsylvania, may bind a Nation, particularly as to matter on which the legislatures of each state have spoken. Pennsylvania's erroneous attempt to do so would represent a "policy of hostility to the public Acts" of each of the 45 affected states, resulting in a direct injury to their sovereignty in violation of the Full Faith and Credit Clause. *See Franchise Tax Bd. v. Hyatt,* 578 U.S. 171 (2016)*; Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Carroll v. Lanza*, 349 U.S. 408 (1955).

50. "The very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers*, 306 U.S. at 501; *see also Alaska Packers Ass'n v. Indus. Accident Comm'n.*, 294 U.S. 532, 547 (1935).

51. In addition to being deprived of the opportunity to negotiate the so-called "workout plan," policyholders have had their contract rights stripped of them without the benefit of due process. Policyholders did not receive proper service of process and were not represented by class representatives or independent legal counsel. The Rehabilitator has offered no justification for why policyholders were literally denied their day in court before being stripped of their contractual and procedural rights.[1] Indeed, it is a case cited by the Rehabilitator's own attorneys that provides an

1 In contrast, several large insurers -- Anthem, Inc., Health Care Service Corporation, Horizon Healthcare Services, Inc. d/b/a Horizon Blue Cross Blue Shield of New Jersey, and UnitedHealthcare Insurance Company -- appeared as intervenors in the proceedings and were represented by counsel. Unsurprisingly, these companies fully supported the Plan. *See, e.g.*, Top 10 health insurance companies in the US, https://www.insurancebusinessmag.com/us/news/healthcare/top-10-health-insurance-companies-in-the-us-212292.aspx (23 Aug 2021); Horizon NJ Health, https://www.horizonnjhealth.com/aboutus/company-overview/company-information.

example of policyholders being represented by class representatives who engaged in "extensive negotiations" with the insurer and the receiver. *Underwriters Nat. Assur. Co. v. North Carolina Life and Acc. and Health Ins. Guar. Ass'n*., 455 U.S. 691 (1982).

52. Insurance commissioners as receivers and their deputies are fiduciaries, and as part of their responsibilities are charged with preserving and protecting the rights of policyholders. *E.g.*, *McPherson v. U.S. Physicians Mut. Risk Retention Group*, 99 S.W.3d 462 (Mo. Ct. App. 2003); *Green v. Louisiana Underwriters Ins. Co.*, 571 So.2d 610 (La. 1990); *see also* NAIC Receiver's Handbook for Insurance Company Insolvencies 333 (2018) ("A Receiver has a fiduciary responsibility to all of the receivership estate's creditors and is charged with protecting the interests of insureds, creditors and the public generally.") And yet, these policyholders, who number among the most vulnerable members of our society, now face having to shoulder a financial burden that would otherwise rest, as the legislatures of the affected states intended, with the insurance industry that created and sold the same kind of policies. It is impossible to reconcile the faithful performance of the Rehabilitator's fiduciary duty with the casual disposal of the contractual and constitutional rights of policyholders.

53. Notwithstanding the clear mandate of South Carolina law, the limited reach of the Pennsylvania proceedings, and the numerous and serious defects in those proceedings, Defendants have made clear their position that SHIP is no longer subject to South Carolina law and that they have no intention to obey it, and have instead given Plaintiffs the deadline of November 15, 2021 to deliver a binding decision regarding the "opt-out" provision and have otherwise evinced their intent to move forward immediately with implementing changes to policies and rates.

54. Plaintiffs seek an order temporarily enjoining Defendants from taking any measure that purports to bypass, impede, supersede, diminish or interfere in any manner with the State of

South Carolina's regulatory authority over changes to the terms of policies and review and approval of insurance rates in this State, and further temporarily enjoining Defendants from communicating in any form or manner with South Carolina policyholders regarding proposed changes to policy terms or rates without prior written approval by the State.

55. A preliminary injunction pursuant to Rule 65(a), SCRCP is warranted under the circumstances.

56. "A preliminary injunction should issue only if necessary to preserve the *status quo ante*, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." *Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010) (citing *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009). 1984). "When *prima facie* showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." *Id.* (quoting *D.W. Alderman & Sons Co. v. Wilson*, 69 S.C. 156, 48 S.E. 85 (1904)).

57. A temporary injunction to preserve *the status quo ante* is necessary to prevent irreparable harm to South Carolina policyholders. Plaintiffs are specifically charged by the South Carolina General Assembly to uphold the insurance laws of this State. Those laws are designed to protect the policyholders, whose contracts were formed in this State and are subject to its laws and regulations. The State has a strong interest in protecting policyholders and ensuring that its laws are enforced. If those laws are not enforced, and Defendants are permitted to implement their Plan immediately, Plaintiffs will have not upheld their statutory duty and policyholders will be permanently denied basic contractual, procedural and constitutional rights and suffer permanent and substantial economic harm. Even if Plaintiffs were to fine SHIP or suspend or revoke its license,

such after-the-fact measures would not reinstate any permanent or temporary loss of benefits or premium overcharges. The same is true of any lawsuit to recover lost benefits or premium overcharges, which would also be impractical given the advanced age and typically limited means of the victims. They would also not undo the substantial confusion and disruption of the marketplace that would have occurred. Conversely, Defendants need do no more than refrain from violating South Carolina law. If they wish to file for a rate increase in accordance with the laws of the applicable state, including, this one, they have done so in the past and may do so again.

58. Plaintiffs are also likely to prevail on the merits. Defendants' Plan is founded on a clearly erroneous reading of the law that is likely to be overturned on appeal and suffers from several other underlying legal defects. Regardless, the order approving that Plan is not binding on Plaintiffs or policyholders. Both federal and State statutory law support Plaintiffs' position that insurers licensed by Plaintiffs must obey the laws of this State and those contracts issued in this state are subject to South Carolina law.

59. Plaintiffs have therefore made the necessary showing that they are entitled to a temporary injunction - irreparable harm, likelihood of success on the merits, and no adequate remedy at law, thereby establishing grounds for relief pursuant to Rule 65, SCRCP.

60. For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion for Temporary Injunction prohibiting the Defendants taking any action that would result in prejudice to the rights of policyholders with respect to contracts of insurance subject to the laws of this State or from otherwise interfering with the orderly administration and enforcement of the insurance laws of this State.

61. This motion, and the relief sought herein, are based on and supported by the statutory and decisional law of this State and the United States, the South Carolina Rules of Civil Procedure,

the pleadings and filings in the underlying lawsuit, and such other submissions that may be filed with the Court.

62. Pursuant to Rule 11, SCRCP, the undersigned certifies that consultation with the attorneys for the Defendants prior to the filing of this motion would not serve any useful purpose.

WHEREFORE, Plaintiffs respectfully pray the Court for an order temporarily enjoining Defendants from implementing or enforcing the rehabilitation plan in this State, otherwise interfering with the rights of SHIP policyholders in South Carolina or otherwise violating the insurance laws of this State pertaining to long-term care insurance until the resolution of the appeal in Pennsylvania, with Plaintiffs given leave to apply for an extension upon a showing that it is necessary to protect policyholders and uphold the laws of this State.

Respectfully submitted,

November 12, 2021

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One of the Attorneys for Petitioner

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
RICHLAND COUNTY	**FIFTH JUDICIAL CIRCUIT**
Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance, Plaintiffs, vs. Jessica K. Altman, 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 in Rehabilitation, Defendants.	Civil Action No. 2020-CP-40-05802 **TEMPORARY RESTRAINING ORDER**

This matter comes before the Court on Plaintiff's Motion for a Temporary Restraining Order pending the hearing and determination of Plaintiff's Motion for Temporary Injunction and Memorandum in Support, the Summons and Complaint previously filed in this matter, and the Verification of Daniel N. Morris, in which it appears that (1) Plaintiffs are specifically charged by the South Carolina General Assembly to uphold the insurance laws of this State, (2) those laws are designed to protect policyholders, whose contracts were formed in this State and are subject to its laws and regulations, (3) the State has a strong interest in protecting policyholders and ensuring that its laws are enforced, (4) if those laws are not enforced, and Defendants are permitted to continue to implement a plan of rehabilitation by implementing and communicating changes to premium rates and policy changes in December 2021 or sooner without required state regulatory approvals as planned, Plaintiffs will have not upheld their statutory duty and policyholders will be

permanently denied basic contractual, procedural and constitutional rights and suffer permanent and substantial economic harm, (5) even if Plaintiffs were to fine Senior Health Insurance Company of Pennsylvania in Rehabilitation (SHIP) or suspend or revoke its license, such after-the-fact measures would not reinstate any permanent or temporary loss of benefits or premium overcharges, (6) the same is true of any lawsuit to recover lost benefits or premium overcharges, which would also be impracticable given the advanced age and typically limited means of the victims, and (7) those actions would also not undo the substantial confusion and disruption of the marketplace that would have occurred.

On the basis of these pleadings and papers, it appears to the Court that Plaintiffs will suffer immediate and irreparable injury, loss, and damage before notice can be given of a hearing and a hearing can be held on Plaintiffs' Motion for Temporary Injunction in that if Defendants are permitted to implement changes to premium rates and policy changes without required approvals in December 2021 or sooner, it would irretrievably alter the *status quo* with respect to the enforcement of the insurance laws, the insurance marketplace and the rights of policyholders.

The Court is of the opinion that the temporary restraining order should be issued without hearing and without further notice, pending a hearing on Plaintiffs' Motion for Temporary Injunction and Memorandum in Support. Therefore, it is ordered that:

1. Defendants, their officers, agents, employees, successors, and attorneys, and all those in active concert or participation with them, are enjoined and restrained from communicating, implementing or enforcing in this State the SHIP rehabilitation plan approved by the Pennsylvania Commonwealth Court, otherwise interfering with the rights of SHIP long-term care insurance policyholders or otherwise violating the insurance laws of this State pertaining to long-term care insurance until such time as Plaintiffs' Motion for Temporary Injunction and

Memorandum in Support can be heard and determined and an order on said Motion and Memorandum is issued by this Court.

2. Pursuant to Rule 65(c), SCRCP, no security shall be required of Plaintiffs as an officer and agency of the State.

3. A hearing on the Motion for Temporary Injunction is set for Monday, November 29, 2021 at 2:00 p.m. in Courtroom 3B of the Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina 29201.

4. This Order shall expire at 11:59 p.m., November 29, 2021, unless within that time the Order is extended by this Court or unless Defendants consent to an extension.

AND IT IS SO ORDERED.

L. Casey Manning
Chief Administrative Judge
Fifth Judicial Circuit

November 19, 2021
Columbia, South Carolina

STATE OF SOUTH CAROLINA
RICHLAND COUNTY

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
2020-CP-4005802

Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance,

Plaintiffs,

vs.

Jessica K. Altman, 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 in Rehabilitation,

Defendants.

DEFENDANTS' OPPOSITION TO MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Filed December 13, 2021

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Defendants, Jessica K. Altman, as 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"), submit this Opposition to Plaintiffs' Motion for Temporary Restraining Order and Motion for Preliminary Injunction. As set forth herein, the order extending the Court's temporary restraining order should be allowed to expire and the Motion for Preliminary Injunction should be denied.

I. INTRODUCTION

Plaintiffs' Complaint and related motions are part of an extraordinary collateral attack on a court-approved rehabilitation plan and the state officials implementing that plan. Plaintiffs ask this Court to assert jurisdiction over out-of-state officials and enjoin those officials from exercising their statutory authority under the order and supervision of a Pennsylvania court, despite that Plaintiffs deliberately and voluntarily ignored every opportunity to intervene and stake out their position in the proper forum. Plaintiffs also ask this Court to assert its authority over the rehabilitation of a financially-distressed insurer domiciled in Pennsylvania which is already within the exclusive jurisdiction of a Pennsylvania court, thus denying full faith and credit to the orders of Pennsylvania courts and substituting their and this Court's views for the findings of the Commonwealth Court following a hearing on the merits.

This Court must refuse the invitation to enjoin these state-officer Defendants, and this Court must refuse the invitation to create conflicting court decisions regarding the plan. For this Court to grant relief to Plaintiffs, it must challenge the authority of Pennsylvania courts and Pennsylvania officials, subjecting South Carolina officials to similar challenges in other states. This Court should not take sides in a regulatory disagreement amongst state officials that should have been—and was—resolved in the rehabilitation proceedings in Pennsylvania in keeping with established national insurance regulation practice.

