G. Glennon Troublefield
Brian H. Fenlon
Jordan M. Steele
Sean M. Kiley
CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO, P.C.
5 Becker Farm Road
Roseland, New Jersey 07068-1739

Attorneys for Plaintiffs

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]

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO STAY PENDING THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION DECISION

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PRELIMINARY STATEMENT

Defendants invite this Court to grant them extraordinary relief in the form of a complete stay of this proceeding. Defendants' invitation should be declined because of their failure to demonstrate that they will suffer great hardship in the absence of a stay.

On March 9, 2022, Commissioner Marlene Caride and the New Jersey Department of Banking and Insurance ("DOBI"), commenced the above-captioned action in the Superior Court of New Jersey, Mercer County (the "Removed Action"). The substance of the Removed Action is directed towards Defendants' refusal to follow the New Jersey Long-Term Care Act in connection with adjusting the contractual rates and/or benefits sold by Senior Health Insurance Company of Pennsylvania ("SHIP") to New Jersey policyholders. Although SHIP has complied with the Long-Term Care Act for over a decade, Defendants are now refusing to comply which places SHIP policyholders in New Jersey—senior citizens—at risk of crippling financial harm.[1]

Rather than comply with the New Jersey Long-Term Care Act, Defendants brought the Removed Action to this court. On the heels of filing their notice of removal, Defendants also filed a request to transfer the Removed Action to the Judicial Panel on Multidistrict Litigation ("JPML"), in an attempt to have this matter ultimately transferred to the United States District Court for the Eastern District of Pennsylvania. That is to say, in their view, a judge sitting in Pennsylvania is better suited to decide local New Jersey issues such as, whether or not Commissioner Caride and DOBI have the right to enforce the long-term care laws of New Jersey State against Defendants.

[1] As used herein, the term "New Jersey policyholders" refer to, collectively, SHIP policyholders who either reside in New Jersey or had their policy issued in New Jersey.

Having turned a purely local state court dispute into a "federal case," Defendants' concern about judicial economy and the need to preserve resources is unsupported. First, before this Court renders any decision on Defendants' motion to stay, or even their motion to dismiss, this Court must decide whether or not it has subject matter jurisdiction over the Removed Action. If subject matter jurisdiction do\ not exist, this Court lacks the authority to decide Defendants' pending motion(s). According, Commissioner Caride's motion to remand or, in the alternative, to abstain should be decided before this motion to stay or Defendants' motion to dismiss. As set for the motion to remand, this Court lacks subject matter jurisdiction over this matter because diversity of citizenship is absent, the amount in controversy requirement is not met, and the causes of action asserted by Commissioner Caride does not arise under federal law. In view of these defects, the threshold question of jurisdiction must be determined first.

Indeed, on April 25, 2022, the United States District Court for the Eastern District of North Carolina, considered the issue of jurisdiction before this Court and found that it lacked jurisdiction and remanded the action to North Carolina state court. See Causey v. Altman, No. 5:22-CV-89-FL, ECF No. 28 (E.D.N.C. Apr. 25, 2022). Judge Louise W. Flanagan found that the plaintiff was an arm of the State and not a citizen for purposes of diversity jurisdiction, and so therefore complete jurisdiction was lacking. Persuasively, Judge Flanagan opined that:

> 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***.

(emphasis added). Id. at 5. This Court should not accept Defendants' invitation to squander judicial and New Jersey State resources on a matter that is squarely in the realm of state law.

As a separate ground, Defendants' request for a stay is intellectually disingenuous. On the one hand, Defendants want to bring litigation to a screeching halt and require everyone to wait until the JPML decides their transfer motion at some point in the future. Defendants have no reasonable idea when the JPML will issue a final non-appealable decision. On the other hand, Defendants have flatly refused to stay their steps to solicit New Jersey policyholders and implement the rehabilitation Plan in New Jersey. They continue to violate New Jersey's Long-Term Care Act by trying to make unilateral changes to the contractual terms of SHIP policyholders in New Jersey. Thus, Commissioner Caride and DOBI are the only parties who will suffer prejudice and hardship if a stay is entered—parties which only seek to represent the senior citizen New Jersey policyholders who are about to see a dramatic rate increase. That is patently unfair and an affront to justice.

