IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

RAYMOND G. FARMER, *as Director of the South Carolina Department of Insurance*, and THE SOUTH CAROLINA DEPARTMENT OF INSURANCE, Plaintiffs, *v.* JESSICA K. ALTMAN, *as Rehabilitator of Senior Health Insurance Company of Pennsylvania*, PATRICK H. CANTILO, *as Special Deputy Rehabilitator of Senior Health Insurance Company of Pennsylvania*, and SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Defendants.	)	Case No. 3:21-cv-00097-MGL

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND

Defendants Jessica K. Altman, as Rehabilitator (the "Rehabilitator") of Senior Health Insurance Company of Pennsylvania ("SHIP"), Patrick H. Cantilo, as Special Deputy Rehabilitator (the "Special Deputy Rehabilitator") of SHIP, and SHIP (collectively "Defendants"), respectfully submit this Memorandum of Law in Opposition to the Motion to Remand filed by Plaintiffs Raymond G. Farmer, as Director of the South Carolina Department of Insurance ("Director Farmer"), and the South Carolina Department of Insurance (the "South Carolina Department").

I. INTRODUCTION

This case presents a dispute between two states, South Carolina and Pennsylvania, regarding the extent of Pennsylvania's power and authority over insolvent insurers domiciled in Pennsylvania. Contrary to Plaintiffs' assertions, the material legal issues raised in the Complaint have little to do with SHIP in particular, SHIP's South Carolina policies, or even South Carolina's insurance

regulations. Instead, the material question raised by the Complaint is whether Pennsylvania—through the Rehabilitator and the Commonwealth Court of Pennsylvania, which has exclusive jurisdiction to conduct rehabilitation proceedings of insurers domiciled in Pennsylvania—have the power and jurisdiction to implement a ***national*** plan of rehabilitation. The only appropriate forum to decide this issue is the Pennsylvania rehabilitation court that has exclusive jurisdiction to approve or disapprove of any rehabilitation plan and is already considering this very question—the Commonwealth Court of Pennsylvania. The appropriate forum to determine the Commonwealth Court of Pennsylvania's powers in rehabilitation is certainly not a South Carolina state court, or any other state or federal court in the 45 other states in which SHIP or its predecessors did business. As such, abstention in favor of the ongoing rehabilitation proceedings in the Commonwealth Court of Pennsylvania is warranted.

Critically, however, a federal court is the only appropriate forum to resolve the threshold issue of abstention. Defendants are entitled to a forum that is free from local bias, and it would be anathematic to the principles of federalism, comity, and the basic framework of the Constitution for a South Carolina state court to resolve a dispute regarding the limits of Pennsylvania's power to regulate insolvent insurers. Defendants satisfy diversity jurisdiction, and thus this Court—not a South Carolina state court—must resolve the threshold question of whether to abstain in favor of SHIP's ongoing rehabilitation proceedings in the Commonwealth Court of Pennsylvania. Accordingly, Plaintiffs' motion to remand must be denied.

The Pennsylvania legislature has vested in Pennsylvania's Insurance Commissioner, Jessica K. Altman, and the Commonwealth Court of Pennsylvania the power to implement a national rehabilitation plan for an insolvent company domiciled in Pennsylvania. There is ample support for the Rehabilitator's authority to do just that.[1] South Carolina's insurance regulator, Plaintiffs herein,

[1] This power is inherent to Pennsylvania's comprehensive scheme for the rehabilitation of insolvent companies domiciled in Pennsylvania, which requires that all rehabilitation proceedings take place in a single, exclusive forum—the Commonwealth Court of Pennsylvania. No rehabilitation proceeding

believe that a Pennsylvania rehabilitation court is without such power. Instead, Plaintiffs assert that the Commonwealth Court of Pennsylvania's power and jurisdiction to modify an insolvent company's policies starts and stops with policies issued within Pennsylvania's own borders. That is a view shared by a limited number of other states, which have properly raised this exact argument in SHIP's ongoing rehabilitation proceedings in the Commonwealth Court of Pennsylvania. But importantly, ***neither*** Plaintiffs nor Defendants are requesting that this Court reach the merits of whether the Commonwealth Court of Pennsylvania may approve a national plan for SHIP's rehabilitation. Instead, both parties only request a decision regarding which court should properly adjudicate that question. Only the Commonwealth Court of Pennsylvania may properly consider the extent of its own powers and jurisdiction in the first instance, and it will do so in due course. Indeed, the Commonwealth Court plans to conduct a hearing on the Amended Rehabilitation Plan—including evidence and argument regarding its power and jurisdiction to approve a national rehabilitation plan for SHIP—during the week of May 17, 2021. Plaintiffs will in no way be prejudiced by abstention

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of an insurance company with policyholders nationwide could possibly be comprehensive, if the rehabilitation court lacked authority to make changes to those policies' rates or benefits. Indeed, requiring piecemeal approval by each individual state's insurance regulators across the country would create an obvious collective action problem, likely dooming the possibility for any successful rehabilitation. For this reason, the power of a state's rehabilitation court to affect changes to policies nationwide has long been recognized and largely left unchallenged. *See, e.g.*, *Neblett v. Carpenter*, 305 U.S. 297 (1938) (leaving unchallenged California's power as domiciliary state to make rate and form decisions for all of the insolvent company's policies, wherever issued, as part of a national rehabilitation plan); *Underwriters Nat. Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 697 (1982); (rehabilitation plan that was later approved "proposed that the Rehabilitation Court reform the policies to require increased premiums and reduced benefits," including with respect to out-of-state policies); *Mathias v. Lennon*, 474 F. Supp. 949, 957 (S.D.N.Y. 1979) (rejecting argument that New York rehabilitation court "lacked jurisdiction to affect the property interests of the Illinois policyholders"); *accord Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1094 (Pa. 1992) (Rehabilitator "afforded broad powers" to "minimize the harm to *all* affected parties," and explaining that "the exigencies attendant to a major commercial insolvency and the goals of rehabilitation necessitate the reality that individual interests may need to be compromised in order to avoid greater harm to a broader spectrum of policyholders and the public."). In the case at bar, the Rehabilitator has even provided a mechanism for states to determine premium rates within the context, and subject to the conditions, of the Rehabilitation Plan's provisions.