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II. BRIEF FACTUAL AND PROCEDURAL HISTORY

A. SHIP is a Pennsylvania long-term care insurer in rehabilitation under the court-ordered and court-supervised authority of Defendants Altman and Cantilo.

SHIP is a long-term care insurance ("LTCI") company organized under the laws of the Commonwealth of Pennsylvania. (Declaration of Patrick H. Cantilo ("Cantilo Dec.") filed herewith, at ¶ 6.) On January 29, 2020, as a result of its long financial decline, the Commonwealth Court placed SHIP in rehabilitation under the Pennsylvania Insurance Department Act, 40 Pa. Stat. §§ 221.1–221.63 ("PID Act"). (*Id.* at ¶ 7; *see also* Rehabilitation Order, attached hereto as Exhibit 1.) By law, rehabilitation proceedings are designed "to protect the interests of insureds, creditors, and the public generally." 40 Pa. Stat. §§ 221.4–221.5. South Carolina has adopted a similar scheme with a similar purpose. *See* S.C. Code § 38-27-30 (purpose of receivership laws is "the protection of the interests of insureds, claimants, creditors, and the public generally.")

The PID Act establishes the Commonwealth Court of Pennsylvania as the exclusive forum for judicial review of the Rehabilitation proceedings. *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1091 (Pa. 1992) (internal quotation omitted). 40 Pa. Stat. §§ 221.4–221.5. The Commonwealth Court assumed jurisdiction over SHIP by placing it in rehabilitation January 29, 2020. (Cantilo Dec. at ¶ 8; *see also* Ex. 1.) That Court also affirmed the authority of Defendant Jessica K. Altman, Insurance Commissioner for Pennsylvania, to act as Rehabilitator for SHIP by "tak[ing] possession of the assets of the insurer" and "administer[ing] them under orders of the [Commonwealth Court of Pennsylvania]." 40 Pa. Stat. § 221.15(c). 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). The PID Act further provides that the Rehabilitator "may appoint a special deputy who shall have all the powers of the rehabilitator" granted under the Act. 40 Pa. Stat. § 221.16. Defendant Patrick H. Cantilo was

duly appointed as Special Deputy Rehabilitator pursuant to this authority. (Cantilo Dec. at ¶ 9; Ex. 1 at ¶ 14.)

B. The Commonwealth Court 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 South Carolina—as well as insurance regulators across the country. (Cantilo Dec. at ¶ 10; *see also* Form of Notice, attached hereto as Exhibit 2.) Insurance regulators, including Plaintiff Farmer, were already familiar with the possibility of rehabilitation, as Defendants Altman and Cantilo made numerous outreach efforts prior to filing the application for rehabilitation in the Commonwealth Court. (Cantilo Dec. at ¶ 11.) 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. (Cantilo Dec. at ¶ 12.)

Insurance regulators from five states filed formal comments, and insurance regulators from three states intervened. (Cantilo Dec. at ¶ 13.) Plaintiffs participated in SHIP's rehabilitation proceeding but did not seek to intervene. First, Plaintiffs submitted separate comments opposing both the Initial Rehabilitation Plan and the Amended Plan. (Cantilo Dec. at ¶¶ 14, 15.) According to the Plaintiffs, they "fully supported the positions taken by the three intervening state insurance regulators" in the Commonwealth Court of Pennsylvania. (Cantilo Dec. at ¶ 16.)[1] 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

[1] The "three intervening state insurance regulators" are the chief insurance regulators of Maine, Massachusetts, and Washington, referred to herein as the "Intervening Regulators."

included the Intervening Regulators presenting their arguments that the proposed plan did not benefit policyholders and improperly usurped state rate making authority. (Cantilo Dec. at ¶ 17.)

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.[2] (Opinion and Order, attached as Exhibit 3; *see also* Cantilo Dec. at ¶ 18.) 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.

The deadline to "opt-out" of the Approved Plan was November 15, 2021. Plaintiffs chose not to opt-out, and, under the Commonwealth Court's opinion and the Approved Plan, South Carolina is thus an "opt-in" state. (Cantilo Dec. at ¶ 19.) Should the current restraints expire and no further injunction be entered, policyholder election material will be sent to the holders of policies issued in South Carolina in January 2022. (Cantilo Dec. at ¶ 20.) Importantly, however, no policy would be modified until April 2022 at the earliest, following receipt of policyholder elections and the planned audit of the election process to ensure accuracy.

The Commonwealth Court's order on the Approved Plan is now on appeal to the Supreme Court of Pennsylvania, but the matter has not been stayed and the Rehabilitator is moving forward

[2] The Plan Approval Opinion was amended in minor ways in November 2021; Exhibit 3 is the amended opinion.

with implementation. (Cantilo Dec. at ¶ 22.) On October 1, 2021, the Intervening Regulators filed a motion in the Commonwealth Court of Pennsylvania seeking a stay of implementation of the Approved Plan pending appeal. (Cantilo Dec. at ¶ 23.) That motion was denied, and the Court found that a stay should not be entered because, *inter alia*, delay was damaging for policyholders and the prospects of the plan. (Cantilo Dec. at ¶ 24; Stay Denial Opinion, attached hereto as Exhibit 4.) Then, on November 8, the Intervening Regulators filed a motion in the Supreme Court of Pennsylvania seeking a stay. (Cantilo Dec. at ¶ 26.) The Intervening Regulators primarily sought to prevent the Rehabilitator from sending and accepting opt-in and opt-out decisions by state regulators which were due for submission by November 15, 2021. (Cantilo Dec. at ¶ 25.) The Intervening Regulators did not seek expedited relief, however, and the opt-in and opt-out deadline passed on November 15, 2021 without an order of the Supreme Court. (Cantilo Dec. at ¶ 27.) The Intervening Regulators' motion to stay remains pending, but, as they admit in arguments joined by Plaintiffs here, any alleged harm to policyholders from receiving election packages and making policy elections is and would be reparable. (*See* Intervening Regulators' Application for Stay, attached hereto as Exhibit 5, at 40-41 (explaining how state opt-in/out process and policyholder elections could be undone).)

C. Plaintiffs are using any means necessary to pursue 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 did not file formal comments in the rehabilitation proceedings, and they did not seek to intervene despite receiving notice of the invitation to do so. Instead, Plaintiffs commenced a collateral attack on the plan by filing suit in this Court on December 10, 2021—*i.e.*, prior to plan approval. In that Complaint, Plaintiffs asked this Court to intervene and issue declaratory and injunctive relief that would upend SHIP's rehabilitation and prevent the consideration and implementation of the proposed plan. (*See generally* Compl.) Defendants removed to federal court on the basis of diversity, but the matter was remanded after the United States District court for the

District of South Carolina concluded that it "necessarily lack[ed] original jurisdiction over a case over which the Commonwealth Court of Pennsylvania has exclusive jurisdiction." *Farmer v. Altman*, No. CV 3:21-00097-MGL, 2021 WL 3223114, at *3 (D.S.C. July 29, 2021).

On August 23, 2021, Defendants moved this Court for an order dismissing Plaintiffs' Complaint in its entirety. Defendants argued that this Court lacked jurisdiction to grant the requested relief and that Plaintiffs' claims were without merit in any event. (*See generally* Motion to Dismiss.) The Commonwealth Court approved the plan soon thereafter (*see supra* at 4-5); Defendants advised this Court of that change in the relevant facts. (*See* Supplemental Authority filed September 15, 2021.) Plaintiffs did not respond to the motion or to the supplemental authority, and they did not amend their Complaint despite the significant change in circumstances. No hearing was ever scheduled on the motion to dismiss, and it remains pending today.

On November 12, 2021, Plaintiffs applied for a Temporary Injunction in this Court while the Intervening Regulators' application for a stay was pending in the Supreme Court of Pennsylvania. That same day, Plaintiffs and a number of other states filed a motion to be heard as *amici* in the Supreme Court of Pennsylvania on the Intervening Regulators' stay request and possibly on the merits. (Cantilo Dec. at ¶ 29; *see also Amici* Filing, attached hereto as Exhibit 6.) The proposed *amicus* brief regarding a stay was authored by counsel for Plaintiffs and for the chief insurance regulator of Louisiana. (*Id.*, Brief at 6.) As Plaintiffs and the other states explained, they joined entirely in the arguments set forth by the Intervening Regulators regarding the stay. (*Id.*, Motion at 4.)[3]

The November 15, 2021, opt-in and opt-out deadline passed without an effective opt-out election by Plaintiffs, and this deliberate decision by Director Farm and the Department of Insurance

[3] The *amicus* request did not specify which states would later file a brief on the merits, and no proposed brief was submitted. The motion to be heard as *amici* on the stay and on the merits remains pending. (Cantilo Dec. at ¶ 35.)

made South Carolina an opt-in state under the premium rate setting provisions of the Plan. (Cantilo Dec. at ¶ 32.) Then, on November 18—*i.e.*, after failing to opt-out—Plaintiffs sought a Temporary Restraining Order ("TRO") from this Court to prevent further implementation of the Plan. This Court entered that order *ex parte* on November 19, 2021, and, by agreement, that TRO was extended until the hearing on Plaintiffs' motions set for December 15, 2021.

III. LEGAL STANDARD

It is well established that an injunction "is a drastic remedy' that may be issued only "to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 603 S.E.2d 905, 907–08 (S.C. 2004). Moreover, "[t]he sole purpose of a temporary injunction is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001) (citation omitted). In resolving Plaintiffs' Motion, the Court must independently do so without reference to any prior order for temporary injunction. *See Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 413 S.E.2d 824, 826 (1992) (explaining that "[a] temporary injunction is made without prejudice to the rights of either party pending a hearing on the merits," and holding that "trial judge erred in concluding he was bound by the findings of the hearing judge who issued the temporary injunction"). Any order granting a temporary injunction is directly appealable. *Atwood Agency v. Black*, 374 S.C. 68, 646 S.E.2d 882, 883 (2007).

IV. JURISDICTIONAL ARGUMENTS

This Court cannot enter any injunction because it lacks jurisdiction over the claims and over the Defendants Plaintiffs seek to enjoin. Specifically, this Court lacks subject matter jurisdiction over Plaintiffs' claims seeking to invalidate or bar implementation of the court-approved rehabilitation plan, and this Court lacks personal jurisdiction over the Defendants charged with implementing that

plan. Absent jurisdiction, this Court must refuse to enter a temporary injunction—and indeed must dismiss the Complaint, as Defendants have requested in their still-pending Motion to Dismiss.

A. This Court lacks subject matter jurisdiction over Plaintiffs' claims seeking a declaratory order and injunction preventing implementation of the Rehabilitation Plan because the Commonwealth Court of Pennsylvania has exclusive jurisdiction over plan approval and implementation.

The Motion must be denied because South Carolina courts are without subject matter jurisdiction over the claims at issue in the Complaint. It is well established that in order to enter even a temporary injunction, a court must have first resolved whether it has subject matter jurisdiction over the underlying claims at issue. *See Hunt v. Avondale Mills, Inc.*, 385 S.C. 616, 616, 686 S.E.2d 190 (S.C. 2009) (vacating temporary injunction because "the circuit court did not have subject matter jurisdiction to entertain this matter"); *Floyd v. Horry Cty. Sch. Dist.*, 351 S.C. 233, 569 S.E.2d 343, 344–45 (2002) (affirming decision vacating temporary injunction because circuit court lacked subject matter jurisdiction over underlying claims); *accord* 43A C.J.S. Injunctions § 314 ("A trial court may not grant a preliminary injunction if it lacks subject matter jurisdiction over the claim before it."); 42 Am. Jur. 2d Injunctions § 217 ("If a trial court lacks subject matter jurisdiction over a case, it similarly lacks jurisdiction to render even a temporary injunction.").

