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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

L. Casey Manning, Chief Administrative Judge, Fifth Judicial Circuit

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2020-CP-4005802

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

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 in Rehabilitation, — Appellants

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REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Other Authorities

APPELLANTS' BRIEF IN REPLY

Defendants-Appellants Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of Pennsylvania and Statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania ("Rehabilitator"), Special Deputy Rehabilitator Patrick Cantilo ("SDR"), and Senior Health Insurance Company of Pennsylvania ("SHIP," and, together with the Rehabilitator and SDR, the "SHIP Rehabilitation Appellants") hereby submit their Initial Reply Brief of Appellants in this appeal from the preliminary injunction order entered on January 20, 2022 ("Preliminary Injunction Order") in favor of Plaintiffs-Respondents South Carolina Department of Insurance and the Director of the South Carolina Department of Insurance ("SCDOI Respondents"). For the reasons set forth herein and in their opening Brief, SHIP Rehabilitation Appellants respectfully request that this Court dismiss the SCDOI Respondents' Complaint entirely for want of jurisdiction. Should the Court turn to the merits, it should hold that the preliminary injunction was an abuse of discretion and must be vacated.

As their Brief demonstrates, SCDOI Respondents mistakenly conflate routine questions of jurisdiction and choice of law with usurpation of the authority of South Carolina's legislature and agencies, and SCDOI Respondents compound that mistake by making broad but unsupported assertions of harm arising out of a rehabilitation Plan designed to give policyholders a voice in the SHIP receivership. These errors cannot be grounds for an injunction against Plan implementation, however, and even a cursory examination of the record reveals that the Court of Common Pleas accepted SCDOI Respondents' arguments without meaningful analysis and without requiring evidentiary proof. Relying primarily on their opening Brief, SHIP Rehabilitation Appellants address only the most significant errors in SCDOI Respondents' factual summaries, arguments, and analyses.

A. SCDOI Respondents cannot show that the Court of Common Pleas had subject-matter jurisdiction over the claims at issue here.

As the SHIP Rehabilitation Appellants have argued, the Court of Common Pleas lacked subject-matter jurisdiction because the South Carolina Insurance Receivership and Liquidation Act ("IRLA") precludes the exercise of jurisdiction over the claims in the Complaint. Even if the IRLA did not prohibit the claims here, jurisdiction would be lacking because SCDOI Respondents' Complaint improperly seeks to invade the exclusive jurisdiction of the Commonwealth Court over SHIP's rehabilitation and the distribution of SHIP's assets. Absent subject-matter jurisdiction, the Court of Common Pleas could not issue an injunction and its order must be vacated. *See, e.g., Hunt v. Avondale Mills, Inc.*, 385 S.C. 616, 616, 686 S.E.2d 190 (S.C. 2009). The absence of jurisdiction requires immediate dismissal as well because the Court of Common Pleas lacks the power to rule on the underlying merits. *See Deborah Dereede Living Trust dtd Dec. 18, 2013 v. Karp*, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019).

Subject-matter jurisdiction is a fundamental requirement of court action reviewed by this Court *de novo*, and no deference is due to the Court of Common Pleas. SCDOI Respondents cannot establish their case for subject-matter jurisdiction, focusing their opposition on challenging the Rehabilitator's reliance on the Commonwealth Court's exclusive jurisdiction, and their argument falls flat as inconsistent and unsupported. Indeed, the SCDOI Respondents admit the key jurisdictional facts and principles on which the SHIP Rehabilitation Appellants rely. According to their opening Brief, SCDOI Respondents agree that:

- SHIP should be in receivership in Pennsylvania. (Brief at 7.)
- Pennsylvania courts exercise *in rem* jurisdiction through the rehabilitation proceedings. (Brief at 8.)
- SCDOI Respondents are not asserting a direct claim against SHIP's assets. (Brief at 9.)

- No South Carolina policyholders asserted a cause of action related to the Rehabilitation. (Brief at 12.)

- The policy of both Pennsylvania and South Carolina is to "lessen[] the problems of interstate rehabilitation" through their receivership laws. *See* 40 P.S. § 221.1; S.C. Code Ann. § 38-27-30. (Brief at 11.)

Despite these admissions, SCDOI Respondents wrongly assert that their claims do not invade the jurisdiction of the Commonwealth Court based on three fundamental errors, each of which separately requires reversal.

1. The Complaint violates South Carolina's receivership law.

SCDOI Respondents cannot avoid the injunction prohibition and limitation forming a fundamental part of South Carolina's IRLA, which provides as follows:

> No court of this State has jurisdiction to entertain, hear, or determine any complaint praying for the dissolution, liquidation, rehabilitation, sequestration, conservation, or receivership of an insurer or praying for an injunction or restraining order or other relief preliminary to, incidental to, or relating to the proceedings other than in accordance with this chapter.

§ 38-27-60(b). SCDOI Respondents do not argue that their injunction action is "in accordance with" the IRLA, and, as a result, the preliminary injunction must be voided and the Complaint must be dismissed because SCDOI Respondents' plainly claims seek prohibited "relief preliminary to, incidental to, or relating to" the proceedings of SHIP in rehabilitation.

