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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

MARLENE CARIDE, As Commissioner of the New Jersey Department of Banking and Insurance, and THE NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE,	:	Case No.: 3:22-cv-01329-FLW-LHG
	:	
Plaintiffs,	:	[formerly Superior Court of New Jersey, Law Division, Civil Part, Mercer County, Docket No.: MER-L-448-22 and subsequently transferred to Superior Court of New Jersey, Chancery Division, General Equity, Mercer County, Docket No.: MER-C-26-22]
	:	
v.	:	
	:	
JESSICA K. ALTMAN, as Rehabilitator of Senior Health Insurance Company of Pennsylvania and her successors in office, in their capacity as Rehabilitator of SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, PATRICK H. CANTILO, as Special Deputy Rehabilitator of Senior Health Insurance Company of Pennsylvania, MICHAEL HUMPHREYS, as Successor Rehabilitator of Senior Health Insurance Company of Pennsylvania, and SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA,	:	
	:	
Defendants.	:	

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

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PRELIMINARY STATEMENT

The standards governing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) are well-established, but have been confused by Defendants. Defendants are applying Rule 12(b)(6) as a means to dismiss this civil action which they removed from the Superior Court of New Jersey without basis and which concerns their unilateral desire to ignore applicable New Jersey insurance laws. Even more disturbing are Defendants' claims that this Court lacks personal jurisdiction over them.

Clearly, the verified complaint in this matter contains sufficient factual matter which if accepted as true, states a claim for relief that is plausible on its face. Commissioner Marlene Caride ("Commissioner Caride"), in her capacity as Commissioner of Insurance for the State of New Jersey Department of Banking and Insurance ("DOBI"), had little choice but to respond to Defendants' refusal to comply with applicable insurance laws by commencing this action.¹ SHIP sold long-term care policies to customers in New Jersey and routinely submitted to Commissioner Caride (or to her predecessors in office) rate and/or benefit changes to said policies for review and/or approval. Submission of requests for rate and/or benefit changes to Commissioner Caride is part of the ratemaking process in New Jersey established to protect New Jersey's citizens from the potentially harmful predatory acts of carriers. In a stark departure from the ratemaking process, Defendants have unilaterally modified contractually guaranteed rates and/or and benefits of New

¹ The term "Commissioner Caride" or "Plaintiffs" means collectively Commissioner Caride and DOBI.

The term "Defendants" means collectively: defendants Jessica K Altman, as Rehabilitator of Senior Health Insurance Company of Pennsylvania and her successors in office, in their capacity as Rehabilitator of Senior Health Insurance Company of Pennsylvania, Patrick H. Cantilo, as Special Deputy Rehabilitator of Senior Health Insurance Company of Pennsylvania, Michael Humphreys, as Successor Rehabilitator of Senior Health Insurance Company of Pennsylvania, and Senior Health Insurance Company of Pennsylvania ("SHIP").

Jersey senior citizens who had purchased long-term care policies from SHIP. Defendants made the changes without any regulatory oversight, input or review by Commissioner Caride. Defendants argue that SHIP's *in rem* rehabilitation proceedings in Pennsylvania excuses their obligation to comply with New Jersey insurance laws. Defendants are wrong.

The 'kitchen sink' approach taken by Defendants arguing application of the Full Faith and Credit Clause, collateral attacks, and res judicata lacks merit. Defendants' approach toward rehabilitation of SHIP is unpersuasive. Commissioner Caride strongly disagrees with the order of rehabilitation and with the determination not to adjudicate SHIP insolvent. Nonetheless, Commissioner Caride respects the process and proceedings in Pennsylvania. Commissioner Caride joined other state insurance regulators to raise certain concerns about the rehabilitation via submission of an *amici curiae* brief filed with the Pennsylvania Supreme Court. Notwithstanding that filing, Defendants have leveraged the rehabilitation by soliciting senior citizens with options to change their contractually guaranteed rates and benefits without any review and/or approval by Commissioner Caride. Defendants' activities give rise to this action.

Defendants attempt to twist this purely state law dispute into a "federal case". They have used an identical strategy in lawsuits filed by state insurance regulators against them in Iowa, North Dakota and North Carolina based on similar facts. Less than a week ago, on April 25, 2022, the District Court for the Western District of North Carolina had enough of Defendants ligation maneuvers and forum shopping. That court soundly rejected Defendants' arguments (which are strikingly similar to the ones before this court) in its memorandum decision which remanded that action to state court. See Ex. 2. Although the court's analysis in North Carolina is not binding on this Court, it is highly persuasive.

Accordingly, as detailed below, this Court should deny Defendants' motion to dismiss.

FACTUAL AND PROCEDURAL BACKGROUND²

A. The Parties.

Plaintiffs in this action are Commissioner Caride and DOBI. See Ex. 1. DOBI has the exclusive authority to regulate the business of insurance in New Jersey.

Defendants are former Commissioner Jessica K. Altman, Acting Commissioner Michael Humphreys, Special Deputy Rehabilitator Patrick H. Cantilo (“Cantilo”), and SHIP. Commissioner Altman and Special Deputy Rehabilitator Humphreys are court appointed representatives/agents of SHIP.

B. SHIP – Long-Term Care Business.

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. SHIP commenced business on July 5, 1887, as the Home Beneficial Society. By the 1980’s, SHIP was known as American Travelers Insurance Company and was primarily writing long-term care insurance policies. It was then acquired by, and merged into, CIHC, Inc., which was a wholly-owned subsidiary of Conseco, Inc (“Conseco”). Id. at Ex. 1, ¶17.

SHIP was licensed in 46 states, including the State of New Jersey. SHIP’s policies cover long-term care services provided in congregant settings, such as nursing homes, assisted living facilities, as well as home-based health care services and adult day care. Upon information and belief, the average age of a SHIP long-term care policyholder is eighty-nine (89) years old. Id. at ¶20.

² All facts are as set forth in the Verified Complaint, a copy of which is attached as Exhibit 1 to the Declaration of G. Glennon Troublefield, Esq. (“Troublefield Declaration”), filed herewith. All other references cited as “Ex. __” refer to those exhibits annexed to the Troublefield Declaration. A copy of the decision of the Western District of North Carolina is attached to the Troublefield Dec as Ex. 2.

SHIP's financial condition deteriorated and required rehabilitation. By 2020, SHIP's assets were one billion four hundred million dollars (\$1,400,000,000) and its liabilities were two billion six hundred million dollars (\$2,600,000,000), which created the one billion two hundred million dollar (\$1,200,000,000) Funding Gap. *Id.* at ¶21.

C. SHIP's Rehabilitation Proceeding.

On January 23, 2020, pursuant to Article V of the Insurance Department Act of 1921, Act of May 17, 1921, P.L. 789, as amended, 40 P.S. § 221.1-221.63, and Rule 3774(c) of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. 3774(c), the Rehabilitator filed an application for an order placing SHIP in rehabilitation. The application was filed in the Commonwealth Court of Pennsylvania and titled Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania v. Senior Health Insurance Company of Pennsylvania, Docket No. 1 SHP 2020, (the "Rehabilitation Proceeding"). *Id.* at ¶22.

Among other grounds, the Rehabilitator asserted that SHIP committed one (1) or more acts which constitute grounds for rehabilitation as set forth in 40 P.S. § 221.14 and 221.15. SHIP's most recent annual statement demonstrated that it is statutorily insolvent as defined by 40 P.S. § 221.3, and that its most recent risk-based capital report ("RBC"), indicated that its total adjusted capital is substantially below its mandatory control level RBC. Going below the RBC triggered a "mandatory control level event" as that term is defined in 40 P.S. § 221.1A. *Id.* at ¶23.

The Commonwealth Court in the Rehabilitation Proceeding entered an Order of Rehabilitation and appointed the Rehabilitator. The Rehabilitator appointed Cantilo as Special Deputy Rehabilitator. *Id.* at ¶24. On August 24, 2021, the Commonwealth Court in the Rehabilitation Proceeding entered a Memorandum Opinion and Order approving the Rehabilitator's plan of rehabilitation (the "Plan"). *Id.* at ¶ 26.

On September 21, 2021, the State Insurance Regulators filed a direct appeal to the Supreme Court of Pennsylvania of the Commonwealth Court's Order approving the Plan. The appeal is titled In re: Senior Health Insurance Company of Pennsylvania (In Rehabilitation) - Appeal of: The Super Superintendent of Insurance of the State of Maine, Commissioner of Insurance of the Commonwealth of Massachusetts, and Insurance Commissioner of the State of Washington, Docket No. 71 MAP 2021. Id. at ¶27.

On November 18, 2021, the State Insurance Regulators filed a motion in the Supreme Court of Pennsylvania for a stay pending appeal of, inter alia, the Commonwealth Court's Order approving the Plan. Id. at ¶29. The motion was denied.

D. SHIP's Required Filing and Approval.

Under Section 10 of the Long-Term Care Act, long-term care policies, certificates, riders, or endorsements are required be filed with Commissioner Caride for approval. SHIP and the rehabilitator were subject to the filing requirements under the Act. Section 10 of the Act provides:

Every long-term care insurance policy or contract, including any application, certificate, rider, or endorsement to be issued or delivered in this State shall be filed with the commissioner for prior approval as provided in this section.

N.J.S.A. 17B:27E-10.

Similarly, Section 11 of the Act provides:

An insurer providing long-term care insurance issued on an individual basis in this State shall file, for the commissioner's approval, its rates, rating schedule, and supporting documentation demonstrating that it is in compliance with the applicable loss ratio standards of this State. All filings of rates and rating schedules shall demonstrate that the benefits are reasonable in relation to the premium charged and that the rates are not excessive, inadequate, or unfairly discriminatory.

N.J.S.A. 17B:27E-11.

Under N.J.A.C. 11:4-34.17, premium and benefits under long-term care policies that are subject to the Act are required to be reviewed by Commissioner Caride:

(a) This section applies to all rates for individual long-term care policies except those covered pursuant to N.J.A.C. 11:4–34.8 and 34.18.

(b) Premiums and benefits under long-term care insurance policies whose rates are subject to this section shall meet the loss ratio requirements of N.J.A.C. 11:4–18.5.

(c) Carriers shall include with each submission of new or revised rates for individual long-term care insurance an actuarial memorandum which includes anticipated loss ratio, methodology for calculating gross premiums, an explanation and documentation supporting the premium assumptions and the objective basis for any rate differentials . . .

N.J.A.C. 11:4-34.17.

E. SHIP’s Policies in New Jersey.

As of January 12, 2021, SHIP has approximately five hundred ninety two (592) active long-term care policies in New Jersey. Of that group of policies, seventeen (17) policies were terminated, five hundred twenty three (523) policies are still in force, and approximately forty nine (49) policies are identified as being “NFO” – which means non-forfeiture option and no premium is due.

From approximately 2003 to 2019, either SHIP or one its successors and/or assigns submitted requests for rate increases for its long-term care policies issued to New Jersey policyholders. SHIP’s requests were either approved, denied, or withdrawn. On August 26, 2019, SHIP filed its last application for a rate increase with DOBI. On March 13, 2020, SHIP withdrew that request. Ex. 1 at ¶27.

F. SHIP, The Rehabilitator, and The Plan.

SHIP is insolvent. Because SHIP is insolvent, a liquidation would inevitably result in the triggering of the ‘life and health insurance guaranty associations’ of the several states (“GA’s”) if SHIP cannot be successfully rehabilitated. Mandatory triggers of guaranty association benefits include an insurer being placed in liquidation with a finding of insolvency. Once “triggered”, GA’s commence the payment of policy benefits. The GA’s generally provide for the continuation of insurance coverage provided by the failed insurer, up to the statutory maximum coverage amounts. Unlike GA’s in other states, New Jersey does not have a limit or “cap” on what benefits will be paid to policyholders. The benefits recoverable from GA’s are subject to the policy limits. In addition, under the GA’s, each provider receiving payments from the guaranty association must agree to a twenty percent (20%) discount pursuant to N.J.S.A. 17B:32A-3(e) as follows:

A provider of health care services, in order to receive payment directly from the association upon a claim of the provider against an insured, shall agree to forgive the insured of 20% of the obligation which would otherwise be paid by the insurer had it not been insolvent. The obligations of solvent insurers to pay all or part of the covered claim are not diminished by the forgiveness provided in this paragraph. The association is not bound by an assignment of benefits executed with respect to the coverage provided by the insolvent insurer. The association may aggregate all claims owed health care providers when negotiating direct payment of claims of all covered individuals.

Ex. 1 at ¶41.

Rather than consider SHIP insolvent, the Rehabilitator has proposed the Plan. Through the Plan, the burden of reducing the Funding Gap rests exclusively on SHIP’s current policyholders who have not taken non-forfeiture options.

State insurance regulators other than Pennsylvania were given the option under the Plan to either ‘opt in’ or ‘opt out’. By letter dated September 20, 2021, the Rehabilitator communicated this option to Commissioner Caride. Id. at ¶51.

Commissioner Caride declined the Rehabilitator's invitation for New Jersey to 'opt in' or 'opt out' by letter dated November 9, 2021, wherein Commissioner Caride stated:

“[G]iven that rate regulation has long been reserved to the insurance commissioners of each state, the purpose of this letter is to notify you that (a) the Department will not respond to the Notice, and (b) the Department does not believe the Rehabilitator has authority to impose rate increases on our policyholders without the Department's approval.”

Id. at ¶52.

Commissioner Caride's letter further stated to the Rehabilitator that DOBI objects to the Plan, as expressed by State Insurance Regulators. Id. at ¶ 53.

In late January 2022, the Rehabilitator mailed “Coverage Election Packages” to New Jersey policyholders, which contained the options, referred to in the Plan. Id. at ¶54. On February 2, 2022, the Rehabilitation Court approved SHIP's use of nationwide-premium rates for all states, including New Jersey and requested policyholders to select options by March 15, 2022. Id. at ¶55.

G. Action in New Jersey

On March 9, 2022, Plaintiffs commenced this action by way of verified complaint and an order to show cause in the Superior Court of New Jersey, Chancery Division, Mercer County, through the Law Division (“the Removed Action”).

March 11, 2022, Counsel for Defendants filed the Notice of Removal to remove the Superior Court Action to this Court. Ex. 4.

On March 29, 2022, Defendants filed with the United States Judicial Panel on Multidistrict Litigation a motion to transfer this action, as well as federal action pending in Iowa, North Dakota and North Carolina to the United States District Court for the Eastern District of Pennsylvania.

On March 29, 2022, Defendants filed a motion to dismiss this action with prejudice.

