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,

vs.

Jessica K. Altman, as Rehabilitator of Senior Health Insurance Company of Pennsylvania, Patrick H. Cantilo, as Special Deputy Rehabilitator of Senior Health Insurance Company of Pennsylvania, and Senior Health Insurance Company of Pennsylvania in Rehabilitation,

Defendants.

Case No. 3:21-cv-00097-MGL

PLAINTIFFS' MOTION TO REMAND

Plaintiffs Raymond G. Farmer, Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance, by and through their undersigned counsel, hereby move the Court for an Order remanding the above-captioned action to the Court of Common Pleas for Richland County, South Carolina. As grounds for this motion, Plaintiffs would offer the following:

1. Pursuant to the system of state-based regulation of the business of insurance, the General Assembly of South Carolina has the sole power to regulate the business of insurance in that State.

2. The General Assembly has delegated that regulatory power by creating the South Carolina Department of Insurance (Department) and charging it and the Director of Insurance (Director) with the responsibility for administering and enforcing the laws and regulations governing the business of insurance in South Carolina.

3. Defendant Senior Health Insurance Company of Pennsylvania (SHIP) holds a Certificate of Authority (COA) to conduct the business of insurance in South Carolina issued by the Plaintiff Department, the Director of which is the Plaintiff Raymond G. Farmer.

4. SHIP continues to conduct the business of insurance in South Carolina.

5. As a licensee of the Department, SHIP is subject to the laws and regulations of the State of South Carolina governing the business of insurance in that State, including the laws and regulations governing the filing and approval of rates and changes in benefits under policies.

6. As with similarly-situated insurers, SHIP has complied with South Carolina law by submitting rates and policy forms to the Department for approval.

7. That SHIP has been placed in rehabilitation in its state of domicile does not alter or diminish its obligation to abide by the laws of the several states, including those of South Carolina.

8. SHIP, by and through the Defendants Rehabilitator and Special Deputy Rehabilitator, has nonetheless consistently and repeatedly insisted, without support of valid precedent, that it is no longer required to abide by the laws of South Carolina.

9. Pursuant to their charge by the South Carolina General Assembly to enforce the insurance laws of South Carolina, the Department initiated an action before the Court of Common Pleas of South Carolina for a declaration of the law of South Carolina and for an injunction to enforce that law within the State of South Carolina with respect to a licensee of South Carolina.

10. The parties agree that this dispute does not involve a question of law arising under the laws of the United States.

11. The Court lacks diversity jurisdiction under 28 U.S.C. § 1332 because the amount in controversy does not exceed $75,000; in fact, there is no amount in controversy, as the sole object this action is to declare the law of South Carolina and require Defendants to comply with the same

laws and regulations with which SHIP has complied previously and with which all similarly-situated licensees must and do comply.

12. Even Defendants maintain that the Court lacks jurisdiction over the subject matter pursuant to U.S. CONST. art. III.

13. Pursuant to 28 U.S.C. § 1447(c), "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded," an "order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal," and the "State court may thereupon proceed with such case."

14. Pursuant to 28 U.S.C. § 1447(d), an "order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

15. Even assuming, *arguendo*, that the Court has jurisdiction over the subject matter, the parties are unanimous, albeit for different reasons, in urging the Court to abstain from exercising jurisdiction.

16. The business of insurance is an area of the law that has typically been left to the states to regulate, and there is an express federal policy to leave the regulation of insurance to the states, including South Carolina, which has a substantial interest in protecting the interests of the public and policyholders of this State through the independent establishment, maintenance and administration of state insurance law, the development and implementation of coherent domestic policies, and the preservation of the integrity of its extensive insurance regulatory scheme, thereby warranting abstention and remand.

17. In this action for declaratory relief, there are several grounds for the Court to use its discretion to abstain from exercising jurisdiction.

18. Plaintiffs respectfully submit that the proper action upon a finding of lack of jurisdiction or upon abstention is to remand this matter to the Court of Common Pleas for Richland County.

Respectfully submitted,

February 10, 2021

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO REMAND

Plaintiffs Raymond G. Farmer, Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance, by and through their undersigned counsel, hereby submit their Memorandum of Law in Support of their Motion to Remand.