The Complaint requests injunctions that, if entered, will purport to bar the Rehabilitator from complying with the rehabilitation orders of the Commonwealth Court of Pennsylvania with respect to the administration of SHIP's assets and its relationship with policyholders. In approving the Plan, the Commonwealth Court issued an order regarding the administration of SHIP's assets vis-à-vis SHIP's policies. *See* 40 P.S. § 221.15(c) (assets must be administered under Court's supervision). In fact, the entry of the Plan Approval Order requires the Rehabilitator to implement

the Plan as a matter of statute. *See* 40 P.S. § 221.15(d) ("If [the Plan] is approved, the rehabilitator *shall* carry out the plan." (emphasis added).) SCDOI Respondents cite no legal authority that could give them a veto over the Commonwealth Court's administration of policyholder claims and decisions regarding SHIP's assets, nor do SCDOI Respondents cite any legal authority permitting them to disregard and overrule the decisions of policyholders impacted by SHIP's receivership by preventing those policyholders from making the elections allowing those policyholders to decide for themselves how to allocate the potential burdens of receivership.[1]

Instead, SCDOI Respondents argue only that the prohibition in § 38-27-60 does not apply because the issue was previously decided when this Court considered a similar predecessor statute in *Smalls v. Weed*, 293 S.C. 364, 360 S.E. 531 (Ct. App. 1987). *Smalls* does not overcome the plain language of the IRLA or the practical effect of the injunctions sought by SCDOI Respondents, however, because—unlike the case now before the court—an order in favor of the *Smalls* plaintiff by the South Carolina court would not have contravened the substantive findings of the receivership court, and it would have had no impact on the rehabilitation proceedings or the rehabilitator's ability to comply with the orders of the receivership court. In *Smalls*, the insured brought a claim for breach of contract and bad-faith refusal to pay based on a specific claim submitted prior to the receivership—*i.e.*, a cause of action that could have been brought on the

[1] To be clear, the Rehabilitator has never argued that *all* actions against the SHIP Rehabilitation Appellants are beyond the jurisdiction of courts outside of Pennsylvania, contrary to SCDOI Respondents' efforts to wrongly recast the Rehabilitator as power-hungry and hostile to the government and people of South Carolina. (*See, e.g.*, Brief at 9 (arguing that Rehabilitator has claimed "'jurisdiction over the whole field.'").) Instead, the Rehabilitator has claimed consistently that SCDOI Respondents' Complaint is problematic because it seeks to decide how the Rehabilitator should manage SHIP's assets and thereby implement SHIP's Approved Plan and to require the Rehabilitator to take action contrary to the Commonwealth Court's orders approving the Plan.

same facts regardless of the receivership. *See Smalls v. Weed*, 291 S.C. 258, 260, 353 S.E.2d 154, 155 (S.C. 1987) (Supreme Court summarizing facts of case prior to remand). Thus, *Smalls* involved "merely an action against an insurance company which happens to be" in receivership, and "not an action regarding or relating to the institution of rehabilitation proceedings." *Smalls*, 293 S.C. at 371, 360 S.E.2d at 534.

SCDOI Respondents try to reframe the questions presented in this appeal by claiming that their injunction action asks only "if an insurer that happens to be in rehabilitation must continue to comply with the laws by which it has always been bound" (Brief at 9), but their argument works only by ignoring the critical facts underlying SCDOI Respondents' claim. SHIP Rehabilitation Appellants are not acting unilaterally to ignore a state law that SCDOI Respondents seek to enforce regardless of any rehabilitation order or rehabilitation Plan. Instead, SCDOI Respondents seek an injunction that will purport to bar the Rehabilitator from complying with his statutory obligation to implement the Plan—an order that, if enforceable, would purport to void the notice and opportunity to be heard given to all interested parties, the Commonwealth Court's Plan hearing and consideration, and the Commonwealth Court's approval and finding that the Plan is not limited or barred by the state-based rate-regulation scheme.

2. The Complaint invades the exclusive and pre-existing jurisdiction of the Pennsylvania Courts.

Even if an injunction complaint is not barred outright in these circumstances, the specific allegations and claims in SCDOI Respondents' Complaint seek to invade the admitted exclusive authority of the Pennsylvania courts with respect to the review and approval of a rehabilitation plan and the scope of a rehabilitator's authority. This defect is most apparent in the SCDOI Respondents' insistence that the Rehabilitator's authority is limited to that of SHIP management, and thus the SHIP Rehabilitation Appellants must comply with all of South Carolina's insurance

laws. SCDOI Respondents err in both premise and conclusion. As the Commonwealth Court found, the Rehabilitator's authority goes beyond that of management when the Rehabilitator implements a rehabilitation Plan or acts pursuant to the orders and authority of the Commonwealth Court. As a result, the injunction requested by SCDOI Respondents would purport to reject and overrule the conclusions of a Pennsylvania court with unquestionable jurisdiction.

SCDOI Respondents focus on specific powers given to the Rehabilitator by statute, but the statutes are not so limited. The specific sections cited merely add details to the broad grant of authority in the first sentence of 40 P.S. § 221.16(b) to "take such action as he deems necessary or expedient to correct the condition or conditions which constituted the grounds for the order of the court to rehabilitate the insurer." There can be no doubt that a Rehabilitator's authority extends beyond the managerial authority of an insurer's officers and directors, particularly when the Rehabilitator invokes the Court's authority to approve a Plan or issue orders to protect the rehabilitation, the company, its assets, or its policyholders, as is the case here. *See* 40 P.S. § 221.16(c) (authorizing plan). SCDOI Respondents cannot identify any civil cause of action, for example, that would enable the officers and directors of an insurer in the ordinary course to obtain orders preventing potentially preferential treatment for certain policyholders or creditors, to bar the institution of new proceedings against the company, or to prohibit acts merely prejudicial to the rights of policyholders—yet the Rehabilitator is specifically granted such powers. *See* 40 P.S. § 221.5 (granting authority to "receiver," a term including rehabilitators and liquidators under 40 P.S. § 221.1).[2]

[2] The SCDOI Respondents suggest that taking a broad view of a rehabilitator's authority is unreasonable or beyond the scope of guidance provided by Model Acts or the National Association of Insurance Commissioners. To the contrary, state courts will recognize that a rehabilitator has duties and powers beyond that of the insurer's officers and directors. *See, e.g., Insurance Commission of South Carolina v. New Life Ins Co.*, 272 S.C. 438, 442, 248 S.E.2d 591, 593 (S.C.