On March 31, 2022, Defendants filed an amended notice of removal, which claimed that federal question as to jurisdiction exists. Ex. 5.

ARGUMENT

I. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED BECAUSE PLAINTIFFS' COMPLAINT STATES A CLAIM FOR RELIEF THAT IS PLAUSIBLE ON ITS FACE.

A. Legal standard

Under the Federal Rules of Civil Procedure, a claimant must only provide a complaint that contains “‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); accord Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam); Fed.R.Civ.P. 8(a). In assessing the sufficiency of a complaint under Rule 12(b)(6), a Court must “draw all inferences in the light most favorable to the non-moving party.” In re NYSE Specialists Sec. Litig., 503 F.3d 90, 95 (2d Cir.2007).

Specifically, “a Complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009), quoting Twombly, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft, 556 U.S. at 678. “[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.” Iqbal at 663-664, citing Twombly, at 556

In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court must construe the complaint in the light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations. Phillips v. County of

Allegheny, 515 F.3d 224, 231 (3d Cir. 2008) “[S]o long as the plaintiff alleges facts to support a theory that is not facially implausible, the court’s skepticism is best reserved for later stages of the proceedings.” In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1057 (9th Cir. 2008).

It is well -settled that dismissal of a complaint for failure to state a claim is a drastic step. The function of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence, which might be offered in support thereof. As recited by the Third Circuit Court of Appeals, “stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest the required element. This does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element.” Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) (internal quotations omitted) (citing Twombly, 550 U.S. at 556). In short, “unless it appears beyond doubt that [Plaintiff] can prove no set of facts in support of [her] claim which would entitle [her] to relief,” the motion to dismiss must be denied. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

Applying the foregoing standard under Federal Rule 12(b)(6), it is clear that Commissioner Caride’s claims are more than sufficient to withstand a motion to dismiss. As demonstrated below, Commissioner Caride has made sufficient factual allegations supporting the requisite elements of each of her claims. Defendants’ challenges as to the Full Faith and Credit clause and lack of personal jurisdiction are unsupported. The validity of Commissioner Caride’s claims and the strength of the supporting evidence she will develop and present are matters that must be evaluated by the trier of fact with the benefit of a full factual record. Moreover, none of the cases Defendants cites are relevant or to the contrary. Instead, these cases are factually distinguishable, legally

inapposite, or support denial of Defendants' motion. Accordingly, Defendant's motion to dismiss the Complaint should be denied.

II. PLAINTIFFS' CAUSES OF ACTION AGAINST DEFENDANTS AND RELIEF SOUGHT ARE SUPPORTED BY THE FACTS AND APPLICABLE LAW

Commissioner Caride's claims against Defendants in the verified complaint are more than plausible on their face and show that she is entitled to relief. The Court should decline Defendants' invitation to characterize Commissioner Caride's causes of action as collateral attacks on the Pennsylvania Commonwealth Court's orders. See Defendants' Brief, at p. 10. Defendants rely on the Full Faith and Credit Clause and res judicata to suggest that the Commonwealth Court's order approving the Plan is entitled to absolute full faith and credit. They take that position even though the validity of the order remains disputed and the order did not specifically address the particulars of New Jersey law or issues raised by Commissioner Caride. Simply put, as Defendants acknowledge, Commissioner Caride did not fully participate in the proceeding and did not have the opportunity to litigate the issues raised in the Complaint fully and vigorously nor was it reasonably foreseeable that Defendants intended to violate state law in implementing the plan of rehabilitation. Ibid, at 12. Defendants' theories and arguments are no more than paper buckets that simply do not hold water.

A. Commissioner Caride's allegations against Defendants are plausible

Defendants' lack of understanding regarding the nature of Commissioner Caride's lawsuit against them is glaring. Commissioner Caride, in this action, is not requesting that this court reverse the decision of Commissioner Altman in seeking rehabilitation as opposed to liquidation or the entry of the order approving the Plan in the first place. As Commissioner Caride said in her opening motion papers to commence this action, the decision to seek rehabilitation is a judgment by the Rehabilitator who decided not to spread the burden of SHIP's insolvency through the

guaranty association system. That is true. Whether or not the Rehabilitator's decision to seek rehabilitation or liquidation was in error is not an issue to be decided by this Court. Rather, the focus of Commissioner Caride's claims are directed to the process in which Defendants are seeking to implement the Plan in New Jersey. That is completely consistent with Commissioner Caride's authority in New Jersey.

Regardless of its foreign or domestic status, a company engaged in the insurance business in New Jersey is subject to the "strict regulatory control" of DOBI. In re Markel Ins. Cos., 319 N.J. Super. 23, 28-29 (App. Div. 1999). In particular, under N.J.S.A. 17:1-15, the Commissioner is authorized, among other things, to:

c. Perform, exercise and discharge the functions, powers and duties of the department through those divisions established by law or as the commissioner deems necessary;

g. Institute or cause to be instituted the legal proceedings or processes necessary to enforce properly and give effect to any of the commissioner's powers or duties; [and]

. . . .

j. Have the power, in addition to any powers prescribed by law, to order any person violating any provision of 29 A-0653-20 Title 17 of the Revised Statutes or Title 17B of the New Jersey Statutes to cease and desist from engaging in such conduct[.]

[N.J.S.A. 17:1-15 (emphasis added).]

Overall, "the grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities and . . . courts should readily imply such incidental powers . . . are necessary to effectuate fully the legislative intent." N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978). "[T]he breadth of an agency's authority encompasses all express and implied powers necessary to fulfill the legislative scheme that the agency has been entrusted to administer." In re Virtua-W. Jersey Hosp. Voorhees for a Certificate of Need, 194 N.J. 413, 422- 23 (2008).

Commissioner Caride said it best in her November 9, 2021 letter to Commissioner Altman, who offered Commissioner Caride the option for the State of New Jersey to opt in or opt out of the Plan. Commissioner Caride, in an exercise of her duty as the chief administrator of the insurance laws of New Jersey, rejected the offer. She explained to Commissioner Altman:

[G]iven that rate regulation has long been reserved to the insurance commissioners of each state, the purpose of this letter is to notify you that (a) the Department will not respond to the Notice, and (b) the Department does not believe the Rehabilitator has authority to impose rate increases on our policyholders without the Department's approval.

Through Commissioner Caride's letter, Defendants had notice as of November of 2021 that attempts to unilaterally enforce and implement the Plan in New Jersey without review and approval violated applicable New Jersey laws in the area of long-term care policies. Commissioner Caride's legal position expressed to the Commissioner Altman was well grounded.

Under Section 10 of the Long-Term Care Act, long-term care policies, certificates, riders, or endorsements are required be filed with Commissioner Caride for approval. Section 10 of the Act provides:

Every long-term care insurance policy or contract, including any application, certificate, rider, or endorsement to be issued or delivered in this State shall be filed with the commissioner for prior approval as provided in this section.

N.J.S.A. 17B:27E-10. Similarly, Section 11 of the Act provides:

An insurer providing long-term care insurance issued on an individual basis in this State shall file, for the commissioner's approval, its rates, rating schedule, and supporting documentation demonstrating that it is in compliance with the applicable loss ratio standards of this State. All filings of rates and rating schedules shall demonstrate that the benefits are reasonable in relation to the premium charged and that the rates are not excessive, inadequate, or unfairly discriminatory.

N.J.S.A. 17B:27E-11.

The statutory and regulatory schemes embodied in the Long Term Care Act form the basis of Commissioner Caride's action seeking declaratory and injunctive relief against Defendants. Defendants' failure to submit its planned rate and/or benefit changes associated with the Plan to Commissioner Caride for review and approval before enforcing it upon SHIP policyholder who are senior citizens violates the Long-Term Care Act. See Counts One and Two of the verified complaint. Although the Rehabilitator has the authority to propose, and the Commonwealth Court has the authority to approve the Second Amended Plan's provisions directed to the establishment of proposed premium rates for policyholders, nothing decided by the Commonwealth Court renders New Jersey's Long Term Care Act void, unconstitutional, or inapplicable. Defendants have not and cannot point to any case law that stands for the position that New Jersey's Long Term Care Act is unenforceable due to foreign rehabilitation proceedings by an insurer that consented to the jurisdiction of New Jersey as a condition to doing business in New Jersey.

It has been long recognized that 'the insurance business is strongly affected with a public interest and therefore properly subject to comprehensive regulation in protecting the public welfare. R.J. Gaydos 21 A-0653-20 Ins. Agency, Inc. v. Nat'l Consumer Ins. Co., 168 N.J. 255, 280-81 (2001) (quoting Sheeran v. Nationwide Mut. Ins. Co., 80 N.J. 548, 559 (1979)). To safeguard that public welfare, DOBI has "broad and comprehensive regulatory authority . . . over the business of insurance." In re Twin City Fire Ins. Co., 129 N.J. 389, 407 (1992). Consistent with her charge to safeguard the public welfare, Commissioner Caride's complaint against Defendants is focused on requiring adherence to a process that follows New Jersey law and insurance regulation. That process allows Commissioner Caride to give prior approval to premium increases and policy modifications. The relief sought by Commissioner Caride arises from her

official function as the chief officer charged with the duty to execute and enforce insurance laws and regulations of New Jersey. Commissioner Caride has a statutory duty as the Insurance Commissioner to protect the citizens of New Jersey from injurious conduct and practices by carriers. Hence, this action is consistent with the fulfillment of her statutory obligations and authority invested in her by the New Jersey Legislature under N.J.S.A. 17B:27E-10 and -11.

It is undisputed that Defendants elected not to submit a request for a rate or benefit change with Commissioner Caride. It is also undisputed that Defendants are implementing the Plan by communicating directly with SHIP policyholders in New Jersey, have offered New Jersey policyholders one of four options has offered those options which were not reviewed or approved by Commissioner Caride, and has knowingly taken the position that it will not comply with the Long-Term Care Act. It is also undisputed that SHIP has routinely submitted rate change requests to Commissioner Caride for review, with the most recent submission being made in 2019, but has chosen not to do so simply because it is in rehabilitation. Based on the past conduct of SHIP and the statutory obligations of Commissioner Caride under the Long Term Care Act, it is clear that Commissioner Caride has plead more than sufficient facts for a trier of fact to conclude that Defendants violated the Long-Term Care Act and that Commissioner Caride is entitled to both declaratory and injunctive relief. Any of Defendants' arguments regarding the impact of the proceedings in Pennsylvania on Commissioner Caride's authority are defenses are better addressed during the action. Those defenses do not require that Commissioner Caride's action against Defendants be dismissed under Rule 12(b)(6).

Accordingly, Defendants' motion to dismiss for failure to state a claim under Federal Rule 12(b)(6) should be denied.

B. Defendants reliance on The Full Faith and Credit Clause and Res Judicata is sorely misplaced

Defendants' use of the Full Faith and Credit Clause is not applicable. This is especially so in the area of insurance regulation, Commissioner Caride's rate making authority, and the implementation/enforcement of the Plan in New Jersey.

The contours of the Full Faith and Credit Clause are not without limits. The Full Faith and Credit Clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events. Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501, 59 S.Ct. 629, 632, 83 L.Ed. 940 (1939). A statute is a "public Act" within the meaning of the Full Faith and Credit Clause. See, e.g., Carroll v. Lanza, 349 U.S. 408, 411 (1955); see also 28 U.S.C. § 1738 (referring to "[t]he Acts of the legislature" in the full faith and credit context). For instance, a sister State's decree concerning land ownership in another State is ineffective to transfer title and unenforceable under the Full Faith and Credit Clause. See Baker by Thomas v. General Motors Corp, 522 U.S. 222, 235 (1998)(citing Fall v. Eastin, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65 (1909)). In Baker, Justice Ginsberg stated that the Full Faith and Credit Clause does not require a state court to substitute the statutes or common law of other states for the statutes or common law of its state, particularly when the law of the other state is antithetical to the public policy of the forum state. Id. at 118 S.Ct. at 663, 139 L. Ed.2d at 591–92. The enforcement of laws is distinguished from the credit accorded to money judgments. Thus, it has been also recognized, as another example, that antisuit injunctions regarding litigation elsewhere, even if compatible with due process, is not

automatically enforceable. Baker, 522 at 235 (citing Cole v. Cunningham, 133 U.S. 107, 10 S.Ct. 269, 33 L.Ed. 538 (1890))

As another example of the limits of the Full Faith and Credit Clause, in another highly regulated area, arises from ownership of a fire arm. In the Matter of the Denial of the Application of George Winston, 438 N.J. Super. 1 (App. Div. 2014), the Superior Court of New Jersey, Appellate Division, addressed whether or not the Full Faith and Credit Clause does not require New Jersey to automatically approved a license to own a fire arm simply because the applicant was granted such a license in another state. In that case, an applicant had New York criminal convictions and applied for a license to own a fire harm. In New York, the law did not disqualifying the applicant from purchasing a firearm. In New Jersey by comparison, the law remained that prior convictions were disqualifying for purposes of purchasing a firearm. Because of the statutory differences and policy considerations, the Appellate Division held that the Full Faith and Credit clause was applicable.

Based on the foregoing, the confidence Defendants have placed in relying on the Full Faith and Credit Clause and the doctrine of res judicata to cause the dismissal of Commissioner Caride's complaint is misplaced. As Justice Ginsburg addressed in the majority opinion in Baker, the dimensions of the order by the Commonwealth Court relied on by Defendants must be examined to determine its preclusive effect. An examination of the dimensions of the proceedings in Pennsylvania demonstrate that Commissioner Caride did not participate in the rehabilitation proceedings which led to the entry of the order approving the Plan. Defendants acknowledge that fact on page 14 of their motion papers when it comments that Plaintiffs (i.e. Commissioner Caride) did not formally participate in the proceedings before the Commonwealth Court. Defendants raise that fact as a way to argue that Commissioner Caride cannot claim a lack of due process as a

defense to attempts to enforce the order approving the Plan. But it also applies on the reverse. Because Commissioner Caride did not participate and did not raise the identical issues as she does here which, frankly, arose after Defendants attempted to implement/enforce the plan in New Jersey. Therefore, the doctrine of res judicata does not apply.

The Commonwealth Court's decision to approve the Plan does not render as moot questions regarding how the Plan will be implemented /enforced in New Jersey, if at all. Inasmuch as the mechanics of enforcing a judgment do not travel with the judgment itself, the implementation of the Plan likewise does not automatically travel to New Jersey, which reserves the decision on the applicable rates. New Jersey law and insurance regulation in the area of rate or benefit change remains intact and unchanged. Following that process enables Commissioner Caride to give prior approval to premium increases and policy modifications that were approved by the Commonwealth Court.