I. INTRODUCTION AND PROCEDURE OF THE CASE.

This matter began as an action for declaratory and injunctive relief in the Court of Common Pleas for Richland County, South Carolina. Named as Defendants are Senior Health Insurance Company of Pennsylvania and its rehabilitator and special deputy rehabilitator, who by operation of law presently serve in a managerial role in place of the officers and directors, who are suspended. Defendants removed this case, asserting that the United States District Court had jurisdiction pursuant to the diversity statute, 28 U.S.C. § 1332. In addition to diversity of citizenship between the parties, that Code section requires that the matter in controversy exceed the sum or value of

$75,000. Shortly after removing this matter, on January 19, 2021, Defendants filed a Motion to Dismiss on a number of grounds, including that there was no case or controversy as required under U.S. CONST. art. III. In the alternative, Defendants asked the Court to abstain from exercising its jurisdiction pursuant to *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) or *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

Plaintiffs now move the Court for an order remanding this matter to the Court of Common Pleas for Richland County on the grounds that (1) as agreed by all parties, the Court lacks jurisdiction over the subject matter; (2) this action for declaratory and injunctive relief arises completely out of the law of South Carolina, and involves an administrative agency of the State of South Carolina and a company licensed by that agency to conduct the business of insurance in South Carolina, a business reserved by Congress for regulation by the States; and (3) as also agreed by the parties, albeit for different reasons, even assuming that the Court has jurisdiction over the subject matter, the Court should abstain from exercising that jurisdiction and, Plaintiffs submit, the matter should be remanded to the South Carolina court where it was filed.

II. ARGUMENT

A. This Case Must be Remanded to the State Court Because Plaintiffs Have Admitted that the District Court Lacks the Power Under the U.S. Constitution to Adjudicate the Matter.

This is an odd case, in that none of the parties presently maintain that this matter belongs in federal court. Just one week after removing this action on the ground that the federal district court had jurisdiction over the subject matter, Defendants filed a motion seeking dismissal of the Complaint on the ground that the same court lacks such jurisdiction.[1] Defendants maintain that the

[1] Plaintiffs do not concede that they lack standing and will file a separate response to Defendants' Motion to Dismiss. Plaintiffs' position here is that the Defendants having argued that the Court lacks constitutional authority to hear this matter, they cannot continue to maintain that this action

Complaint must be dismissed because Plaintiffs lack standing to sue in federal court under Article III of the U.S. Constitution. Standing "implicates the court's subject-matter jurisdiction and may be challenged in a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure." *Meyer v. McMaster*, 394 F. Supp. 3d 550 (D.S.C. 2019) (internal quotation marks omitted); *see also Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 208 (4th Cir. 2017); *Beyond Sys., Inc. v. Kraft Foods, Inc.*, 777 F.3d 712, 715 (4th Cir. 2015); Arthur R. Miller, Mary Kay Kane & A. Benjamin Spencer, 5B Federal Practice & Procedure: Civil § 1350 (3d ed. 2007) ("As the abundance of case citations in . . . this paragraph indicate, the Rule 12(b)(1) motion to dismiss for a lack of subject matter jurisdiction also may be appropriate . . . when the plaintiff lacks standing to bring the particular suit before the district court.") "Standing is a threshold jurisdictional question which ensures that a suit is a case or controversy appropriate for the exercise of the courts' judicial powers under the Constitution of the United States." *Pye v. United States*, 269 F.3d 459 (4th Cir. 2001) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)).

"'The party attempting to invoke federal jurisdiction bears the burden of establishing standing.'" *Meyer*, 394 F. Supp. 3d at 558 (quoting *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006) (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990)). Here, however, Defendants, as the parties who invoked federal jurisdiction in the first instance, have failed to carry that burden. To the contrary, they have insisted that Plaintiffs lack Article III standing to sue in federal court. In so doing, they have argued their way out of the District Court.

For the purposes of this motion to remand, Plaintiffs are not concerned with establishing standing. They brought their action in the courts of South Carolina, where Article III requirements are, of course, irrelevant, and Plaintiffs are content to have their action returned there. This is an

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was properly removed. Defendants' apparent argument that the Court lacks constitutional authority

action brought by an agency of the State of South Carolina and its Director, a member of the Cabinet of the Governor of South Carolina, against a South Carolina-licensed insurer (and its management), seeking to protect the rights of South Carolina policyholders and to otherwise vindicate laws established by the General Assembly of South Carolina to govern the business of insurance, the regulation of which has long been the province of the individual States. The Defendants are the ones who decided to make a federal case out of it, and now they contend it no longer belongs here. As the Defendants have admitted that this matter should not have been removed, the case should be remanded to the Court of Common Pleas where it was initiated.