Defendants are the parties who created this jurisdictional debacle. They have taken a purely local dispute regarding compliance with New Jersey's Long-Term Care Act, and made it into a federal case. Such behavior should not be rewarded by obtaining a stay, whilst they continue to violate New Jersey insurance laws "pending a final determination by the JPML" on whether or not to grant their motion to coordinate or consolidate pretrial proceedings in a single court, under 28 U.S.C. 1407.

FACTUAL AND PROCEDURAL BACKGROUND

This Court is likely familiar with the core facts and procedural posture. Without wading into too much of the details, Commissioner Caride will summarize the facts and procedural history below:[2]

A. SHIP

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 was licensed in forty six (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. See Declaration of G. Glennon Troublefield, Esq., dated May 2, 2022, Ex. 1. at ¶20.

As of January 12, 2021, SHIP has approximately five hundred ninety two (592) active long-term care policies in New Jersey. Of those policies, seventeen (17) were terminated, five hundred twenty three (523) 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.

For more than a decade, 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) gap known as the "Funding Gap". Id. at ¶21.

[2] For purposes of this brief, reference to "Commissioner Caride" shall refer, collectively, to both Commissioner Caride and DOBI.

B. 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 Commissioner Jessica K. Altman ("Commissioner Altman" or 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.

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 Superintendent of Insurance of the State of Maine, Commissioner of Insurance of the Commonwealth of Massachusetts, and the Insurance Commissioner of Wisconsin (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.

C. SHIP's Required Filing and Approval Under New Jersey Law.

Defendants' desire to implement the Plan to affect SHIP policyholders in New Jersey, requires compliance with New Jersey's Long-Term Care Insurance Act, N.J.S.A. 17B:27E-1, et seq. (the "Long-Term Care Act"). 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.

Notwithstanding the public policies in New Jersey articulated under the Long-Term Care Act, the Rehabilitator chose not to comply with it. By letter dated September 20, 2021, the Rehabilitator offered the option to "opt in' or to "opt out" 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.

Defendants have continued to solicit SHIP senior citizens in New Jersey. Defendants have not provided any grounds to assume that they will abate their actions without a court order.

D. 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 (i.e., "the Removed Action").

On March 11, 2022, Defendants filed the Notice of Removal to remove the Superior Court Action to this Court. Defendants asserted that removal was proper under 28 U.S.C. § 1332, based upon diversity of jurisdiction.

On March 29, 2022, Defendants filed their motion to transfer with the United States Judicial Panel on Multidistrict Litigation with respect to the instant action, as well as in other federal actions currently pending in Iowa, North Dakota, and North Carolina to the United States District Court for the Eastern District of Pennsylvania (collectively, the "Subject Actions"). According to Defendants' brief in support of their motion to transfer, they are requesting the JPML to take jurisdiction over the Subject Actions, under 28 U.S.C. § 1407(a). They argue that transfer would further the interests of the convenience of the parties, the witnesses, and will promote judicial economy. They also posit that, the four (4) district court actions "share the same complex and disputed underlying facts, giving rise to the need to conduct substantial discovery (including written document production and depositions). Thus, through their eyes, Defendants assert that a transferee court would best serve the interests of convenience of the parties and witnesses, and of judicial economy. Their proposal for a transferee court is the United States District Court for the Eastern District of Pennsylvania – which is essentially their "home court".

Notwithstanding the obvious imbalance and lack of any appearance of being impartial in terms of the proposed transferee court, Defendants' motion to transfer glosses over the fact that:

(1) the insurance laws in each of New Jersey, North Carolina, North Dakota, and Iowa are all unique and based upon their respective local state laws; (2) the authority of each of the states' respective Commissioners of Insurance rests on different statutory and/or State constitutional authority; (3) the creation of the respective departments of insurance were created based upon different statutory and/or State constitutional authority; (4) the facts underlying the obligations of Defendants to comply with long-term care acts are different; and (5) the witnesses to be called to determine the violations and/or the status of the administrative proceedings will not be identical, but will be different. Claims of "similarity" and a "one size fits all" approach of each case pending in the Subject Actions suggested by Defendants is unsupported and disingenuous.

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.

On April 8, 2022, Commissioner Caride filed a notice of motion to remand or, in the alternative, to abstain and remand.