Accordingly, neither the Full Faith and Credit Clause nor the doctrine of res judicata are applicable or bind Commissioner Caride. The Commonwealth Court was not requested to and did not enter any order which establishes that the Long Term Care Act is unenforceable, moot, or invalid. Indeed, Baker teaches that orders commanding action or inaction have been denied enforcement in a sister state when they purported to accomplish an official act within the exclusive province of that other state or interfered with litigation over which the ordering state had no authority. 522 U.S.at 235, 118 S.Ct. 657. Certainly, Defendants have construed the decision by the Commonwealth Court to approve the Plan as ordering Commissioner Caride to comply, which is inappropriate and is not enforceable under the Full Faith and Credit Clause.³ However, in seeking

³ The proceedings and decision of the Commonwealth Court do not reveal that that the Pennsylvania court made a determination of its jurisdiction, its authority over Commissioner Caride, and any discussion of whether it had jurisdiction over the application of New Jersey's Long

enforcement of the Plan, Defendants are seeking to accomplish an official act on behalf of Commissioner Caride in approving rate under the Plan, which is an official action within the exclusive province of Commissioner Caride. Defendants' implementation/enforcement of the Plan does not dilute the authority of Commissioner Caride.

III. DEFENDANTS CLAIMS THAT THIS COURT LACKS PERSONAL JURISDICTION OVER THEM IS INTELLECTUALLY AND FACTUALLY UNSUPPORTED

This Court should easily dispatch Defendants' claims that lack of personal jurisdiction over them.

A. SHIP has consented to the jurisdiction of New Jersey

There is no question that this court has jurisdiction over defendant SHIP. As a carrier authorized to conduct the business of insurance in New Jersey, SHIP, through its officers and board, expressly consented to the jurisdiction of any court of competent jurisdiction in New Jersey. On November 19, 2008, SHIP executed a document entitled Uniform Consent to Service of Process, to amend its previous submission. SHIP form was submitted to DOBI as a condition for SHIP to be a carrier in New Jersey. The Uniform Consent to Service of Process form provides:

The entity named above, organized under the laws of Pennsylvania, for purposes of complying with the laws of the State(s) designate hereunder relating to the holding of a certificate of authority or the conduct of an insurance business within said State(s), pursuant to a resolution adopted by its board of directors or other governing body, hereby irrevocably appoints the officers of the State(s) and their successors identified in Exhibit A, or where applicable appoints the required agent so designated in Exhibit A hereunder as its attorney in such State(s) upon whom may be served any notice, process or pleading as required by law as reflected on Exhibit A in any action

Term Care Act. The Pennsylvania court did not have adjudicatory authority over the subject matter of this action or Commissioner Caride in her official capacity as Insurer of the State of New Jersey, who is not a resident of Pennsylvania and was not a party to the SHIP rehabilitation proceedings. Thus, issues Defendants assert should be binding on Commissioner Caride were not fully and fairly litigated so as to require the application of full faith and credit clause.

or proceeding against it in the State(s) so designated; and does hereby consent that any lawful action or proceeding against it may be commenced in any court of competent jurisdiction and proper venue with the State(s) so designated; and agrees that any lawful process against it which is served under this appointment shall be of the same legal force and validity as if served on the entity directly. This appointment shall be binding upon any successor to the above named entity that acquires the entity's assets or assumes its liabilities by merger, consolidation or otherwise; and shall be binding as long as there is a contract in force or liability of the entity outstanding in the State. The entity hereby waives all claims of error by reason of such service. The entity named above agrees to submit an amended designation form upon a change in any of the information provided on this power of attorney.

Troublefield Dec., Ex. 3.

Therefore, it is undisputed that SHIP has agreed that any lawful action against it may be commenced in any court of competent jurisdiction in New Jersey. Cases relied on by Defendants such as O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312 (3d Cir. 2007); Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915 (2011) and Stevens v. Welch, No. 16-882, 2011 U.S. Dist. LEXIS 12142, ** 14-15 (D.N.J. Feb. 7, 2011) are distinguishable. Those cases, as well as other cited by Defendants, do not concern an insurance carrier, which has expressly consented to the jurisdiction of the forum state in which it has sold and marketed its insurance products to residents of the forum. Questions of either general or specific jurisdiction do not exist in this case, especially given the allegations that SHIP is an approved carrier that has sold long-term care insurance policies to residents of New Jersey and has specifically communicated with those policyholders in an effort to enforce and implement the Plan in New Jersey. Indeed, the fact that Commissioner Altman, Commissioner Humphreys and Special Deputy Cantilo have operated SHIP and have knowingly communicated with SHIP policyholders in New Jersey to generate money to help cure the Funding Gap, is uncontroverted evidence of Defendants' purposely availing themselves of the opportunity to continue doing business in New Jersey.

SHIP's consent is binding on Commissioner Altman, Commissioner Humphreys and Special Deputy Cantilo.

B. Commissioner Altman, Commissioner Humphreys and Special Deputy Cantilo are agents of SHIP and bound by its consent

Defendants argue that this Court cannot exercise authority over Pennsylvania officials. Defendants' position misstates the capacity in which Commissioner Altman, Commissioner Humphreys and Special Deputy Cantilo were named as defendants in this action. Defendants claim that these individuals are party defendants in their state capacity as state officers. However, as the Complaint makes clear, they were not. These Defendants are not party defendants based on their appointment as Rehabilitators of SHIP and not in their capacity as officials performing official state duties.

Under Pennsylvania law, insurance officials acting in a statutory capacity as an appointed Rehabilitator are not agents of the court and are neither free agents with unfettered discretion. Koken v. Legion Ins. Co., 831 A.2d 1196, 1232 (Pa. Commw. Ct. 2003). Rather, the Rehabilitator is a "creature of statute" and, is therefore, confined to exercising "those powers which have been conferred by the Legislature in clear and unmistakable language." Id. at 1227. Accordingly, the insurance officials acting as Rehabilitator serves only one purpose: to achieve a successful rehabilitation. Id.

In other words, when the Insurance Commissioner is acting as a liquidator or rehabilitator, he or she is acting in a different capacity from the position as head of the Pennsylvania Department of Insurance. See Greenberger v. Pennsylvania Insurance Department, 39 A.3d 625 (Pa. Commw. Ct. 2012). The Pennsylvania courts have referred to this theory as the "separate capacities doctrine." See, e.g., Koken v. One Beacon Ins. Co., 911 A.2d 1021, 1028–29 (Pa. Commw. Ct. 2006) ("Under the separate capacities doctrine, a governmental entity . . . is treated as a separate

entity when acting in another capacity.”). This doctrine applies equally when the Commissioner is acting in the capacity of either a Rehabilitator or a Liquidator. See One Beacon Ins. Co., 911 A.2d at 1029. Acting in this capacity, the Pennsylvania Insurance Commissioner steps into the shoes of SHIP management for purposes of the rehabilitation, and has no greater authority in New Jersey than the SHIP management he replaced.

For example, the court in Foster v. Monsour Medical Foundation, addressed “whether actions of the Insurance Commissioner prior to the order of liquidation of an insurance company [could] be asserted as affirmative defenses in an action commenced by the Statutory Liquidator.” 667 A.2d 18, 19 (Pa. Commw. Ct. 1995). In holding that they could not, the court discussed the “dual capacity” in which an Insurance Commissioner acts in these scenarios. According to the court, once the Insurance Commissioner is appointed as the Statutory Liquidator, she “steps into the shoes of the insurer” such that “[a]ny actions commenced by the Liquidator are on behalf of the insurance company,” and the “claims are not premised upon any rights asserted by the Insurance Department or the Insurance Commissioner.” Id. at 20; Foster v. Rockwood Holding Co., 632 A.2d 335, 338 (Pa. Commw. Ct. 1993) (same). When acting in that statutory capacity, the Insurance Commissioner is acting on behalf of the insurance company not the state. See also One Beacon Ins. Co., 911 A.2d at 1029 (finding that in a suit brought by the Insurance Commissioner in her statutory capacity as Liquidator, “the Insurance Commissioner, in her regulatory capacity, [was] not a party”).

As such the Commissioner Altman, Commissioner Humphreys and Special Deputy Cantilo are not performing regulatory functions; rather, they are agents of SHIP with authority to operate SHIP until the end of rehabilitation. They have all “stepped into the shoes of the insurer” and should, therefore, be treated exclusively as an agent of SHIP. Monsour Med. Found., 667 A.2d 18

at 20. Under 40 P.S. § 221.44 upon issuance of the order to rehabilitate, the rights and liabilities of an insurer and of its creditors, policyholders, shareholders, members and all other persons interested in the estate shall become fixed as of the date of the filing of the petition . Moreover, the rehabilitation or liquidator steps into the shoes of the insurer's officers and directors in the conduct of that insurer's affairs. Koken v. Legion Ins. Co., 865 A.2d 945, 958 (Pa. Cmwlth. 2004) Once the rehabilitation process is complete, Humphreys or Cantilo may step back into their position as a state actor. However, until then, they serve and have served SHIP, and they must be treated as a separate, non-governmental entity when acting as Rehabilitator.

Accordingly, because Altman, Humphreys and Cantilo have stepped in the shoes of SHIP, they are subject to prior consent to the jurisdiction of New Jersey and can be sued in their capacity as Rehabilitators. They did not send out the Coverage Election Packages to New Jersey policyholder sin the state capacity; rather, they sent them in their capacity as rehabilitators on behalf of SHIP. Also, the fact that Commissioner Altman took the additional step to write to Commissioner Caride directly to solicit New Jersey to Opt in or Opt Out, clearly she should have anticipated being hauled into court in New Jersey when Commissioner Caride responded by her November 9, 2021 letter advising that Commissioner Altman was violating New Jersey law.

CONCLUSION

For all of the foregoing reasons, Defendants' motion to dismiss should be denied.

Respectfully submitted,

Dated: May 2, 2022

**CARELLA, BYRNE, CECCHI,
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/s/ G. Glennon Troublefield

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

MARLENE CARIDE, as Commissioner of
the New Jersey Department of Banking and
Insurance, and THE NEW JERSEY
DEPARTMENT OF BANKING AND
INSURANCE,

Plaintiffs,

V.

JESSICA K. ALTMAN, as Rehabilitator of Senior Health Insurance Company of Pennsylvania and her successors in office, in their capacity as Rehabilitator of Senior Health Insurance Company of Pennsylvania, PATRICK H. CANTILO, as Special Deputy Rehabilitator of Senior Health Insurance Company of Pennsylvania, MICHAEL HUMPHREYS, as Successor Rehabilitator of Senior Health Insurance Company of Pennsylvania, and SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA,

Defendants.

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

[formerly Superior Court of New Jersey, Law Division, Civil Part, Mercer County, Docket No.: MER-L-448-22 and subsequently transferred to Superior Court of New Jersey, Chancery Division, General Equity, Mercer County, Docket No.: MER-C-26-22]

DECLARATION OF G. GLENNON TROUBLEFIELD

I, G. GLENNON TROUBLEFIELD, hereby declare as follows:

1. I am an attorney at law of the State of New Jersey and member of the law firm of Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C., counsel for Plaintiffs Marlene Caride, as Commissioner of the New Jersey Department of Banking and Insurance, and The New Jersey Department of Banking and Insurance (collectively, “Plaintiffs”) in connection with the above-captioned matter.

2. I am fully familiar with the facts as set forth below, unless otherwise indicated.

3. I make this Declaration in support of Plaintiffs’ Opposition to Defendants’ Motion to Dismiss the Complaint filed by 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, Michael Humphreys, as Successor Rehabilitator of Senior Health Insurance Company of Pennsylvania, and Senior Health Insurance Company of Pennsylvania (collectively, “Defendants”)

4. Annexed hereto as Exhibit 1 is a true and accurate copy of Plaintiffs’ Verified Complaint against Defendants.

5. Annexed hereto as Exhibit 2 is a true and accurate copy of the April 25, 2022 decision of the United States District Court for the Eastern District of North Carolina, in the matter Causey v. Altman, No. 5:22-CV-89-FL, ECF No. 28 (E.D.N.C. April 25, 2022).

6. Annexed hereto as Exhibit 3 is a true and accurate copy of the Uniform Consent to Service of Process executed by the Senior Health Insurance Company Of Pennsylvania on November 8, 2008 and filed with the New Jersey Department of Banking and Insurance.

I hereby declare that the foregoing statements made by me are true. I further declare that I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ G. Glennon Troublefield
G. GLENNON TROUBLEFIELD

Dated: May 2, 2022

EXHIBIT 1

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MARLENE CARIDE, as Commissioner of
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Insurance, and THE NEW JERSEY
DEPARTMENT OF BANKING AND
INSURANCE,

Plaintiffs,

V.

JESSICA K. ALTMAN, as Rehabilitator of Senior Health Insurance Company of Pennsylvania and her successors in office, in their capacity as Rehabilitator of Senior Health Insurance Company of Pennsylvania, PATRICK H. CANTILO, as Special Deputy Rehabilitator of Senior Health Insurance Company of Pennsylvania, MICHAEL HUMPHREYS, as Successor Rehabilitator of Senior Health Insurance Company of Pennsylvania, and SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
GENERAL EQUITY PART
MERCER COUNTY
DOCKET NO. MER-C- 22

Civil Action

Plaintiffs Marlene Caride, in her capacity as Commissioner of the State of New Jersey Department of Banking and Insurance (the “Commissioner”), and the New Jersey Department of Banking and Insurance (“DOBI”), by way of Verified Complaint against defendants Jessica K. Altman, in her capacity as the court appointed Rehabilitator of Senior Health Insurance Company of Pennsylvania (“Altman” or the “Rehabilitator”), and her successors in office, in their capacity as Rehabilitator of Senior Health Insurance Company of Pennsylvania, Michael Humphreys, as Acting Insurance Commissioner of Pennsylvania and successor to Altman, Patrick H. Cantilo, in his capacity as Special Deputy Rehabilitator of Senior Health Insurance Company of Pennsylvania (“Cantilo” or “the Special Deputy Rehabilitator”), and Senior Health Insurance Company of Pennsylvania (“SHIP”) (collectively, the “Defendants”), hereby state:

NATURE OF THE ACTION

1. This action is directed to Defendants’ violation of New Jersey insurance laws. Despite their acute knowledge of the exclusive authority of Commissioner Caride over entities transacting insurance business in New Jersey, Defendants have attempted to undermine and side-step the express authority granted to Commissioner Caride. Specifically, Defendants have announced plans to, without first obtaining required regulatory approval from New Jersey, raise premium rates and/or reduce benefits rates for long-term care insurance products purchased or held by residents of the State of New Jersey.