B. This Action for Declaratory and Injunctive Relief Does Not Meet the Amount in Controversy Requirements for Invoking the Court's Diversity Jurisdiction.

Assuming for argument's sake that the Defendants' constitutional standing defense alone is not sufficient to warrant remand of this action, the statutory requirements for invoking the jurisdiction of this Court are lacking. Neither party contends that the Complaint implicates "federal question" jurisdiction under 28 U.S.C. § 1331, nor does this action for declaratory and equitable relief involve any amount in controversy, much less an amount sufficient to meet the requirements of the diversity statute, 28 U.S.C. § 1332. State court defendants may only remove a civil action to federal district court if it has original subject matter jurisdiction over the action. *See* 28 U.S.C. § 1441(a). District courts have original jurisdiction over actions between citizens of different states in which the amount in controversy exceeds $75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a)(1).

"Because removal jurisdiction raises significant federalism concerns," the Court "must strictly construe removal jurisdiction. If federal jurisdiction is doubtful, a remand is necessary." *Mulcahey v. Columbia Organic Chemicals Co.*, 29 F.3d 148, 151 (4th Cir. 1994) (internal citation

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to adjudicate the matter but somehow has jurisdiction pursuant to statute is a non sequitur.

omitted). "The removability of a case 'depends upon the state of the pleadings and the record at the time of the application for removal.'" *Francis v. Allstate Ins. Co.*, 709 F.3d 362, 367 (4th Cir. 2013) (quoting *Alabama Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 216 (1906)). "If diversity of citizenship, under 28 U.S.C. § 1332(a), provides the grounds for removal, then 'the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy.' " *Id.* (quoting 28 U.S.C. § 1446(c)(2)). "If a complaint does not allege a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $75,000." *Id.* (internal quotation marks and alteration omitted). "[A] claim not measurable in 'dollars and cents' fails to meet the jurisdictional test of amount in controversy." *McGaw v. Farrow*, 472 F.2d 952, 954 (4th Cir. 1973).

Where, as here, the plaintiffs seek declaratory and equitable relief, "'the amount in controversy is measured by the value of the object of the litigation.'" *Francis*, 709 F.3d at 367 (quoting *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 347 (1977)); *see also JTH Tax, Inc. v. Frashier*, 624 F.3d 635, 639 (4th Cir. 2010) ("[R]equests for injunctive relief must be valued in determining whether the plaintiff has alleged a sufficient amount in controversy."). The object may be valued from either party's perspective—i.e., what the plaintiff stands to gain, or what the defendant stands to lose. *See Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002); *Gov't Emp. Ins. Co. v. Lally*, 327 F.2d 568, 569 (4th Cir. 1964). In other words, the Court must consider the monetary effect that a judgment would have on either party to the litigation. *Dixon*, 290 F.3d at 710. The Fourth Circuit has explained that courts "ascertain the value of an injunction for amount in controversy purposes by reference to the larger of two figures: the injunction's worth to the plaintiff or its cost to the defendant." *JTH Tax*, 624 F.3d at 639.

Defendants apparently would have the Court believe that the entire fate of the insurer rests on its ability to avoid filing its South Carolina rates for review and approval by the Department, which is as ridiculous as it is speculative. It should be clear from the context, but to remove all doubt, the Complaint does not ask for any relief that would extend beyond the borders of South Carolina, and it would seem plain to all that a South Carolina state court can grant no more than that. The sole issue in this litigation is whether the Defendant insurer must file its rates with the Department in accordance with South Carolina law, as it has done numerous times in the past.[2] Plaintiffs do not dispute that, within the limits of the law and reason, a domiciliary state may rehabilitate an insurer as it sees fit. Rather, they simply maintain that a Pennsylvania insurer may not shove new rates and decreased benefits down the throats of several hundred South Carolina policyholders with an average age of over 85, and the notion that their efforts to vindicate the legislatively-guaranteed rights of these policyholders could harm an insurer to such an extent as to thwart any attempt to save it is nothing short of absurd.