Importantly, SHIP is not seeking rate increases in the ordinary course; the Rehabilitator is exercising his authority and fulfilling his statutory obligation to implement the Court-approved Plan, thus going beyond the authority of company management. SCDOI Respondents' Brief reveals numerous ways that they challenge the authority of the Rehabilitator *as rehabilitator* under Pennsylvania law, invading an issue reserved for the Pennsylvania courts. For example, SCDOI Respondents question the Rehabilitator's notice procedures, asking why policyholders were not "afforded . . . protection in the form of proper notice, class representation or appointment of a policyholders' committee," but the questions of notice and the rights of policyholders are matters for the receivership court to decide even in the cases cited by SCDOI Respondents. *See Underwriters Nat. Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 697 (1982) (receivership court acted); *See Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1091 (Pa. 1992) (receivership court acted). Regardless, SCDOI Respondents are wrong legally and factually with respect to notice: Pennsylvania law does *not* require the creation of any policyholder committee or any specific notice upon the filing of a rehabilitation petition, only "such notice and hearing as the court may prescribe" prior to the review and approval of any proposed rehabilitation plan. 40 P.S. § 221.16(d). Here, while SCDOI Respondents falsely state that required notice was not provided to policyholders, the record shows that the Rehabilitator

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1978) (predecessor statute gave South Carolina rehabilitator "broad authority in dealing with insurance policies of insurance companies in rehabilitation"); *In re CastlePoint Nat'l Ins. Co.*, 65 Cal. App. 5th 668, 681-82 (Cal. Ct. App. 2021) (as conservator (*i.e.*, rehabilitator), commissioner has broad authority and "'exercises the state's police power to carry forward the public interest and to protect policyholders and creditors of the insolvent insurer.'" (citation omitted)); *Vickodil v. Commissioner*, 559 A.2d 1010, 1013 (Pa. Commw. Ct. 1989) (recognizing rehabilitator's duty "toward minimizing inevitable financial harm to *all* policyholders, creditors and the general public" even if "individual interests may need to be compromised in order to avoid greater harm to a broader spectrum of policyholders and the public.").

provided notice in consultation with the Commonwealth Court. (*See* R. p. 983-84 (Preliminary Injunction Opposition, Cantilo Dec. ¶ 10); *see also* R. p. 1051 (Form of Notice).) Nothing more was required to satisfy due process requirements (*see, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)), no South Carolina policyholder has argued otherwise now or in the past (*see* SCDOI Respondents' Brief at 12), and the SCDOI Respondents do not and cannot claim standing to assert claims on behalf of absent policyholders even if such claims existed.

3. Pennsylvania has jurisdiction over a *res* that includes SHIP's assets, and SCDOI Respondents' Complaint invades that jurisdiction.

SCDOI Respondents take a narrow view of the *res* over which they admit Pennsylvania has jurisdiction, claiming it is SHIP's *business* but not its *assets*. This argument makes no sense, however, because both Pennsylvania law and South Carolina law explicitly provide that the Rehabilitator must administer SHIP's assets under court supervision. *See* 40 P.S. § 221.15(c); S.C. Code Ann. § 38-27-320(a). SCDOI Respondents point to *Hanson v. Denckla*, 357 U.S. 235 (1958) and *Thormann v. Frame*, 176 U.S. 350 (1900) as limiting the scope of *in rem* jurisdiction, but those cases are inapplicable here, where there is no dispute over the location or ownership of SHIP's financial assets. Neither *Hanson* nor *Thormann* offers a basis for finding that SHIP's assets are not the *res* within the jurisdiction of the Court pursuant to Pennsylvania law. *See Hanson*, 357 U.S. at 247 (explaining that parties agreed that trust assets were *res* located in Delaware); *Thormann*, 176 U.S. at 355 (noting that *in rem* jurisdiction binds property within the court's control). SCDOI Respondents also cite *Matter of Rehabilitation of Nat'l Heritage Life Ins. Co.*, 656 A.2d 252 (Del. Ch. 1994), which similarly does not support a finding that SHIP's financial assets are outside the jurisdiction and control of the Commonwealth Court. In *National Heritage*, the Delaware Chancery Court found that *in rem* jurisdiction means holding whatever "rights, title,

and interest" may exist "subject to court control," just as the SHIP Rehabilitation Appellants argue now that the Commonwealth Court may exercise control over SHIP's assets. *Id.* at 260.

SCDOI Respondents' Complaint invades this exclusive *in rem* jurisdiction by asserting a right to dictate how the Rehabilitator can distribute SHIP's assets in violation of the Commonwealth Court's orders.[3] Receivership alters the relationship between insured and insurer because absent a change in circumstances, the insurer will be unable to satisfy its obligations to the insured on the same terms, creating a risk of harm and loss to the insured. Accordingly, 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). One of the primary tools for minimizing harm is giving the Commonwealth Court exclusive jurisdiction over the administration and distribution of SHIP's assets. *See* 40 P.S. § 221.15(c) (assets are to be "administer[ed] under the orders of the [Pennsylvania] court."). The modification of SHIP's policies pursuant to the Plan's election procedure is the mechanism through which the Commonwealth Court of Pennsylvania and the Rehabilitator controls the disposition of SHIP's assets and ensure that any distribution or disposition is fair and equitable under the circumstances. In doing so, the Rehabilitator acts for the benefit of policyholders and the Commonwealth Court of Pennsylvania oversees those actions for the protection of policyholders.