2. The exclusive authority of Commissioner Caride and/or DOBI to review, regulate and approve rates for long-term insurance products marketed to residents of the State of New Jersey is undisputed. As the administrator and the Chief Executive Office of DOBI, Commissioner Caride is granted the statutory authority to determine all matters of policy within and to perform, exercise, and discharge the powers and duties of DOBI over the business of insurance within New

Jersey. The mission of DOBI is to, inter alia, regulate the banking, insurance, and real estate industries of New Jersey in a professional and timely manner, protect and educate consumers, and promote the growth, financial stability, and efficiency of these industries. In furtherance of its mission, the New Jersey Legislature has vested exclusive statutory authority in Commissioner Caride and DOBI over long-term care insurance policies issued in New Jersey.

3. Under the authority vested in the Commissioner and DOBI by statute, every long-term care insurance policy or contract, including any application, certificate, rider, or endorsement to be issued or delivered, shall be filed with the Commissioner for prior approval. N.J.S.A. 17B:27E-10. An insurer providing long-term care insurance issued on an individual basis in New Jersey is required to file, for the commissioner's approval, its rates, rating schedule, and supporting documentation demonstrating that it is in compliance with the applicable loss ratio standards of New Jersey. All filings of rates, rating schedules, and supporting documentation shall demonstrate to the satisfaction of Commissioner Caride that the benefits are reasonable in relation to the premium charged and the rates are not excessive, inadequate, or unfairly discriminatory. N.J.S.A. 17B:27E-11.

4. DOBI seeks the immediate intervention of this court to protect the interests of over 500 New Jersey policyholders who risk suffering irreparable harm. The policyholders are senior citizens who have an estimated average age of 89 years old and who purchased long-term care policies from defendant SHIP. The policyholders have paid for their long-term care policies for over 20 years. As part of SHIP's rehabilitation, the Rehabilitator has proposed a plan of rehabilitation. The Rehabilitator's plan's ultimate goal is to, inter alia, eliminate a \$1.2 billion funding gap experienced by SHIP by increasing premium revenue and modifying the existing terms of SHIP's 39,000 policies in force, including approximately 592 of said policies in New

Jersey. The Rehabilitator's goal is not to honor SHIP's contractual obligations owed to policyholders, but rather to reduce SHIP's liabilities/deficit, by increasing premium revenue and reducing policyholder benefits. The increased premiums and modification of the benefits selected by the Rehabilitator was done without the approval of DOBI in violation of N.J.S.A. 17B:27E-11.

5. DOBI requests this Court to immediately enjoin Defendants' implementation of the Rehabilitator's plan in New Jersey. This court should enjoin Defendants from undertaking any further communications with New Jersey policyholders and enter an order that voids any Plan elections that were previously made by the policyholders. An injunction of this type will preserve the rights of the New Jersey policyholders as they existed before the Rehabilitator's attempt to implement the Plan.

PARTIES

6. Commissioner Caride is the commissioner of DOBI, and maintains her office address at 20 West State Street, Trenton New Jersey 08625.

7. DOBI is a department within New Jersey State government and is charged by the New Jersey Legislature with the exclusive authority to regulate the business of insurance in New Jersey. DOBI maintains an office address at 20 West State Street, Trenton, New Jersey 08625.

8. Commissioner Altman is the former Commissioner of Insurance for the Commonwealth of Pennsylvania. On January 23, 2022, pursuant to the Order of Rehabilitation (the "Order"), entered by the Commonwealth Court of Pennsylvania, Commissioner Altman was appointed as the Rehabilitator of SHIP. Commissioner Altman maintains her office address at Commissioner of Insurance, Commonwealth of Pennsylvania, 1326 Strawberry Square, Harrisburg, Pennsylvania 17120.

9. Michael Humphreys is the Acting Commissioner of Insurance for the Commonwealth of Pennsylvania and is the successor in office to Commissioner Altman.

10. Cantilo is the Special Deputy Rehabilitator for SHIP who was appointed by Commissioner Altman. Special Deputy Cantilo maintains his office address at Cantilo & Bennett, L.L.P., 11401 Century Oaks Terrace, Suite 300, Austin, Texas 78758.

11. 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. SHIP maintains its office address at 550 Congressional Boulevard, Suite 200, Carmel, Indiana 46032.

JURISDICTION AND VENUE

12. Defendants, as insurers and/or representatives of SHIP, are doing business in New Jersey and have consented to the jurisdiction of the Courts of the State of New Jersey.

13. SHIP has in the past and continues to engage in substantial, continuous, and systematic business with residents of the State of New Jersey. For several years, SHIP marketed, sold, and serviced long-term care policies to New Jersey policyholders having received the approval of the Commissioner of Insurance of DOBI to do so. After it had sold its last long-term care policy to New Jersey policyholders in 2003, SHIP and/or its predecessors, successors, and/or assigns, submitted requests for rate increases to DOBI for approval from approximately 2003 to 2020.

14. Defendants have purposely availed themselves of the privilege of conducting activities within New Jersey, thus invoking the benefit and protection of the laws of the State of New Jersey. Also, because Defendants, as insurers and/or representatives, have entered into contractual relationships with New Jersey policyholders who purchased long-term care policies from SHIP, relative to the authority that the Commissioner granted to SHIP to sell long-term

insurance policies to New Jersey residents, they have reasonably anticipated being subjected to lawsuits in New Jersey.

15. Defendants' actions as set forth herein that occurred within New Jersey has given rise to the causes of action asserted in this Verified Complaint and the jurisdiction of this court.

16. Venue is proper in the Superior Court of New Jersey, Chancery Division, Mercer County, New Jersey.

FACTUAL BACKGROUND AND SUBSTANTIVE ALLEGATIONS

A. SHIP – Long-term Care Business

17. 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. SHIP commenced business on July 5, 1887, as the Home Beneficial Society. By the 1980s, SHIP was known as American Travelers Insurance Company and was primarily writing long-term care insurance policies. It was then acquired by, and merged into, CIHC, Inc., which was a wholly-owned subsidiary of Consecro, Inc. Ex. 1.¹

18. Upon information and belief, in 2002, Consecro filed a petition for bankruptcy protection, emerged from bankruptcy as CNO Financing Group. By 2003, CNO Financial Group's successor, Consecro Senior Health Insurance Company, ceased writing long-term care insurance policies. Consecro Senior Health Insurance Company has not sold any new policies since 2003. Ibid.

19. In October 2008, Consecro Senior Health Insurance Company changed its name to Senior Insurance Company of Pennsylvania (*i.e.* "SHIP"), and its ownership was transferred from CNO Financial Group to the newly-formed nonprofit Senior Health Care Oversight Trust, which

¹ Reference herein to numbered Exhibits (e.g., "Ex. 1"), are attached to the Troublefield Cert., which is filed simultaneously herewith.

has managed the run-off of SHIP's long-term care insurance business since 2008. At the time SHIP was transferred to the Senior Oversight Trust, SHIP had approximately 165,000 policyholders and approximately \$3.2 billion in assets. Ibid.

20. SHIP was licensed in 46 states, including the State of New Jersey. SHIP's policies cover long-term care services provided in congregant settings, such as nursing homes and assisted living facilities, as well as home-based health care services and adult day care. SHIP's policies are approximately thirteen percent (13%) home health care coverage, eighteen percent (18%) facility care coverage (inclusive of nursing homes and/or assisted living facilities), and sixty-nine percent (69%) comprehensive coverage. Upon information and belief, the average age of a SHIP long-term care policyholder is 89 years old and the average age of a policyholder claim is the same. Ibid.

21. SHIP's financial condition deteriorated and required rehabilitation. By 2020, SHIP's assets were \$1.4 billion and its liabilities were \$2.6 billion, which created the Funding Gap.

B. SHIP's Rehabilitation Proceeding

22. On January 23, 2020, pursuant to Article V of the Insurance Department Act of 1921, Act of May 17, 1921, P.L. 789, as amended, ("Article V"), 40 P.S. § 221.1-221.63, and Rule 3774(c) of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. 3774(c), the Rehabilitator filed an application for an order placing SHIP in rehabilitation. The application was filed in the Commonwealth Court of Pennsylvania and titled Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania v. Senior Health Insurance Company of Pennsylvania, Docket No. 1 SHIP 2020, (the "Rehabilitation Proceeding"). Ex. 1.

23. Among other grounds, the Rehabilitator asserted that SHIP committed one or more acts which constitute grounds for rehabilitation as set forth in 40 P.S. § 221.14 and 221.15, in that

SHIP'S most recent annual statement demonstrated that it is statutorily insolvent as defined by 40 P.S. § 221.3 and that its most recent risk-based capital report ("RBC"), indicated that its total adjusted capital is substantially below its mandatory control level RBC, which triggered a "mandatory control level event" as that term is defined in 40 P.S. § 221.1A. SHIP's directors consented to being placed in rehabilitation. Ibid.

24. On January 29, 2020, the Commonwealth Court in the Rehabilitation Proceeding entered an Order of Rehabilitation and appointed the Rehabilitator. The Rehabilitator appointed Cantilo as Special Deputy Rehabilitator. Ex. 2.

25. On April 22, 2020, the Rehabilitator filed a proposed plan of rehabilitation and over the course of several months proposed two amended plans. Ex. 3.

26. On August 24, 2021, the Commonwealth Court in the Rehabilitation Proceeding entered a Memorandum Opinion and Order approving the Plan. Exs. 4 and 5.

27. On September 21, 2021, the State Insurance Regulators filed a direct appeal to the Supreme Court of Pennsylvania of the Commonwealth Court's order approving the Plan. The appeal is titled In re: Senior Health Insurance Company of Pennsylvania (In Rehabilitation) - Appeal of: The Superintendent of Insurance of the State of Maine, Commissioner of Insurance of the Commonwealth of Massachusetts, and Insurance Commissioner of the State of Washington, Docket No. 71 MAP 2021. Ex. 6.

28. On October 1, 2021, the State Insurance Regulators filed a motion in the Rehabilitation Proceeding to stay implementation of the Plan pending the appeal. Ex. 7. The motion was denied.

29. On November 8, 2021, the State Insurance Regulators filed a motion in the Supreme Court of Pennsylvania for a stay pending appeal of, inter alia, the Commonwealth Court’s order approving the Plan. Ex. 8.

30. On December 22, 2021, Amici Curiae filed a brief in support of the State Insurance Regulators’ appeal of the Commonwealth Court’s order approving the Plan. Ex. 9.

31. On January 31, 2022, the Pennsylvania Supreme Court denied the State Insurance Regulators’ motion for a stay pending appeal. Ex. 10.

C. Commissioner Caride’s Authority

32. The New Jersey Legislature has expressly authorized the commissioner of insurance to be the administrator and chief executive officer of DOBI. N.J.S.A. 17:1-2 and 17:1-15. Among other duties and responsibilities, the commissioner of insurance has the exclusive authority to “perform, exercise, and discharge the functions, powers, and duties of the department through these divisions established by law or as the commissioner deems necessary.” N.J.S.A. 17:1-15(c).

33. The New Jersey Legislature has also expressly authorized the commissioner of insurance to “determine all matters of policy within the commissioner’s jurisdiction” and to “institute or cause to be instituted the legal proceedings or process necessary to enforce properly and give effect to any of the commissioner’s powers or duties; and perform such other functions as may be prescribed by law in this act or by another other law.” N.J.S.A. 17:1-15(f) and (g).

34. As to long-term care insurance, the New Jersey Legislature enacted the New Jersey Long-Term Care Insurance Act, N.J.S.A. 17B:27E-1, et seq. (the “Act”). The stated purpose of the Act is to “promote the public interest, to promote the availability of long-term care insurance policies, to protect applications for long-term care insurance from unfair or deceptive sales or

enrollment practices, to establish standards for long-term care insurance, to facilitate public understanding and comparison of long-term care insurance policies, and to facilitate flexibility and innovation in the development of long-term care insurance coverage.” N.J.S.A. 17B:27E-1.

35. Commissioner Caride is empowered to enforce the Act in New Jersey.

D. Required Filing And Approval

36. Under Section 10 of the Act, long-term care policies, certificates, riders, or endorsements are required be filed with Commissioner Caride for approval. Section 10 of the Act provides:

Every long-term care insurance policy or contract, including any application, certificate, rider, or endorsement to be issued or delivered in this State shall be filed with the commissioner for prior approval as provided in this section.

[N.J.S.A. 17B:27E-10.]

37. Similarly, Section 11 of the Act provides:

An insurer providing long-term care insurance issued on an individual basis in this State shall file, for the commissioner's approval, its rates, rating schedule, and supporting documentation demonstrating that it is in compliance with the applicable loss ratio standards of this State. All filings of rates and rating schedules shall demonstrate that the benefits are reasonable in relation to the premium charged and that the rates are not excessive, inadequate, or unfairly discriminatory.

[N.J.S.A. 17B:27E-11.]

38. Under N.J.A.C. 11:4-34.17, premium and benefits under long-term care policies that are subject to the Act are required to be reviewed by Commissioner Caride:

(a) This section applies to all rates for individual long-term care policies except those covered pursuant to N.J.A.C. 11:4–34.8 and 34.18.

(b) Premiums and benefits under long-term care insurance policies whose rates are subject to this section shall meet the loss ratio requirements of N.J.A.C. 11:4–18.5.

(c) Carriers shall include with each submission of new or revised rates for individual long-term care insurance an actuarial memorandum which includes anticipated loss ratio, methodology for calculating gross premiums, an explanation and documentation supporting the premium assumptions and the objective basis for any rate differentials. . .

[N.J.A.C. 11:4-34.17].

E. SHIP’s Policies In New Jersey

39. As of January 12, 2021, SHIP has approximately 592 active long-term care policies in New Jersey. Of that group of policies, 17 policies were terminated, 523 policies are still in force, and approximately 49 policies are identified as being “NFO” – which means non-forfeiture option and no premium is due.

40. From approximately 2003 to 2019, either SHIP or one its successors and/or assigns submitted requests for rate increases for its long-term care policies issued to New Jersey policyholders. SHIP’s requests were either approved, denied or withdrawn. On August 26, 2019, SHIP filed its last application for a rate increase with DOBI. On March 13, 2020, SHIP withdrew that request. See Certification of Gale Simon, dated March 8, 2022 (“Simon Cert.”), Exhibit A.