Defendants also seem to argue that any amount they do not earn if the rate increase is not granted in full constitutes the amount in controversy; however, if this were the case, any insurer would be able to seek relief from a state's prospective rate denial in federal court so long as it alleges a difference of at least $75,000.01 between the amount the insurer projects to earn under the permitted rate and what it would collect under the new rate it proposes to charge. Moreover, *no one*

[2] Defendants offer as an alternative the submission of their rates on condition that the insurer may unilaterally alter the terms of the contracts it has made with each South Carolina beneficiary in the event the new rates are not approved in full. (Am. Rehab. Plan at 102-104; Complaint at ¶ 77.) This, however, is merely a device for achieving a unilateral rate increase through the back door: if the insurer doesn't get the rate increase it wants, it simply lowers its obligations under policies to fit what it determines is the appropriate risk at the permitted rate, without regard for its preexisting written commitments to policyholders. In other words, if it cannot fix the rate for the risk, it will unilaterally push back onto each policyholder some of the risk transferred to it under the policies. Moreover, policy benefits are also not subject to unilateral change, but must be approved by the

can say at this juncture whether a rate increase would be approved or not, and assuming it were, how large an increase would be granted. The only monetary benefit or detriment that would result from a judgment in favor of Plaintiffs (i.e., a declaratory judgment and an injunction) is the cost of compliance, the same cost that the Defendant insurer, and every other similar insurer, always incur when seeking to increase rates. *See James River Ins. Co. v. William Kramer & Assocs.*, 2018 WL 851092 at *3 (quoting *Grubb v. Jos. A. Bank Clothiers, Inc.*, 2005 WL 1378721, at *9 (S.D.W. Va. June 2, 2005) ("In the case of injunctive relief, this burden requires the defendant to quantify the cost of compliance.") Any other amount is entirely speculative.

C. Assuming, *arguendo*, that the District Court Has Jurisdiction, the Court Should Abstain from Exercising that Jurisdiction and Remand this Case, Returning It to the South Carolina State Court from Which It Was Removed.

Even if the Court did have jurisdiction over the subject matter, Plaintiffs agree with Defendants that the Court should abstain from exercising its jurisdiction, but for different reasons. Plaintiffs also submit that the proper action upon abstention is remand to the Court of Common Pleas.

1. The Court should abstain from exercising its jurisdiction in order to avoid needless conflict with the state over its regulation of insurance.

In *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the Supreme Court held that a federal court sitting in diversity jurisdiction may abstain from hearing a case when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar" or, where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *See also Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959) (federal court may abstain in cases raising issues "intimately involved with [the

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Department.

State's] sovereign prerogative," where proper adjudication might be impaired by unsettled questions of state law).

"The underlying purpose of *Burford* abstention is to enable federal courts to avoid needless conflict with the administration by a state of its own affairs." *Meredith v. Talbot Cty., Md.*, 828 F.2d 228, 231 (4th Cir.1987); 17A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Vikram David Amar, Federal Practice & Procedure: Jurisdiction § 4244 (3d ed. 2007) ("Needless Conflict with States—When Abstention Required"). Comprehensive guidance regarding when abstention under *Burford* is called for may be found in the Fourth Circuit's decision in *First Penn-Pacific Life Ins. Co. v. Evans*, 304 F.3d 345, 348 (4th Cir. 2002) (Wilkinson, C.J.):

> A federal court's exercise of discretion in deciding whether to invoke *Burford* abstention "must reflect principles of federalism and comity." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996) . . . . These constitutional commitments require federal courts to "exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy." *Burford*, 319 U.S. at 318 . . . . Courts should abstain from deciding cases presenting "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or whose adjudication in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) ("*NOPSI*") . . . .
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> The Supreme Court's decisions "do not provide a formulaic test for determining when dismissal under *Burford* is appropriate." *Quackenbush*, 517 U.S. at 727. Nevertheless, the general concern that should inform a federal court's discretion is clear enough:
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> > Ultimately, what is at stake is a federal court's decision, based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the "independence of state action," *Burford*, 319 U.S. at 334, that the State's interests are paramount and that a dispute would best be adjudicated in a state forum." *Id*. at 728.

There can be no doubt that this insurer's challenge to South Carolina's authority to approve insurance rates and regulate insurance policies within its borders presents "difficult questions of state

law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar" and the adjudication of which in a federal forum "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *NOPSI*, 491 U.S. at 361. Concern for the independence of state action and South Carolina's strong interest in the regulation of the business of insurance weigh heavily in favor of the conclusion that this dispute could be best adjudicated in a state forum. *See First Penn-Pacific Life*, 304 F.3d at 348.