SCDOI Respondents err by again relying on *Smalls*, which did not involve questions related to the Rehabilitator's authority to act pursuant to an approved rehabilitation Plan.

[3] SCDOI Respondents' failure to give notice and opportunity to be heard to policyholders is problematic as well, because SCDOI Respondents' actions will impair the rights of South Carolina policyholders by depriving them of the opportunity to make elections under the Approved Plan and by requiring SHIP to cram down South Carolina policyholders' benefits through reductions in rehabilitation or caps applied in liquidation.

Similarly, while the *National Heritage* matter found that the rehabilitation court did not have the exclusive authority to "adjudicate[e] adverse claims," SCDOI Respondents admit that they do not assert any claim against SHIP's assets, and their Complaint does not reveal any effort to adjudicate any "adverse claims" to SHIP's assets.[4] SCDOI Respondents go on to argue that *Ballesteros v. N.J. Property Liab. Ins. Guar. Assn.*, 530 F. Supp. 1367 (D.N.J. 1982), *aff'd* 696 F.2d 980 (3d Cir. 1982) is not binding on this Court, ignoring its jurisprudential and persuasive value regarding the *in rem* treatment of an insurer's assets in rehabilitation. SCDOI Respondents wrongfully miscast *Ballesteros* as a liquidation "by whatever name" on the grounds that the Uniform Insurers Liquidation Act ("UILA") did not adequately distinguish between rehabilitators and liquidators. (Brief at 10.)[5] Notably absent from SCDOI Respondents' argument, however, is any meaningful evidence that the statutory provisions on which the *Ballesteros* court relied arose out of a meaningful lack of distinction between rehabilitators and liquidators. To the contrary, the

[4] Plan-related issues were not present in *Smalls*, where the insured brought a claim for breach of contract and bad-faith refusal to pay based on the insurer's pre-receivership conduct that could have been brought on the same facts outside of receivership as well. *Smalls*, 291 S.C. at 260 (summarizing facts of case prior to remand). *National Heritage* arose out of a clear dispute over ownership of certain property when the rehabilitator asserted that the court's *in rem* jurisdiction required a non-resident to "turn over . . . certain documents, books and records claimed to be the property" of the insurer in rehabilitation. 656 A.2d at 253.

[5] In support of this point, SCDOI Respondents cite comments to the Wisconsin Model Act but fail to show that the alleged lack of distinction between rehabilitators and liquidators under the UILA led to an erroneous result in *Ballesteros*. The comments cited by SCDOI Respondents refer only to a distinction between rehabilitators (who do not personally take title to assets and property) and liquidators (who do); the remainder of the Wisconsin Model Act recognizes the importance of placing assets under the control of a single court. *See* Act No. 89, Wis. Leg., 1967-1968 Sess., Ch. 89, Laws of 1967, at § 645.32 cmt. (noting title distinction); § 645.32(1) (rehabilitator to "administer [assets] under the orders of the court"); § 645.42(1) (liquidator to "administer [assets] under the orders of the court"). With respect to the distinction between rehabilitation and liquidation, the Wisconsin Model Act also notes that it is designed to recognize and enable the flexibility offered by rehabilitation, which can—but does not always—require formal planning and change. *Id.* at Preliminary Comment, Formal Procedures.

Ballesteros court noted that the UILA reflected "the benefits of centralizing the management over delinquency proceedings in the courts of one state," a principle recognized by current receivership law as well. *See* S.C. Code. Ann. § 38-27-30 (purpose of statute is to "[l]essen the problems of interstate rehabilitation…."), S.C. Code Ann. § 38-27-310 (limiting authority to seek rehabilitation to "a domestic insurer or an alien insurer domiciled in [South Carolina]."); S.C. Code Ann. § 38-27-940 (authorizing appointment as ancillary receiver for insurer domiciled outside of South Carolina only when that insurer is in liquidation, and providing no similar authority for ancillary rehabilitation).

If SCDOI Respondents are successful, no adverse property claims are resolved and no competing claims to SHIP's assets are resolved, but the conduct of the Rehabilitator is restrained, as he must seek to comply with two competing and inconsistent court orders regarding how he may administer SHIP's assets—*i.e.*, two orders purporting to governing the Rehabilitator's conduct as rehabilitator implementing the Approved Plan for SHIP. This conflicting court approach would depart from well-established receivership law and would be anathema to the efficient rehabilitation of SHIP. Moreover, in contrast to *Smalls* and *Nat'l Heritage*, SCDOI Respondents claims against the SHIP Rehabilitation Appellants are not incidental; they arise *only because* SHIP is in rehabilitation and the approved Plan seeks to modify policies through a centralized process, a cause of action that depends on the exercise of the Rehabilitator's authority and obligation to implement the Plan once approved. *See* 40 P.S. § 221.15(d) ("If [the Plan] is approved, the rehabilitator *shall* carry out the plan." (emphasis added).) For these reasons, SCDOI Respondents' Complaint is very different from other matters filed against Rehabilitators or insurers in rehabilitation, and it would result in an unlawful invasion of the exclusive jurisdiction of the Commonwealth Court.

B. South Carolina cannot exercise personal jurisdiction over the SHIP Rehabilitation Appellants by enjoining implementation of the Plan.