In the Complaint, Plaintiffs assert two causes of action. First, "Plaintiffs seek a declaration that the rehabilitation plan is invalid and unenforceable to the extent it seeks to bypass, impede, supersede, diminish or interfere in any manner with the State of South Carolina's regulatory authority over changes to the terms of policies and review and approval of insurance rates and forms or to impose unauthorized changes to policies and rates in violation of the rights of South Carolina policyholders.") (Compl. ¶ 133.) Second, "Plaintiffs seek an order permanently enjoining the enforcement or implementation of any order of the Commonwealth Court or any plan or directive of the Defendants" with respect to the same issues. (Compl. ¶ 135.) This Court lacks subject matter

jurisdiction over either claim, and thus this Court cannot enter any preliminary—or permanent—injunction related to those claims.[4]

Plaintiffs seek a declaration that the approved rehabilitation plan is "invalid and unenforceable," but South Carolina courts are without jurisdiction to entertain a collateral attack on the Commonwealth Court of Pennsylvania's exclusive jurisdiction over SHIP's rehabilitation proceedings. This Court's jurisdiction is not unlimited with respect to matters involving insurers in receivership. Under the IRLA, South Carolina state courts only have jurisdiction "to entertain, hear, or determine" rehabilitation proceedings commenced by the Director of the South Carolina Department, S.C. Code § 38-27-60(a). Plaintiffs have not commenced any receivership action in South Carolina, however, and the statute does not give this Court jurisdiction over rehabilitation proceedings commenced by the chief insurance regulators of other states, as is the case for SHIP. Holding otherwise would open the door for chief insurance regulators of other states to challenge in their own state courts the decisions and actions of Director Farmer and the Department of Insurance, as well as this Court, in receivership matters. Such a result would defy logic—and, importantly, South Carolina law.

The IRLA's jurisdictional provisions codify a commonsense approach that preserves respect and comity for each state's rehabilitation proceedings of distressed insurers domiciled in their respective states. Indeed, the IRLA expressly provides that South Carolina courts *lack* jurisdiction to hear any complaint "praying for an injunction or restraining order or other relief preliminary to, incidental to, or relating to [rehabilitation] proceedings" other than those proceedings commenced by the Director of the South Carolina Department in accordance with the IRLA. *Id.* § 38-27-60(b). That is the precise—and prohibited—relief that Plaintiffs now seek in this Court: declaratory and

[4] Defendants made a similar argument in their pending Motion to Dismiss the Complaint filed August 23, 2021. Since that time, the Commonwealth Court has approved the Rehabilitation Plan, but that change in circumstances only confirms that this Court cannot enter the requested relief.

injunctive relief relating not to any receivership matter in South Carolina, but to rehabilitation proceedings commenced in Pennsylvania by the Insurance Commissioner for Pennsylvania for an insurer domiciled in Pennsylvania. In fact, the relief Plaintiffs seek would be far more than "incidental to" or "relating to" SHIP's Rehabilitation proceedings: Plaintiffs plainly seek to reopen and relitigate the Commonwealth Court's findings and conclusions of law regarding the Rehabilitator's authority, questions this Court is not authorized to consider or address.[5]

Any challenges to the provisions of SHIP's Rehabilitation Plan or the authority of the Rehabilitator to implement that plan are within the exclusive jurisdiction of the Commonwealth Court of Pennsylvania, just as South Carolina courts have exclusive jurisdiction over their own rehabilitation proceedings commenced pursuant to the IRLA. *See* 42 Pa. Stat. § 761(a)(3) and (b) (providing Commonwealth Court of Pennsylvania with original jurisdiction over all proceedings arising under the PID Act and recognizing that its jurisdiction is exclusive in this context); 40 Pa. Stat. § 221.16(d) (the Commonwealth Court of Pennsylvania may approve, disapprove, or modify a proposed rehabilitation plan). No other court may interfere with the Commonwealth Court of Pennsylvania's exclusive jurisdiction of SHIP's Rehabilitation proceeding and adjudicate the propriety of the Rehabilitation Plan or the scope of the Rehabilitator's authority. *See Ballesteros v. New Jersey Prop. Liab. Ins. Guar. Ass'n*, 530 F. Supp. 1367, 1371 (D.N.J. 1982) (recognizing that in insurer delinquency proceedings, "other courts, except when called upon by the court of primary jurisdiction for assistance, are excluded from participation") *aff'd sub nom. Appeal of Ballesteros*, 696 F.2d 980 (3d Cir. 1982); Indeed, "[t]he need for giving one state exclusive jurisdiction over

[5] Plaintiffs' impermissible effort to conduct parallel rehabilitation proceedings is evident through their discussion of the scope of Pennsylvania law (*see* Compl. ¶ 97), the meaning of that law based on the Wisconsin model (*id.* ¶¶ 96-101), and the scope of the Commonwealth Court's jurisdiction (*see id.* ¶¶ 106-107 asserting without authority certain limits on the Commonwealth Court's jurisdiction over the rights of policyholders).

delinquency proceedings has long been recognized in the courts[.]" *Ballesteros*, 530 F. Supp. at 1371 (collecting cases).[6]

The proper mechanism for Plaintiffs to challenge the Rehabilitation Plan or its implementation has always been for Plaintiffs to participate in the Rehabilitation Proceedings, not to collaterally attack those proceedings in their own state court. *See Hunt v. Avondale Mills, Inc.*, 385 S.C. at 616, 686 S.E.2d at 190 (Circuit court lacked subject matter jurisdiction to issue injunction where "statutes clearly provide a mechanism by which respondents could have and should have raised the issue" in separate forum.). Indeed, Plaintiffs have implicitly recognized this by filing letters in support of the Intervening Regulators in SHIP's rehabilitation, and more recently, by seeking leave to file an amicus brief in support of the Intervening Regulators' motion to stay pending appeal in the Pennsylvania Supreme Court. What Plaintiffs appear to be doing is tactically seeking two bites of the proverbial apple: that is, (1) collaterally attacking the Rehabilitation Plan in their own state court by claiming the Pennsylvania court cannot bind South Carolina policyholders, while (2) advancing Plaintiffs' very same claims and legal arguments in the Rehabilitation Proceedings on appeal as an *amicus* supporting the arguments of the Intervening Regulators. The IRLA and PID Act—as well as the very nature of rehabilitation proceedings—prohibit these improper collateral attacks on Pennsylvania's ongoing rehabilitation proceedings.

[6] For this reason, federal courts generally abstain from exercising jurisdiction in cases involving ongoing rehabilitation proceedings. *E.g.*, *Brandenburg v. Seidel*, 859 F.2d 1179, 1191 (4th Cir. 1988) (abstaining from exercising jurisdiction because Maryland's "comprehensive scheme for the rehabilitation and liquidation of insolvent state-chartered savings and loan associations" would be "greatly impeded by the involvement of more than one decision-making authority"), *overruled on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *Eden Fin. Grp., Inc. v. Fid. Bankers Life Ins. Co.*, 778 F. Supp. 278, 283 (E.D. Va. 1991) (declining to exercise jurisdiction because "federal courts must defer to the exclusive jurisdiction of state proceedings over the rehabilitation of insurance companies"). Plaintiffs offer this Court no reason to deviate from that practice.

B. 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.

Similarly, the Court lacks personal jurisdiction to enjoin the Rehabilitator and Special Rehabilitator from implementing the court-approved rehabilitation plan. *See State v. Nathans*, 49 S.C. 199, 27 S.E. 52, 61 (1897) (order of injunction "was a nullity" where court lacked personal jurisdiction over defendant); *accord* 43A C.J.S. Injunctions § 329 ("[U]nless a court has acquired personal jurisdiction over a defendant by service of process, a court may not use its contempt power against the defendant to enforce a temporary injunction.").

Under South Carolina's Long-Arm Statute, S.C. Code § 36-2-803(A), the exercise of personal jurisdiction over non-residents such as the Rehabilitator and Special Deputy Rehabilitator must not exceed the limits of the South Carolina and United States Constitutions. *See Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 611 S.E.2d 505, 508 (2005) ("Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process."). "Personal jurisdiction over a non-resident defendant may be invoked only if the nonresident's contacts in South Carolina are sufficient to satisfy due process requirements," and Plaintiffs bear the burden of demonstrating personal jurisdiction over each Defendant. *Power Prod. & Servs. Co. v. Kozma*, 379 S.C. 423, 665 S.E.2d 660, 664–65 (Ct. App. 2008). "The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." *Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505, 508 (S.C. 2005). Moreover, "[t]he due process requirements must be met as to each defendant and thus the Court is to assess individually each defendant's contacts with South Carolina." *Id.*

Plaintiffs make no claim of general jurisdiction over Defendants Altman and Cantilo; they cite no "enduring relationship with the forum state" or any substantial "continuous and systematic" contacts which would justify the exercise of general jurisdiction. *Cockrell*, 611 S.E.2d at 509-10

(citation and quotation marks omitted).[7] Thus, this Court can grant relief to Plaintiffs only if it finds specific jurisdiction, but Plaintiffs cannot identify a single act of the Rehabilitator or Special Deputy Rehabilitator directed to South Carolina sufficient to establish specific jurisdiction with respect to Plaintiffs' claims. The actions of which Plaintiffs complain are (a) "impos[ing] rates for use nationwide through approval of the rehabilitation plan by the Commonwealth Court"; (b) "unilaterally reduc[ing] benefits nationwide without individual state regulator approval, again through the Commonwealth Court" for any state that opts-out of the rehabilitation plan; and (c) sending communications to policyholders nationwide regarding the options available under the approved plan. (*See* Compl. ¶¶ 77-79.) The first two acts occurred and will occur exclusively in Pennsylvania, and thus outside of South Carolina. The third act—sending information to policyholders and inviting them to make a plan option election as part of the nationwide plan—is the only one which *may* involve South Carolina, but it is not enough for specific jurisdiction. *See Cockrell*, 611 S.E.2d at 510 (citing with approval a prior appellate decision refusing to find specific jurisdiction over "the producer of a nationwide television program and the author of a book distributed nationwide"). Indeed, as Plaintiffs allege, the plan Defendants seek to implement involves options calculated for rates and benefits determined independent of the state of issuance or state of residence nationwide. To the extent a policyholder has a particular option offered to him or to her, there is only a fortuitous and attenuated connection to South Carolina.

Plaintiffs appear to invoke § 36-2-803, subsections (A)(1) and (A)(6), asserting that Defendants are "transacting the business of insurance" by "disseminating information as to coverage or rates" and other ways (Compl. ¶¶ 88, 89). To establish that Defendants are conducting "business" in South Carolina, however, Plaintiffs rely on the statute prohibiting insurance business without a

[7] Plaintiffs also fail to claim general jurisdiction over SHIP and make only cursory allegations of doing business in South Carolina with respect to specific jurisdiction.

certificate of authority. S.C. Code § 38-25-110. There is no allegation that SHIP or the Defendants are operating in violation of the statute by conducting business without a certificate of authority, and this licensing provision does not—and cannot—define the constitutional limits of personal jurisdiction. For example, § 38-25-110(6) includes "indirectly acting as an agent . . . in the dissemination of information as to coverage or rates," language which would make even the fortuitous and indirect mailing of a single piece of rate-related information that eventually arrives in South Carolina sufficient to establish personal jurisdiction despite clearly exceeding the constitutional limits of due process.

Even if this statute could define transacting business in South Carolina, however, neither the Rehabilitator nor the Special Deputy Rehabilitator meet that standard such that they are conducting "business" within the meaning of the long-arm statute. Put differently, Defendants are not purposefully availing themselves of the benefits of doing business in South Carolina; the fact that SHIP or a predecessor issued policies in South Carolina in the past which may now be altered under the plan is fortuitous as to the Rehabilitator and Special Deputy Rehabilitator, who took SHIP as it was upon entry of the rehabilitation order. Any acts seeking approval of or implementing the plan have occurred outside of South Carolina and were directed to the Pennsylvania court and to the SHIP *res* in Pennsylvania—none of which were purposefully directed toward South Carolina as opposed to SHIP and its policyholders as a whole. *See, e.g., ESAB Group, Inc. v Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997) (analyzing constitutional limits of due process when applying South Carolina long-arm statute).[8] Moreover, Plaintiffs claim that Defendants seek to use the plan to evade South Carolina

[8] This is especially true for policyholders of policies issued in other states, such as Florida or Pennsylvania, who now happen to reside in South Carolina. Plaintiffs seek to enjoin communications with those policyholders regarding plan options despite the purely fortuitous nature of their residence in South Carolina. Moreover, providing those policyholders with information related to the rate options is not transacting insurance business in South Carolina even under the statute cited by Plaintiffs. *See* S.C. Code 38-25-150(3) (exempting from the business of insurance "transactions in [South Carolina] involving a policy lawfully solicited, written, and delivered outside [South Carolina]

law, and thus Plaintiffs have not alleged that Defendants "activities are shielded by 'the benefits and protections' of [South Carolina] law" such that the exercise of personal jurisdiction would be proper. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

Plaintiffs conflate the proper exercise of the Commonwealth Court of Pennsylvania's undisputed exclusive *in rem* jurisdiction over SHIP's assets with requisite minimum contacts on which personal jurisdiction over the Rehabilitator and Special Deputy Rehabilitator may be based. This proper exercise of power by a state court or state officer does not equate to minimum contacts upon which personal jurisdiction over ***the Rehabilitator and Special Deputy Rehabilitator*** can be grounded. *Cf. Burger King Corp.*, 471 U.S. at 476 (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 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-

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covering only subjects of insurance not resident, located, or expressly to be performed in [South Carolina] *at the time of issuance*, and which transactions are subject to the issuance of the policy." (emphasis added).)