With the passage of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, in 1945, Congress explicitly determined that the regulation of insurance be entrusted to the states. *See Lac D'Amiante du Quebec v. American Home Assurance Co.*, 864 F.2d 1033, 1039 (3d Cir.1988) ("the states have assumed the primary role in regulating insurance"). As in other states, long-term care insurance, and the insurance industry in general, are heavily regulated in South Carolina. Federal review in this matter threatens to "frustrate the purpose of the complex administrative system that [South Carolina] ha[s] established," *see Quackenbush*, 517 U.S. at 725, by unduly disrupting the administration of South Carolina's insurance laws and hampering the State's development of coherent regulatory policy with statewide implications.

The South Carolina Insurance Law, which created the Department and its Director, to whom the General Assembly has delegated its sole authority to regulate the business of insurance in South Carolina, makes specific provision for long-term care insurance. Indeed, an entire chapter of Title 38 (Insurance) of the South Carolina Code of Laws is devoted to long-term care. *See* Long Term Care Insurance Act, S.C. Code Ann. §§ 38-72-10 through 38-72-100. In addition to this legislation, the General Assembly in 2019 passed a measure to "require a long-term care insurance provider to submit all premium rate schedules to the Department of Insurance and to establish certain procedures concerning the premium approval process." S.C. Act No. 6 of 2019 (the "Act"). (*See also*

Complaint at ¶ 118.)

The Act requires that "[a]ll premium rate schedules for long-term care insurance must be filed with the [D]epartment and are subject to the prior approval of the [D]irector or his designee," and prohibits long-term care insurers from changing "a premium charged to an insured under a policy or contract of long-term care insurance until the applicable premium rate is filed with and approved by the [D]irector or his designee." *See* S.C. Code Ann. § 38-72-75 (2019). The Act provides that the Director or his designee "may disapprove or modify premium rates if he determines that the benefits provided are unreasonable in relation to the premiums charged, appear to be inadequate, unfairly discriminatory, or excessive in relation to benefits or appear to have assumptions that are unreasonable in the aggregate or for each assumption individually." *Id.* In addition to the factors set forth in Chapter 72 of Title 38 of the Code and in regulation, the Director or his designee are mandated to "consider the following to the extent appropriate when determining whether to disapprove or modify a premium rate filing of an insurer: (a) past and prospective loss experience in and outside the State; (b) underwriting practice and judgment; (c) a reasonable margin for reserve needs; (d) past and prospective expenses, both countrywide and those specifically applicable to the State; (e) prior approved rate changes; and (f) any other relevant factors necessary including the factors set forth in the regulation." *Id.* The Act also provides for appeal of any adverse "decision or determination of disapproval before the Administrative Law Court as provided by law." *Id.*

The Director or his designee "may hold a public hearing or solicit public comments as a part of the process to review long-term care insurance rate filings received by the [D]irector or his designee," and "shall provide all individuals present at a public hearing held pursuant to this section an opportunity to offer testimony or written comments." *Id.* Each premium rate filing and any

supporting information filed and subject to disclosure "must be open to public inspection after the filing becomes effective." *Id*. Moreover, if the Director or his designee holds a public hearing or solicits public comments on a premium rate filing, he "may open to public inspection some or all portions of the filing that are subject to disclosure as a part of the public hearing or solicitation of public comments." *Id*. "Each decision of the [D]irector or his designee about long-term care insurance premium rates . . . is subject to judicial review in accordance with Section 38-3-210" of the South Carolina Code. In addition to these statutes, the Department has promulgated and the General Assembly has approved regulations governing long-term care insurance, which are codified at S.C. Code Regs. § 69-44. These regulations provide for, among other things, actuarial review of proposed rates. *Id*. *See also* S.C. Code Ann. § 38-61-20 (approval of forms by Director).

Nor does the State's commitment to protect its senior citizens with respect to long-term care end there. With S.C. Act No. 261 of 2018, the legislature created the South Carolina Department on Aging supported by an Advisory Council on Aging consisting of members appointed by the Governor. S.C. Code Ann. § 43-21-130 (2018) provides for a Long-Term Care Council, which is to include one representative each of long-term care providers, long term care consumers, and "persons in the insurance industry developing or marketing a long-term care product." In short, the State's General Assembly has provided a detailed, comprehensive and thorough system for the open, transparent regulation of long-term care insurance that policyholders can not only observe but in which they may actively participate. And it is this very system that Defendants wish to circumvent so that they may exercise unfettered power to impose drastic rate increases and complex benefit changes on those who number among South Carolina's most vulnerable citizens. (*See generally* Am. Plan of Rehab. at 102-104; Complaint at ¶¶ 64-85, 122-126.)