SCDOI Respondents contend that the Court of Common Pleas properly exercised jurisdiction over the SHIP Rehabilitation Appellants by tying a tenuous connection between the SHIP Rehabilitation Appellants, SHIP as the insurer operating in the ordinary course *prior* to entering receivership, and acts in rehabilitation directed nationwide. This argument is without merit.

1. SHIP Rehabilitation Appellants do not have minimum contacts permitting the exercise of personal jurisdiction.

As was true before the Court of Common Pleas, SCDOI Respondents do not and cannot separate rehabilitation acts *generally* from rehabilitation acts directed to South Carolina, and thus SCDOI Respondents still cannot show that the SHIP Rehabilitation Appellants directed their rehabilitation activities to residents of South Carolina. (*See also* Brief at 20 (contacts and power prong, citing *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 594 S.E.2d 878 (Ct. App. 2004)). In their Brief, SCDOI Respondents specifically cite the following alleged contacts:

- Payments to Defendant Patrick Cantilo's law firm, Cantilo & Bennett, for services related to the rehabilitation. (*See* Brief at 20.)[6]
- Authoring and presenting the Plan for court consideration in Pennsylvania (*See* Brief at 21.)

Notably, SCDOI Respondents fail to explain which part or parts of these general acts were directed at residents at South Carolina rather than policyholders across the country. For example, this Court has found that authoring a book on a matter of national interest later distributed in South

[6] SCDOI Respondents draw this information from a source outside of the record on appeal—specifically, the Rehabilitator's Annual Report filed on March 31, 2022 in the rehabilitation proceedings in the Commonwealth Court of Pennsylvania—but make no effort to argue for judicial notice of this fact. SHIP Rehabilitation Appellants do not object, however, because they argued for judicial notice of the Annual Report in their opening Brief and take SCDOI Respondents citation to it as an endorsement of that position.

Carolina and participating in a television program airing in South Carolina were not the type of contacts that should be considered in a personal jurisdiction analysis because they did not involve any purposeful availment. *Moosally*, 358 S.C. at 333-34, 594 S.E.2d at 885. SCDOI Respondents do not and cannot allege that any compensation paid to Cantilo & Bennett was related to or targeted at South Carolina, nor can SCDOI Respondents allege that any part of the Plan was related to or targeted at South Carolina.

SCDOI Respondents also complain that the SHIP Rehabilitation Appellants have engaged in unspecified acts that "attack [a state's] laws and violate the rights of its citizens, forcing a state insurance department to vindicate a fundamental feature of insurance regulation." (Brief at 21.) This allegation should not be considered at all, of course, because SCDOI Respondents cannot identify any actual "attack" on South Carolina law nor any act that would "violate the rights" of South Carolina's citizens. Arguing for the application of a Pennsylvania court decision or Pennsylvania law over the application of South Carolina law is not an "attack," it is the standard question presented by full faith and credit and conflict of laws issues. South Carolina's citizens do not have any "right" that is violated by the Plan, because policyholders do not have any enforceable "right" to have SCDOI Respondents review and approve rates.

Assuming this allegation of unspecified wrongdoing refers to the potential future process of sending election packages and accepting responses (Brief at 21), those acts cannot be considered in assessing personal jurisdiction because (1) they have not yet occurred, and personal jurisdiction is determined at the time of filing of the action, and (2) they are merely acts of communication without economic effect and, therefore, cannot constitute wrongdoing. The acts about which SCDOI Respondents actually complain (without so stating) is the *future* modification of insurance policies, which will occur in Pennsylvania and is quintessentially within the exclusive province of

the Rehabilitation Court. Moreover, merely alleging an invasion of rights should be insufficient to warrant the exercise of personal jurisdiction, as every lawsuit involves some allegation of a violation of rights. *Cf. Tisdale v. Nadramia*, C.A. No. 3:11-647, 2012 WL 693525, at *3 (D.S.C. Mar. 5, 2012) (finding insufficient contacts under South Carolina law where Florida police officer's contacts "were incidental to executing the fugitive warrant and extraditing [the South Carolina resident] Plaintiff to Florida.") To the extent any acts will be taken with respect to South Carolina residents, it will be done in Pennsylvania and be incidental to implementing the nationwide plan, and insufficient to establish personal jurisdiction.

2. SCDOI Respondents cannot demonstrate that the exercise of personal jurisdiction would comport with due process.

Exercising personal jurisdiction here would offend traditional notions of fair play and substantial justice by requiring the SHIP Rehabilitation Appellants to answer the complaints of another state's regulator based solely on the performance by the Rehabilitator and Special Deputy Rehabilitator of their duties as required by Pennsylvania law and pursuant to the Commonwealth Court of Pennsylvania's proper exercise of its exclusive *in rem* jurisdiction to allocate SHIP's insufficient assets. In response, SCDOI Respondents assert that "an insurance commissioner as rehabilitator can be sued," but this argument misses the point. All of the cases cited by SCDOI Respondents in their string cite on pages twenty-three and twenty four involve receivers or other parties enforcing specific rights; all were filed in the receivership state or in federal court by the receiver; and, most importantly, none involve actions first filed against a rehabilitator to stop implementation of the Plan or change the course of the rehabilitation broadly.[7] Whatever

[7] *See e.g., Gross v. Weingarten*, 217 F.3d 208 (4th Cir. 2000) (receiver sued directors and stockholders who then filed counterclaims); *Bennett v. Liberty Nat. Fire Ins. Co.*, 968 F.2d 969 (9th Cir. 1992) (liquidator sued on contract with reinsurer); *Kemper Reinsurance Co. v. Corcoran*, 167 A.D.2d 75, 569 N.Y.S.2d 951 (N.Y. App. Div.1991), *aff'd,* 79 N.Y.2d 253, 582 N.Y.S.2d 58,

proposition those cases may stand for, none addresses the situation presented here, where a party without a claim against the rehabilitator or the insurer in rehabilitation has asserted a right to control the rehabilitation proceedings and block implementation of a court-approved Plan as to the extent it may impact third parties not before the Court.