0241-HE, 2015 WL 5091984, at *1 (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-HLM, 2013 WL 12109374, at *11 (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); *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").

Thus, even sending communications to policyholders located in South Carolina in order to effectuate the Commonwealth Court of Pennsylvania's orders is, in and of itself, insufficient to establish personal jurisdiction over the Rehabilitator and Special Deputy Rehabilitator.[9] Plaintiffs do not identify any authority—in South Carolina or elsewhere—permitting them to sue and enjoin state officials performing their official authority. The Rehabilitator and Special Deputy Rehabilitator have only taken action in the Commonwealth of Pennsylvania and seek only to implement the orders of the Commonwealth Court of Pennsylvania. They did not purposefully avail themselves of South Carolina's laws and benefits, and could not reasonably anticipate being haled before South Carolina Court. Requiring Defendants to answer the complaints of another state's regulator based solely on the performance by the Rehabilitator and Special Deputy Rehabilitator of their statutory duties and pursuant to the Commonwealth Court of Pennsylvania's proper exercise of its exclusive *in rem*

[9] Indeed, by Plaintiffs' logic, the Rehabilitator and Special Deputy Rehabilitator should anticipate being hauled into ***nearly any court in the country***—notwithstanding their contacts (or lack thereof) with the relevant state—solely because SHIP is licensed to operate in 46 states, as well as the District of Columbia and the U.S. Virgin Islands. (*See* Compl. ¶ 60.)

jurisdiction to allocate SHIP's insufficient assets would offend "traditional notions of fair play and substantial justice," *Cockrell,* 611 S.E.2d at 08–09 (2005), and does not comport with due process.

V. ARGUMENTS IN OPPOSITION TO THE REQUESTED INJUNCTION

Should this Court find that it has subject matter jurisdiction and personal jurisdiction, it nevertheless should deny the preliminary injunction motion because Plaintiffs cannot satisfy each of the required elements.[10] Plaintiffs' Complaint is, in many ways, moot. It was filed *before* the Commonwealth Court approved the proposed rehabilitation plan now being implemented, and Plaintiffs then sought to improperly stop the Commonwealth Court from considering that plan or permitting its implementation in South Carolina. Specifically, the passage of time and the Commonwealth Court's approval order has mooted two of the three alleged misdeeds committed by Defendants Altman and Cantilo: (a) "impos[ing] rates for use nationwide through approval of the rehabilitation plan by the Commonwealth Court"; and (b) "unilaterally reduc[ing] benefits nationwide without individual state regulator approval, again through the Commonwealth Court" for any state that opts-out of the rehabilitation plan. (*See* Compl. ¶¶ 77-79.)

Through the remaining claims in the Complaint and the preliminary injunction motion, Plaintiffs seek to stop Defendants Altman and Cantilo from sending communications to regarding the options available to the approved plan policyholders in South Carolina and outside of South Carolina to prevent those policyholders from availing themselves of those options. Even if Plaintiffs are permitted to move for an injunction on their out-of-date Complaint while a motion to dismiss is pending, however, it is clear they cannot establish any irreparable harm on either claim such that an injunction should be issued.

[10] Defendants present these merits arguments in the alternative and for consideration only if the Court concludes that it has jurisdiction. Defendants do not intend any waiver of their jurisdictional arguments or consent to the exercise of jurisdiction if permissible.

A. Plaintiffs must meet a heavy burden in seeking the drastic remedy of a preliminary injunction.

In order to obtain an injunction, Plaintiffs "must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law." *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 310, 811 S.E.2d 758, 767 (2018); *Scratch Golf Co. v. Dunes West Residential Golf Props., Inc.*, 361 S.C. 117, 603 S.E.2d 905 (2004) (same). Additionally, "in order to receive the aid of a Court of equity to enjoin a public corporation or department of government in the performance of actions or duties provided by statute, there must be allegations or showing that the public department or corporation has exercised its power in an arbitrary, oppressive or capricious manner." *Id.*; *accord* 42 Am. Jur. 2d Injunctions § 158 ("Generally, the courts will not grant an injunction against a public official or public body when to do so would involve the review of a judgment that was not arbitrary, made in bad faith, or in the exercise of fraud."); 43A C.J.S. Injunctions § 205 ("Courts of equitable jurisdiction lack power to restrain public agencies or officers by injunction from performing any official act which they are by law required to perform, or acts which are not in excess of the authority and discretion reposed in them.").

B. Plaintiffs cannot establish irreparable harm arising out of the proposed policyholder communications or proposed amendments to policies based on policyholder elections.

Irreparable harm is "the most important requirement for an injunction," and it must be "substantial" as well as "likely and not merely possible." 42 Am. Jur. 2d Injunctions § 35; *see also Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15, 17 (2010) (emphasizing importance of irreparable harm). In South Carolina, irreparable harm arises, *inter alia*, upon some immediate and irremediable interference with the use and enjoyment of property (*AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009)) or a threat to "business as a whole" (*Professional Wiring Installers, Inc. v. Sims*, No. 2008-UP-173, 2008 WL 9840409, at *3 (S.C. Ct. App. Mar. 12, 2008)).

There is no such harm from sending election packages to policyholders, because the mere receipt and review of such material does not impair policyholders' rights in any way. Policies remain in force as is during the period of time in which election materials will be sent and reviewed, and Plaintiffs make no showing that policyholders will be confused by such material in the event the plan is not implemented in South Carolina or if different options are offered to South Carolina policyholders. Even if such confusion could arise, however, it is plainly reparable; Plaintiffs or Defendants could provide further updates to policyholders informing them of any change in the proceedings or process.

The argument that allowing policyholders to exercise their right to make an election under the plan also fails to demonstrate any irreparable harm. Similarly, by speaking about policyholders as a whole, Plaintiffs make no showing of actual, definitive harm to anyone at all—only the mere *possibility* of harm for some *unknown* policyholder or policyholders who might voluntarily choose to pay premiums in excess of that which Plaintiffs would have approved. Plaintiffs offer no discussion of what premiums or benefits Director Farmer might allow, nor is there any analysis of why requiring all policyholders to accept Director Farmer's preferred premium rate or benefit package would be better for any specific policyholder, let alone policyholders as a group. Indeed, Plaintiffs' broad-strokes approach ignores the obvious: there is no harm to giving policyholders choice and agency in deciding which policy option might best suit their needs. For example, a policyholder who wishes to stop paying premiums entirely but keep at least some coverage will be better with a plan option rather than the choices available outside of the plan. (Cantilo Dec. at ¶ 33.)[11] At most, Plaintiffs have shown

[11] For this reason, should the Court enter an order enjoining Defendants from communicating with policyholders regarding the plan, notice and an opportunity to be heard must be provided to any and all policyholder impacted by the injunction, as many or all of those policyholders may dispute Plaintiffs' position and seek to learn about and exercise their right to make plan option elections. The Complaint and related motions lack any evidence demonstrating that Plaintiffs' allegations of harm to policyholders are supported by information from actual policyholders or an analysis of policyholder interests.

that some state courts have found that their commissioners *could* deny a rate request filing in the ordinary course if it does not comply with state regulations. (*See* Compl. at ¶ 118 (citing decisions of Hew Hampshire, Maryland, and Massachusetts).) None of those cases involve rehabilitation matters and none of them arose under South Carolina law. Plaintiffs' Complaint would deny that policyholder the ability to benefit himself or herself by making that choice.

Even if policies are modified in March or April of 2022—the earliest date by which such changes could be made according to policyholder elections—policyholders are not inherently damaged by paying actuarially justified premiums, and Plaintiffs make no showing to the contrary. And, even if those changes *could* be a harm to policyholders, that harm is not irreparable. Plaintiffs have joined with the Intervening Regulators' arguments on their motion for a stay in the Pennsylvania Supreme Court, and, as the Intervening Regulators' admitted in their briefing, undoing the elections might be difficult but not impossible. (*See* Ex. 5, Intervening Regulators' Application for Stay joined by Plaintiffs, at 40-41.)

C. The status quo is preserved by permitting implementation to proceed, not by the entry of a preliminary injunction.

Plaintiffs also fail to satisfy the requirement than an injunction be entered to maintain the status quo. *See* 27 S.C. Jur. Injunctions § 9 ("The court must be convinced based on verified facts that injury is imminent" for an injunction to enter.) No policy modifications will be made until, at the earliest, March or April of 2022, providing enough time for the Court to hear the merits of Plaintiffs' claims should jurisdiction be properly exercised. This Court cannot enjoin operation of the plan without a finding that the plan violates South Carolina law and that Plaintiffs have the authority to launch a collateral attack barring implementation and approval of a rehabilitation plan within the jurisdiction of another court. Importantly, however, a finding on that issue at this time would be improper as it would fail to "preserve the parties' positions pending a decision on the merits." *See FOC Lawshe Ltd. P'ship v. Int'l Paper Co.*, 352 S.C. 408, 417, 574 S.E.2d 228, 233

(S.C. Ct. App. 2002) (court could not enter injunction without adjudicating whether party seeking order had control of property such that it could limit operations on its land).

Here, the status quo is plan implementation nationwide pursuant to the Commonwealth Court's order approving the plan. Until this Court's temporary restraining order, policyholders in South Carolina—like policyholders nationwide—were set to receive information on options available to them under the plan so that they could make an election. Indeed, the status quo is likely to remain the same even during the pendency of any appeal, if necessary. *See Atwood Agency v. Black*, 646 S.E.2d 882, 883 (S.C. 2007) ("An order granting a temporary injunction is directly appealable."). An injunction upending this process would disturb the status quo, not preserve it, and thus cannot be entered.

D. Plaintiffs chose not to opt-out of the plan, and thus Plaintiffs cannot pursue relief from the plan implementation that results from their deliberate decision.

Injunctions are proper only when "reasonably necessary to protect the rights of the moving party." *Atwood Agency*, 374 S.C. at 72. The moving parties in this case, however, lack any interest in the plan whatsoever. They do not allege that Director Farmer is a policyholder or that he will suffer any personal harm from plan implementation—only that he will not have an opportunity to review rates for policies issued in South Carolina. But as Plaintiffs admit, Director Farmer had an opportunity to approve rates, and he deliberately ignored it. The plan provided for an opt-out procedure by which state regulatory authorities could elect to receive rate increase filings, then exercise their purported authority over those requests by approving or rejecting the rates requested. Director Farmer elected *not* to exercise that right despite knowing that it would cause South Carolina policyholders to be considered opt-in states and despite knowing that he would not have an opportunity to review the rate increase filing before policyholder elections were sent. Having failed to avail himself of this opportunity, there are no "rights" held by Plaintiffs which an injunction can,

should, or must protect. They exercised their regulatory authority by refusing to opt-out of the plan, and no additional order is necessary.

Moreover, to the extent Plaintiffs claim that the opt-out procedure damages policyholders by limiting the available options, that argument is mooted by Plaintiffs' decision not to opt out. Indeed, the effect of Plaintiffs inaction is to make all policy options available to South Carolina policyholders—the very harm Plaintiffs claim to be caused by Defendants here. Plaintiffs should not be permitted to obtain an injunction against out-of-state government officials for the alleged purpose of protecting South Carolinians from Plaintiffs own actions.

E. Plaintiffs—and policyholders—had and have adequate remedies at law.

Plaintiffs' Motion also necessarily fails because they have always had an adequate remedy at law: participation in SHIP's rehabilitation proceedings, as have SHIP's policyholders. *See Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 627 S.E.2d 687, 689–90 (2006) (the opportunity to pursue litigation in the proper forum is an adequate remedy at law providing an opportunity to enforce one's rights); *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 603 S.E.2d 905, 907–08 (S.C. 2004) (injunction not appropriate where plaintiff had adequate remedy at law through alternative statutory remedy of attachment). Plaintiffs assert that no such remedy exists, but Plaintiffs cannot dispute that they intentionally chose not to formally participate in SHIP's rehabilitation proceedings, and, despite their incendiary language to the contrary, Plaintiffs cannot support the allegation that SHIP's policyholders were denied their day in court. (*See* Cantilo Dec. at ¶ 10 (regarding notice).) Indeed, Plaintiffs (and policyholders) had the ability to participate in SHIP's rehabilitation proceedings, and thus the ability to participate in appeal, but chose not to exercise that right.[12] To the extent any adequate remedy is *not* available, Plaintiffs have voluntarily released and relinquished that

[12] Their *amicus* filing reflects Plaintiffs' attempt to pursue this collateral attack while simultaneously (and mistakenly) asserting that the Pennsylvania orders are not binding because Plaintiffs did not join the action.

right.[13] This Court should not permit an injunction to enter where the moving party has manufactured the very exigent need on which it seeks relief.