As a condition to obtaining a certificate of authority to do business in South Carolina, the

insurer agreed to conduct its business in compliance with South Carolina's insurance laws, including those described above. Its claim that it is no longer bound by those laws presents a novel question regarding the proper interpretation and application of these laws. If ever there were an esoteric question of state law, it would be whether an insurer in rehabilitation can unilaterally impose new rates or benefits without filing them with the State's insurance regulator and obtaining his approval. This question also directly impacts the State's extensive regulatory scheme governing the business of insurance, an area of strong public interest which has traditionally been left to the states. Thus, significant questions of public policy are inextricably involved in any consideration of the underlying legal issues.

That these matters have yet to be addressed by the courts of South Carolina should alone be sufficient to persuade a federal court to stay its hand lest it bring about needless conflict with the administration by the State of South Carolina of its own affairs. *See Kelly Servs., Inc. v. Johnson*, 542 F.2d 31, 32-33 (7th Cir. 1976) (abstention appropriate where issues touching matters of traditional state concern have not been subject to state scrutiny). Initial consideration of state law questions of first impression and formulation of policy is clearly best left to state administrative and judicial entities. *Marks v. Snedeker*, 612 F. Supp. 1158, 1161 (D.N.J. 1985). No federal district court can reasonably be expected to divine how the South Carolina courts would decide this question of first impression.

In addition, by its nature, regulatory approval of insurance premiums by each individual state entails consideration of local interests. (Complaint 91-95.) It should go without saying that the same rate increase will impact the citizens of one state differently than citizens of another due to variances in local conditions. Where, as here, the matter presented to the federal court involves state regulatory efforts affecting local interests, abstention is particularly appropriate. *See, e.g., Alabama*

Public Service Commission v. Southern Railway Co., 341 U.S. 341, 347 (1951) (abstention proper since the state had established a special state-wide review process to resolve the "essentially local problem"). South Carolina's efforts involving a quintessentially local matter could easily be frustrated by federal intervention.

An erroneous decision regarding the review and approval of insurance premium rates and policy provisions would have a severely disruptive impact in an area of state sovereignty, i.e., the regulation of the business of insurance. *E.g., Smith v. Metropolitan Property and Liability Ins. Co.*, 629 F.2d 757, 759,761 (2d Cir. 1980) (judicial revision of the terms upon which policies are issued may produce extensive repercussions throughout the insurance industry of the state.) Any issue arising out of the filing and approval of the insurer's premium rates and conduct in the South Carolina insurance marketplace can and should be resolved by the South Carolina administrative law courts and state judicial courts specifically charged with providing complete and expeditious review of Department decisions. *E.g., Liberty Mut. Ins. Co. v. Hurlbut*, 585 F.3d 639, 651 (2d. Cir. 2009) (issues should be resolved by state administrators and courts to avoid disruption of a carefully established state system with inconsistent and conflicting federal and state results).

Moreover, the state in its sovereign capacity is involved here as a party, and both the Department's technical expertise and the South Carolina courts' jurisdiction over the Department and matters of state law is implicated. *E.g., Onondaga Landfill Systems, Inc. v. Williams*, 624 F. Supp. 25, 30 (N.D.N.Y. 1985) (*Burford* abstention appropriate where state is a party in its sovereign capacity and state court's jurisdiction is implicated). The concern for friction between the federal courts and the State is particularly strong under these circumstances. *See Burford*, 319 U.S. at 332 (abstention necessary to avoid "needless friction" with state policies). Considerations of federalism and comity dictate that this court abstain to avoid interfering in the state's complex insurance

regulatory scheme.

The Department stands in much the same position as the Railroad Commission in *Burford*. Just as the Railroad Commission regulated the oil and gas industry, the Department is charged by the General Assembly with regulating and protecting the public and private interests involved in the insurance industry. *Cf. Meicler v. Aetna Cas. & Sur. Co.*, 372 F. Supp. 509, 515 (S.D. Tex.1974) ("State Board of Insurance stands in much the same position as the Railroad Commission" in *Burford*). Thus, consistent with *Burford*, it is appropriate for this Court to abstain in order to avoid needless conflict and unnecessary friction with the State of South Carolina over the administration of long-term care insurance policies in that State. *See Burford*, 319 U.S. at 334 ("Delay, misunderstanding of local law, and needless federal conflict with the state policy, are the inevitable product of this double system of review.")