in favor of the Commonwealth Court of Pennsylvania, which will simply allow that court to exercise its exclusive jurisdiction in rehabilitation proceedings and make an initial determination of its own powers and jurisdiction.

Notwithstanding, Plaintiffs commenced this suit in South Carolina state court in an attempt to circumvent the exclusive jurisdiction of the Commonwealth Court of Pennsylvania. This is not simply a case of forum shopping. This is an attempt by one state, South Carolina, to have its ***own*** state court issue a declaration regarding the powers and jurisdiction of ***another*** sovereign state's courts. Indeed, Plaintiffs go so far as to seek to have South Carolina's state court enjoin the Commonwealth Court of Pennsylvania from even *considering* the extent of its own powers and jurisdiction. As such, Plaintiffs' suit—and its Motion to Remand—ignore the very framework of our national government and the supporting principles reflected in the United States Constitution.

Dismissal in favor of the ongoing Rehabilitation proceedings in the Commonwealth Court of Pennsylvania is the only proper resolution to this matter, and a federal court is the only proper court to resolve this threshold determination in a dispute between states. As discussed further below, Defendants properly invoked this court's diversity jurisdiction because there is complete diversity and the amount in controversy exceeds $75,000—indeed, it exceeds well over $1 million. Moreover, Plaintiffs' tacit admission that their claims are not justiciable is no cause for remand to a South Carolina state court, but instead proof that this Court should dismiss this case based on abstention principles.

II. FACTUAL BACKGROUND

A. Rehabilitation of Insolvent Insurance Companies Under Pennsylvania Law

The Pennsylvania Insurance Department ("PID") is charged with regulating and monitoring the financial condition of all insurance companies domiciled in Pennsylvania. As part of those responsibilities, the Insurance Commissioner for Pennsylvania serves as rehabilitator for insolvent

insurance companies that are placed in rehabilitation pursuant to the Pennsylvania Insurance Department Act, 40 P.S. §§ 221.1–221.63 ("PID Act").

The PID Act is a "comprehensive statutory scheme for the rehabilitation and liquidation of insolvent insurance companies." *Koken v. Reliance Ins. Co.*, 893 A.2d 70, 83 (Pa. 2006); *accord Harleysville Mut. Ins. Co. v. Reliance Nat. Ins. Co.*, 256 F. Supp. 2d 421, 423 (M.D.N.C. 2003) ("[I]t is clear [that] Pennsylvania has in place a comprehensive scheme for liquidating insolvent state-chartered insurance carriers."). Rehabilitation proceedings are designed "to protect the interests of insureds, creditors, and the public generally," and the PID Act establishes the Commonwealth Court as the exclusive judicial forum. *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1091 (Pa. 1992) (internal quotation omitted); 40 PS. §§ 221.4–221.5. South Carolina has an analogous statutory scheme for the rehabilitation of insurers **domiciled in South Carolina**. *See* Insurers Rehabilitation and Liquidation Act, S.C. Code §§ 38-27-10, *et seq.*

As Insurance Commissioner for Pennsylvania, Defendant Jessica Altman acts as Rehabilitator for insolvent Pennsylvania insurers by "tak[ing] possession of the assets of the insurer" and "administer[s] them under orders of the [Commonwealth Court]." 40 P.S. § 221.15(c). The Rehabilitator is granted broad powers to effectuate equitably the intent of rehabilitation—that is, "to minimize the harm to *all* affected parties"—under the PID Act. *Foster*, 614 A.2d at 1094 (emphasis in original). After rehabilitation is ordered, the Rehabilitator is required to "design[] a plan of rehabilitation [that] must be submitted to the Commonwealth Court for approval in order that it may have efficacy." *Foster*, 614 A.2d at 1091; *see* 40 P.S. § 221.16(d). If a proposed plan of rehabilitation is approved by the Commonwealth Court, the Rehabilitator is charged to "take such action as she deems necessary or expedient to correct the condition or conditions which constituted the grounds for the order of the court to rehabilitate the insurer." *Id.* (*quoting* 40 P.S. § 221.16(b)) (brackets omitted). As such, the Rehabilitator and the Commonwealth Court "are obligated to interact in order to

supervise, implement and regulate equitably the process engaged to rehabilitate an insolvent or financially hazardous insurer." *Id.*

B. SHIP's Ongoing Rehabilitation Proceedings

SHIP is a long-term care insurance ("LTCI") company organized under the laws of the Commonwealth of Pennsylvania, and licensed to operate in 46 states, as well as the District of Columbia and the U.S. Virgin Islands. *See* Compl. ¶¶ 5–8, 60; Defs.' Mot. Dismiss, Ex. A (the "Amended Plan") at 76. On January 29, 2020, as a result of a long financial decline, the Commonwealth Court of Pennsylvania ordered that SHIP be placed in rehabilitation and appointed the Insurance Commissioner for Pennsylvania, Defendant Jessica K. Altman, as Rehabilitator pursuant to the PID Act. Defs.' Mot. Dismiss, Ex. B. As is typical in such cases, the Commissioner as Rehabilitator has appointed a Special Deputy Rehabilitator (SDR) to actually take charge of the Company and develop a plan for its rehabilitation—in this instance Patrick Cantilo who has also been made a defendant in this proceeding. Since that time, the Rehabilitator and SDR have filed an initial Proposed Plan of Rehabilitation for SHIP and a subsequent Amended Rehabilitation Plan.