On April 25, 2022, the United States District Court for the Eastern District of North Carolina declined to stay the North Carolina action and remanded the action to state court. Ex. 2.

ARGUMENT

I. THE COURT'S AUTHORITY TO GRANT A STAY OF PROCEEDINGS REQUIRES A BALANCE OF HARDSHIPS, INCLUDING PREJUDICE TO THE NON-MOVANT

District courts have the power to grant a stay of a proceeding. See Clinton v. Jones, 520 U.S. 681, 706-707 (1997) (citing Landis v. North American Co., 299 U.S. 248, 254 (1936)). Incidental to a trial court's power to schedule disposition of the cases on its docket is the power to stay those proceedings before it "so as to promote fair and efficient adjudication." U.S. v. Breyer, 41 F.3d 884, 893 (3d Cir.1994); Gold v. Johns–Manville Sales Corp., 723 F.2d 1068, 1077 (3d

Cir.1983) (citing Landis, 299 U.S. at 254–55). The party seeking the stay must demonstrate "a clear case of hardship or inequity, if there is even a fair possibility that the stay would work damage on another party." Gold, 723 F.2d at 1075–76 (citing Landis). A stay of civil litigation is discretionary. See e.g., Bechtel Corp. v. Local 215 Laborers' Int'l Union of N.A., 544 F.2d 1207, 1215 (3d Cir. 1976).

Whether or not a stay should be entered turns on a balance of competing interests. See Ford Motor Credit v. Chiorazzo, 529 F.Sup.2d 535 (D.N.J. 2008); Local 478 Trucking & Allied Indus. Pension Fund v. Jayne, 778 F.Supp. 1289, 1324 (D.N.J.1991). Courts consider the following non-exhaustive factors in deciding whether or not to grant a stay: the hardship to the moving party should the case proceed; the potential prejudice to the non-moving party; whether the actions involve the same or similar parties; the similarity of issues; and judicial economy. Ford 529 F.Supp.2d at 542; Local 478 Trucking, 778 F.Supp. at 1324.

For the reasons expressed below, based on the unique facts in this case and the prejudice to Plaintiffs, Defendants have not carried their burden to demonstrate clear hardship in the absence of a stay.

II. THIS COURT SHOULD DECIDE PLAINTIFFS' MOTION TO REMAND BEFORE CONSIDERING DEFENDANTS' MOTION TO STAY

Before reaching Defendants' motion to stay this Court should decide whether it has the federal jurisdictional grounds to do so. In this matter, in response to Defendants' notices of removal, Plaintiffs filed a motion to remand. Plaintiffs' motion to remand challenges the basis of federal jurisdiction. Specifically, Plaintiffs have established that diversity jurisdiction is not present and Defendants' belated claim that federal question jurisdiction exists is lacking legal and factual support. Therefore, before this Court entertains any consideration of Defendants' motion to stay, this Court should decide in the first instance Plaintiffs' motion to remand.

Case law in this area of the law professes that when presented with both a motion to remand and a motion to stay, the method for addressing the remand motion is considered. In Meyers v. Bayer AG, 143 F.Supp.2d 1044 (E.D.Wis.2001), the district court established a method, used in a number of jurisdictions, to address competing stay and remand motions in a proceeding which is also the subject of a motion to transfer to the JPML. See, e.g., Nekritz v. Canary Capital Partners, LLC, Civ. A. No. 03–5081, 2004 WL 1462035 (D.N.J.2004) (utilizing the Meyers test.). The Meyers court instructed courts to give threshold consideration to a remand motion by making a "preliminary assessment" of the jurisdictional issue. Meyers, 143 F.Supp.2d at 1048. In the preliminary assessment of jurisdiction, courts should distinguish between easily determinable procedural issues and complex substantive issues. If its preliminary assessment suggests that removal to federal court was clearly improper, the court must promptly remand the case to state court. Meyers, 143 F.Supp.2d at 1049.[3]

The analysis and thinking expressed by the district court in Meyers, has been followed in the District of New Jersey. For example, in Nekritz v. Canary Capital Partners, LLC, the Honorable Dickinson R. Debevoise, U.S.D.J., had occasion to address a motion to stay and a motion to remand, in view of a pending motion to transfer. In identifying the issues that a district court should consider when presented with the pending motions, the Court noted:

> If the relevant jurisdictional considerations clearly favored Plaintiff, or if there were no cases likely to present similar jurisdictional issues before a transferee court, it might be appropriate to address and grant the remand motion immediately. Cf. Meyers v. Bayer AG, 143

[3] In accordance with JPML Rule of Procedure 2.1(d), the filing of a motion to transfer with the MDL Panel does not deprive the original court of jurisdiction while the motion is pending. That is, notwithstanding Defendants' filing of their motion to transfer, this Court retains the authority to decide pending motions before it. See also Ex. 2, Causey v. Altman, No. 5:22-CV-89-FL, ECF No. 28 (E.D.N.C. Apr. 25, 2022) (remanding prior to a decision on the motion to transfer and denying SHIP's motion to stay).

> F.Supp.2d 1044, 1048–49 (E.D.Wis.2001) (concluding that a court faced with simultaneous remand and stay motions should assess the difficulty of issues relevant to remand and determine whether similar issues have been raised in other cases that have been or may be transferred). If remand were patently appropriate, the Court could grant Plaintiff's motion without expending significant time or effort on the analysis, allowing the case to proceed in state court, and there would be little danger that the decision to remand would be inconsistent with other courts' decisions. Alternatively, if no other cases were likely to present similar remand issues to a transferee court, judicial economy would not be served by postponing a decision on remand because a transferee court would not be in a position to resolve several motions by deciding one set of legal issues.

Nekritz v. Canary Capital Partners, LLC, No. CIV. 03-5081 (DRD), 2004 WL 1462035, at *2 (D.N.J. Jan. 12, 2004).

Factually, the court in Nekritz, addressed an action removed from the Superior Court of New Jersey, which was one of numerous pending court cases across the country in which plaintiffs had alleged that defendants engaged in improper trading of mutual funds. Defendants moved before the Judicial Panel on Multidistrict litigation to transfer the cases to that court and simultaneously moved for a stay. Defendants were abler to tip the scales of justice in their favor only because, in stark contrast to this case, the court found that several class actions were pending, which raised **identical issues** in each action. The potential proliferation of additional cases in the future based upon defendants' market schemes played a significant role in the Court's decision.

Jurisdictions outside of New Jersey have also recognized that jurisdictional issues on a motion to remand should be decided before other motions pending before the court. See Grace Cmty., Inc. v. KPMG Peat Marwick (In re Grace Community, Inc.), 262 B.R. 625 (Bankr. E.D. Pa. 2001) (considering remand motion before transfer motion); Wheeling–Pittsburgh Corp. v. Am. Ins. Co., 267 B.R. 535 (N.D.W. Va. 2001) (same); Aetna U.S. Healthcare, Inc. v. Hoechst Aktiengesellschaft, 54 F. Supp. 2d 1042, 1047 (D. Kan. 1999) (jurisdictional issue determined on

motion to remand before court considered staying the action). Most critically, the United States District Court in the Eastern District of North Carolina analyzing the same set of facts considered the remand motion prior to other motions pending before it. Ex. 2.

Here, this Court, as opposed to either the JPML or the transferee court, is in the best position to decide Plaintiffs' pending motion to remand. Plaintiffs' motion to remand strikes at the heart of this Court's federal jurisdiction over Defendants. If remand, or abstention, is appropriate, the resources of this Court, the JPML, and the transferee court would be preserved because they would not have to incur the time, effort, and analysis to decide questions of law that begin and end with New Jersey insurance laws. Although Defendants attempt to conjure a greater dispute by suggesting that Commissioner Caride is challenging the authority of the Rehabilitator and the insurance laws of Pennsylvania, that assertion is simply not true. Unlike the facts before Judge Debevoise, there is "zero" chance of any proliferation of cases that will raise the narrow question of whether or not Defendants have violated the Long-Term Care Act, which is centered on New Jersey insurance laws. Commissioner Caride is **not challenging** the authority of Defendants by seeking to interfere in the proceedings in Pennsylvania in the Removed Action.[4]