F. Plaintiffs are not entitled to an injunction where they cannot establish a likelihood of success on the merits.

The Commonwealth Court of Pennsylvania found that the Defendants have the authority to implement the plan as proposed, including the opt-out process and the rate and benefit setting mechanisms. In this collateral attack, Plaintiffs cannot establish that the plan should not have been approved or that the plan should not be implemented in South Carolina, and thus they fail to show a likelihood of success on the merits.

1. The plan approval order is entitled to full faith and credit and thus cannot be undone by a South Carolina court.

Under the United States Constitution, "[f]ull 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. "Full faith and credit 'generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it.'" *Ware v. Ware*, 404 S.C. 1, 743 S.E.2d 817, 823 (S.C. 2013) (citations omitted). The validity and effect of a foreign judgment must be determined by the laws of the state which rendered the judgment. *Minorplanet Sys. USA Ltd. v. Am. Aire, Inc.*, 368 S.C. 146, 628 S.E.2d 43, 45 (2006). The Commonwealth Court intended its approval order to be binding on all policyholders, and Pennsylvania law would recognize the Commonwealth Court's authority to bind SHIP and its policyholders.[14]

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[13] By seeking this injunction rather an opting out or allowing the election process to proceed, Defendants also deprive policyholders of the opportunity to mitigate any alleged harm caused by plan implementation.

[14] Plaintiffs frequently allege that the Commonwealth Court cannot bind state regulators, but that argument is immaterial even if were accepted as true. 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. Even if regulators must be bound, however, notice and an

"[P]ersonal jurisdiction is presumed when a foreign judgment appears on its face to be a record of a court of general jurisdiction." *Ware*, 743 S.E.2d at 823 (citation and quotation marks omitted). The mere fact that all of South Carolina's policyholders did not appear in the rehabilitation proceedings after receiving notice regarding the matter and having an opportunity to intervene is not enough to overcome full faith and credit requirements. 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 (quotation marks omitted)). Like policyholders, Plaintiffs cannot voluntarily choose to forego formally participating in the Rehabilitation proceedings and raise the same arguments as the intervening state insurance regulators in a separate (and improper) forum based on the alleged rights of those policyholders. Given the comments and letter of support Plaintiffs submitted in the rehabilitation proceedings, this is little more than a coordinated effort by a handful of state insurance commissioners to have a proverbial second bite at the apple by again raising the same arguments already considered by the Rehabilitation Court.

SHIP's rehabilitation proceeding is an in rem proceeding. *See, e.g.*, *Ballestros*, 530 F. Supp. at 1370–71 ("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. CIV.A. 2844-VCP, 2011 WL 4553582, at *4 (Del. Ch. Oct. 4, 2011) ("[T]his Court

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).

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."). 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, by simply 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*, 4:20-CV-2524, 2020 WL 7212181, at *4 (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).

2. The Commonwealth Court's order is preclusive as to any challenge in this Court.

The Commonwealth Court's decision precludes reconsideration of the rate setting and benefit modification issues even if is not binding under principles of reciprocity or full faith and credit. Issue preclusion (or collateral estoppel) prevents a party from relitigating issues decided in a previous action "regardless of whether the claims in the first and subsequent lawsuits are the same." *State v. Hewins*, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014) (citation and quotation marks omitted). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* Parties need not have actually presented the argument in the prior action—instead, they must only have had a full and fair opportunity to litigate the issue. *Id.* The Commonwealth Court decision addressed the proposed rehabilitation plan in its entirety following a

five-day hearing with factual and legal argument presented, and the Court found that the Rehabilitator has the authority to (a) propose a nationwide rate-setting mechanism, (b) accept opt-out and opt-in decisions, and (c) modify benefits down for opt-out policies. Plaintiffs knew of the rehabilitation proceedings, received notice of the rehabilitation, and were invited to intervene—yet they chose not to so, a deliberate decision to relinquish their right to litigate the matter in the proper forum. Under such circumstances, Plaintiffs had a full and fair opportunity to litigate, and their decision to ignore it does not excuse them from principles of issue preclusion.

Similarly, any dispute over the Rehabilitator's authority over policyholder premiums and benefits was resolved in the Commonwealth Court such that *res judicata* (or claim preclusion) bars relitigation of that issue here. To establish res judicata, the following elements must be shown: (1) identities of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *In re Crews*, 389 S.C. 322, 339, 698 S.E.2d 785, 794 (2010) (citing *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992)). Here, Plaintiffs' claims related to plan approval and implementation, and specifically the regulatory authority over rates and benefits, were addressed and decided in the Commonwealth Court proceedings. Plaintiffs are not permitted to assert the rights of policyholders simply because they deliberately avoided participating in those proceedings.

3. The Commonwealth Court correctly approved the plan, and Defendants reserve all rights to contest Plaintiffs claims on the merits.

This Court should not—and cannot—revisit the issues decided in the rehabilitation proceedings, and thus Defendants do not address them in depth here. Should the Court examine this question, however, it must follow the existing authority recognizing that a rehabilitation plan may modify policy benefits and increase premiums through a centralized plan. *See, e.g., Underwriters Nat'l Assurance Co. v. N. C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 696-97 (1982) (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).

Moreover, this Court would need to address clear authority under Pennsylvania law—largely ignored by Plaintiffs—that the discretion and authority granted to the Rehabilitator under 40 Pa. Stat. § 221.16 is necessarily broad, and that "[i]t is well settled that [a legislature] may enact a statute in broad outlines, leaving to the executive officials the duty of arranging the details." *Application of People, by Van Schaick*, 268 N.Y.S. 88, 96 (App. Div. 1933), *aff'd sub nom. People, by Van Schaick, v. Nat'l Sur. Co.*, 191 N.E. 521 (N.Y. 1934) (citing *Field v. Clark*, 143 U. S. 649 (1892); *Buttfield v. Stranahan*, 192 U. S. 470 (1904); *Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*, 83 N. E. 693 (N.Y. 1908)). Accordingly, it is properly, and exclusively, within the Rehabilitator's domain to determine how the law should be reasonably interpreted and applied. *See Starr v. Dep't of Envtl. Res.*, 607 A.2d 321, 323 (Pa. Commw. Ct. 1992) ("[T]he construction given a statute by those charged with its execution and application is entitled to great weight and should not be disregarded unless it is clear that the agency's interpretation is incorrect.") (citing *T.R.A.S.H., Ltd. v. Department of Environmental Resources*, 574 A.2d 721 (Pa. Commw. 1990), *appeal denied*, 527 Pa. 659, 593 A.2d 429 (1990); *Slovak–American Citizens Club of Oakview v. Pennsylvania Liquor Control Board*, 549 A.2d 251 (Pa. Commw. Ct. 1988)); *In re Ambac Assur. Corp.*, 841 N.W.2d 482, 495 (Wis. Ct. App. 2013) (holding a rehabilitator's interpretation of a governing statute will be affirmed if it is "reasonable, even if . . . another interpretation is more reasonable."); 44 C.J.S. Insurance § 268 ("The courts will defer to the insurance commissioner's interpretation and application of statutes governing rehabilitation."). As such, the Rehabilitator as Commissioner is not constrained by other states' laws. *See Ferrelli v. Commonwealth*, 783 A.2d 891,

894 (Pa. Commw. Ct. 2001) ("'[T]he Full Faith and Credit Clause does not require a state to subordinate public policy within its borders to the laws of another state'" (citation omitted)); *Neyman v. Buckley*, 153 A.3d 1010, 1018 (Pa. Commw. Ct. 2016) ("[W]e recognize that the legal principle of comity should only be utilized when the application of another 40 state's law contradicts no public policy of Pennsylvania."); *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d, 1086, 1091-1094 (Pa. 1992) (recognizing "the significant interest on behalf of the state to regulate the fiscal affairs of its insurers for the welfare of the public" and that "it is not the function of the courts to reassess the determinations of . . . public policy made by the Rehabilitator"). Should this Court enter an injunction or refuse to dismiss the Complaint, Defendants reserve the right to make arguments on the substance of any governing law.

VI. ANY TEMPORARY INJUNCTION MUST BE LIMITED.

Defendants oppose any injunction and contend that the matter should be dismissed. Should an injunction enter, however, it must be limited and tailored to that which is absolutely necessary to preserve the status quo and positions of the parties. To do so, any injunction must reach only to policies issued in South Carolina, not to South Carolina residents holding policies issued in other states, as Plaintiffs do not have—and do not assert—any regulatory authority over such policyholders. Any injunction must also permit Defendants to communicate with policyholders regarding matters arising in the ordinary course of business. Finally, to truly preserve the status quo, the injunction must apply to Plaintiffs as well; if they are successful in securing an injunction based on the fear of policyholder confusion arising out of plan information, Plaintiffs must be barred too from communicating with policyholders regarding elections and plan options to avoid sowing the same sort of confusion and discord they purport to fear from Defendants actions.

VII. CONCLUSION

This Court should grant Defendants' pending Motion to Dismiss, terminating the Complaint and denying all requested injunctions and other relief, because this Court lacks jurisdiction over the claims and over Defendants. Alternatively, this Court should grant Defendants' Motion to Dismiss because, as demonstrated in that motion and herein, Plaintiffs cannot establish a right to relief following approval in the Commonwealth Court. Should this Court find jurisdiction and address the merits of the injunction motions, those motions must be denied, as Plaintiffs have failed to show irreparable harm, a likelihood of success on the merits, or the need for any injunction to maintain the status quo.

Respectfully submitted,

December 13, 2021

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STATE OF SOUTH CAROLINA
RICHLAND COUNTY

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
2020-CP-4005802

Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance,

Plaintiffs,

vs.

Jessica K. Altman, 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 in Rehabilitation,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2021, served the foregoing Defendants' Opposition to Motion for Temporary Restraining Order via automatic electronic service (South Carolina Courts E-File) and electronic mail:

Geoffrey B. Bonham
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COZEN O'CONNOR

December 13, 2021
Charlotte, North Carolina

By: s/ Tracy Eggleston
Tracy Eggleston

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STATE OF SOUTH CAROLINA
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Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance,

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Jessica K. Altman, 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 in Rehabilitation,

Defendants.

DECLARATION OF DEFENDANT PATRICK H. CANTILO IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

COMES NOW, Defendant Patrick H. Cantilo, as Special Deputy Rehabilitator of Senior Health Insurance Company of Pennsylvania, who declares as follows:

Preliminary Matters

1. My name is Patrick H. Cantilo. I am an attorney licensed in Texas and Pennsylvania and recognized expert in the field of insurance receiverships, including rehabilitation and liquidation.

2. I have reviewed the Complaint and other pleadings filed in this matter, and I understand that I am a Defendant in this action based solely on my status as Special Deputy Rehabilitator ("SDR") of Senior Health Insurance Company of Pennsylvania ("SHIP").

3. I submit this Declaration in opposition to the motions filed by Plaintiffs seeking injunctive and declaratory relief, although I dispute that this Court has jurisdiction over Plaintiff's claims and over me as a defendant.

4. This Declaration is submitted subject to and without waiving my arguments contesting jurisdiction, and this Declaration should not be treated as my consent to personal jurisdiction.

5. I submit these arguments solely in support of my objections to jurisdiction and the entry of an injunction. Should this Court conclude that I must submit to the Court's jurisdiction to submit this Declaration, then I withdraw its submission.

Factual and Procedural Matters

6. SHIP is a long-term care insurance ("LTCI") company organized under the laws of the Commonwealth of Pennsylvania.

7. On January 29, 2020, as a result of its long financial decline, the Commonwealth Court placed SHIP in rehabilitation under the Pennsylvania Insurance Department Act, 40 P.S. §§ 221.1–221.63.

8. The Commonwealth Court assumed jurisdiction over SHIP by placing it in rehabilitation and entering a Rehabilitation Order on that date. (*See* Rehabilitation Order, attached to Defendants' opposition papers as Exhibit 1.)