The Amended Rehabilitation Plan at issue in this case was filed by the Rehabilitator in the Commonwealth Court of Pennsylvania on October 21, 2020. *See* Compl. ¶ 77. The Commonwealth Court has not yet approved, modified, or rejected the Amended Plan. The Amended Plan describes a number of proposed measures to increase revenues and reduce the liabilities of SHIP, so as to narrow or eliminate a "funding gap" of more than $1 billion. Amended Plan at 81–82. Of relevance here, as a condition of continuing to receive LTCI coverage from SHIP, the Amended Plan proposes that most policyholders choose from among several options to modify policy premiums or benefits so that SHIP's LTCI policies may be properly priced prospectively. *Id.* at 19–20. The Amended Plan enables individual states to "opt-out" of the premium setting provision of the Plan and determine premium rates for policies issued in such states (the "opt-out states"). If an insurance regulator in an opt-out

state declines to approve the premium rate increases proposed by the Rehabilitator, then the policy benefits available under those policies will be adjusted to correspond to the premium rates set by the opt-out state. *Id.* at 102–04. These equitable provisions are necessary to prevent the holders of policies issued in one state from subsidizing policies issued in another state.

Three state insurance regulators have intervened as parties in SHIP's Rehabilitation proceedings, and two others have otherwise provided Formal Comments to the Rehabilitation Plan. *See* Defs.' Mot. Dismiss, Exs. F–G. Those states have already raised the very question at issue in Plaintiffs' Complaint, asking the Commonwealth Court of Pennsylvania to consider the scope of its authority with respect to changes to rates and benefits for policies issued outside of Pennsylvania. Defs.' Mot. Dismiss, Ex. D ("State Comments") at 14–18. In due course, the Commonwealth Court will consider those arguments—*after* the Rehabilitator presents a final proposed Plan and all parties are afforded the ability to offer argument and evidence.[2]

C. SHIP's Policies Issued in South Carolina

At present, there are approximately 309 SHIP policyholders residing in South Carolina that would be subject to the proposed Amended Plan of Rehabilitation. Compl. ¶ 61. The Amended Rehabilitation Plan proposes a variety of policyholder options entailing significant adjustments to the premiums and benefits for these policies, so that they may be properly priced prospectively. *See* Declaration of Defendant Patrick H. Cantilo ("Cantilo Decl."), ¶ 9. Currently, the projected premiums at current rates for SHIP's policies issued in South Carolina totals $2,372,252. *Id.* ¶ 10. Under the Amended Plan of Rehabilitation, the projected premiums from these policies could increase to as much as $4,062,765 depending on policyholder elections, generating an additional $1,690,512

[2] As noted above, the Commonwealth Court of Pennsylvania has indicated its intent to schedule a hearing on the Amended Rehabilitation Plan during the week of May 17, 2021. At that hearing, the Commonwealth Court will allow the parties to introduce evidence and argument on, *inter alia*, its power and jurisdiction to approve a national rehabilitation plan for SHIP.

in revenue for SHIP. *Id.* ¶ 11. As explained above, if the Amended Plan of Rehabilitation is approved and Director Farmer elects to opt-out as to SHIP LTC policies issued in South Carolina (the "opt-out policies") and instead approves premium rate increases that differ from those proposed by the Rehabilitator, then the policy benefits for the opt-out policies will be adjusted as set forth in the plan, in part to correspond to the premium rates approved by Director Farmer. This will prevent policyholders in other states from involuntarily subsidizing South Carolina's policyholders.

D. Procedural History

Nearly a year after SHIP was placed in Rehabilitation, and after electing not to participate in the pending Pennsylvania Rehabilitation proceedings, Plaintiffs commenced this suit in South Carolina state court on December 10, 2020, collaterally attacking the Rehabilitation proceeding. In the Complaint, Plaintiffs broadly seek declaratory and permanent injunctive relief from their own state court regarding the extent of the jurisdiction and powers of the Commonwealth Court of Pennsylvania and Rehabilitator to effectuate the Amended Plan of Rehabilitation. Indeed, the Complaint seeks to effectively prevent the Commonwealth Court of Pennsylvania from even *considering* the Amended Plan of Rehabilitation. That is, Plaintiffs "seek a declaration that the rehabilitation plan is invalid and unenforceable," and seek to permanently enjoin "the enforcement of any order of the Commonwealth Court or any plan or directive of the Defendants" that would implement the current Amended Plan of Rehabilitation. Compl. ¶¶ 133, 135. Plaintiffs go as far as seeking to prevent Defendants from even communicating "in any form or manner with South Carolina policyholders regarding proposed changes to policy terms or rates" set forth in the Amended Plan of Rehabilitation, and seek to levy "administrative fines against SHIP and suspension or revocation of SHIP's license" should SHIP proceed with the Amended Plan. *Id.* ¶ 136.