All of this counsels respect for the proceedings that were initiated in the Court of Common Pleas and the return of them to that court. *See First Penn-Pacific Life*, 304 F.3d at 351. Whatever federal interest that might be served by retaining jurisdiction over this dispute is outweighed by the necessity of the "independence of state action" with respect to the regulation of insurers doing business in the South Carolina, a matter of "paramount" concern to that State, and the dispute "would best be adjudicated in a state forum." *Id.* at 348.[3]

[3] Abstention is not unusual in cases involving state regulation of insurance. *E.g., Liberty Mutual Ins. Co.*, 585 F.3d at 650 (challenge to procedural changes in workers' compensation insurance law affecting benefit awards and settlements); *Chiropractic America v. Lavecchia*, 180 F.3d 99 (3d Cir. 1999) (challenge to certain regulations of New Jersey's comprehensive no-fault automobile insurance law automobile insurance rate regulation); *Smith v. Metropolitan Property and Liability Ins. Co.*, 629 F.2d 757 (2d Cir. 1980) (declaration of validity under state law of automobile insurance policy uninsured motorist clause); *Aims Enterprises, Inc. v. Muir*, 609 F. Supp. 257 (M.D. Pa. 1985) (dispute between two states' insurance commissioners involving insolvent insurer); *Marks*, 612 F. Supp. at 1161 (challenge to automobile insurance surcharge law); *Mathias v. Lennon*, 474 F. Supp. 949 (S.D.N.Y. 1979) (dispute between director of insurance in one state and rehabilitator of insurer in another state); *Meicler*, 372 F. Supp. at 515 (abstention in class action against automobile insurers

2. The court should abstain from exercising its jurisdiction under the Declaratory Judgment Act because an ongoing proceeding in state court overlaps with this action.

Because this action seeks declaratory relief, the court has additional reason to exercise its discretion to abstain from exercising jurisdiction. Just as courts may abstain from exercising jurisdiction under certain circumstances that may intrude on the prerogative of state courts and to avoid duplicative litigation and interference with state-court proceedings, courts in declaratory judgment actions must consider whether "federalism, efficiency, and comity" counsel against exercising jurisdiction when an ongoing proceeding in state court overlaps with the federal case. *Trustgard Ins. Co. v. Collins*, 942 F.3d 195 (4th Cir. 2019) (quoting *Penn-Am. Ins. Co. v. Coffey*, 368 F.3d 409, 412 (4th Cir. 2004)). Indeed, "district courts have great latitude in determining whether to assert jurisdiction over declaratory judgment actions." *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488 (4th Cir. 1998). In deciding whether or not to refrain from exercising jurisdiction over a declaratory judgment action when there is a related proceeding underway in state court, a district court should determine whether the controversy "'can better be settled in the proceeding pending in the state court.'" *Bi-Lo, LLC v. National Union Fire Ins. Co. of Pittsburgh*, 2014 WL 12605522, at *8 (D.S.C. 2014) (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995)).

The Fourth Circuit has directed district courts in such situations to consider "(1) whether the state has a strong interest in having the issues decided in its courts; (2) whether the state courts could resolve the issues more efficiently than the federal courts; (3) whether the presence of 'overlapping issues of fact or law' might create unnecessary 'entanglement' between the state and federal courts; and (4) whether the federal action is mere 'procedural fencing,' in the sense that the action is merely the product of forum-shopping." *Id.* (citing *Kapiloff*, 155 F.3d at 493–94).

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due to very legitimate and substantial state interest in liability insurance and driving safety).