F. SHIP, The Rehabilitator, And The Plan

41. SHIP is insolvent. Because SHIP is insolvent, a liquidation would inevitably result in the triggering of the state life and health insurance guaranty associations (“GA’s”) if SHIP cannot be successfully rehabilitated. Mandatory triggers of guaranty association benefits include an insurer being placed in liquidation with a finding of insolvency. Once “triggered,” GA’s commence the payment of policy benefits. The GA’s generally provide for the continuation of insurance coverage provided by the failed insurer, up to the statutory maximum coverage amounts.

Unlike GA's in other states, New Jersey does not have a limit or "cap" on what benefits will be paid to health insurance policyholders, including long-term care insurance policyholders. The benefits recoverable from LHIGA are subject to the policy limits. In addition, under the LHIGA, each provider receiving payments from the guaranty association must agree to a 20% discount pursuant to N.J.S.A. 17B:32A-3(e) as follows:

A provider of health care services, in order to receive payment directly from the association upon a claim of the provider against an insured, shall agree to forgive the insured of 20% of the obligation which would otherwise be paid by the insurer had it not been insolvent. The obligations of solvent insurers to pay all or part of the covered claim are not diminished by the forgiveness provided in this paragraph. The association is not bound by an assignment of benefits executed with respect to the coverage provided by the insolvent insurer. The association may aggregate all claims owed health care providers when negotiating direct payment of claims of all covered individuals.

[N.J.S.A. 17B:32A-3(e)].

42. After the GA's are triggered, the liquidator and the GA's work together to make loss adjustment on claims. The GA becomes a creditor of the liquidation estate and can submit a claim to the liquidation estate for the loss adjustment expense. GA's also receive all ongoing policy premiums once triggered. See N.J.S.A. 17B:32A-7(g). The GA's use the premium and estate assets to fulfill, in part, their obligations to policyholders. The GA's supplement those amounts by making assessments on their member insurance companies.

43. In a liquidation, virtually all of SHIP's long-term care insurance policies would be covered by the state guaranty association system, subject to the individual state statutory conditions and limits. Thus, if SHIP is placed into liquidation because of its insolvency, the SHIP long-term care policies purchased by New Jersey residents would be covered by New Jersey's guaranty association. Because New Jersey does not have statutory limits on its guaranty

association with respect to benefits paid to health insurance policyholders, New Jersey policyholders would be in a better position if SHIP is liquidated than they would be if the plan of rehabilitation is implemented.

44. Rather than deem SHIP insolvent, the Rehabilitator has proposed the Plan as a means of curing SHIP's insolvency. Through the Plan, the burden of reducing the Funding Gap rests exclusively on SHIP's current policyholders who have not taken non-forfeiture options, i.e. the premium paying policyholders. The Plan does not involve any financial assistance from guaranty associations. This strategy reflects a policy judgment by the Rehabilitator not to spread the burden of SHIP's insolvency through the guaranty association system but rather to place the burden solely on the backs of elderly policyholders through higher premiums or reduced benefits. The Rehabilitator has chosen to burden the elderly policyholders even though they paid premiums for years, which contractually guaranty their benefits under their policy and are supposed to be protected by guaranty association support in the event of company insolvency.

45. The Rehabilitator knew or should have known that implementation of the Plan has left its mostly elderly policyholders with no option but to accept this ultimatum. Because of their age, the elderly policyholders do not have the option to obtain a new long-term care policy from a different carrier. Their advanced age makes them uninsurable based on present industry standards associated with long-term care policy products offered in the life and health insurance market. As a result, the elderly policyholders have no choice but to either accept paying increased premiums or accept reduce benefits if they want to keep their long-term care policy from SHIP. That is patently unfair to the elderly policyholders. They faithfully paid their premiums over 20 years and, frankly, did nothing wrong. Now, at the time when they will need their contractually guaranteed long-term care policy benefits, they have to accept less than what they paid for because of SHIP's

insolvency. Worst yet, even though the guaranty association system exists in each state, including New Jersey, to protect the interests of the elderly policyholders, the Rehabilitator has chosen to ignore that option. The Rehabilitator would rather require the elderly policyholders to pay more money or receive less premiums under the Plan for the sole purpose of curing the Funding Gap. That is unfair to the elderly policyholders who have timely paid their premiums for over 20 years and unacceptable to DOBI.

46. The Plan is implemented in three phases. Phase One, which began immediately upon the Commonwealth Court's approval of the Plan, is the principal phase through which the Rehabilitator seeks to reduce or eliminate the Funding Gap. Ex. 5.

47. In Phase One, policyholders whose premiums are below the "If Knew" premium level will be required to elect among options to modify premiums and/or benefits. The If Knew Premium rate is the rate that, if charged from inception, would have produced an underwriting loss ratio of 60% for each policy form. Policyholders whose current premium (including the premium they would be paying but for a premium waiver) falls below the If Knew Premium rate for the policy's benefits are required to select among five options. Option 1 ("downgrade") reduces benefits to the level supported by current premium on an If Knew Premium basis. Option 2 is a "basic policy endorsement" with reduced benefits. Option 2(a) is an "enhanced basic policy" with somewhat smaller benefit reductions. Option 3 is "non-forfeiture option" or "NFO" with reduced benefits and no future premium. Option 4 is the current policy with premiums increased to If Knew levels.

48. Phase Two is intended to address the Funding Gap remaining after Phase One through further premium increases or benefit cuts largely based on Self-sustaining Premium. Phase Two will not affect policyholders who selected Options 2 or 3 in Phase One. Policyholders who

choose Options 1 or 4 in Phase One face the possibility of additional substantial rate increases or benefit reductions in Phase Two. The substance of Phase Two is otherwise unknown, as the Plan does not specify all remedial measures that may be applied to policyholders in Phase Two and provides for an “alternative premium structure.” The alternative premium structure is a “placeholder,” and the Rehabilitator does not know what it would be.

49. Phase Three will run-off the long-term care business in force.

50. Policyholder elections under the Plan will be permanent. If SHIP is placed in liquidation after the Plan is implemented, the policies to which the guaranty association coverage will apply will be those as modified under the Plan. The modified policies will also be the basis for distribution from the liquidation estate. Accordingly, the total policy obligations will be reduced by the elections made by policyholders during implementation of the Plan.

51. State insurance regulators other than Pennsylvania were given the option under the Plan to either ‘opt in’ or ‘opt out’. By letter dated September 30, 2021, the Rehabilitator communicated this option to Commissioner Caride. Simon Cert., Exhibit B. A state which opts out is one that elects to make its own determinations as to modifications of premium rates. Ibid. If a state opts in, the state agrees that the Rehabilitator may make rate increases and benefit changes to that state’s policyholders (pursuant to the Plan). If a state opts out, then the Rehabilitator will file a premium rate application for all policies below the If Knew premium. If a state denies the requested premium or approves only a lower premium, the Rehabilitator will then unilaterally adjust the benefits to the level that is determined to be appropriate.

52. Commissioner Caride disagreed that the Rehabilitator had the unilateral right or ability to alter benefits or premium rates for New Jersey policyholders without her approval. By letter dated November 9, 2021, Commissioner Caride rejected the options presented to her by the

Rehabilitator in the September 20, 2021 letter. Simon Cert., Exhibit C. In her letter, Commissioner Caride stated:

[G]iven that rate regulation has long been reserved to the insurance commissioners of each state, the purpose of this letter is to notify you that (a) the Department will not respond to the Notice, and (b) the Department does not believe the Rehabilitator has authority to impose rate increases on our policyholders without the Department's approval.

Ibid.

53. Commissioner Caride further stated to the Rehabilitator that DOBI objects to the Plan, as expressed by State Insurance Regulators. Ibid.

54. In late January 2022, the Rehabilitator mailed "Coverage Election Packages" to New Jersey policyholders which contained the options referred to in the Plan.

55. On February 2, 2022, the Commonwealth Court approved SHIP's use of nationwide-premium rates including New Jersey. The "Coverage Election Packages" do not provide legally sufficient notice to New Jersey policyholders of SHIP's proposed rate increases, which have not been approved by Commissioner Caride. If a New Jersey policyholder does not make an option election by March 15, 2022, SHIP will on its own elect the basic policy coverage option for the non-responding policyholder, resulting in a significant benefit reduction under a New Jersey insurance policy. Ex. 11.

56. Neither the laws of Pennsylvania, nor proceedings under the laws, nor the full faith and credit clause of the United States Constitution supersede or nullify the Constitution and laws of New Jersey. Nor do they command that New Jersey, DOBI or Commissioner Caride implement any rehabilitation plan which violates or contravenes New Jersey law.

57. As a direct and proximate result of their conduct as aforesaid, Plaintiffs have suffered and will continue to suffer immediate and irreparable harm.

58. Defendants' conduct as aforesaid was intentional, willful, and malicious and designed to inflict immediate and irreparable harm upon plaintiffs.

COUNTS

FIRST COUNT (Declaratory Judgment)

59. Plaintiffs repeat and re-allege all allegations above as if fully set forth at length herein.

60. The Declaratory Judgments Act, N.J.S.A. 2A:16-51, et seq., authorizes courts to declare the rights, status and other legal relations so as to afford litigants relief from uncertainty and insecurity.

61. Defendants are currently implementing the Plan pursuant to an order that disregards New Jersey law. The order approving the Plan was entered by the Commonwealth Court, which has no jurisdiction over New Jersey, DOBI or Commissioner Caride.

62. The Commonwealth Court's authority over SHIP does not give the Rehabilitator appointed by that court with authority over DOBI or Commissioner Caride.

63. The Commonwealth Court's authority over SHIP does not give the Rehabilitator the authority over the laws or legislature of New Jersey.

64. The Rehabilitator, who stands in the shoes of SHIP, does not have authority to change the rates and benefits of SHIP's long-term care policies in New Jersey without compliance with New Jersey law.

65. Upon information and belief, Defendants seek to enforce the Plan on New Jersey policyholders. However, under the McCarren-Ferguson Act, the Act, and the Police Powers of

New Jersey, New Jersey has the exclusive authority and right to govern the business of insurance in New Jersey.

66. The New Jersey Legislature created DOBI for the purpose of, inter alia, regulating the business of insurance in New Jersey.

67. Under N.J.S.A. 17B:27E-10 and -11, the New Jersey Legislature empowered DOBI with the exclusive authority to regulate long-term care policies in New Jersey. Pursuant to those statutory sections, Commissioner Caride has a duty and is empowered to review and approve any changes to premiums and benefits for long-term care policies purchased by residents of New Jersey.

68. DOBI and Commissioner Caride's exclusive authority extends to and covers SHIP long-term policies purchased by residents of or issued in New Jersey.

69. The Rehabilitator's premium increases or benefit changes to SHIP's long-term care policies under the Plan, that were purchased by New Jersey policyholders, were required to be with the review and approval of DOBI and Commissioner Caride.

70. An actual controversy exists between Commissioner Caride and Defendants regarding Defendants' plans and actions to implement and enforce the Plan in New Jersey.

71. Commissioner Caride in her oversight and regulatory role has a significant interest in obtaining a judicial declaration that the actions taken by Defendants by seeking to implement the Plan in New Jersey, violate the Act.

72. Commissioner Caride is standing in the shoes of all New Jersey policyholders who purchases long-term care policies from SHIP.

73. Commissioner Caride has the duty and is empowered to protect the interests of New Jersey policyholders from Defendants' conduct.

74. Accordingly, Plaintiffs seek a declaratory judgment from this Court that any order entered in Pennsylvania by the Commonwealth Court, which grants Defendants' authority to impose unilateral premium increases and policy modifications on SHIP's New Jersey policyholders is void.

75. Plaintiffs also seek a declaratory judgment from this Court that any unilateral premium increases and policy modifications on SHIP's New Jersey policyholders pursuant to the Plan is void.

76. Plaintiffs further seek a declaratory judgment from this Court that any action by the Defendants to implement the Plan in New Jersey is void.

77. The declaratory judgments sought in this action will ensure that Plaintiffs can perform their statutory duties and faithfully execute the insurance laws of New Jersey without interference by Defendants.

WHEREFORE, Plaintiffs seek the entry of a declaratory judgment:

A. Declaring that any order or decree entered in the Rehabilitation Proceeding or that is entered by the Pennsylvania Supreme Court that approves the Plan or any other SHIP rehabilitation Plan and/or that purports to grant Defendants the authority to impose long-term care insurance premium increases or changes to policy benefits on SHIP's New Jersey policies without the approval of Commissioner Caride is void and unenforceable in New Jersey.

B. Declaring that any order or decree entered in the Rehabilitation Proceeding or by the Pennsylvania Supreme Court purporting to compel New Jersey SHIP policyholders to comply with the Plan, or any other SHIP rehabilitation plan, is not enforceable in New Jersey.

C. Declaring that Defendants must comply with the insurance rate making laws and regulations of New Jersey if they seek to implement the Plan, or any other SHIP rehabilitator plan,

in New Jersey.

D. Declaring that Defendants may not implement any provisions of the Plan, or any other SHIP rehabilitation plan, that would allow Defendants to modify SHIP long-term care insurance premium rates or benefits for New Jersey policyholders without first complying with the insurance laws and regulations of New Jersey.

E. Declaring that Defendants' communications with New Jersey policyholders to implement the Plan, which results in any changes to their policy premiums or benefits, are void and not enforceable.

SECOND COUNT
(Injunctive relief)

78. Plaintiffs repeat and re-allege all of the above allegations in the Complaint as if fully set forth at length herein.

79. As a direct result of Defendants' conduct, Plaintiffs and New Jersey policyholders have suffered irreparable harm because of: (a) Defendants' actions to knowingly and intentionally avoid complying with the express statutory authority of Commissioner Caride to review and approve in advance any changes to rates, rating schedules, and benefits associated with long-term care policies issued by SHIP; (b) Defendants' actions to communicate with existing New Jersey policyholders who purchased long-term care policies from SHIP and/or one of its predecessors, successors, or assigns; (c) unauthorized solicitation of existing New Jersey policyholders who have chosen an option to modify the terms and conditions of their long-term care policy purchased from SHIP and/or one of its predecessors, successors, or assigns; and (d) implementation of the Second Amended Plan without obtaining the advance review and approval of Commissioner Caride.

80. As a result of Defendants' conduct, New Jersey policyholders have been or might be in the future lured into selecting options/changes to the rates, rating schedule, and benefits

associated with their long-term care policies issued by SHIP and/or one of its predecessors, successors, or assigns, who become locked in to those changes, notwithstanding the fact that the rates, rating schedule, and benefits to be modified by the Second Amended Plan were not previously submitted to Commissioner Caride for review and approval.