C. SCDOI Respondents' Brief confirms that the preliminary injunction was issued without evidentiary support, making it an abuse of discretion.

An injunction "is a drastic remedy' that may be issued only "to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907–08 (S.C. 2004). To establish its right to a preliminary injunction, SCDOI Respondents were required to show irreparable harm to themselves as well as

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590 N.E.2d 1186 (1992) (reinsurer initiated action for offset against liquidator in state of liquidation) *In re Allstar Ins. Corp.*, 112 Wis. 2d 329, 332 N.W.2d 828 (Wis. App.1983), *appeal dismissed*, 461 U.S. 951 (1983) (liquidator brought action in receivership state on behalf of insurer against agency); *Commonwealth v. Central Penn Nat'l Bank,* 31 Pa. Cmwlth. 190, 375 A.2d 874 (1977) (liquidator brought action in his own receivership state and respondent asserted counterclaims); *Navarro v. Allied World Surplus Lines Ins. Co.*, 544 F. Supp. 3d 229 (D. Conn. 2021) (Delaware liquidator brought suit against liability carrier); *State of N.C. ex rel. Long v. Alexander & Alexander Services, Inc.*, 711 F. Supp. 257 (E.D.N.C. 1989) (rehabilitator brought RICO action in federal court against defendants who filed counterclaims); *In re Reliance Group Holdings, Inc.*, 273 B.R. 374 (Bankr. E.D. Pa. 2002) (matter filed by liquidator in receivership state seeking declaration of asset ownership removed to bankruptcy court in same state based on Chapter 11 filing); *Reider v. Arthur Andersen, LLP*, 784 A.2d 464 (Conn. Super. Ct. 2001) (liquidator filed suit in receivership state against accounting firm); *Kentucky Cent. Life Ins. Co. By and Through Stephens v. Park Broadcasting of Kentucky, Inc.*, 913 S.W.2d 330 (1996) (rehabilitator brought matter to court after news reporter sought information relating to receivership in receivership state); *Corcoran v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 532 N.Y.S.2d 376 (App. Div. 1988) (liquidator brought suit against another insurance company in receivership state); *Consolidated Edison Co. of New York, Inc. v. Insurance Dep't of New York,* 532 N.Y.S.2d 186, 189 (Sup. Ct. 1988) (insured brought action under freedom of information law in state of liquidation); *Benjamin v. Ernst & Young, L.L.P.*, 855 N.E.2d 128, 135 (Ohio Ct. App. 2006) (liquidator filed action in court of receivership state and defendant counterclaimed); *Koken v. One Beacon Ins. Co.*, 911 A.2d 1021 (Pa. Commw. Ct. 2006) (liquidator filed suit in receivership court); *Foster v. Monsour Medical Foundation,* 667 A.2d 18 (Pa. Commw. Ct. 1995) (liquidator brought action in receivership court).

a likelihood of success on the merits and the absence of an adequate remedy at law. *See Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 310, 811 S.E.2d 758, 767 (2018). Even if jurisdiction existed here (which the SHIP Rehabilitation Appellants emphatically deny), this Court cannot affirm the Court of Common Pleas' order on a record devoid of indispensable support for the claims in the underlying Complaint and Petition for Preliminary Injunction. *See City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000) ("factual conclusions without evidentiary support" constitute abuse of discretion; *see also Hook Point, LLC v. Branch Banking & Trust Co.*, 397 S.C. 507, 511, 725 S.E.2d 681, 683 (2012) (reversing the circuit court's grant of an injunction where there was no evidence that the party seeking the injunction was more likely than not to succeed on its claim, the circuit court "failed to evaluate the evidence under the strict standard required for injunctions," and thus the circuit court's finding was "based upon an error of law"); *Ledford v. Pa. Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E. 2d 900, 902 (1976) ("This Court has held that an abuse of discretion arises in cases in which: (1) the judge issuing the order was controlled by some error of law; or (2) where the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support") (internal citations omitted).)

1. There is no support for a finding of irreparable harm because a full faith and credit dispute is not irreparable harm to states or state actors.

SCDOI Respondents presented no evidence of irreparable harm to the Court of Common Pleas, creating a fatal flaw in its decision to enter a preliminary injunction. The Court of Common Pleas made only one reference to "harm" as to the SCDOI Respondents, finding that if the Plan is implemented, the SCDOI Respondents "will not have upheld their statutory duty." (R. p. 31 (Preliminary Injunction Order p. 17).) Apart from the oblique premise of this argument, it does not remotely identify actual or potential harm. Similarly, the only reference to irreparable harm in

SCDOI Respondents' Brief is the claim of irreparable harm "with respect to the enforcement of the insurance laws, the order and stability of the insurance marketplace and the rights of policyholders Respondents have the statutory duty to protect." (Brief at 39.) Again, no harm is identified, only a suggestion that the Plan might inhibit Respondents from enforcing certain laws, without identifying the consequences of such non-enforcement. The potential conflict between operation of different state's laws, court decisions, and authority is the very issue addressed by full faith and credit; it is not a basis for a finding of irreparable harm. *See* U.S. CONST. ART. 4, § 1; *Ware v. Ware*, 404 S.C. 1, 743 S.E.2d 817, 823 (S.C. 2013) ("Full faith and credit 'generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it.'"); *Minorplanet Sys. USA Ltd. v. Am. Aire, Inc.*, 368 S.C. 146, 628 S.E.2d 43, 45 (2006).