Regarding whether the state has a strong interest in resolving the issues in state court and whether state court resolution would be more efficient, the Complaint in this action is of course the same pleading filed in the Court of Common Pleas. The whole purpose of this action, brought by the State, is to settle legal rights, duties and relationships under South Carolina law. It seeks to do so to avert a violation or disturbance of those rights and relationships, specifically with respect to South Carolina policyholders, whose interests the State has both the right and obligation to protect. The issues in this matter are issues of South Carolina state law, which a state judge is uniquely qualified to rule upon. In fact, the Court of Common Pleas for Richland County, because of its location in Columbia, is quite accustomed to hearing disputes involving agencies of the State, including the Department, and other matters arising out or of related to State administrative proceedings. Together, these considerations establish that the State has a substantial interest in resolving the issues in its courts and that it would be more efficient for those courts, which are accustomed to addressing both South Carolina law in general and the law of insurance in that State, to do so. As to the third factor, the issues are more than intertwined, they are identical, and removal of a state court action to a federal court could hardly entangle one more in the operations of the other. The fourth and final factor, forum shopping, also weighs toward abstention, in that the removing party appears to have moved the action to federal court in an attempt to use procedural tactics to extinguish a state court action brought under state law to protect important state interests. Little else could explain Defendants' motion to dismiss the action based on the Court's lack of subject matter jurisdiction on the heels of their having removed it. For the reasons set forth above, this Court has the discretion to abstain and remand the matter to the Court of Common Pleas.

3. The Court should abstain under *Colorado River* because there is a substantially similar lawsuit pending in state court.

Should the Court determine that neither *Burford* abstention nor an exercise of its discretion under the Declaratory Judgment Act is appropriate, Plaintiffs would respectfully ask it to consider abstention pursuant to *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800 (1976). Under *Colorado River*, a district court may exercise its discretion to stay or dismiss a suit in exceptional and limited circumstances where there is a substantially similar lawsuit pending in state court. *Id*. Here, Plaintiff would ask that the Court remand the action, as the "substantially similar" lawsuit (indeed, the very same lawsuit) was pending in state court. *Colorado River* abstention may be used in the interest of "wise judicial administration" when concurrent state and federal suits are parallel. *Id*. at 817. The removed state court action is more than parallel, it is the identical action involving identical parties and state law claims. Accordingly, the Court may abstain under *Colorado River* with the requisite expectation that the state court litigation can resolve the controversy. *See id*. at 820.

A district court considering *Colorado River* should assess a number of factors, no one of which is controlling -- abstention is warranted when these factors, taken together, constitute "exceptional circumstances." *Id*. at 818-820. The district court is required to make a "carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise." *Id*. at 819-820. Among the factors to be considered are the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation in the interest of judicial economy, the order in which the state and federal courts obtained jurisdiction, and whether federal or state law controls the litigation. *Id*. Here, appearing in state court in Columbia, South Carolina is no less convenient for any party than appearing in a federal court a few blocks away; however, judicial economy would be served by not wasting federal resources on a state lawsuit for declaratory and injunctive relief brought exclusively under state law

involving a subject matter traditionally left to the states. At this early juncture, the state court action could easily be remanded to its place of origin no worse for wear, before a significant investment of the time or resources of the district court. *See id*. at 820. ("We also find significant . . . the apparent absence of any proceedings in the [federal case], other than the filing of the complaint, prior to the motion to dismiss.") Taken as a whole, the circumstances warrant an exception to the exercise of jurisdiction and remand the Court of Common Pleas.

4. The Court should remand the case to state circuit court.

Of the five parties to this action, literally no one has argued that it should remain in the federal district court, and all five have urged the Court to abstain. The only difference is that they disagree on the court in which the claims should be heard. However, "unless there is some ambiguity in the language of a statute, a court's analysis must end with the statute's plain language." *Hillman v. I.R.S.*, 263 F.3d 338, 342 (4th Cir. 2001) (citing *Caminetti v. United States*, 242 U.S. 470, 485 (1917)) (the "Plain Meaning Rule"); *see also In re Sunterra Corp.*, 361 F.3d 257, 265(4th Cir. 2004). Thus, in interpreting the word "remand" in 28 U.S.C. § 1447(c), the Court should apply its plain and ordinary meaning. *Matson v. Alarcon*, 651 F.3d 404, 408 (4th Cir. 2011). According to Black's Law Dictionary (11th ed. 2019), "remand" is the "act or an instance of sending something (such as a case, claim, or person) back for further action." Similarly, Merriam-Webster.com defines "remand" as "to order back: such as a: to send back (a case) to another court or agency for further action" and as a noun, "law: the act of remanding something or someone or the state of being remanded: an order to return or send back someone or something a: the return of a case to another court or agency for further action." Applying the plain meaning of "remand," the intent of 28 U.S.C. § 1447(c) then is for the district court to return the matter to the court from whence it came. The instant action should be remanded to the state circuit court.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Remand should be granted and the matter remanded to the Court of Common Pleas for Richland County, South Carolina for further proceedings according to the laws of that State.

Respectfully submitted,

February 10, 2021

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