Defendants timely removed this action to this Court on January 12, 2021, based on diversity of citizenship under 28 U.S.C. § 1332(a). Subsequently, Defendants filed a Motion to Dismiss the

Complaint on January 19, 2021. The Motion to Dismiss explains that the Commonwealth Court of Pennsylvania is the only court that may properly consider the extent of its own jurisdiction and powers with respect to an insolvent insurer domiciled in Pennsylvania, and accordingly requests that the Court abstain and dismiss this suit in favor of the ongoing Rehabilitation proceedings. The Motion to Dismiss also highlights numerous incurable defects throughout the Complaint, including that Plaintiffs have suffered no injury in fact and therefore lack standing to bring the claims, that this matter is not ripe for the Court's resolution, lack of personal jurisdiction over the Defendants, and that the Complaint fails to state a claim for which relief can be granted.

III. ARGUMENT

A. The Amount in Controversy is Easily Satisfied

Plaintiffs incredulously assert that the amount in controversy in this action is zero dollars. That is, Plaintiffs maintain that because they are seeking declaratory and equitable relief, rather than damages, this action necessarily does not "involve any amount in controversy." Pls.' Mem. at 4. That is not the law, and the amount in controversy is well over $1 million—easily satisfying the $75,000 requirement in Section 1332.

"In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." *Am. Scrap Iron & Metal, LLC v. Treno Servs., LLC*, No. 3:18-CV-2134-TLW, 2019 WL 7761807, at *2 (D.S.C. Jan. 31, 2019) (*citing Hunt v. Wash. State Apple Advert. Comm'n,* 432 U.S. 333, 347 (1977)). Courts in the Fourth Circuit measure the value of the litigation "from the view point of 'either party.'" *HT Inv., Inc. v. RJC, LLC*, No. 9:17-CV-02144-DCN, 2017 WL 4401675, at *2 (D.S.C. Oct. 4, 2017) (citing *JTH Tax., Inc. v. Frashier*, 624 F.3d 635, 639 (4th Cir. 2010)). Accordingly, "[t]he relevant inquiry is whether the direct pecuniary value of the right the plaintiff seeks to enforce, or the cost to the defendant of complying with any prospective equitable relief exceeds $75,000." *Id.* (internal

quotation marks and citation omitted); *accord Cole v. Captain D's, LLC*, No. 5:08CV21-V, 2008 WL 4104577, at *2 (W.D.N.C. Aug. 29, 2008) (courts look "to the potential 'pecuniary consequences' to the parties in determining whether the requisite jurisdictional amount is present").

By one simple measure, the potential pecuniary value of a judgment could be as much as $1,690,512. Under the Amended Plan of Rehabilitation, SHIP's projected premiums from its South Carolina policies would increase by as much as $1,690,512. Cantilo Decl. ¶ 11. That is, SHIP's projected premiums will increase from the current projected total of $2,372,252 to as much as $4,062,765 depending on policyholder elections —and should Plaintiffs disapprove of the premium increases, then there will be a corresponding adjustment in benefits. *Id.* ¶¶ 10–11. The actual amount of premium increase would depend on policyholder elections, but those policyholders who choose options that avoid rate increases would necessarily be selecting options that reduce SHIP's liability by comparable amounts. Thus, the amount in controversy easily exceeds $1 million either in premium increases or reduction in liability. Because Plaintiffs seek to declare the Amended Plan of Rehabilitation "invalid and unenforceable" and to permanently enjoin its implementation (Compl. ¶¶ 133, 135), a judgment will necessarily have the direct pecuniary effect of invalidating the Amended Plan and the projected revenue increases or liability reductions contemplated therein. That says nothing of the administrative fines and revocation of SHIP's license that Plaintiffs have *also* threatened, should Defendants proceed with implementing the Amended Plan of Rehabilitation—or even contacting South Carolina policyholders regarding any proposed changes to policy terms or rates. *Id.* ¶ 136.

Plaintiffs also baldly suggest that any amount in controversy is "entirely speculative" because "no one can say" whether they will approve the Amended Plan's proposed rate increases, *even after* having the Amended Plan invalidated. That argument misses the mark for numerous reasons. As a threshold matter, Plaintiffs ignore that the *direct* pecuniary effect of invalidating the Amended Plan

of Rehabilitation will be to invalidate the Amended Plan itself and the very mechanism by which SHIP seeks to generate an additional $1,690,512 in revenue and/or reduction in liabilities. Similarly, Plaintiffs overlook that the amount in controversy is measured by the *potential* pecuniary impact of a judgment.[3] The potential pecuniary impact of a judgment, should Plaintiffs prevail, will be that Plaintiffs will have the power to avoid both (a) an increase of $1,690,512 to premiums, *and* (b) a corresponding adjustment to benefits, should they disapprove of the premium increases. Thus, Plaintiffs would have gained the ability to have other states' policyholders subsidize South Carolina's policies by $1,690,512—a power that they do not possess under the Amended Plan of Rehabilitation.

But more broadly, Plaintiffs' assertions are belied by their own allegations in the Complaint. That is, Plaintiffs make clear that they stopped approving proposed rate increases for SHIP in 2018 after it became "clear that SHIP was hopelessly insolvent." Compl. ¶ 82. It defies commonsense to believe that Plaintiffs will now approve premium rate increases "of well over four hundred percent (400%)" for some South Carolina policyholders, when SHIP is in an objectively *worse* financial condition than it was in 2018. *See id.* ¶ 83. Indeed, Plaintiffs go so far as to allege that the Amended Plan's proposal to increase rates and modify premiums *will fail* and that SHIP will eventually be "placed into liquidation." *Id.* ¶ 78. Notwithstanding those allegations, *even if* Plaintiffs somehow approved over 95% of the proposed premium increases, the $75,000 amount in controversy would *still* be satisfied.