SCDOI Respondents cannot be harmed by the operation of the constitutional command of the Full Faith and Credit Clause, and they offer no facts or law to establish such harm. SCDOI Respondents even admit that states "routinely acknowledge and even enforce the lawful judgments of other states," effectively conceding that they are not injured by Pennsylvania's assertion of authority by way of its courts, statutes, and state officers. As a result, SCDOI Respondents failed to show any irreparable harm entitling them to an injunction against Plan implementation, making the Court of Common Pleas' injunction order an abuse of its discretion. *See Walde v. Ass'n Ins. Co.*, 401 S.C. 431, 442-443, 737 S.E.2d 631, 637 (Ct App. 2012) (citing Black's Law Dictionary in defining "injury" to be "the violation of another's legal right, for which the law provides a remedy").

Indeed, the Supreme Court of South Carolina has held that full faith and credit cannot be avoided on questions of fairness, policy, or local disagreement with the outcome. *See Widenhouse*

v. Colson, 405 S.C. 55, 61, 747 S.E.2d 188, 191 (2013) (citing extensive precedent from the Supreme Court of the United States). "[A] judgment obtained in a sister State is, with exceptions not relevant here, entitled to full faith and credit in another State, though the underlying claim would not be enforced in the State of the forum." *Id.* (quoting *Morris v. Jones*, 329 U.S. 545, 551 (1947)). Depriving South Carolina officials of the ability to enforce South Carolina law as a result of the Full Faith and Credit Clause is not "irreparable harm, because "the judgment, if valid where rendered, must be enforced in such other State although repugnant to its own statutes." *Id.* (citing *Roche v. McDonald*, 275 U.S. 449, 452 (1928)). Likewise, SCDOI Respondents' policy disagreements do not create a risk of irreparable harm because "the full faith and credit clause 'order[s] submission by one State even to hostile policies reflected in the judgment of another State.... [T]he requirements of full faith and credit, so far as judgments are concerned, are exacting, if not inexorable....'"). *Id.* (citing Estin *v. Estin*, 334 U.S. 541, 546 (1948)). If SCDOI Respondents lose the ability to regulate, it is not the acts of the SHIP Rehabilitation Appellants that cause that loss, but, rather, the operation of the Full Faith and Credit Clause to give enforceable weight to the decisions of a Pennsylvania court in South Carolina. SCDOI Respondents simply cannot be harmed by the operation of a constitutional requirement. Moreover, even disregarding these fatal legal flaws, Respondents have wholly failed factually to show any actual harm that will result from their failure to regulate. No evidence has been adduced that some policyholder injury would thereby be avoided, nor that, in the absence of such regulation, an unfair result would be imposed on policyholders, let alone the State of South Carolina.

2. There is no support for a finding of irreparable harm because the record is devoid of allegations showing any harm whatsoever, even if SCDOI Respondents' theory is accepted.

Even if SCDOI Respondents view of full faith and credit was correct, they offered the Court of Common Pleas no actual evidence supporting a finding of irreparable harm to them. There is no factual basis for finding that SCDOI Respondents would suffer any negative outcome for failing to regulate the insurance marketplace in South Carolina,[8] and there was no evidence alleged or offered showing that South Carolina residents would fare better in an immediate liquidation as compared to the options under the Plan—indeed, there was no evidence from or directly related to South Carolina residents at all.

This is particularly true on questions of confusion and impairment of the marketplace, where SCDOI Respondents' argument was little more than a blanket assertion of harm without any citation or support. For example, the Court of Common Pleas found that no legal remedy could address the "confusion" that would arise if Plan elections were mailed and changes implemented (R. p. 31 (Preliminary Injunction Order p. 17)), but the record reveals no evidence supporting a finding that confusion would or could occur, and neither the Court of Common Pleas nor SCDOI Respondents have ever cited to the record in supporting that finding.[9] SCDOI Respondents also

[8] SCDOI Respondents make reference to "dismay among policyholders" and "justifiable fury of their elected representatives," but SCDOI Respondents did not allege any actual facts relating to policyholder dismay or angry legislators, so these statements are mere supposition that cannot support an injunction.

[9] SCDOI Respondents alleged, and the Court of Common Pleas found, potential harm to policyholders in the form of the loss of "basic rights" and "permanent and substantial economic harm." (R. p. 31 (Preliminary Injunction Order p. 17); Brief at 38.) Even if these alleged injuries to non-parties were relevant on a preliminary injunction, the record does not establish a loss of any "basic rights" or any "permanent and substantial economic harm." For example, the Court of Common Pleas had evidence from the Rehabilitator establishing that he provided notice and an opportunity to be heard to all policyholders, and the Court apparently rejected that evidence despite the lack of any evidence to the contrary. The Court of Common Pleas had no evidence showing

wrongfully try to convert harms that will occur independent of the rehabilitation Plan into harms occurring as a result of the Plan. For example, SCDOI Respondents allege that there will be "[m]assive increases in premium and decreases in benefits," but they offer no support for such findings, and in fact they ignore that rate increases will occur at similar levels even if SHIP is immediately liquidated rather than rehabilitated (*see* R. p. 1095 (Approval Order p. 36 finding similar rate increases applied in previous long-term care liquidations)) and ignore that benefit reductions will be mandated by operation of South Carolina's guaranty association law capping the coverage that is available to policyholders (*see* S.C. Code Ann. § 38-29-40(3)(b)(i)(B)(2) (limiting liquidation benefits to "$300,000 for long-term care insurance")). Glaringly absent from SCDOI Respondents Brief and the Court of Common Pleas' order is any factual allegation—let alone evidence—showing that the Plan's mechanism of permitting policyholders to choose which mix of rate increases and/or benefit reductions best suits their needs is somehow more harmful than imposing changes upon them without regard for their circumstances.