[4] It is worth noting that Defendants' apparently have forgotten to disclose to this Court that various insurance commissioners and their departments, including Commissioner Caride, are already participating in proceedings that concern the implantation of the Plan. Specifically, Commissioner Caride joined other State insurance commissioners in filing an amicus brief with the Supreme Court of Pennsylvania to directly challenge the Commonwealth's Court's Order implementing the Plan. Pennsylvania is the forum in the first instance where questions regarding the authority of Commissioner Humphreys to establish "national rates" and change SHIP long-term care policy benefits under Pennsylvania insurance laws. Defendants have ignored that direct challenge and proceedings within the courts system of Pennsylvania and have opted to try to suggest that Commissioner Caride is seeking a "collateral attack" on the implementation of the Plan which is not accurate. Commissioner Caride, in the Removed Action, is only seeking to enforce the requirements of the Long-Term Care Act which, among other things, requires rate change requests to be filed and reviewed by the Commissioner.

Accordingly, the most pressing question in this matter is whether this Court has jurisdiction over Commissioner Caride's claims under the Long-Term Care Act, and as such, the motion to remand should be decided before any other motions pending before the Court. Based on the facts before this Court, the federal court's jurisdiction is not present. First, diversity jurisdiction does not exist because Commissioner Caride is an appointed representative of the State of New Jersey. Her actions are clearly on behalf of the State of New Jersey. Commissioner Caride is the alter ego of the State of New Jersey, therefore New Jersey is the real party in interest and, under applicable case law, the State, or in the instant matter, New Jersey, cannot be a "citizen" for diversity purposes. Second, Defendants have failed to carry their burden to demonstrate that the amount in controversy exceeds the $75,000 threshold. Third, federal question jurisdiction is absent because Commissioner Caride's claims arise under New Jersey state law. The passing references in Commissioner Caride's Complaint to the McCarran-Ferguson Action are insufficient to create a federal question.

As a practical matter, this Court must not lose sight of the fact that Commissioner Caride is not challenging the authority of Commissioner Humphreys. Commissioner Humphreys, as well as his predecessor, Commissioner Altman, are not acting on behalf of the Commonwealth of Pennsylvania. Under the Commonwealth's insurance laws, Commissioner Humphrey is the court appointed agent/representative of SHIP. That is, Commission Humphreys has stepped into the shoes of SHIP and is authorized to operate SHIP on its behalf. In that capacity, the implementation of the Plan is by SHIP. SHIP is the real party in interest; not, the Commonwealth of Pennsylvania. That is precisely why Commissioner Humphrey's appointment as Rehabilitator simply means that he has authority to manage SHIP and, thus, is obligated to comply with the insurance laws of each state in the identical manner that SHIP is obligated to comply with local state insurance laws.

Therefore, when the background noise of Defendants' arguments is filtered, what is left is a simple action to address SHIP's refusal to abandon more than a decade of consenting to New Jersey State jurisdiction by submitting requests for a rate and/or benefit modifications pursuant to New Jersey insurance laws.

III. DEFENDANTS HAVE NOT CARRIED THEIR BURDEN TO DEMONSTRATE CLEAR HARDSHIP IN THE ABSENCE OF A STAY

Courts have entered a stay of civil actions when the moving party demonstrates that issues of transfers, consolidation, and coordination are present before the JPML, and there are **common** issues in all actions present. See, e.g., Packer v. Power Balance LLC, No. CIV.A. 11-802, 2011 WL 1099001, (D.N.J. Mar. 22, 2011) [Emphasis added]; See also Rivers v. Walt Disney Co., 980 F. Supp. 1358, 1362 (C.D. Cal. 1997). In support of transferring this matter, Defendants argue that they are faced with the potential heavy burden of defending multiple cases, the pendency of the JMDL's panel's decision, and the fact that this case is in its inception. Defendants also argue that denying a stay risks depriving them of the opportunity to obtain the benefits of the JMDL panel consideration. As Defendants see it, the motion to stay should be granted to avoid wasting judicial and party resources, to avoid inequity and hardship, and to serve the interests of judicial economy.

Here, denying the stay is the most appropriate remedy in this matter, especially given that Defendants have not carried their burden to demonstrate clear hardship. As this Court noted in Hertz Corp. v. The Gator Corp., 250 F. Supp. 2d 421, 424 (D.N.J. 2003), the party seeking the stay must demonstrate "a clear case of hardship or inequity, if there is even a fair possibility that the stay would work damage to another party." Therefore, Defendants have the burden to demonstrate a clear case of hardship against their rights, claims, or defenses if a stay is not entered. Based on the record before this Court, Defendants have not carried their burden.

a. Scope of the dispute.