The Court "is not required to leave common sense behind" when determining whether the amount in controversy has been satisfied. *Chek v. State Farm Fire & Cas. Co.*, No. 5:13-CV-378-JG, 2014 WL 12680676, at *2 (E.D.N.C. Mar. 17, 2014) (internal quotation omitted). Plaintiffs

[3] *Wood v. Gen. Dynamics Advanced Info. Sys., Inc.*, No. 1:08CV624, 2009 WL 1687967, at *5 (M.D.N.C. June 17, 2009) (amount in controversy satisfied where "the 'potential' impact of a judgment in this matter could have the effect of resulting in either a $400,000 'gain' to Plaintiff, or 'loss' to Defendant"), *report and recommendation adopted*, No. 1:08CV624, 2010 WL 11651771 (M.D.N.C. Jan. 22, 2010).

would not have commenced this lawsuit if they intended to effectively accept the entirety of the Amended Plan's rate increases and adjustments to benefits—and certainly not when they have already stopped approving rate increases because they believe SHIP is hopelessly insolvent and will enter liquidation. The $75,000 amount in controversy is easily satisfied. *See JTH Tax, Inc. v. Frashier*, 624 F.3d 635, 639 (4th Cir. 2010) (amount in controversy satisfied by demonstrating that the object of the litigation "arguably yields a figure that exceeds the necessary jurisdictional amount").

B. The Court Can, and Should, Resolve the Threshold Issue of Abstention Prior to Resolving Plaintiffs' Lack of Standing to Bring Unripe Claims

Plaintiffs seemingly concede that there is no justiciable case or controversy and that the claims are unripe for the Court's review. *See* Pls.' Mem. at 2–4. Because Plaintiffs lack Article III standing to bring their claims in federal court, Plaintiffs suggest that a remand to South Carolina state court—where Article III requirements are "irrelevant"—is appropriate. *Id*. at 3. Plaintiffs' tacit admission that they fail to satisfy Article III standing requirements is somewhat surprising. Although Plaintiffs commenced this action in state court, South Carolina's standing requirements are identical to federal standing requirements. *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 550 S.E.2d 287, 291 (S.C. 2001) (adopting same test for standing as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)).

Notwithstanding the Complaint's incurable defects, remand is not appropriate because the Court should first resolve the threshold question of abstention. It is well-established that courts may ordinarily resolve "threshold" issues, including abstention, before examining jurisdictional questions such as "whether a case present[s] an Article III case or controversy." *E.g.*, *Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 232–33 (4th Cir. 2008); *Cioca v. Rumsfeld*, 720 F.3d 505, 508 (4th Cir. 2013) (concluding that "judicial abstention is appropriate," notwithstanding the Court's "serious doubts" that plaintiffs possessed standing to bring claims); *accord Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 513 (D.C. Cir. 2018) ("courts may address certain

nonjurisdictional, threshold issues before examining jurisdictional questions," and "[e]xamples of such threshold questions include abstention"); *Warner v. McVey*, No. CIV A 08-55, 2009 WL 703416, at *5 (W.D. Pa. Mar. 16, 2009) ("Abstention is the sort of threshold inquiry that should be addressed before addressing Defendants' arguments for dismissal based upon lack of subject matter."). Indeed, Plaintiffs agree that the Court may appropriately resolve the issue of abstention before addressing the other jurisdictional defects in the Complaint. *See* Pls.' Opp. to Mot. Dismiss, ECF No. 14, at 3–6.

"Diversity jurisdiction is founded on the assurance to non-resident litigants of courts free from susceptibility to potential local bias." *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 111 (1945). Here, the need for the Court to exercise diversity jurisdiction to resolve the threshold question of abstention and ensure that the issue is decided by a court free from any potential local bias is particularly acute. The Complaint is, in effect, a dispute between states regarding Pennsylvania's power to regulate insolvent insurers domiciled in Pennsylvania, and the appropriate jurisdiction and power of the Commonwealth Court of Pennsylvania overseeing rehabilitation proceedings for the insurer. Principles of federalism, comity, and the basic framework of the Constitution dictate that these questions must be resolved in the first instance by the Commonwealth Court conducting the rehabilitation proceedings—not in a lawsuit commenced by an arm of South Carolina in a South Carolina state court.

Defendants' Motion to Dismiss highlights the numerous ways in which Plaintiffs' claims are incurably defective, including their lack of standing to bring any claims. Apparently, Plaintiffs hope that a local state court will be more inclined to overlook the Complaint's defects and resolve the merits of the claims in South Carolina's favor. However, it is important to reiterate that Plaintiffs lack standing to bring their claims ***precisely because*** the Commonwealth Court of Pennsylvania has not yet approved, modified, or disapproved of the Amended Rehabilitation Plan. It would defy logic and fairness if Plaintiffs could have their claims remanded because the Commonwealth Court of

Pennsylvania has not yet approved any rehabilitation plan, only to then seek to prevent the Commonwealth Court from doing just that in a South Carolina state court. Thus, this underscores the need for this Court to exercise diversity jurisdiction and ensure that the threshold issue of abstention will be resolved in a court free from any susceptibility to local bias.