9. In the Rehabilitation Order, the Commonwealth Court appointed Defendant Jessica K. Altman, Insurance Commissioner of Pennsylvania, as Statutory Rehabilitator, and she appointed me as SDR. (Ex. 1 at ¶¶ 2, 14.)

10. Upon being placed in rehabilitation, notice was provided to, *inter alia*, all policyholders—including those residing in or with policies issued in South Carolina—as well as

insurance regulators across the country. (*See* Notice, attached to Defendants' opposition papers as Exhibit 2.)

11. Insurance regulators, including Plaintiff Farmer, were already familiar with the possibility of rehabilitation, as Commissioner Altman and I made numerous outreach efforts prior to filing the application for rehabilitation in the Commonwealth Court.

12. 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.

13. Insurance regulators from five states filed formal comments, and insurance regulators from three states intervened.

14. Plaintiffs participated in SHIP's rehabilitation proceeding but did not seek to intervene.

15. Plaintiffs submitted separate comments opposing both the Initial Rehabilitation Plan and the Amended Plan.

16. According to the Plaintiffs, they "fully supported the positions taken by the three intervening state insurance regulators" in the Commonwealth Court of Pennsylvania. The "three intervening state insurance regulators" are the chief insurance regulators of Maine, Massachusetts, and Washington, referred to herein as the "Intervening Regulators."

17. 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 proposed plan did not benefit policyholders and improperly usurped state rate making authority.

18. 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.[1] (*See* Opinion and Order approving plan attached to Defendants' moving papers as Exhibit 3.)

19. The deadline to "opt-out" of the premium rate setting provisions of the Approved Plan was November 15, 2021.

20. Plaintiffs chose not to opt-out, and, under the Commonwealth Court's opinion and the Approved Plan, South Carolina is thus an "opt-in" state.

21. Should the current restraints expire and no further injunction be entered, policyholder election material will be sent to the holders of policies issued in South Carolina in January 2022.

22. The Commonwealth Court's order on the Approved Plan is now on appeal to the Supreme Court of Pennsylvania, but the matter has not been stayed and the Rehabilitator is moving forward with implementation.

23. On October 1, 2021, the Intervening Regulators filed a motion in the Commonwealth Court of Pennsylvania seeking a stay of implementation of the Approved Plan pending appeal.

[1] The Plan Approval Opinion was amended in minor ways in November 2021; Exhibit 2 is the amended opinion.

24. That motion was denied, and the Court found that a stay should not be entered because, *inter alia*, delay was damaging for policyholders and the prospects of the plan. (*See* Stay Denial Opinion, attached as Exhibit 4 to Defendants' opposition papers.)

25. The Intervening Regulators primarily sought to prevent the Rehabilitator from sending and accepting opt-in and opt-out decisions by state regulators which were due for submission by November 15, 2021.

26. Then, on November 8, the Intervening Regulators filed a motion in the Supreme Court of Pennsylvania seeking a stay.

27. The Intervening Regulators did not seek expedited relief, however, and the opt-in and opt-out deadline passed on November 15, 2021 without an order of the Supreme Court.

28. The Intervening Regulators' motion to stay remains pending but, as they admit, any alleged harm to policyholders from receiving election packages and making policy elections is and would be reparable. (*See* Intervening Regulators' Application, attached hereto as Exhibit 5).)

29. That same day, Plaintiffs and a number of other states filed a motion to be heard as *amici* in the Supreme Court of Pennsylvania on the Intervening Regulators' stay request and possibly on the merits. (*See Amici* Filing, attached as Exhibit 6 to Defendants' opposition papers.)

30. The proposed *amicus* brief regarding a stay was authored by counsel for Plaintiffs and for the chief insurance regulator of Louisiana.

31. As Plaintiffs and the other states explained, they joined entirely in the arguments set forth by the Intervening Regulators regarding the stay.

32. The November 15, 2021, opt-in and opt-out deadline passed without an effective opt-out election by Plaintiffs, and this deliberate decision by Director Farm and the Department of Insurance made South Carolina an opt-in state under the plan.

33. The plan offers options for policyholders which are better than those offered in the ordinary course of business or in liquidation. For example, a policyholder who wishes to stop paying premiums entirely but keep at least some coverage will be better with a plan option rather than the choices available outside of the plan.

34. Plaintiffs have joined with the Intervening Regulators' arguments on their motion for a stay in the Pennsylvania Supreme Court, and, as the Intervening Regulators' admitted in their briefing, undoing the elections might be difficult but not impossible.

35. The *amicus* request did not specify which states would later file a brief on the merits, and no proposed brief was submitted. The motion to be heard as *amici* on the stay and on the merits remains pending.

Response to Allegations in Motion for Temporary Injunction

36. I have read the Motion for Temporary Injunction filed in this case, and it contains a number of misstatements of facts, some of which are important enough that I wish to correct the record. My silence on a specific paragraph does not reflect any agreement by me or by any other of the Defendants, and Defendants' legal arguments are addressed in the opposition brief.

37. In Paragraph 8 and elsewhere, the Motion states that SHIP is insolvent, but no court has entered an order of insolvency. SHIP is in rehabilitation, not liquidation.

38. In Paragraph 11 and elsewhere, the Motion states that neither Plaintiffs nor SHIP policyholders were party to the proceedings, but that was by deliberate choice of those persons and entities. As noted herein, all interested stakeholders—including Plaintiffs and all South Carolina issued and resident policyholders—received notice of the proceedings and had an opportunity to be heard.

39. In Paragraph 13 and elsewhere, the Motion states that Defendants will impose extreme rates that will force unnecessary lapses, but the Motion is devoid of any meaningful

analysis of rate increases and I am not aware of any analysis by Plaintiffs. Moreover, the plan is designed to give choices precisely to avoid forcing policyholders to lose coverage, as they would in an immediate liquidation or if rate increases were applied as would occur in the ordinary course.

40. In Paragraph 16, Plaintiffs refer to testimony in which I used the term "workout plan," but that phrase was applied to the early stages of rehabilitation planning; it was not used to characterize the plan as submitted to the Commonwealth Court.

41. In that same paragraph, Plaintiffs state that Defendants will "*unilaterally*" dictate policy terms, but that is untrue. Opt-out states may set their own rates and thus determine the available options, and opt-in state policyholders will receive the full panel of options for coverage types and costs. In that way, it is policyholders, not Defendants or Plaintiffs, who set the policy terms.

42. In Paragraph 18, Plaintiffs refer to SHIP's prior rate-increase requests, but this characterization is misleading. South Carolina has approved only 63% of the requested rate increases.

43. In Paragraphs 20 and elsewhere, Plaintiffs state that the purpose of the plan is to "reduce the liabilities . . . before [SHIP] goes into liquidation," and that the plan is designed to serve "large insurance companies" and avoid guaranty association coverage. This is plainly untrue. The purposes of the plan include providing policyholders with a significant degree of autonomy and choice over options available to them, as well as eliminating subsidies and rate inequities by asking policyholders to pay actuarially justified rates across the board.

44. In Paragraph 51, Plaintiffs assert that "policyholders were literally denied their day in court before being stripped of their contractual and procedural rights." This statement is patently untrue. As noted, all policyholders received notice and an opportunity to be heard in the

rehabilitation proceedings—unlike here, where Plaintiffs have asserted the authority to limit options available to policyholders without conferring with those policyholders or providing notice of these proceedings which will impair their contract rights if relief is granted to Plaintiffs.

45. If accepted by the Court, the foregoing statements are made subject to the penalty of perjury for willfully providing false or misleading testimony.

December 13, 2021

Patrick Cantilo

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
RICHLAND COUNTY	**FIFTH JUDICIAL CIRCUIT**
Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance, Plaintiffs, vs. Jessica K. Altman, 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 in Rehabilitation, Defendants.	Civil Action No. 2020-CP-40-05802 **ORDER GRANTING PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION**

This matter comes before the Court pursuant to a motion for temporary injunction filed on November 12, 2021, by the Plaintiffs, Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance. The motion seeks to enjoin the Defendants, Jessica K. Altman, 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 in Rehabilitation, from taking any action in furtherance of their expressed plans to, without first obtaining required regulatory approval from the State, raise premium rates, reduce benefits, or both under certain binding contracts of insurance issued in the State of South Carolina or held by residents of this State, including, but not limited to, notifying policyholders of proposed rate or benefit changes or requesting that they select rates or benefits different from those authorized by

the appropriate state regulator and called for under the terms of the contract, charging additional premium, or withholding, delaying or encumbering benefits in whole or in part. Notice duly having been provided to all parties, a hearing was held before the undersigned at 10:30 a.m. on December 15, 2021, in the Court of Common Pleas for Richland County. Geoffrey R. Bonham, Associate General Counsel for the South Carolina Department of Insurance, appeared for the Plaintiffs. Tracy L. Eggleston, Esq. and Michael J. Broadbent, Esq., both of Cozen O'Connor P.C., appeared for the Defendants.

FINDINGS OF FACT

After consideration of Plaintiffs' motion and the arguments presented by the parties at the hearing, I find as follows:

1. All parties were properly served notice of the hearing.

2. Plaintiff Raymond G. Farmer is the Director of the South Carolina Department of Insurance (the "Director").

3. Plaintiff South Carolina Department of Insurance (the "Department") is an agency of the State of South Carolina created and charged by the South Carolina General Assembly to regulate the business of insurance in this State. *See generally* S.C. Code Ann. §§ 38-1-10 *et seq*. ("The Insurance Law").

4. Defendant Jessica K. Altman is the Commissioner of Insurance for the Commonwealth of Pennsylvania and has been appointed Rehabilitator of Senior Health Insurance Company of Pennsylvania (the "Rehabilitator") by order of the Commonwealth Court of Pennsylvania ("Commonwealth Court") dated January 29, 2020 (the "Rehabilitation Order"). (Defs. Exh. 1.)

5. Defendant Patrick H. Cantilo was appointed by the Rehabilitator as Special Deputy

Rehabilitator (the "SDR") of Senior Health Insurance Company of Pennsylvania. He generally has the power to act on behalf of the Rehabilitator, subject to the control and direction of the Rehabilitator. (Defs. Exh. 1 at ¶¶ 2, 14; Decl. of Cantilo at ¶¶ 2, 9.)

6. Defendant Senior Health Insurance Company of Pennsylvania ("SHIP") is a life and health insurance company domiciled in the Commonwealth of Pennsylvania that administers a closed block of long-term care insurance policies issued in over forty states. A fraction of its business remains. (Defs. Exh. 3 at p. 2-3.)

7. SHIP was issued a certificate of authority to conduct the business of insurance in South Carolina on April 8, 1988. (Ver. Mot. at ¶ 6.) It is undisputed that, like all long-term care insurers licensed in this State, SHIP has previously submitted proposed rate increases to the South Carolina Department of Insurance for review and approval in accordance with South Carolina law. (Ver. Mot. at ¶¶ 6, 18.)

8. The average SHIP policyholder age is approximately 87 years of age and the average policyholder on claim is approximately 90 years old. At present, there are approximately 300 policies issued in South Carolina by SHIP, and there are other SHIP policyholders residing in South Carolina whose policies were issued in other states. (Defs. Exh. 3 at p. 4; Ver. Mot. at ¶ 7.)

9. SHIP has been insolvent[1] since at least December 31, 2018, having reported a deficit of approximately a half-billion dollars as of that date; and, SHIP's financial condition has continued to deteriorate, with a current deficit of approximately $1.2 billion. (Pls. Exh. A at p. 45 ln. 2-5, p. 46 ln. 9-10, p. 240 ln. 17-25, p. 292 ln. 11-12.; Defs. Exh. 3 at p. 1.)

10. The Pennsylvania Insurance Department (the "PID") has not sought a declaration

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1 *Compare* 40 Pa. Stat. § 221.3 (defining "Insolvency" within context of receivership) *with, e.g.*, 40 Pa. Stat. § 991.1702 (defining "Insolvent insurer" in the context of guaranty association coverage).

of insolvency, which would have triggered guaranty association coverage in the affected states; however, it did file an application to place SHIP into rehabilitation in the Commonwealth Court of Pennsylvania on January 23, 2020. (*See generally* http://www. https://www.shipltc.com/court-documents.)

11. That application was granted by the Rehabilitation Order entered on January 29, 2020. The Rehabilitation Order is not a subject of dispute between the parties. (Defs. Exh. 1.)