WHEREFORE, Plaintiffs seek the following relief against Defendants and any of their agents, servants, employees, successors, assigns and those persons acting in concert and participation therewith:

1. Temporary Restraints and Preliminary Injunction:

A. On the First and Second Counts of Plaintiffs' Verified Complaint, enjoining Defendants from communicating, implementing, or enforcing the Plan in the State of New Jersey, or otherwise interfering with the rights of SHIP's long-term care insurance policyholders in New Jersey or otherwise violating the insurance laws of the state of New Jersey, including, but not limited to, by offering any rates, forms, riders, or policy documents to any New Jersey SHIP policyholders that have not been previously authorized and approved by the Commissioner Caride.

B. On the First and Second Counts of Plaintiffs' Verified Complaint, enjoining Defendants and any of their respective principles, agents, employees, successors, and assigns from implementing the Plan including, any action to: (a) soliciting New Jersey policyholder elections of rates/premiums or benefits associated with the Election Coverage Packages or the Plan, to modify rates/premiums, rating schedules, and/or benefits associated with any long-term care policies purchased by New Jersey residents from SHIP, or any of its predecessors, or successors, (b) to implement the change to exiting rates/premiums, rating schedule and benefits of long-term care policies, purchased by New Jersey policyholders from SHIP, or any of its predecessors or successors, who have previously selected an option or an election in response to a solicitation from

Defendants, and (c) to make an endorsement to any term or condition of any long-term care policies purchased by any New Jersey policyholder from SHIP or any of its predecessors or successors.

C. On the First through the Fifth Counts of Plaintiffs' Verified Complaint, enjoining Defendants and any of their respective principles, agents, employees, successors, and assigns from altering, encumbering, or diminishing the rights and benefits of any New Jersey SHIP policyholders, in whole or in part, until and unless all policy forms, contractual changes, rate increases, and policyholder options offered by Defendants are approved by the Commissioner in accordance with the laws of the State of New Jersey, and/or until subsequent order of this Court;

D. On the First through the Fifth Counts of Plaintiffs' Verified Complaint, entering an order to provide that violations of the injunction may subject Defendants not only to appropriate action of the Court but to assessments by DOBI of administrative fines against SHIP and suspension or revocation of any licenses or certificates of authority granted to SHIP.

2. Final Judgment

A. On the First and Second Counts of Plaintiffs' Verified Complaint, enjoining Defendants from communicating, implementing or enforcing the Plan in the State of New Jersey, or otherwise interfering with the rights of SHIP long-term care insurance policyholders in New Jersey or those policies issued pursuant to New Jersey law or otherwise violating the insurance laws of the state of New Jersey, including, but not limited to, by offering any rates, forms, riders, or policy documents to any New Jersey SHIP policyholders that have not been previously authorized and approved of by the Commissioner Caride

B. On the First and Second Counts of Plaintiffs' Verified Complaint, enjoining Defendants and any of their respective principles, agents, employees, successors, and assigns from

implementing the Plan including, any action to: (a) solicit New Jersey policyholder elections of rates/premiums or benefits associated with the Election Coverage Packages or the Plan, to modify rates/premiums, rating schedules, and/or benefits associated with any long-term care policies purchased by New Jersey residents from SHIP or any of its predecessors or successors; (b) to implement the change to exiting rates/premiums, rating schedule, and benefits of long-term care policies, purchased by New Jersey policyholders from SHIP or any of its predecessors or successors, who have previously selected an option or an election in response to a solicitation from Defendants; and (c) to make an endorsement to any term or condition of any long-term care policies purchased by any New Jersey policyholder from SHIP or any of its predecessors or successors.

C. On the First and Second Counts of Plaintiffs' Verified Complaint, enjoining Defendants and any of their respective principles, agents, employees, successors, and assigns from altering, encumbering, or diminishing the rights and benefits of any New Jersey SHIP policyholders, in whole or in part, until and unless all policy forms, contractual changes, rate increases, and policyholder options offered by Defendants are approved by the Commissioner in accordance with the laws of the State of New Jersey, and or until subsequent order of this Court;

D. On the First and Second Counts of Plaintiff's Verified Complaint, taking any action in furtherance of their expressed plans to, without first obtaining required regulatory approval from Commissioner Caride, raise premium rats and/or reduce benefits under certain binding contracts of long-term care insurance policies issued in New Jersey or held by residents of New Jersey, including but not limited to, notifying policyholders of proposed rate or benefit changes or requesting that they select rates or benefits different than those authorized by DOBI and called for

under the terms of the contract, charging additional premiums or withholding, delaying or encumbering benefits in whole or in part.

E. On the First and Second Counts of Plaintiff's Verified Complaint, taking any action in furtherance of their expressed plans to, without first obtaining required regulatory approval from Commissioner Caride, raise premium rates and/or reduce benefits under certain binding contracts of long-term care insurance issued in New Jersey or held by residents of New Jersey, including but not limited to, notifying policyholders of proposed rate or benefit changes or requesting that they select rates or benefits different than those authorized by DOBI and called for under the terms of the contract, charging additional premiums or withholding, delaying or encumbering benefits in whole or in part.

F. On the First and Second Counts of Plaintiffs' Verified Complaint, entering an order to provide that violations of the injunction may subject Defendants not only to appropriate action of the Court but to assessments by DOBI of administrative fines against SHIP and suspension or revocation of any licenses or certificates of authority granted to SHIP.

G. Awarding Plaintiffs' counsel fees and costs.

H. Awarding Plaintiffs' pre and post judgment interest.

I. Granting such further relief as the court deems equitable and just.

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, notice is hereby given that G. Glennon Troublefield, Esq., is designated as Plaintiffs' trial counsel.

Dated: March 9, 2022

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CERTIFICATIONS PURSUANT TO RULE 4:5-1 AND R. 1:38-7(B)

I certify that this matter in controversy or facts related thereto are not the subject of any other action pending in any court or of a pending arbitration. I further certify that, at this time, Plaintiffs know of no other parties that should be joined in this action.

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future.

Dated: March 9, 2022

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CERTIFICATION OF VERIFICATION

I, GALE SIMON, of full age, hereby certify the following:

1. I am the Assistant Commissioner, Consumer Protection Services, for plaintiff the New Jersey Department of Banking and Insurance (“DOBI”).
2. I have read the Verified Complaint, the factual contents, and the factual statements contained therein. The factual content and statements contained in the Verified Complaint are known by me to be true based upon my personal knowledge of the files maintained by DOBI regarding this matter.
3. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: March 9, 2022



GALE SIMON

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:22-CV-89-FL

MIKE CAUSEY in his official capacity as)
the Commissioner of Insurance of the State)
of North Carolina,)

Plaintiff,)

v.)

JESSICA K. ALTMAN Insurance)
Commissioner of the Commonwealth of)
Pennsylvania and her successors in office,)
in their capacity as Rehabilitator of Senior)
Health Insurance Company of)
Pennsylvania; PATRICK CANTILO,)
in his capacity as Special Deputy)
Rehabilitator of Senior Health Insurance)
Company of Pennsylvania; SENIOR)
HEALTH INSURANCE COMPANY OF)
PENNSYLVANIA IN)
REHABILITATION,)

Defendants.)

ORDER

This matter is before the court on plaintiff's motion to remand (DE 18) and defendants' motion to stay pending the Judicial Panel on Multidistrict Litigation's decision on centralization (DE 22). The motions have been briefed fully, and in this posture the issues raised are ripe for ruling. For the following reasons, defendants' motion is denied and plaintiff's motion is allowed.

STATEMENT OF THE CASE

Plaintiff commenced this action for declaratory and injunctive relief on March 4, 2022, in Wake County Superior Court, asserting that defendants improperly are implementing a

rehabilitation plan for the defendant Senior Health Insurance Company of Pennsylvania in Rehabilitation (“SHIP”) that modifies long term care insurance premium rates or benefits for North Carolina policyholders without plaintiff’s prior approval.

Defendants filed a notice of removal to this court, on March 9, 2020, on the basis of diversity jurisdiction, under 28 U.S.C. § 1332. Defendants assert that the amount in controversy exceeds \$75,000.00, and there is complete diversity of citizenship because the action is between citizens of different states.

The court held a telephonic conference pursuant to Federal Rule of Civil Procedure 16(a) on March 14, 2022, after which the court entered an order memorializing deadlines for briefing then anticipated motion to remand. The court stayed the deadline for defendants to serve a responsive pleading until 14 days from the date of the court’s decision on any motion to remand.

Plaintiff filed the instant motion on March 21, 2022, asserting that there is a lack of complete diversity because plaintiff is an alter ego of the state of North Carolina and thus not a citizen of North Carolina for diversity of citizenship purposes. Plaintiff relies upon the following court filings in proceedings in the Commonwealth Court of Pennsylvania: 1) application for an order to place SHIP in rehabilitation, filed January 23, 2020, in case No. 1 SHP 2020 (“In re: SHIP”); 2) order of rehabilitation, filed January 29, 2020, in the case In re: SHIP; 3) opinion and order filed August 24, 2021, approving second amended plan of rehabilitation for SHIP, in the case In re: SHIP (hereinafter the “order approving the rehabilitation plan”); 4) notice of appeal of the same to the Supreme Court of Pennsylvania, filed September 21, 2021; 5) partial docket sheet in the case In re: SHIP, dated September 13, 2021; and 6) a transcript of hearing in In re: SHIP.

Defendants responded in opposition to plaintiff’s motion, and shortly thereafter filed the instant motion to stay, with reliance upon: 1) a March 29, 2022, motion they filed in a Judicial

Panel on Multidistrict Litigation proceeding, to consolidate the instant case with three other pending federal cases (hereinafter the “consolidation motion”); and 2) the order approving the second amended plan of rehabilitation in In re: SHIP.

STATEMENT OF THE FACTS

For purposes of context for the instant motions, the allegations in the complaint may be summarized as follows. Plaintiff is the “duly elected Commissioner of Insurance of the State of North Carolina, and brings this action in his official capacity.” (Compl. (DE 1-1) ¶ 1). “SHIP obtained a license to conduct the business of insurance from the North Carolina Department of Insurance in . . . 2004.” (Id. ¶ 2). “SHIP has conducted insurance business within North Carolina and has collected insurance premiums in this State,” including \$1,610,570 from North Carolina policyholders in the first three quarters of 2019. (Id. ¶ 3). SHIP is “engaged solely in the long-term care line of insurance business,” and it “has not written any new insurance business since at least July, 2003.” (Id. ¶ 12).

Defendants apart from SHIP have been appointed as rehabilitator and special deputy rehabilitator of SHIP. (Id. ¶¶ 6, 9).¹ “SHIP is statutorily insolvent,” and in 2021, “SHIP had approximately \$1.4 billion in assets and \$2.6 billion in liabilities.” (Id. ¶¶ 17, 19). On August 24, 2021, the Commonwealth Court entered its order approving the rehabilitation plan for SHIP. (Id. ¶ 42). Under the rehabilitation plan, “premium increases and policy modifications for SHIP’s North Carolina policyholders will not be submitted to [plaintiff] for approval.” (Id. ¶ 40). Defendants are “contacting North Carolina Policyholders with materials and an election form to

¹ First named defendant in this action is “Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania and her successors in office, in their capacity as Rehabilitator of [SHIP].” (Compl. (DE 1-1) at 2; ¶ 6). The court takes judicial notice that Jessica K. Altman (“Altman”) is no longer the Commissioner of Insurance of Pennsylvania, and that her successor is Mike Humphreys. Where first named defendant includes Altman’s “successors in office,” id., for purposes of the instant motions, and for consistency of reference, the court does not constructively amend the caption of this order to reflect this succession.

fill out that will change their policy premium or benefits,” for example, in one instance giving an “elderly North Carolina policyholder until March 11, 2022, to elect coverage from the coverage choices given or suffer a default coverage plan selection by the Rehabilitator.” (Id. ¶ 45).

In addition, under the rehabilitation plan, plaintiff is “required to formally advise the Rehabilitator, by way of an Opt-out Election, whether North Carolina accepts and submits to the rate increase component of the Rehabilitation Plan or whether North Carolina elects to ‘opt-out’ of the rate increase component of the Rehabilitation Plan.” (Id. ¶ 57). Defendants mailed plaintiff an “Opt-out Notice” with a November 15, 2021, response deadline. (Id. ¶ 58). On that deadline, plaintiff responded objecting to the “Opt-out Notice.” (Id. ¶ 59). The next day, defendants replied that North Carolina “will be deemed to have ‘opted in’ to the Rehabilitation Plan,” thus allegedly demonstrating a “clear intent to raise premium rates for SHIP policyholders without seeking the . . . approval of [p]laintiff.” (Id. ¶ 61). According to that reply, “approximately 738 SHIP long-term care policyholders in North Carolina are subject to the rehabilitation plan.” (Id. ¶ 32).

Additional facts bearing on the instant motions will be addressed in the analysis herein.

COURT’S DISCUSSION

A. Motion to Stay

Defendants seek a stay of proceedings pending a ruling on their consolidation motion by the Judicial Panel on Multidistrict Litigation. For the reasons set forth below, the requested stay is not appropriate under the circumstances of this case.

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). “How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an

even balance.” Id. at 254-55. “The party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative.” Williford v. Armstrong World Indus. Inc., 715 F.2d 124, 127 (4th Cir. 1983).

In this case, a stay pending ruling on the consolidation motion by the Judicial Panel on Multidistrict Litigation is not warranted based upon the totality of the circumstances. A significant factor weighing against a stay is that the motion to remand is pending and ripe for ruling, with briefing already completed based on the schedule set by the court at conference on March 14, 2022. The court set that schedule, in part, based upon recognition at conference that plaintiff alleged an “election effective date” of April 28, 2022, and that the court is prepared to make a decision on the motion to remand before that date. (See, e.g., Compl. Ex. 3 ¶ 9 (DE 1-1 at 39)).²

By contrast, in the proceeding before the Judicial Panel on Multidistrict Litigation, defendants filed their consolidation motion on March 29, 2022, after they filed their response in opposition to remand in the instant case. (See MDL Case No. 3033 (Doc. 1) (Judicial Panel on Multidistrict Litigation)). Briefing on the consolidation motion is ongoing, with a response in opposition filed by plaintiff on April 19, 2022, and a reply, if any, due April 26, 2022. (Id. (Doc. 4)). The Judicial Panel on Multidistrict Litigation has set oral argument on the motion to take place May 26, 2022, in Pittsburgh, Pennsylvania. (Id. (Doc. 10)).