C. The Court Should Abstain in Favor of the Ongoing Rehabilitation Proceedings in the Commonwealth Court of Pennsylvania and Dismiss Plaintiffs' Complaint

For the reasons already explained in Defendants' Motion to Dismiss, the court should resolve the threshold issue of abstention and dismiss the Complaint in favor of the ongoing rehabilitation proceedings in the Commonwealth Court of Pennsylvania. *See* Defs.' Mot. Dismiss at 27–32. The very purpose of rehabilitation proceedings is to have the Commonwealth Court of Pennsylvania serve as the single, exclusive forum to conduct the proceedings. *See Harleysville Mut. Ins. Co.*, 256 F. Supp. 2d 421, 423–24. As a matter of commonsense, comity, federalism and our constitutional framework, the Commonwealth Court of Pennsylvania must be allowed to resolve in the first instance questions regarding the extent of its own power and jurisdiction under Pennsylvania law over an insurer domiciled in Pennsylvania.

More fundamentally, the key issues of which Plaintiffs complain and which they seek to have a South Carolina state court resolve have little to do with South Carolina law. The material legal question that Plaintiffs seek to have determined is whether the Rehabilitator and the Commonwealth Court of Pennsylvania have the power and jurisdiction to implement a *nationwide* rehabilitation plan. *See* Pls.' Opp. to Defs.' Mot. Dismiss at 11–12 (asserting that "a rehabilitation proceeding does not "imbue[] a court, much less a rehabilitator, with unlimited power to impose its will nationwide"). Plaintiffs largely ignore that this is the same question that has already been properly raised by other state insurance regulators in the Commonwealth Court, and that this will be resolved by the Commonwealth Court in the due course as part of the ongoing rehabilitation proceedings. *See* State Comments, at 14–18. The question is not yet resolved and highlights the premature nature of

Plaintiffs' collateral attack on the rehabilitation process. Plaintiffs will not suffer any prejudice by simply allowing the Commonwealth Court of Pennsylvania to consider its own powers and jurisdiction to approve a national rehabilitation plan in the first instance. The rehabilitation process can, and should, go forward in the court with exclusive jurisdiction to conduct SHIP's rehabilitation proceeding—the Commonwealth Court of Pennsylvania.

Indeed, it would make little sense for the Court to defer to a South Carolina state court. This would only serve to invite similar litigation in fora throughout the country—rather than in the single, exclusive forum for SHIP's rehabilitation—and lead to inconsistent judgments on the same legal question of whether a nationwide plan may be implemented. Nor is the risk of identical suits throughout the country imagined—Louisiana's Commissioner of Insurance previously filed a separate lawsuit in the U.S. District Court for the Middle District of Louisiana against the Rehabilitator, seeking to resolve the very same issues posed here by Plaintiffs. *See Donelon v. Altman*, No. 3:20-cv-00604-SDD-EWD (M.D. La.). These copycat lawsuits in separate fora seeking to resolve the same question—whether the Commonwealth Court of Pennsylvania may approve a national rehabilitation plan for SHIP—underscore the need for this issue to be addressed in the single, exclusive forum for SHIP's rehabilitation. Indeed, courts in the Fourth Circuit have widely recognized that abstention in favor of a rehabilitation court's jurisdiction is appropriate to avoid this very scenario. *See First Penn-Pac. Life Ins. Co. v. Evans*, 304 F.3d 345, 349 (4th Cir. 2002); *Harleysville Mut. Ins. Co.*, 256 F. Supp. 2d at 423–24.

1. *Burford* Warrants Abstention and Dismissal in Favor of the Rehabilitation Proceedings in the Commonwealth Court of Pennsylvania, Not Remand to a South Carolina State Court

Plaintiffs' assertion that *Burford* abstention warrants a remand to the South Carolina state court is without merit for numerous reasons. First, Plaintiffs oddly ignore that SHIP's ongoing rehabilitation proceedings are taking place in the Commonwealth Court of Pennsylvania, not a South

Carolina state court. The Complaint seeks to bypass the Commonwealth Court as the exclusive forum for SHIP's rehabilitation proceedings, and instead have a South Carolina state court adjudicate in the first instance the propriety of provisions in the Amended Plan for SHIP's rehabilitation. That is completely at odds with the law in the Fourth Circuit, which recognizes that rehabilitation, liquidation, and receivership proceedings present a "classic situation for *Burford* abstention." *Brandenburg v. Seidel*, 859 F.2d 1179, 1191 (4th Cir. 1988), *overruled on other grounds by Quackenbush*, 517 U.S. 706 (1996); *accord First Penn-Pac. Life Ins. Co.*, 304 F.3d at 349 (abstention warranted in action against insurance company in receivership because ["[a]llowing this action to continue in federal court would severely complicate the efficient dissolution of [the debtor's] estate," and would otherwise "be inviting litigation in fora all around the country"); *Charleston Area Med. Ctr., Inc. v. Blue Cross & Blue Shield Mut. of Ohio, Inc.*, 6 F.3d 243, 250 n.5 (4th Cir. 1993). Abstaining in favor of a South Carolina state court, which is not conducting SHIP's rehabilitation proceeding, and allowing it to decide the propriety of key provisions in SHIP's Amended Plan of Rehabilitation would turn the rationale for *Burford* abstention on its head.

More broadly, *Burford* abstention is warranted where there are "difficult questions of state law whose importance transcends the result in the case then at bar." *First Penn-Pac. Life Ins. Co. v. Evans*, 304 F.3d 345, 348 (4th Cir. 2002) (internal quotations omitted). There *are* difficult questions of state law that transcend this case, but they do not involve the narrow applications of South Carolina law that Plaintiffs proffer. Rather, the transcendent legal issue is a question of Pennsylvania law—that is, whether the Rehabilitator may implement a *national* plan for the rehabilitation of an insolvent insurer domiciled in Pennsylvania. That broader question transcends the result in this particular case, and that is the question that must be resolved in the Commonwealth Court of Pennsylvania.