3. There is no record supporting a likelihood of success on the merits.

The Court of Common Pleas erred in finding a likelihood of success on the merits for the reasons set forth in SHIP Rehabilitation Appellants' opening Brief. (*See* pages 36-47.) SCDOI Respondents offer an extensive discussion of the merits, none of which is persuasive, and only part of which even merits further responses in this reply.

First, SCDOI Respondents argue without support that the Plan is founded on a "clearly erroneous reading of the law and appears likely to be overturned on appeal." (Brief at 26.) SCDOI Respondents offer no direct critique of the Commonwealth Court opinion approving the Plan; for example, they do not identify, examine, and argue against the support underlying the

harm to policyholders by a comparison of Plan options to immediate liquidation, and yet the court adopted SCDOI Respondents' views regardless of that defect.

Commonwealth Court's decision to authorize policy modification under the Plan. Similarly, SCDOI Respondents rely on their own arguments against the Plan rather than citation to arguments raised in the appeal in Pennsylvania that would be likely to form the basis for reversal. In truth, SCDOI Respondents do not know one way or another if Plan approval will be affirmed or reversed, and their argument on this issue is little more than a guess contradicted by the thorough analysis of the Commonwealth Court of Pennsylvania.

Second, as noted above, South Carolina *is* obligated to "obey [the orders of a Pennsylvania court] in contravention of its own laws" even if it "require[s] South Carolina to stand idly by while, in an extraordinary act of aggression, they substitute their own desires for the acts of the State's General Assembly." (Brief at 35.)[10] SCDOI Respondents' arguments are at odds with the Full Faith and Credit Clause as interpreted by the Supreme Court of South Carolina, which held that, if jurisdiction is established, a foreign state court's decision could override the law and public policy of South Carolina. *See Widenhouse*, 405 S.C. at 61, 747 S.E.2d at 191. Full faith and credit means enforcing a judgment even if it is "hostile" to the policies of South Carolina. *Id.*[11]

Third, the SHIP Rehabilitation Appellants may modify contracts without causing impairment, and the SHIP Rehabilitation Appellants may impair contractual rights without

[10] Of course, application of the Full Faith and Credit Clause is not an "extraordinary act of aggression" but a constitutional mandate all states are obligated to follow.

[11] *Franchise Tax Board of Calif. v. Hyatt*, 578 U.S. 171 (2016) is not to the contrary, as it defines and limits an impermissible "policy of hostility" as acts by a state that "that disregards its own ordinary legal principles" rather than a result that is hostile to the preferences of a sister state. For example, in *Hyatt*, Nevada adopted a rule regarding sovereign immunity that was impermissibly hostile because it violated Nevada's own sovereign immunity principles as applied to itself. *Id.* at 172. SCDOI Respondents cannot show that Pennsylvania's receivership statute treats out-of-state residents any differently than Pennsylvania's citizens with respect to the effect of the receivership order; in fact, SCDOI Respondents' objection is that Pennsylvania law treats everyone *equally*, a result with which they simply disagree.

violating the Constitution, because SHIP's policyholders are not entitled to "the benefits of the bargain as set forth in their contract of insurance," nor are they permanently entitled to exactly the same premiums and benefits presented before receivership as SCDOI Respondents claim. (*See* Brief at 33.) The primary case on which SCDOI Respondents rely, *Fireman's Co. of Newark, New Jersey v. State Farm Mut. Auto. Ins. Co.*, 295 S.C. 538, 370 S.E.2d 85 (1988), arises out of the ordinary course of business rather than receivership, and SCDOI Respondents offer no reason to find that policyholders have an entitlement to generous benefits at premiums subsidized by other policyholders and taxpayers. SCDOI Respondents have argued that both Pennsylvania and South Carolina adopted the so-called Wisconsin Model for their receivership statutes (*see* R. p. 66-68 (Compl. ¶¶ 97-102)); like Pennsylvania's courts, Wisconsin courts recognize that rehabilitation plans reflect a proper exercise of the state's police power and thus permit the modification and impairment of policyholder contracts. *In re Ambac Assur. Corp.*, 841 N.W.2d 482, 594 (Wis. Ct. App. 2013); *see also Neblett v. Carpenter*, 305 U.S. 297 (1933) (receivership is not a per se impairment); *Foster v. Mut. Fire, Marine, and Inland Ins. Co.*, 531 Pa. 598, 609, 614 A.2d 1086, 1091-92 (1992) (addressing impairment of contractual rights in rehabilitation, citing *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983)).

As a result, SCDOI Respondents are not likely to succeed simply because the Plan may work an impairment of contractual obligations. At best, SCDOI Respondents have demonstrated their disagreement with the SHIP Rehabilitation Appellants, but that disagreement is not evidence of a likelihood of success on the merits, making the preliminary injunction an abuse of discretion by the Court of Common Pleas.

D. Conclusion

Thus, for the reasons set forth herein and in the SHIP Rehabilitation Appellants' opening Brief, SHIP Rehabilitation Appellants respectfully request that this Court vacate the injunction and dismiss the Complaint.

Respectfully submitted,

November 1, 2022

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

L. Casey Manning, Chief Administrative Judge, Fifth Judicial Circuit

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2020-CP-4005802

Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and the South Carolina Department of Insurance,	Respondent,
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 in Rehabilitation,	Appellants

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

November 1, 2022

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