In addition, the court takes into account that defendants’ consolidation motion is opposed by the plaintiffs in each of the three other federal cases that defendants seek to consolidate with this one. (Id. (Doc. 12, 13, 15)). Moreover, in each of those three other federal cases, the plaintiffs have also moved to remand the cases to state court where they commenced, in North Dakota, Iowa,

² Unless otherwise specified, page numbers in citations to documents in the record are to the page number specified by the footer generated by the court’s case management/electronic case filing (CM/ECF) system, and not the page number, if any showing, on the face of the document.

and New Jersey. See Godfread v. Altman, No. 1:22-CV-44 (D.N.D.) (motion to remand filed April 11, 2022); Iowa Ins. Comm. v. Comm. of Ins. for the Commonwealth of Penn., No. 4:22-CV-83 (S.D. Iowa) (motion to remand filed March 25, 2022); Caride v. Altman, No. 3:22-CV-1329 (D.N.J.) (motion to remand filed April 8, 2022). Issues raised in those remand motions, while similar, are not dependent upon a ruling in this court, or vice versa, where jurisdiction depends largely on the status of plaintiffs as insurance commissioners under their respective state laws. This court is better suited than the proposed Multidistrict Litigation court, the Eastern District of Pennsylvania, to apply North Carolina law and the law of this circuit to the issues raised by the motion to remand in this case, just as the district courts in North Dakota, Iowa, and New Jersey are best suited to decide the motions to remand in their respective cases.

As such, interests of judicial economy are not served by awaiting a ruling on consolidation by the Judicial Panel on Multidistrict Litigation. Likewise, defendants have not demonstrated hardship and inequity to themselves if the action is not stayed. Whether following a ruling by the Judicial Panel on Multidistrict Litigation, or before, a federal district judge will have to decide the issues raised by the motion to remand filed in the instant case, considering plaintiff's status under North Carolina law. At the same time, there is potential prejudice to plaintiff in delaying a ruling on the motion to remand, if the outcome of the motion results in remand to state court where proceedings may move forward on the merits, given that the consequences of the elections described in the complaint potentially are unfolding now or may be unfolding in the near future.

Cases cited by defendants in support of a stay are not persuasive under the present circumstances. Many cases cited, for example, do not involve a stay of decision on a motion to remand. See, e.g., Conner v. AT&T, No. CV F 06-0632 AWI DLB, 2006 WL 1817094, at *3 (E.D. Cal. June 30, 2006) (granting stay, thus deferring decisions on "possible dismissal motions, and .

. . potential discovery issues”). In one case cited by defendants, in fact, the district court ruled on a pending motion to remand prior to staying decision on a motion to dismiss pending consolidation by the Judicial Panel on Multidistrict Litigation. See Bullard v. Am. Airlines, Inc., 929 F. Supp. 1284, 1286 (W.D. Mo. 1996). Another case cited by defendants involving a motion to remand, Selico v. Waterman S.S. Co., No. CIV. A. 99-386, 1999 WL 172958, at *1-2 (E.D. La. Mar. 26, 1999), is distinguishable because proceedings in a related multidistrict litigation case were already ongoing, in contrast to the instant circumstances where a consolidation decision has not been made.

In sum, under the circumstances presented, a stay of decision on the motion to remand is not warranted. The court thus turns to consideration of that motion.

B. Motion to Remand

In a case removed from state court, “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c). “The burden of establishing federal jurisdiction is placed upon the party seeking removal.” Mulcahey v. Columbia Organic Chem. Co., 29 F.3d 148, 151 (4th Cir. 1994). “If diversity jurisdiction is challenged, the burden of proof remains on the party invoking federal court jurisdiction, and the citizenship of each real party in interest must be established by a preponderance of the evidence.” Roche v. Lincoln Prop. Co., 373 F.3d 610, 616 (4th Cir. 2004), rev’d on other grounds, 546 U.S. 81 (2005).

Further, “[b]ecause removal jurisdiction raises significant federalism concerns, [the court] must strictly construe removal jurisdiction.” Mulcahey, 29 F.3d at 151. “If federal jurisdiction is doubtful, a remand is necessary.” Id.; see Common Cause v. Lewis, 956 F.3d 246, 252 (4th Cir. 2020) (recognizing the court’s “duty to construe removal jurisdiction strictly and resolve doubts

in favor of remand”) (quoting Palisades Collections LLC v. Shorts, 552 F.3d 327, 336 (4th Cir. 2008)).

Under the federal removal statute, “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a). As pertinent here, a federal district court has original jurisdiction over all civil actions between “citizens of different States” where the amount in controversy exceeds \$75,000.00. 28 U.S.C. § 1332(a)(1).

“It is well established that for purposes of diversity jurisdiction, a State is not a ‘citizen.’” S.C. Dep’t of Disabilities & Special Needs v. Hoover Universal, Inc., 535 F.3d 300, 303 (4th Cir. 2008). “Moreover, a public entity created under state law, which is ‘the arm or alter ego of the State,’ is likewise not a citizen for purposes of diversity jurisdiction.” Id. (quoting Moor v. County of Alameda, 411 U.S. 693, 717 (1973)). “But an entity created by the State which functions independently of the State with authority to sue and be sued, such as an independent authority or a political subdivision of the State, can be a ‘citizen’ for purposes of diversity jurisdiction.” Id.

“In determining if a public entity is an alter ego of the state, and therefore not a ‘citizen’ under § 1332, courts have generally looked to the standards announced in cases addressing whether governmental entities are entitled to Eleventh Amendment immunity as an arm of the state.” Maryland Stadium Auth. v. Ellerbe Becket Inc., 407 F.3d 255, 260 (4th Cir. 2005). For example, such immunity “extends to state agencies and other governmental entities that can be viewed as arms of the State.” Id. (quotations omitted).

“The line separating a State-created entity functioning independently of the State from a State-created entity functioning as an arm of the State or its alter ego is determined by the particular

legal and factual circumstances of the entity itself.” S.C. Dep’t of Disabilities, 535 F.3d at 303.

“To define that line, [the court of appeals has] articulated a nonexclusive list of four factors to be considered,” as follows:

- (1) whether any judgment against the entity as defendant will be paid by the State or whether any recovery by the entity as plaintiff will inure to the benefit of the State;
- (2) the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity’s directors or officers, who funds the entity, and whether the State retains a veto over the entity’s actions;
- (3) whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns; and
- (4) how the entity is treated under state law, such as whether the entity’s relationship with the State is sufficiently close to make the entity an arm of the State.

Id. (quotations omitted) (hereinafter the “S.C. Dep’t of Disabilities factors”).

Also pertinent to the instant analysis is the concept of the “official capacity” of a public officer. “[A] suit against a governmental officer ‘in his official capacity’ is the same as a suit against the entity of which the officer is an agent.” McMillian v. Monroe Cty., Ala., 520 U.S. 781, 785 n. 2 (1997) (quotations omitted). “[V]ictory in such an ‘official-capacity’ suit imposes liability on the entity that the officer represents.” Id. In the context of immunity, upon which the aforementioned factors are based, “only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses.” Hafer v. Melo, 502 U.S. 21, 25 (1991).

Application of the foregoing principles compels the conclusion that plaintiff is an arm of the State of North Carolina and not a citizen for purposes of diversity jurisdiction. As an initial matter, plaintiff sues “in his official capacity as Commissioner of Insurance of the State of North Carolina.” (Compl. (DE 1-1) at 2). The real party in interest is thus “the entity of which the officer

is an agent,” McMillian, 520 U.S. at 785, in this case the State of North Carolina itself. Under North Carolina law, the Commissioner of Insurance is an elected officer of the State. N.C. Const., Article III, § 7(1). He is one of only a dozen “civil executive officers of this State,” including the Governor, the Secretary of State, Treasurer, and Attorney General. N.C. Gen. Stat. § 147-3(c). He is the “chief officer” of the Department of Insurance, which is established by statute “as a separate and distinct department, which is charged with the execution of laws relating to insurance and other subjects placed under the Department.” N.C. Gen. Stat. §§ 58-2-1, 58-2-5. The Department of Insurance is an agency “in the executive branch of the government of this State,” included within the “Council of State,” which includes, for example, the Secretary of State, Treasurer, and Attorney General. N.C. Gen. Stat. § 150B-2(1b); N.C. Const., Article III, § 8; see Cooper v. Berger, 371 N.C. 799, 800 (2018).

The aforementioned circumstances alone establish that plaintiff is an arm of the State of North Carolina for purposes of diversity jurisdiction, because plaintiff is one of the “civil executive officers of this state,” and the Department of Insurance that he leads is one of the core “state agencies” of the State of North Carolina. N.C. Gen. Stat. § 147-3(c); Maryland Stadium Auth., 407 F.3d at 260. As such, this case raises an even less compelling issue of jurisdiction than was presented in S.C. Dep’t of Disabilities, where the court of appeals concluded that the South Carolina Department of Mental Health and Department of Disabilities and Special Needs were “integral arms of the state.” 535 F.3d at 308.

In addition, and in the alternative, the factors set forth in S.C. Dep’t of Disabilities compel the conclusion that plaintiff is an arm of the state. With respect to the first S.C. Dep’t of Disabilities factor, plaintiff does not seek “any recovery by the entity as plaintiff,” but rather seeks declaratory and injunctive relief. 535 F.3d at 303. The declaratory relief sought is in aid to plaintiff’s

execution of the insurance laws of North Carolina for the alleged benefit of North Carolina residents:

77. Plaintiff seeks a declaratory judgment from this Court that any order entered in the Pennsylvania Commonwealth Court which grants [defendants] the authority to impose premium increases and policy modifications on SHIP's North Carolina policyholders without submission to Plaintiff Commissioner for prior approval is not entitled to full faith and credit.

78. Plaintiff Commissioner seeks a declaratory judgment from this Court that Defendants must comply with the insurance laws of North Carolina.

79. Plaintiff Commissioner seeks a declaratory judgment from this Court that Defendants may not implement the Second Amended Rehabilitation Plan in North Carolina.

80. The declaratory judgment sought in this action will ensure that Plaintiff Commissioner can perform his statutory duty to faithfully execute the insurance laws of North Carolina.

(Compl. ¶¶ 77-80) (emphasis added). The injunctive relief sought is similarly concerned with enjoining defendants “from modifying SHIP long term care insurance premium rates or benefits for North Carolina policyholders without the prior approval of Plaintiff Commissioner.” (Id. ¶ 82) (emphasis added). Exercise of insurance laws for the benefit and protection of North Carolina residents is part of plaintiff's statutory mission as an officer of the state. See, e.g., N.C. Gen. Stat. § 58-2-40 (1) (providing, among other duties, that the Commissioner shall “prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public”). Therefore, this factor weighs in favor of treating plaintiff as an arm of the state.

The second factor serves to reiterate that plaintiff is an elected officer of the State of North Carolina, and he leads the Department of Insurance, as a member of the Council of State. Plaintiff is not autonomous from the government of the State of North Carolina, but rather a part of it. 535 F.3d at 303; N.C. Gen. Stat. § 147-3(c); N.C. Const. Art. III § 8. The third and fourth factors, likewise, confirm that plaintiff, by virtue of his statutory mandate, is “involved with state

concerns” rather than “local concerns,” and that plaintiff is treated under state law as an integral part of the executive government of the State of North Carolina. Id.

In sum, because plaintiff is an arm of the State of North Carolina, he is not a citizen for purposes of diversity jurisdiction and diversity jurisdiction is thus lacking.

Defendants’ arguments to the contrary are unavailing. Defendants urge the court to find this case equivalent to North Carolina v. Blackburn, 492 F.Supp.2d 525 (E.D.N.C. 2007), in which this court denied a motion to remand a suit brought by the North Carolina Commissioner of Insurance (“Commissioner”). Blackburn, however, is instructively distinguishable. There, the Commissioner “filed suit in his capacity as the liquidator of London Pacific Life & Annuity Company (“London Pacific”), a North Carolina corporation.” Id. at 526. Blackburn thus triggered a different application of the rule that the real party in interest is “the entity of which the officer is an agent,” McMillian, 520 U.S. at 785, there, London Pacific. Blackburn also is distinguishable because, there, the Commissioner sought “to recover commission advances and guarantees on commissions defendants allegedly owe[d] London Pacific,” 492 F.Supp.2d at 526, thus implicating the first S.C. Dep’t of Disabilities factor much differently than here. 535 F.3d at 303.

Furthermore, the court’s analysis of the remaining S.C. Dep’t of Disabilities factors turned on the Commissioner’s “capacity as the liquidator in [that] case,” which is not a capacity that plaintiff asserts in the instant case. 492 F.Supp.2d at 530-532. For example, the court noted that, in that capacity, the Commissioner “appears to be acting as a fiduciary under the general supervision of the Wake County Superior Court.” Id. at 531. The court further observed that the North Carolina General Statutes did not “address whether North Carolina views the Commissioner in his capacity as liquidator as the State’s alter ego as applied here (i.e., as a litigant-liquidator pursuing a common law debt collection action).” Id. at 532 (emphasis added). None of these facts

unique to Blackburn are present here. Accordingly Blackburn is inapposite on the question of plaintiff's status as a citizen for diversity jurisdiction purposes.³

Defendants argue that the first S.C. Dep't of Disabilities factor weighs in their favor because "no part of the Complaint seeks relief for the public generally or for the benefit of the State of North Carolina," and judgment "will inure to the benefit of Plaintiff's personal preference on the value of liquidation over rehab or to the benefit of a small group of policyholders." (Defs' Mem. (DE 8) at 13). The language of the complaint does not support this argument.

To the contrary, with respect to public and State benefits, the complaint asserts that defendants have sought to "prevent Plaintiff Commissioner from performing his statutory duty to enforce North Carolina law regarding the regulation of the business of insurance," and to "give Defendants the power to void the insurance laws of the State of North Carolina." (Compl. ¶ 63). It asserts that the "declaratory judgment sought in this action will ensure that Plaintiff Commissioner can perform his statutory duty to faithfully execute the insurance laws of North Carolina." (Id. ¶ 80).