This case presents a very narrow question of whether Defendants have complied with, or violated the New Jersey Long-Term Care Act, based upon SHIP's implementation of the Plan in New Jersey. Defendants' response to Commissioner Caride's decision to commence the Removed Action was to avoid any determination of the order to show cause, as well as the declaratory and injunctive relief that Commissioner Caride sought in the Removed Action. Defendants responded by filing a motion to transfer with the Multidistrict Litigation Panel, a motion to dismiss the Removed Action for lack of jurisdiction, and this present motion to stay. In an attempt to create a federal case, where none exists, Defendants argue that Commissioner Caride is seeking to stop the implementation of the Plan, which is palpably false.

Defendants have not shown any hardship that they would suffer without a stay. Defendants, as opposed to Commissioner Caride or any of the other state insurance regulators, are the parties who created this dispute by jettisoning their obligation to comply with the insurance laws of a given state. Commissioner Humphreys, as the successor Rehabilitator, is simply standing in the shoes of SHIP and is seeking to raise capital by modifying the rates and benefits that were contractually guaranteed when SHIP policyholders purchased long-term care policies from SHIP. For over a decade, SHIP, which was doing business in more than forty six (46) states, routinely followed each state's statutory and administrative procedures that were enacted to address rate change requests on long-term care policies. Notably, SHIP has previously submitted rate change requests to Commissioner Caride for review and approval. However, following the Commonwealth Court's decision to place SHIP into rehabilitation, Defendants have attempted to take advantage of SHIP's financial woes by refusing to comply with state specific insurance laws. Thus, the only harm that Defendants claim exists are those self-inflicted wounds by their refusal

to follow the regulatory and administrative procedures in each state and submit the appropriate rate request forms for approval. Having caused the harm themselves, Defendants should not be permitted to whine that they will suffer harm without the entry of a stay.

Even Defendants' motion papers make a half-hearted attempts to demonstrate harm. On pages 3 through 4 of their Brief, Defendants offer platitudes and conclusory statements, as opposed to specific examples of any prejudices they might suffer. It is easy for Defendants to claim that issues of judicial economy exist, without having to demonstrate exactly how a decision on Commissioner Caride's motion to remand or on Defendants' motion to dismiss would prejudice them in any way.

b. Commissioner Caride is the only party suffering prejudice and the senior citizens which she represents.

Defendants' arguments indicating that staying this matter will cause no prejudice to a party is simply not supported by the record. Since March 2022, Defendants have sought to implement the Plan by soliciting SHIP policyholders in New Jersey. Per the Plan, Defendants are seeking to either raise premiums and/or modify benefits based on options selected by policyholders who are senior citizens. At risk, are policyholders who have to decide whether or not to maintain a policy that they have paid for over the past twenty (20) years by either paying increased rates or deciding to drop the policy because the rates that have become financially unacceptable (through no fault of the policyholder). Being senior citizens nearing the end of life, the policyholders should not have to face a health decision to keep benefits, lose them, or pay increase rates that have not undergone review by Commissioner Caride, especially when some, if not most policyholders may need to utilize the policy at some point in the near future. If a senior citizen policyholder makes an election, that senior citizen is unknowingly locking themselves into the rates and benefits, which also place at risk the benefits they would stand to receive under the guaranty association systems

(GAs) implemented in New Jersey. Therefore, if SHIP is transferred into a liquidation, which triggers the GAs, the New Jersey policyholders of SHIP's long-term care policyholders who elected to have reduced benefits to simply save their policy benefits will receive a reduced amount from the GAs in comparison to what they would have received if their policy terms were not changed under their current policy.

Accordingly, it is clear that Commissioner Caride who is acting on behalf of New Jersey in order to protect all citizens of New Jersey from the implementation of the Plan, will suffer prejudice. In comparison, Defendants are not suffering any prejudice because they continue to have the luxury of forum shopping by trying to move the Removed Action, and the other federal court actions, to the JMPL in Washington, and then to the Eastern District of Pennsylvania, to avoid any injunctive or declaratory relief being entered against them. Defendants' forum shopping is masked in a faux argument that they want to conserve judicial resources and to promote judicial economy. Defendants are not seeking to conserve resources, but rather want to drive the litigations from state courts to gain a tactical advantage by being in the Eastern District of Pennsylvania – their backyard. This Court, like that of North Carolina, should not entertain such blatant gamesmanship.

c. Denying the stay will not lead to inequitable outcomes.