12. Plaintiffs are not parties to the Pennsylvania rehabilitation proceedings, nor are SHIP policyholders represented by class representatives or legal counsel in those proceedings. (*See* Defs. Exh. 3.) Policyholders were also not provided formal legal process or service of process. (*See* Defs. Exh. 2.)

13. SHIP was the sole respondent in the Pennsylvania proceedings. (*See* Defs. Exh. 3.)

14. Three states, Massachusetts, Maine and Washington, intervened in those proceedings. (*Id.* at p. 6.)

15. A Second Amended Rehabilitation Plan (the "Plan") was filed on or about May 3, 2021 and approved by a single judge of the Commonwealth Court of Pennsylvania by order filed on August 24, 2021, which was amended by order entered on November 4, 2021. (Defs. Exh. 3.)

16. An appeal by the intervening three states is pending before the Pennsylvania Supreme Court, as is an application for stay. Approximately twenty (20) other state insurance regulators have expressed their support for the stay as *amici curiae*. (Defs. Exh. 6.)

17. Several large insurers -- Anthem, Inc., Health Care Service Corporation, Horizon Healthcare Services, Inc. d/b/a Horizon Blue Cross Blue Shield of New Jersey, and UnitedHealthcare Insurance Company -- appeared as intervenors in the proceedings and were represented by counsel. These companies fully support the Plan and oppose a stay in the

Pennsylvania proceedings. (Defs. Exh. 3 at p. 6; *see generally* http://www.https://www.shipltc.com/court-documents.)

18. Under the Plan, Defendants will impose nationwide rates without filing those rates with state regulators for review and approval in accordance with each state's insurance laws. In some cases, the rate imposed will be more than double the amount of premium currently paid and can reasonably be expected to force policy lapses. Policyholders may be able to avoid some of the increases, but only if they agree to a decrease in benefits currently provided under their policies. (Pls. Exh. B.)

19. The Plan contains a so-called "opt-out" process under which SHIP submits rates to individual states that "opt-out" of the nationwide rate under those states' respective rate approval statutes. However, it also provides that if an "opt-out" state does not approve the rate demanded, that state's policyholders will incur a further downgrade to their benefits. The Rehabilitator "DOES NOT recommend that states opt out because that is generally expected to be disadvantageous to affected policyholders." (Pls. Exh. B at p. 108-118 & Pls. Exh. C, FAQ. 9.)

20. Under the Plan, Defendants gave states until November 15, 2021, to provide written notice, under oath, of their decision to "opt-out." (Pls. Exh. C.) Plaintiffs maintain that they are not subject to nor bound by the Plan.

21. Defendants do not dispute that the changes to rates, benefits or both will reduce the insurer's shortfall and that this in turn would reduce the burden of a declared insolvency on guaranty associations. (Pls. Exh. A at p.78 ln. 19-23, p. 79 ln. 4, p. 83-84 ln. 20-18, p. 289 ln. 9-18 & p. 292 ln. 11-25; Pls. Exh. B at p. 19.).

22. The rate increases and reductions in benefits would also appear to have a permanent adverse effect on policyholders' guaranty association benefits in the likely event that SHIP is

placed into liquidation at a later date: the Defendant Cantilo has admitted in previous testimony that "it is not likely that we will magically restore SHIP to solvency, but it is likely that the plan . . . would substantially reduce the deficit." (Pls. Exh. A at p. 80 ln. 6-12; Pls. Exh. B at p. 14.)

23. Plaintiffs are concerned that, despite SHIP being inevitably headed for liquidation, or perhaps because of it, Defendants are attempting to use the rehabilitation proceedings to (1) coerce vulnerable elderly policyholders into paying exceptionally high rates, accepting substantially less benefits than what they are entitled to under their contracts, or even lapsing on their policies altogether, and (2) avoid state law, specifically restraints on premium increases and changes to policy forms, in an effort to permanently reduce the amount of guaranty association protection benefits each policyholder would receive in a liquidation, resulting in savings to large insurers in the form of substantially smaller guaranty association assessments. They are concerned that this aspect of the Plan violates the law and elevates the interests of large insurers over the rights of policyholders under their insurance contracts and applicable State law.

24. Plaintiffs seek an order temporarily enjoining Defendants from taking any measure that purports to bypass, impede, supersede, diminish or interfere in any manner with the State of South Carolina's laws or regulatory authority over changes to the terms of policies and review and approval of insurance rates in this State, and further temporarily enjoining Defendants from communicating in any form or manner with South Carolina policyholders regarding proposed changes to policy terms or rates without required approval by the State.

CONCLUSIONS OF LAW

I. JURISDICTION

The question of personal jurisdiction over a nonresident defendant is one that must be resolved upon the facts of each particular case. *State v. NV Sumatra Tobacco Trading, Co.*, 379

S.C. 81, 88, 666 S.E.2d 218, 221 (2008) (citing *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 611 S.E.2d 505 (2005)). At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits. *Moosally v. W.W. Norton & Co., Inc.*, 358 S.C. 320, 328, 594 S.E.2d 878, 882 (Ct. App. 2004). Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question is whether the exercise of personal jurisdiction would violate due process. *Cockrell*, 363 S.C. at 491, 611 S.E.2d at 508. Determining whether the requirements of due process are satisfied involves a two-prong analysis: (1) the "power" prong, in which minimum contacts provide courts the "power" to adjudicate the action; and (2) the "fairness" prong, which requires the exercise of jurisdiction to be "reasonable" or "fair." *Moosally*, 358 S.C. at 331, 594 S.E.2d at 884.

Under the power prong, minimum contacts analysis requires a finding that the defendant directed its activities to residents of South Carolina and that the cause of action arises out of or relates to those activities. *Id.* at 331-332, 594 S.E.2d at 884. It is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id.* This "purposeful availment" element ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. *Id.*

The individual Defendants authored, presented and are implementing the Plan, under which they avail themselves of the privilege of conducting activities in the State. They have sought not merely to invoke the benefits and protections of South Carolina's laws, but to supplant them, undermining the authority of the General Assembly and Plaintiffs. By directing their activities to

South Carolina residents under the Plan that gives rise to this action, they have established sufficient contacts with the State to invoke the power of this Court.

In order to determine whether the exercise of jurisdiction over a foreign defendant meets the "fairness" prong, a court must consider the following: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State's interest in exercising jurisdiction. *Cockrell*, 363 S.C. at 492, 611 S.E.2d at 508; *see also Leggett v. Smith*, 386 S.C. 63, 76, 686 S.E.2d 699, 706 (Ct. App. 2009). Which state's law controls is also a factor to be considered under the fairness prong. *Moosally*, 358 S.C. at 332, 594 S.E.2d at 885.

Under the Plan, the Defendants intend to communicate with South Carolina policyholders regarding their insurance contracts and propose to establish new policy rates and benefits. These actions would appear to affect permanently policyholders' rights under South Carolina law, both immediately and in the event of a liquidation. It is their specific decisions and actions with regard to rates and policy benefits that have prompted the dispute between the parties. Without them, there is no Plan, and it is the unique aspects of that Plan that form the basis for Plaintiffs' lawsuit. It would be no less inconvenient for the Plaintiffs to bring suit in Pennsylvania than for Defendants to defend their actions here; and, the State has an obvious interest in defending its sovereignty and laws, and of course its citizens. Finally, Plaintiffs' action itself is for a declaration of South Carolina law. Under these circumstances, the Court's exercise of jurisdiction over the individual Defendants would also be fair. Accordingly, I find that the requisite prima facie showing of personal jurisdiction over the individual Defendants has been made. *See Moosally*, 358 S.C. at 328, 594 S.E.2d at 882.

The Court clearly has personal jurisdiction of the insurer, which as a condition of its licensure has appointed the Director as its agent for service, *see* S.C. Code Ann. § 38-5-70 (2015), and has conducted the business of insurance in this State for many years.

The Court also has jurisdiction over the subject matter. No state's rehabilitation proceedings grant that state jurisdiction over "the whole field." *Smalls v. Weed*, 293 S.C. 364, 360 S.E.2d 531 (Ct. App. 1987). Although the Pennsylvania Commonwealth Court exercises *in rem* jurisdiction in the rehabilitation proceedings, the res over which that jurisdiction is exercised is the corporation itself, the fictitious entity, not all of the corporation's property for all purposes and certainly not the rights of all persons wherever situated. *See Matter of Rehabilitation of Nat'l Heritage Life Ins. Co.*, 656 A.2d 252 (Del. Ch. 1994). It does not appear that the Commonwealth Court may, simply by reason of the *in rem* nature of the Pennsylvania rehabilitation proceedings, abrogate the power and duties of Plaintiffs or adjudicate the rights of South Carolina policyholders and claimants who are neither parties in the Pennsylvania proceedings nor subject to the jurisdiction of the Commonwealth Court. *See Thormann v. Frame*, 176 U.S. 350 (1900) (judgment *in rem* binds only property within the control of the court).

II. GROUNDS FOR A TEMPORARY INJUNCTION

A preliminary injunction should issue where necessary to preserve the *status quo ante*, upon a showing by the moving party that (1) without such relief it will suffer irreparable harm, (2) it has a likelihood of success on the merits, and (3) there is no adequate remedy at law. *Poynter Invs., Inc. v. Cent. Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010) (citing *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009). "'When a prima facie showing has been made entitling plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.'" *Columbia*

Broadcasting System, Inc. v. Custom Recording Co., 258 S.C. 465, 471-472, 189 S.E.2d 305, 308 (1972) (quoting *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 167 S.E.2d 313 (1969) (citing *D.W. Alderman & Sons Co. v. Wilson*, 69 S.C. 156, 48 S.E. 85 (1904)).

III. A PRELIMINARY INJUNCTION PURSUANT TO RULE 65, SCRCP IS WARRANTED UNDER THE CIRCUMSTANCES.

A. Plaintiffs have shown a likelihood of success on the merits.

Based on the foregoing, I find Plaintiffs have shown a likelihood of success on the merits. Defendants' Plan appears to be founded on a clearly erroneous reading of the law and appears likely to be overturned on appeal. Regardless, the order approving that Plan is not binding on Plaintiffs or policyholders. Both federal and State law support Plaintiffs' position that insurers licensed by Plaintiffs must obey the laws of this State and that contracts issued in this state are subject to South Carolina law.

The primary state insurance regulatory functions remain as they have been since the enactment of the McCarran-Ferguson [Act], in which "Congress . . . declare[d] that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. "This allows . . . states to perform solvency oversight of the U.S. insurance industry and to regulate insurer behavior in the marketplace." *State Insurance Regulation*, National Association of Insurance Commissioners (NAIC), Center for Insurance Policy and Research (CIPR) (2011), https://www.naic.org/documents/topics_white_paper_hist_ins_reg.pdf.

"State legislatures are the public policymakers that establish . . . broad policy for the regulation of insurance by enacting legislation providing the regulatory framework under which insurance regulators operate. They establish laws which grant regulatory authority to regulators

and oversee state insurance departments and approve regulatory budgets." *Id.* "State insurance regulatory systems are accessible and accountable to the public and sensitive to local social and economic conditions." *Id.* "State regulators protect consumers by ensuring that insurance policy provisions comply with state law, are reasonable and fair, and do not contain major gaps in coverage that might be misunderstood by consumers and leave them unprotected. The nature of the regulatory reviews of rates, rating rules and policy forms varies somewhat among the states depending on their laws and regulations." *Id.*

The South Carolina General Assembly has delegated its regulatory authority under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, to the Department. Pursuant to S.C. Code Ann. § 38-3-10 (2015), the General Assembly "established a separate and distinct department of this State, known as the Department of Insurance. The department must be managed and operated by a director appointed by the Governor upon the advice and consent of the Senate." Pursuant to S.C. Code Ann. § 38-3-60 (2015), "The director or his designee must follow the general policies and broad objectives enacted by the General Assembly regarding the operation of the insurance industry in this State." S.C. Code Ann. § 38-3-110 (2015) sets forth the Director's responsibilities, which include the duty to:

> (1) supervise and regulate the rates and service of every insurer in this State and fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be observed and followed by every insurer doing business in this State. Nothing contained in this title authorizes or requires a review by the department or the director of any order of the director's designee or the deputy director under the Administrative Procedures Act. This item does not grant any additional authority to the director or his designee with regard to insurance rates other than the ratemaking authority specifically granted to the director or his designee, or the Department of Insurance for certain kinds of insurance in other provisions of this title;
>
> and to:

> (2) see that all laws of this State governing insurers or relating to the business of insurance are faithfully executed and make regulations to carry out this title and all other insurance laws of this State, the enforcement or administration of which is not otherwise specifically provided for.