Similarly, *Burford* abstention is also warranted when adjudication "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Id.*

Abstention in favor of the Commonwealth Court of Pennsylvania's ongoing rehabilitation proceedings is the only way to ensure that Pennsylvania establishes a coherent policy regarding the implementation of a national plan for an insolvent insurance company's rehabilitation. Indeed, it is for this reason that numerous state insurance regulators have already posed that very question in the course of SHIP's rehabilitation proceedings. *See* State Comments, at 14–18. The alternative—a remand to South Carolina state court—would necessarily lead to an *in*coherent policy, whereby each of the 46 states in which SHIP operates may come to a different outcome regarding the propriety of various elements of the same Amended Plan of Rehabilitation. That would eviscerate Pennsylvania's comprehensive scheme for the rehabilitation of insolvent insurance companies, which depends on the Commonwealth Court being the exclusive forum for such proceedings. *See Foster*, 614 A.2d at 1091.

The Commonwealth Court of Pennsylvania is the exclusive forum responsible for approving, or disapproving, any provisions in a proposed plan for rehabilitating an insolvent insurer domiciled in Pennsylvania. Plaintiffs may not simply bypass that exclusive forum in favor of their own state courts, under the transparent guise of seeking a declaration whether a rehabilitation plan comports with their own state law. Dismissing the Complaint in favor of the ongoing Rehabilitation proceedings in the Commonwealth Court of Pennsylvania is the only appropriate application of *Burford* abstention.

2. *Colorado River* Also Warrants Abstention and Dismissal In Favor of the Rehabilitation Proceedings in the Commonwealth Court of Pennsylvania, Not Remand to South Carolina State Court

Similarly, application of the *Colorado River* abstention doctrine supports abstention in favor of the Commonwealth Court of Pennsylvania alone. As a threshold matter, *Colorado River* abstention is only applicable where a federal action and state action are parallel. *Ackerman v. ExxonMobil Corp.*, 734 F.3d 237, 248 (4th Cir. 2013). Plaintiffs assert that the now-removed state court action—which was properly removed on the basis of diversity—is somehow parallel to this case. Again, that is not

the law. It is well-established that "[r]emoved cases … are not parallel proceedings." *BB Energy, L.P. v. Devon Energy Prod. Co., L.P.*, No. 3:07-CV-0723-B, 2007 WL 9717494, at *4 (N.D. Tex. Aug. 16, 2007); *accord Hess v. Kafka*, 221 F. Supp. 3d 669, 674 (D. Md. 2016) ("Because the instant case is what was formerly the parallel state court proceeding but is now removed to this federal Court, no state court action exists to which this Court should defer for decision in the present case. As a result, abstention via a stay in this case is inappropriate."); *Travelers Prop. Cas. Co. of Am. v. Cannon & Dunphy, S.C.*, 997 F. Supp. 2d 937, 939 (E.D. Wis. 2014) ("At the risk of stating the obvious, right now there are no parallel proceedings in state court because the state court action was removed to federal court.").[4]

There is only one state court proceeding parallel to the present case, and that is the ongoing rehabilitation proceeding in the Commonwealth Court of Pennsylvania. For the reasons already set forth in Defendants' Motion to Dismiss—which Plaintiffs fail to contest, or even address in their Opposition to that Motion—this Court should abstain and dismiss the Complaint pursuant to the *Colorado River* abstention doctrine in favor of the rehabilitation proceedings in the Commonwealth Court of Pennsylvania.

3. *Wilton/Brillhart Abstention is Inapplicable*

Plaintiffs also assert that because they seek declaratory relief, the Court has additional discretion to abstain from exercising jurisdiction. *See* Pls.' Mem. at 15. This abstention doctrine is commonly referred to as *Wilton/Brillhart* abstention. *See Teaf v. Estate of Teaf*, No. CV ELH-20-190, 2020 WL 2306454, at *6 (D. Md. May 8, 2020). Plaintiffs overlook that *Wilton/Brillhart*

[4] *See also Luken v. Indiana Ins. Co.*, No. 13-CV-0991-MJR-PMF, 2013 WL 6823082, at *3 (S.D. Ill. Dec. 23, 2013) ("Of course, this is a removed action…[s]o abstaining in deference to a *parallel state court action* makes no sense.") (emphasis in original); *Allstate Ins. Co. v. Longwell*, 735 F. Supp. 1187, 1192 (S.D.N.Y. 1990) (*Colorado River* abstention inapplicable in removal context because "there is no longer anything pending in the state courts" and the previous state actions "are now here" in federal court).

abstention is inapplicable to this case as a matter of law because they are also seeking injunctive relief. *VonRosenberg v. Lawrence*, 781 F.3d 731, 735 (4th Cir. 2015). Unless Plaintiffs now contend that their "request for injunctive relief is frivolous," *Wilton/Brillhart* abstention is inapposite. *Id.*; *accord QBE Ins. Corp. v. Ocean Keyes Dev., LLC*, No. 4:17-CV-01611-RBH, 2017 WL 6323400, at *3 (D.S.C. Dec. 11, 2017). Moreover, as already explained above, there is no parallel state court proceeding in South Carolina state court because the action has been removed to federal court. This is an additional factor that weighs against *Wilton/Brillhart* abstention. *Tomlinson ex rel. Young v. Geico Gen. Ins. Co.*, 433 F. App'x 499, 501 (9th Cir. 2011).