Defendants suffer from the misconception that each of the cases removed to the JMPL have overwhelmingly common issues for which a comprehensive scheduled is required. However, the four (4) cases removed are individually unique because they each focus on special areas of law implemented within their respective state. Each case seeks relief based on the specific laws and regulations implemented by the State to regulate long-term care policies within their state. New Jersey's Long-Term Care Act is not identically verbatim to similar acts and regulations in North

Dakota, North Carolina, and Iowa and vis a vis. Further, SHIP's compliance with the long-term care laws in those States are based upon regulations that are not mirror images of each other, but rather are based upon insurance filing records that are reviewed by different standards authorized by the legislative branches in each State, and are based upon different considerations, such as that GAs and their functionality are different in each State. Each State has a check list of requirements that are unique. Although each state claims that Defendants have failed to follow their particular long-term care act laws, the nature of the violations are purely local and are driven by local state interests that are as different as the population in each state that being served.

d. A stay will not conserve judicial resources and will not enhance judicial efficiency.

Defendants' claims that a stay will conserve judicial resources remains a farce. The civil actions pending before North Dakota and Iowa, along with this action, are not overly complex, do not call for extensive discovery, and do not have common questions of law or fact, under 28 U.S.C § 1407. Transfer is unlikely because Defendants will struggle to carry their burden to demonstrate that these three (3) actions (reduced following the decision from North Carolina) would benefit from consolidation and coordination of discovery. The witnesses in each action are but a handful and the core of each matter turns on the application of questions of law. The questions of law are essentially whether or not Defendants were obligated to comply with the long-term care laws in each of the jurisdictions and, if so, did they comply. That is a very-linear, straightforward, and logical equation. Defendants removed the actions from state court to federal court to side-step their knowing lack of compliance with local insurance laws. Having set the wheels in motion, they now want the JPML to bless their conduct further by transferring all actions to one court, although any shared commonality among the state actions is superficial.

Therefore, any suggestion that a stay will promote judicial efficiency assumes, incorrectly, that the JPML, will purchase the arguments being sold by the Defendants. Commissioner Caride thinks there is more than an even chance that the JPML will see through Defendants' arguments and side with the state insurance regulators that cases within their respective jurisdictions should be decided in state court, as opposed to federal court, just as North Carolina found.

A stay of this action is clearly not warranted because there is a better than even chance that the JPML would not transfer this matter to their court due to the absence of shared facts and applicable laws. A transfer would not "be for the convenience of parties and witnesses" and would not "promote the just and efficient conduct of such actions." 28 U.S.C. § 1407. For example, in In re: Healthextras Ins. Mktg. & Sales Pracs. Litig., the Panel denied centralization of six actions related to the sale and marketing of disability insurance policies. 24 F. Supp. 3d 1376 (U.S. Jud. Pan. Mult. Lit. 2014). Despite finding that certain factual issues were common in all cases, the court ultimately determined that the key issue in each case was legal in nature. Id. Moreover, it concluded centralization was not appropriate because the legal issues were not common across cases—each case required a determination of "whether the subject policies were issued in compliance with the law of the state in which that particular case was brought." Id. at 1377 ("Whether the subject policies in the District of New Jersey action were issued in conformance with New Jersey law . . . has no bearing on whether the subject policies in the Northern District of Texas action were issued in conformance with Texas law."); see also In re Title Ins. Real Est. Settlement Procs. Act (RESPA) & Antitrust Litig., 560 F. Supp. 2d 1374, 1375 (U.S. Jud. Pan. Mult. Lit. 2008) (denying centralization under 28 U.S.C. § 1407 of twenty-five actions involving "different regulatory regimes in the states in which the actions [we]re pending along with variances in insurance regulation and law in each state"); In re: Rite Aid Corp. Wage & Hour Emp. Pracs.