The legislature has also provided, pursuant to S.C. Code Ann. § 38-61-10 (2015), "All contracts of insurance on property, lives, or interests in this State are considered to be made in the State and all contracts of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State." It has enacted and approved detailed and extensive statutes and regulations governing long-term care insurance policies and rates, including provisions for the approval of rates by the Department. *See* S.C. Code Ann. §§ 38-72-10 *et seq.*; S.C. Code Regs. § 69-44. Under the Long-Term Care Insurance Act, S.C. Code Ann. §§ 38-72-10 *et seg.*, "All premium rate schedules for long-term care insurance must be filed with the [South Carolina Department of Insurance] and are subject to the prior approval of the director or his designee." S.C. Code Ann. § 38-72-75(A) (2019); *see also* Act No. 6 of 2019. An insurer may not charge a premium to an insured under a policy or contract of long-term care insurance before the applicable premium rate is filed and approved, and an insurer may not change the premium charged to an insured under a policy or contract of long-term care insurance until the applicable premium rate change has been filed with and approved by the Director or his designee. *Id.* "The director or his designee may hold a public hearing or solicit public comments as a part of the process to review long-term care insurance rate filings received by the director or his designee." S.C. Code Ann. § 38-72-75(C) (2019). Each decision of the Director or his designee about premium rates is subject to review under the Administrative Procedures Act (APA). S.C. Code Ann. § 38-72-75(D) (2019). S.C. Code Regs. 69-44 also provides for the comprehensive regulation of long-term care insurance policies, including rates, forms and required market practices.

In addition, our Supreme Court has held that because the authority to determine what insurance premium rates are just and reasonable is vested in the Department, not even courts should adjudicate what a reasonable rate might be in a collateral proceeding. *Cf. Temporary Services, Inc. v. American Intern. Group, Inc.*, 388 S.C. 348, 351, 697 S.E.2d 527, 529 (2010); § 2:34. Rates—Judicial review, 1 Couch on Ins. § 2:34 ("Ratemaking is generally not a judicial function. Indeed, many jurisdictions have adopted the filed rate doctrine which expressly prohibits courts from imposing rates different than those approved by the state insurance department.") To the extent Defendants might rely on the Pennsylvania court's order approving the Plan and the rate-setting scheme within, this would appear to violate the filed rate doctrine. This doctrine preserves the stability, uniformity, and finality inherent in rates filed with the regulatory agency and what has been determined to be a reasonable rate by that agency. *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 623 S.E.2d 387 (2005).

Pennsylvania law also appears to militate in favor of Plaintiffs' motion. That state's highest court has made clear that as a creature of statute, an insurance commissioner acting as a rehabilitator "'can only exercise those powers which have been conferred upon it by the Legislature in clear and unmistakable language.'" *Aetna Cas. and Sur. Co. v. Com., Ins. Dept.*, 638 A.2d 194 (Pa. 1994) (quoting *Com., Human Relations Commission v. Transit Cas. Ins. Co.*, 387 A.2d 58, 62 (Pa. 1978)). *See also Koken v. Legion Ins. Co.*, 831 A.2d 1196 (Pa. Commw. 2003), *aff'd sub nom. Koken v. Villanova Ins. Co.*, 878 A.2d 51 (Pa. 2005). Defendants Rehabilitator and SDR have only those powers conferred upon them by 40 Pa. Stat. Ann. § 221.16. This statute prescribes the powers and duties of the rehabilitator, who has "all the powers of the directors, officers and managers, whose authority shall be suspended, except as they are redelegated by the rehabilitator" and "full power to direct and manage, to hire and discharge employees subject to

any contract rights they may have, and to deal with the property and business of the insurer." *Id.* These powers are limited and equivalent to those of new management, and rehabilitators and insurance companies in rehabilitation, including SHIP, must therefore obey the insurance laws of each the states in which they conduct the business of insurance. *See id.* (rehabilitator has "full power to direct and manage" the insurer). The rehabilitation statutes do not appear to contain "clear and unmistakable language" permitting a rehabilitator to unilaterally set new rates and policy terms nationwide. Under Pennsylvania law, a rehabilitator's powers are sufficiently limited as to prevent her from even amending an insurer's bylaws. *See Koken*, 831 A.2d at 1227.

In maintaining that South Carolina is bound by the Plan, Defendants appear to rely on the Full Faith and Credit Clause of the U.S. Constitution. Assuming, *arguendo*, that the Pennsylvania approval order is a "judgment" for purposes of full faith and credit, South Carolina does not appear obligated to obey it in contravention of its own laws. As noted, the jurisdiction of the Pennsylvania court and the extraterritorial reach of the rehabilitation proceedings is limited. *See, e.g., Smalls*, 293 S.C. at 371, 360 S.E.2d at 534; *see also Heritage Life*, 656 A.2d at 259-260. Even the Pennsylvania court seems to indicate that its order is binding only on those who appeared before it. Although that order is in places ambiguous as to its intended reach, the court does plainly state, "Once this Court renders a judgment on the Second Amended Plan, it is Maine, Massachusetts, and Washington [the three intervening regulators] that owe this Court's judgment full faith and credit." (Defs. Exh. 3 at p. 61.)

Moreover, full faith and credit requires only that every state give a foreign judgment the *res judicata* effect which that judgment would be accorded in the state which rendered it. *Durfee v. Duke*, 375 U.S. 106 (1963). Under Pennsylvania law, application of *res judicata* requires that the two relevant proceedings possess several common elements, including identity of the parties.

Robinson Coal Co. v. Goodall, 72 A.3d 685 (Pa. Super. 2013). Plaintiffs were not parties to the Pennsylvania proceedings. The constitutional command of full faith and credit does not compel South Carolina to defer to a Pennsylvania court where the matter was neither fully and fairly litigated nor involved the relevant parties: "Before a court is bound by the judgment rendered in another State, it may inquire into the jurisdictional basis of the foreign court's decree" and "[i]f that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given." *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n.*, 455 U.S. 691, 705 (1982).

To the contrary, enforcing Defendants' apparent attempt to supplant the laws of South Carolina and other states risks adoption of a "policy of hostility to the public Acts" of each of the forty-plus affected states, resulting in a direct injury to their sovereignty in violation of the Full Faith and Credit Clause. *See Franchise Tax Bd. v. Hyatt,* 578 U.S. 171 (2016)*; Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Carroll v. Lanza*, 349 U.S. 408 (1955). "The very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939); *see also Alaska Packers Ass'n v. Indus. Accident Comm'n.*, 294 U.S. 532, 547 (1935).

Full faith and credit also need not be granted a judgment obtained in violation of procedural due process. *Purdie v. Smalls*, 293 S.C. 216, 359 S.E.2d 306 (Ct. App. 1987). An insurance policy is a contract between the insured and the insurance company. *Coakley v. Horace Mann Ins. Co.*, 376 S.C. 2, 656 S.E.2d 17 (2007). Statutes governing an insurance contract are part of the contract as a matter of law. *See Williams v. Government Employees Ins. Co. (GEICO)*, 409 S.C. 586, 762

S.E.2d 705 (2014). Here, policyholders appear to have had their contract rights, including the statutory rights that are part of their policies, stripped of them without the benefit of due process. There is no evidence that policyholders, who were not respondents in the Pennsylvania proceedings, received proper service of process or were represented by class representatives or independent legal counsel. Defendants have yet to offer a justification for why policyholders, who Defendants would have bound by the Plan, were not afforded the process apparently due them. *Cf. Underwriters Nat. Assur. Co.*, 455 U.S. at 712 (example of policyholders being represented by legal counsel and class representatives who engaged in "extensive negotiations" with the insurer and the receiver).

Moreover, the Defendants in their own filings appear to concede that the Pennsylvania order is not a final order, but temporary or interlocutory, and thus not entitled to full faith and credit: "Even after approval . . . the Rehabilitator and the Commonwealth Court of Pennsylvania 'are obligated to interact in order to supervise, implement and regulate equitably the process engaged to rehabilitate an insolvent or financially hazardous insurer.' Thus, plan approval and implementation remain in the jurisdiction of the Commonwealth Court of Pennsylvania and within its supervision throughout the proceedings." (Defendants' Memorandum of Law in Support of their Motion to Dismiss at 6.) *See Purdie*, 293 S.C. at 220, 359 S.E.2d at 308 (temporary or interlocutory order not entitled to full faith and credit).

B. <u>Plaintiffs have shown that a preliminary injunction is necessary to prevent irreparable harm and that there is no adequate remedy at law.</u>

A temporary injunction to preserve *the status quo ante* is necessary to prevent irreparable harm. Plaintiffs are specifically charged by the South Carolina General Assembly to uphold the insurance laws of this State. Those laws are designed to protect the policyholders, whose contracts were formed in this State and are subject to its laws and regulations. Notwithstanding the clear

mandate of South Carolina law, the insurer's past compliance with that law, the limited reach of the Pennsylvania proceedings, and the apparent defects in those proceedings, Defendants have made clear their position that SHIP is no longer subject to South Carolina law and have manifested their intention to not obey it and to move forward immediately with implementing changes to South Carolina policies and rates.

The State has a strong interest in protecting policyholders and ensuring that its laws are enforced. If those laws are not enforced, and Defendants are permitted to implement their Plan immediately, Plaintiffs will have not upheld their statutory duty and policyholders will be permanently denied basic rights and suffer permanent and substantial economic harm. In short, Plaintiffs would not have performed the very functions delegated to them by the General Assembly.

Even if Plaintiffs were to fine SHIP or suspend or revoke its license, such after-the-fact measures would not reinstate any permanent or temporary loss of benefits or premium overcharges. The same is true of any lawsuit to recover damages for lost benefits or premium overcharges, which would also be impracticable given the advanced age and typically limited means of the victims. Similarly, a suit by Plaintiffs for damages arising out of violation of this State's laws seems implausible, if not infeasible. An action at law by either Plaintiffs or policyholders would also not undo the substantial confusion and disruption of the marketplace that would have occurred. *See Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 328, 721 S.E.2d 447, 450 (Ct. App. 2011) ("adequate" remedy at law is one that is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity). Conversely, Defendants need do no more than refrain from violating South Carolina law. If they wish to file for a rate increase in accordance with the laws of this State, they have done so in the past and may

do so again.

On the basis of the pleadings and papers in this matter and the arguments of the parties, it appears to the Court that Plaintiffs have shown a likelihood of success on the merits, and that they will suffer immediate, irreparable injury, with no adequate means of redress at law, in that, *inter alia*, without a temporary injunction, the *status quo* would be irretrievably altered with respect to the enforcement of the insurance laws, the order and stability of the insurance marketplace and the rights of policyholders Plaintiffs have the statutory duty to protect. Plaintiffs have therefore made the necessary showing that they are entitled to a temporary injunction - irreparable harm, likelihood of success on the merits, and no adequate remedy at law - thereby establishing grounds for relief pursuant to Rule 65, SCRCP.

IT IS THEREFORE ORDERED THAT:

1. Plaintiffs' Motion for Temporary Injunction is hereby GRANTED;

2. Defendants are hereby enjoined from communicating, implementing or enforcing in this State the Plan, otherwise interfering with the rights of SHIP long-term care insurance policyholders or otherwise violating the insurance laws of this State pertaining to long-term care insurance, including, but not limited to, notifying policyholders of proposed rate or benefit changes or requesting that they select rates or benefits different from those authorized by the appropriate state regulator and called for under the terms of the contract, charging additional premium, or withholding, delaying or encumbering benefits in whole or in part, until such time as specified herein;

3. The temporary injunction granted is binding upon the Defendants, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or

participation with them who receive actual notice of this Order for Temporary Injunction by personal service or otherwise;

4. This temporary injunction is to remain in effect for no more than thirty (30) days after there has been a final adjudication on the merits of the proceedings pending in Pennsylvania, with leave granted to Plaintiffs to apply for an extension; and

5. Pursuant to Rule 65(c), SCRCP, no bond or other security shall be required of Plaintiffs as an officer and agency of the State as a result of the granting of a temporary injunction in this case.

AND IT IS SO ORDERED.

L. Casey Manning
Chief Administrative Judge
Fifth Judicial Circuit

JAN 20, 2022
~~December~~ __, 2021
Columbia, South Carolina