D. Application of Abstention Doctrines Does Not Require a Remand

Plaintiffs lastly assert that if the Court determines that abstention is warranted, it must remand the case to the South Carolina state court. Pls.' Mem. at 18. Again, that is not the law. "[F]ederal courts have the power to dismiss ***or*** remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary. This includes claims for both injunctive and declaratory relief." *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 727 (4th Cir. 1999) (emphasis added, internal citation omitted) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996)). Importantly, application of abstention doctrines does not fall within "either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure." *Quackenbush*, 517 U.S. at 712. Thus, Plaintiffs' suggestion that § 1447(c) requires remand, as opposed to dismissal, is without merit as a matter of law.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully requests that the Court deny Plaintiffs' Motion to Remand.

Respectfully submitted,

February 24, 2021

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

RAYMOND G. FARMER, *as Director of the South Carolina Department of Insurance*, and THE SOUTH CAROLINA DEPARTMENT OF INSURANCE, Plaintiffs, *v.* JESSICA K. ALTMAN, *as Rehabilitator of Senior Health Insurance Company of Pennsylvania*, PATRICK H. CANTILO, *as Special Deputy Rehabilitator of Senior Health Insurance Company of Pennsylvania*, and SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Defendants.	)	Case No. 3:21-cv-00097-MGL

DECLARATION OF PATRICK H. CANTILO IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION TO REMAND

I, Patrick H. Cantilo, hereby declare and state as follows:

1. My name is Patrick H. Cantilo. I am a resident of the State of Texas. I am of sound mind and legal age and am fully competent to make this declaration. The statements made herein are made to the best of my knowledge.

2. On January 29, 2020, the Commonwealth Court of Pennsylvania (the "Commonwealth Court") issued an order placing Senior Health Insurance Company of Pennsylvania ("SHIP") in rehabilitation under the Pennsylvania Insurance Department Act, 40 P.S. §§ 221.1–221.63. At that time, the Commonwealth Court appointed Jessica K. Altman, the Insurance Commissioner of the Commonwealth of Pennsylvania, as Rehabilitator of SHIP (the "Rehabilitator").

3. Pursuant to the Commonwealth Court's January 29, 2020 Order and section 221.16 of the Pennsylvania Insurance Department Act, I was appointed as Special Deputy Rehabilitator of

SHIP ("Special Deputy Rehabilitator") on the same date. I have continued serving as Special Deputy Rehabilitator since that time.

4. As Special Deputy Rehabilitator, I have all the same powers, rights, and authority as the Rehabilitator, subject to oversight and supervision by the Rehabilitator and the Commonwealth Court.

5. The Rehabilitator filed an initial Proposed Plan of Rehabilitation for SHIP in the Commonwealth Court on April 22, 2020. For at least two years prior to the filing of the Proposed Plan of Rehabilitation, the Pennsylvania Insurance Department, the Rehabilitator, and I have worked with insurance regulators throughout the country to establish a dialogue regarding SHIP and its rehabilitation. These efforts have included numerous meetings and conference calls to which representatives of all insurance departments were invited, and the distribution of a multitude of reports and spreadsheets about SHIP and the Proposed Plan of Rehabilitation.

6. The state insurance regulators of Maine, Massachusetts, and Washington obtained leave from the Commonwealth Court to intervene in SHIP's rehabilitation. Those insurance regulators, as well as the state insurance regulators of Maryland and Wisconsin, submitted timely Formal Comments to the Proposed Plan of Rehabilitation.

7. In part in response to the Formal Comments received to the initial Proposed Plan of Rehabilitation—including those from state insurance regulators, as well as numerous Informal Comments—the Rehabilitator filed an Amended Rehabilitation Plan for SHIP in the Commonwealth Court on October 21, 2020. The Amended Plan includes a mechanism for states to determine premium rates <u>within the context, and subject to the conditions, of the Rehabilitation Plan's provisions.</u>

8. The Amended Rehabilitation Plan describes a number of proposed measures to increase revenues and reduce the liabilities of SHIP, so as to narrow or eliminate a "funding gap" of

more than $1 billion. These measures include a proposal requiring most policyholders to choose from among several options to modify policy premiums or benefits so that SHIP's long-term care insurance policies may be properly priced prospectively. The Plan enables individual states to "opt-out" of the premium setting provision of the Plan and determine premium rates for policies issued in such states (the "opt-out states"). If an insurance regulator in an opt-out state declines to approve the premium rate increases proposed by the Rehabilitator, then the policy benefits available under those policies will be adjusted to correspond to the premium rates set by the opt-out state. These equitable provisions are necessary to prevent the holders of policies issued in one state from involuntarily subsidizing policies issued in another state.

9. At present, there are approximately 309 SHIP policyholders residing in South Carolina that would be subject to the proposed Amended Rehabilitation Plan. The Amended Rehabilitation Plan proposes significant adjustments to the premiums and benefits for these policies, so that they may be properly priced prospectively.

10. Currently, the projected premiums at current rates for SHIP's policies issued in South Carolina totals $2,372,252.

11. Under the Amended Plan of Rehabilitation, the projected premiums from these policies could increase to as much as $4,062,765, generating an additional $1,690,512 in revenue for SHIP.

12. As explained above, if the Amended Plan of Rehabilitation is approved and the South Carolina Department of Insurance opts out of the premium rate increases contemplated by the Rehabilitation Plan, then the policy benefits of policies issued in South Carolina will be adjusted to correspond to the premium rates approved by Director Framer or his successor. This will reduce or prevent the need for policyholders in other states to subsidize South Carolina's policyholders prospectively.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 24th day of February 2021.

Patrick H. Cantilo

Patrick H. Cantilo