Furthermore, with respect to plaintiff's official involvement and the benefits sought, the complaint alleges that defendants notified plaintiff of the opportunity to "opt-out" of the rehabilitation plan, and plaintiff objected in his capacity as Insurance Commissioner, including with the assertion that "[a]s a North Carolina licensed entity, the Department expects SHIP to file its rate increase proposal for review before implementing it." (Compl. Ex. 5 (DE 1-1) at 62). Plaintiff further objected on the basis that "[r]ate regulation has long been reserved to the insurance

³ At most, Blackburn is pertinent to the status of defendants as litigants appearing in "their capacity as rehabilitator of [SHIP]," and not appearing as arms of the State of Pennsylvania. (Compl. (DE 1-1) at 2). For this reason, the court rejects defendants' invitation to hold that jurisdiction over the instant suit lies solely in the Supreme Court of the United States as a civil suit between states. (See Defs' Br. (DE 21) at 26-27).

commissioners of each state.” (Id.). Defendants, in turn, tied plaintiff’s response to that notice expressly to consequences for the State of North Carolina:

Dear Commissioner Causey If you do not provide an opt-out notice that complies with the Plan’s requirements, in accordance with the Approved Plan SHIP will not file any application for rate increases with your department. Instead, your state will be deemed to have opted into the Plan and the holders of the approximately 738 SHIP long-term care policies issued in North Carolina . . . will be treated as opt-in policyholders. . .

(Compl. Ex. 2 (DE 1-1 at 34) (emphasis added). In this manner, defendants themselves have taken the position that plaintiff was acting on behalf of his department and the State of North Carolina, and not in a personal, individual, sense, in objecting to the opt-out notice.

Furthermore, contrary to defendants’ argument, the complaint does not assert that judgment “will inure to the benefit of a small group of policyholders.” (Defs’ Mem. (DE 8) at 13). Indeed, the complaint does not seek relief in the form of a particular result for policyholders, but rather seeks adherence to a process that follows North Carolina law and insurance regulation, which would allow the Commissioner to give “prior approval” of “premium increases and policy modifications.” (Compl. ¶¶ 77, 82). In this respect, the complaint seeks relief that is directed at plaintiff’s official functions in executing the insurance laws and regulations of the state. In any event, even if the complaint seeks in part benefits for North Carolina policyholders, it is consistent with plaintiff’s statutory obligations as Insurance Commissioner to protect such North Carolina citizens from allegedly injurious conduct. See N.C. Gen. Stat. § 58-2-40 (1) (tasking plaintiff with “prevent[ing] persons subject to the Commissioner’s regulatory authority from engaging in practices injurious to the public”).

Defendants further suggest that plaintiff is acting “autonomously” as a member of the public, and not as the state or one of its agents, because the statutes authorizing the declaratory and injunctive relief sought by the complaint apply to “any person.” (Defs’ Mem. at 13). This

argument misses the mark on two levels. First, the statutory authority upon which plaintiff relies is not limited to that authorizing declaratory and injunctive relief. Rather, plaintiff relies upon multiple additional statutes governing licensing and supervision of insurance companies by the Insurance Commissioner, which duties are uniquely reserved to plaintiff acting in his official capacity. (See, e.g., Compl. ¶¶ 26-31, 33, 49, 53, 61 (citing, N.C. Gen. Stat. §§ 58-2-40(1), 58-2-125, 58-2-150, 58-3-1, and 58-51-95)). Second, the statutes upon which plaintiff relies to state a claim for declaratory and injunctive relief are not determinative of plaintiff's status. Rather, plaintiff's status "as an arm of the State or its alter ego is determined by the particular legal and factual circumstances of the entity itself." S.C. Dep't of Disabilities, 535 F.3d at 303.

Defendants argue that the second S.C. Dep't of Disabilities factor should be considered "neutral" where there is "no apparent mechanism for the state to veto [plaintiff's] actions." (Defs' Mem. at 15). Defendants rely, for example, on a comparison to the University System of Maryland in Maryland Stadium Auth. v. Ellerbe Becket Inc., 407 F.3d 255, 264 (4th Cir. 2005). That case, however, demonstrates why dependence upon the S.C. Dep't of Disabilities factors, including veto power of the state, is unnecessary here, where plaintiff's alleged actions arise by virtue of the North Carolina Constitution and General Statutes as a component of statewide governance, a part of the Council of State, and one of only a dozen "civil executive officers of this State." N.C. Gen. Stat. § 147-3(c). The connection of the University System of Maryland to that state, by contrast, was more dependent upon a combination of factors. See 407 F.3d at 263-265. The court of appeals, in effect, suggested that the State of Maryland's retention of a "veto over most of the University's actions" showed its subservience to the State, id. at 264, which stands in contrast to plaintiff's more direct participation in state governance.

Defendants also argue that plaintiff's "claim to act as an alter ego is undermined by his failure to take any of the administrative steps contemplated by the laws he purports to be enforcing." (Defs' Resp. at 17). For example, defendants note that N.C. Gen. Stat. § 58-2-50 contemplates hearings to address violations, and § 58-51-95 provides plaintiff with authority to revoke approval for an insurance form only after notice and hearing. Those statutes, however, do not prohibit plaintiff from bringing suit to enforce state insurance law. In fact, § 58-2-60 expressly authorizes plaintiff to bring suit in superior court for injunctive relief to restrain any violation, or threatened violation, of state insurance laws codified in Chapter 58 of the North Carolina General Statutes.

Finally, defendants take issue with the merits of plaintiff's claims, suggesting for instance that the statutory authority upon which plaintiff relies is inapplicable to an insurer in rehabilitation, such as SHIP, and that court orders in other jurisdictions may place SHIP outside plaintiff's alleged supervision. However, "[a] federal court must satisfy itself [first] that it has jurisdictional power to rule on the merits of a case." Roach v. W. Virginia Reg'l Jail & Corr. Facility Auth., 74 F.3d 46, 49 (4th Cir. 1996) (quotations omitted). Here, the court lacks jurisdiction to delve into these arguments on the merits. In any event, the asserted flaws in plaintiff's claims are not so clear from the face of the statutes to transform plaintiff's status from an arm of the state to an independent actor.

In sum, plaintiff, as an alter ego and arm of the State of North Carolina, is not a citizen for purposes of diversity jurisdiction. Therefore, this court lacks jurisdiction over plaintiff's claims and the action must be remanded to the Superior Court of Wake County.

CONCLUSION

Based on the foregoing, defendants' motion to stay (DE 22) is DENIED, and plaintiff's motion to remand (DE 18) is GRANTED. This case is REMANDED to the General Court of Justice, Superior Court Division, Wake County, North Carolina, for further proceedings. The clerk is DIRECTED to transmit a certified copy of this order to the clerk of the General Court of Justice, Superior Court Division, Wake County, North Carolina, and to file in this case a copy of the clerk's transmittal letter with certified copy of the instant order.

SO ORDERED, this the 25th day of April, 2022.



LOUISE W. FLANAGAN
United States District Judge

EXHIBIT 3

Applicant Name: Senior Health Insurance Company of Pennsylvania
f/k/a Conesco Senior Health Insurance Company

NAIC No. 76325
FEIN: 23-0704970

Uniform Consent to Service of Process

☐ Original Designation

☒ Amended Designation
(must be submitted directly to states)

Insurer Name: Senior Health Insurance Company of Pennsylvania

Previous Name (if applicable): Conesco Senior Health Insurance Company

Home Office Address: 3220 Tillman Drive

City, State, Zip: Bensalem, Pennsylvania 19020 NAIC Co Code: 76325

The entity named above, organized under the laws of Pennsylvania, for purposes of complying with the laws of the State(s) designate hereunder relating to the holding of a certificate of authority or the conduct of an insurance business within said State(s), pursuant to a resolution adopted by its board of directors or other governing body, hereby irrevocably appoints the officers of the State(s) and their successors identified in Exhibit A, or where applicable appoints the required agent so designated in Exhibit A hereunder as its attorney in such State(s) upon whom may be served any notice, process or pleading as required by law as reflected on Exhibit A in any action or proceeding against it in the State(s) so designated; and does hereby consent that any lawful action or proceeding against it may be commenced in any court of competent jurisdiction and proper venue within the State(s) so designated; and agrees that any lawful process against it which is served under this appointment shall be of the same legal force and validity as if served on the entity directly. This appointment shall be binding upon any successor to the above named entity that acquires the entity's assets or assumes its liabilities by merger, consolidation or otherwise; and shall be binding as long as there is a contract in force or liability of the entity outstanding in the State. The entity hereby waives all claims of error by reason of such service. The entity named above agrees to submit an amended designation form upon a change in any of the information provided on this power of attorney.

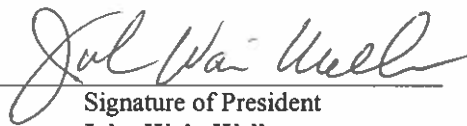
Applicant Officers' Certification and Attestation

One of the two Officers (listed below) of the Applicant must read the following very carefully and sign:

1. I acknowledge that I am authorized to execute and am executing this document on behalf of the Applicant.
2. I hereby certify under penalty of perjury under the laws of the applicable jurisdictions that all of the forgoing is true and correct, executed at Chicago, Illinois.

11-19-08

Date



Signature of President

John Wain Wells

Full Legal Name of President

Date

Signature of Secretary

Full Legal Name of Secretary

Applicant Name: Senior Health Insurance Company of Pennsylvania
f/k/a Conesco Senior Health Insurance Company

NAIC No. 76325
FEIN: 23-0704970

Uniform Consent to Service of Process

Exhibit A

Place an "X" before the names of all the States for which the person executing this form is appointing the designated agent in that State for receipt of service of process:

☐ AL	Commissioner of Insurance # and Resident Agent*	☐ MT	Commissioner of Insurance #
☐ AK	Director of Insurance #	☐ NE	Officer of Company* or Resident Agent* (circle one)
☐ AZ	Director of Insurance # ^	☐ NH	Commissioner of Insurance #
☐ AR	Resident Agent *	☐ NV	Commissioner of Insurance of Insurance Commission # ^
☐ AS	Commissioner of Insurance #	☒ NJ	Commissioner of Banking and Insurance #^
☐ CO	Commissioner of Insurance # or Resident Agent* (circle one) ^	☐ NM	Superintendent of Insurance #
☐ CT	Commissioner of Insurance #	☐ NY	Superintendent of Insurance #
☐ DE	Commissioner of Insurance #	☐ NC	Commissioner of Insurance
☐ DC	Commissioner of Insurance and Securities Regulation # or Local Agent* (circle one)	☐ ND	Commissioner of Insurance # ^
☐ FL	Chief Financial Officer # ^	☐ OH	Resident Agent*
☐ GA	Commissioner of Insurance and Safety Fire # and Resident Agent*	☐ OR	Resident Agent*
☐ GU	Commissioner of Insurance #	☐ OK	Commissioner of Insurance #
☐ HI	Insurance Commissioner # and Resident Agent*	☐ PR	Commissioner of Insurance #
☐ ID	Director of Insurance # ^	☐ RI	Commissioner of Insurance # ^
☐ IL	Director of Insurance #	☐ SC	Director of Insurance #
☐ IN	Resident Agent* ^	☐ SD	Director of Insurance # ^
☐ IA	Commissioner of Insurance #	☐ TN	Commissioner of Insurance #
☐ KS	Commissioner of Insurance #	☐ TX	Resident Agent*
☐ KY	Secretary of State #	☐ UT	Resident Agent* ^
☐ LA	Secretary of State #	☐ VT	Secretary of State #
☐ MD	Insurance Commissioner #	☐ VI	Lieutenant Governor/Commissioner#
☐ ME	Resident Agent* ^	☐ WA	Insurance Commissioner #
☐ MI	Resident Agent *	☐ WV	Secretary of State # @
☐ MN	Commissioner of Commerce #	☐ WY	Commissioner of Insurance #
☐ MS	Commissioner of Insurance and Resident Agent* BOTH are required.		

For the forwarding of Service of Process received by a State Officer complete Exhibit B listing by state the entities (one per state) with **full name and address where service of process is to be forwarded**. Use additional pages as necessary. Exhibit not required for New Jersey, and North Carolina. Florida accepts only an individual as the entity. New Jersey allows but does not require a foreign insurer to designate a specific forwarding address on Exhibit B. SC will not forward to an individual by name; however, it will forward to a position, e.g., Attention: President (or Compliance Officer, etc.).

* Attach a completed Exhibit B listing the Resident Agent for the insurer (one per state). Include state name, Resident Agent's **full name and street address**. Use additional pages as necessary. (DC* requires an agent within a ten mile radius of the District).

^ Initial pleadings only. Kansas requires two signatures.

@ Form accepted only as part of a Uniform Certificate of Authority application.

MA will send the required form to the applicant when the approval process reaches that point.

Exhibit A

Applicant Name: Senior Health Insurance Company of Pennsylvania
f/k/a Consecro Senior Health Insurance Company

NAIC No. 76325
FEIN: 23-0704970

Exhibit B

Complete for each state indicated in Exhibit A:

State New Jersey Name of Entity Senior Health Insurance Company of Pennsylvania

Mailing Address Corporation Service Company

Street Address 830 Bear Tavern Road West Trenton, New Jersey 08628

State _____ Name of Entity _____

Mailing Address _____

Street Address _____

State _____ Name of Entity _____

Mailing Address _____

Street Address _____

State _____ Name of Entity _____

Mailing Address _____

Street Address _____

State _____ Name of Entity _____

Mailing Address _____

Street Address _____

State _____ Name of Entity _____

Mailing Address _____

Street Address _____

State _____ Name of Entity _____

Mailing Address _____

Street Address _____

Applicant Name: Senior Health Insurance Company of Pennsylvania
f/k/a Conesco Senior Health Insurance Company

NAIC No. 76325
FEIN: 23-0704970

Exhibit B
Resolution Authorizing Appointment of Attorney

BE IT RESOLVED by the Board of Directors or other governing body of

Senior Health Insurance Company of Pennsylvania,
(company name)

this 27th day of February, 2006 that the President or Secretary of said entity be and are hereby authorized by the Board of Directors and directed to sign and execute the Uniform Consent to Service of Process to give irrevocable consent that actions may be commenced against said entity in the proper court of any jurisdiction in the state(s) of

New Jersey

in which the action shall arise, or in which plaintiff may reside, by service of process in the state(s) indicated above and irrevocably appoints the officer(s) of the state(s) and their successors in such offices or appoints the agent(s) so designated in the Uniform Consent to Service of Process and stipulate and agree that such service of process shall be taken and held in all courts to be as valid and binding as if due service had been made upon said entity according to the laws of said state.

CERTIFICATION

I, John W. Wells, President of
Senior Health Insurance Company of Pennsylvania,
(company name)

state that this is a true and accurate copy of the resolution adopted effective the 27th day of February, 2006 by the Board of Directors or governing board at a meeting held on the 27th day of February, 2006 or by written consent dated ____ day of _____, 20 ____.



John W. Wells, President