Litig., 655 F. Supp. 2d 1376, 1377 (U.S. Jud. Pan. Mult. Lit. 2009) (denying centralization of cases where "plaintiffs assert[ed] violations of various state wage laws, which have differing provisions"); In re Master Settlement Agreement Antitrust Litig., 374 F. Supp. 2d 1355, 1356 (J.P.M.L. 2005) (denying centralization based, in part, on a finding that "issues of state sovereignty would arise").

Transfer and consolidation is improper in the case at hand because Plaintiffs' claims arise exclusively from issues related to New Jersey's regulatory regime of the insurance industry within the state. Accordingly, resolution of Plaintiffs' case depends exclusively on the analysis of New Jersey state law. As the Panel determined in In re: HealthExtras and In re Title Insurance, centralization of Plaintiffs' case with cases arising from other states' insurance laws would be inappropriate because the underlying claims are not common to one another and resolution of the cases in a consolidated manner would not be efficient. Whether another state's insurance law were violated has no bearing on whether Defendants violated New Jersey insurance regulations. Plaintiffs' case should, therefore, be decided separately and within the District of New Jersey.

For these reasons, Defendants' confidence that the JPML will transfer this action is misplaced. The statutory and regulatory scheme of the regulation of long-term care insurance was adopted in New Jersey to give final rate making authority to Commissioner Caride. A federal court does not have that authority. By staying this case, this Court would indirectly allow SHIP to side-step the structure of the orderly regulation of insurers who elect to write long-term care policies in New Jersey. Such a stay would send a signal to present and future insurers to refuse to comply with New Jersey laws and run into federal court as a means to shield themselves the authority of Commissioner Caride that is entrusted in her by the New Jersey legislature. Such a result should be unacceptable to this Court.

Therefore, Defendants' motion to stay should be denied as impractical, unsupported, and a waste of judicial resources.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully requests that this Court deny Defendants' motion to stay.

Respectfully submitted,

Dated: May 2, 2022

CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO, P.C.

/s/ *G. Glennon Troublefield*
G. Glennon Troublefield
Brian H. Fenlon
Jordan M. Steele
Sean M. Kiley
Roseland, New Jersey 07068-1739
Telephone: (973) 994-1700
gtroublefield@carellabyrne.com
bfenlon@carellabyrne.com
jsteele@carellabyrne.com
skiley@carellabyrne.com

Attorneys for Plaintiffs

G. Glennon Troublefield
Brian H. Fenlon
Jordan M. Steele
Sean M. Kiley
CARELLA, BYRNE, CECCHI, OLSTEIN, BRODY & AGNELLO, P.C.
5 Becker Farm Road
Roseland, New Jersey 07068-1739
(973) 994-1700

Attorneys for Plaintiffs

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 Stay Pending the Judicial Panel on Multidistrict Litigation's Decision On Consolidation 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 Easter 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).

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

G. Glennon Troublefield, Esq. 042321991
Brian H. Fenlon, Esq. 035071987
Sean Kiley, Esq. 199062020
CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO, P.C.
5 Becker Farm Road
Roseland, New Jersey 07068-1739
(973) 994-1700
gtroublefield@carellabyrne.com
bfenlon@carellabyrne.com
skiley@carellabyrne.com

Attorneys for Plaintiffs

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.	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 Conseco, Inc. Ex. 1. [1]

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

19. In October 2008, Conseco 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 their 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 form 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 rats 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 judgement 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

CARELLA, BYRN, CECCHI, OLSTEIN, BRODY & AGNELLO, P.C.

/s/ *G. Glennon Troublefield*
G. Glennon Troublefield, Esq. 042321991
Brian H. Fenlon, Esq. 035071987
Sean Kiley, Esq. 199062020
Roseland, New Jersey 07068-1739
(973) 994-1700
gtroublefield@carellabyrne.com
bfenlon@carellabyrne.com
skiley@carellabyrne.com

Attorneys for Plaintiffs

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

CARELLA, BYRN, CECCHI, OLSTEIN,
BRODY & AGNELLO, P.C.

/s/ *G. Glennon Troublefield*
G. Glennon Troublefield, Esq. 042321991
Brian H. Fenlon, Esq. 035071987
Sean Kiley, Esq. 199062020
Roseland, New Jersey 07068-1739
(973) 994-1700
gtroublefield@carellabyrne.com
bfenlon@carellabyrne.com
skiley@carellabyrne.com

Attorneys for Plaintiffs

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