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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Senior Health Insurance Company of Pennsylvania in Rehabilitation	:	No. 1 SHP 2020

O R D E R

AND NOW, this ___ day of _____, 2020, upon consideration of the Application to Intervene of Aetna Life Insurance Company, Anthem, Inc., Health Care Service Corporation, Horizon Healthcare Services, Inc. d/b/a Horizon Blue Cross Blue Shield of New Jersey, and UnitedHealthcare Insurance Company (collectively, the "Health Insurers") and the Rehabilitator's response thereto, the Health Insurers' Application is hereby DENIED. The Health Insurers may file Formal Comments in support of or in objection to the Proposed Plan of Rehabilitation and participate in the hearing on the Proposed Plan of Rehabilitation, in accordance with Paragraph 8 of the Court's June 12, 2020 Case Management Order.

BY THE COURT:

_____
MARY HANNAH LEAVITT
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Senior Health Insurance Company of Pennsylvania in Rehabilitation	: : :	No. 1 SHP 2020

RESPONSE OF THE REHABILITATOR TO THE APPLICATION TO INTERVENE OF AETNA LIFE INSURANCE COMPANY, ANTHEM, INC., HEALTH CARE SERVICE CORPORATION, HORIZON HEALTHCARE SERVICES, INC. D/B/A HORIZON BLUE CROSS BLUE SHIELD OF NEW JERSEY, AND UNITEDHEALTHCARE INSURANCE COMPANY

Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania, in her capacity as Statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania ("SHIP"), hereby responds to the Application to Intervene of Aetna Life Insurance Company, Anthem, Inc., Health Care Service Corporation, Horizon Healthcare Services, Inc. d/b/a Horizon Blue Cross Blue Shield of New Jersey, and UnitedHealthcare Insurance Company (collectively, the "Health Insurers") as follows below:

PRELIMINARY STATEMENT

The Rehabilitator opposes the Health Insurers' Application because the Health Insurers cannot demonstrate a direct, substantial, and immediate interest necessary for intervention. To the contrary, the Health Insurers' interest is, at best derivative of the guaranty associations' interests, speculative, and remote. The potential harm that the Health Insurers identify is contingent on numerous future events, some or all of which may never occur, and the amount of that exposure is purely speculative. Such indirect and remote interests cannot suffice to satisfy their burden for intervention. Moreover, if the law were as the Health Insurers suggest, it would be difficult for the Court to deny standing to thousands of insurers around the country in proceedings like this one. Nothing has been suggested by the Health Insurers that justifies special treatment for these five companies unlike their thousands of peers.

On January 29, 2020, this Court appointed the Rehabilitator and granted her the full powers and authority of a rehabilitator as set forth in Section 516 of the Insurance Department Act of 1921, 40 P.S. §221.16 concerning SHIP. Consistent with the goals and objectives of that appointment, the Rehabilitator filed a Proposed Plan of Rehabilitation that seeks to protect the interests of the insureds, creditors and the public by proposing corrective action to restore SHIP as a financially self-sustaining long-term care insurance company. A number of parties filed

Applications for Intervention as permitted by this Court's June 12, 2020 Case Management Order. The Rehabilitator has been contemplative and measured in determining whether to oppose these Applications. Indeed, the Rehabilitator does not oppose the Application to Intervene filed by the National Organization of Life and Health Insurance Guaranty Associations ("NOLHGA"), which already adequately represents *any* possible interest, *vel non*, of the Health Insurers or other members of the guaranty associations. Guaranty associations generally have statutory standing to intervene, unlike their individual members.[1] But because the Health Insurers plainly lack standing to intervene in the rehabilitation proceeding, the Rehabilitator opposes the Health Insurers' Application.

The Pennsylvania Supreme Court has held that direct harm is the threshold issue in the intervention and standing analysis. *See Johnson v. Am. Standard*, 8 A.3d 318, 333 (Pa. 2010) ("[A] party must be aggrieved in order to possess standing to pursue litigation."). Unless adversely affected, an entity is not aggrieved and thus "has no standing to obtain a judicial resolution of that challenge." *Hosp. & Health*

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[1] *See* Life and Health Insurance Guaranty Association Model Act § 8(J) (providing that a guaranty association has the "right to appear or intervene before a court or agency in another State with jurisdiction over an impaired or insolvent insurer for which the Association is or may become obligated."); 40 P.S. § 991.1706(l) (providing that the Pennsylvania Life and Health Insurance Guaranty Association has "standing to appear before any court in this Commonwealth with jurisdiction over an impaired or insolvent insurer concerning which the [guaranty] association is or may become obligated").

Sys. Ass'n of Pennsylvania v. Dep't of Pub. Welfare, 888 A.2d 601, 607 (Pa. 2005). "This standard is even more stringent in the context of an insurance receivership proceeding." *In Re Penn Treaty Network Am. Ins. Co. in Rehab.*, No. 1 ANI 2009, 2016 WL 5804872, at *2 (Pa. Commw. Ct. Sept. 23, 2016).

Under Pennsylvania Rule of Appellate Procedure 3775, a limited intervenor must have "a direct and substantial interest" in a "discrete controversy relating to the administration of the insurer's business or estate[.]" *Id.* (quoting Pa. R.A.P. 3775(a), (c)(2). Thus, the Health Insurers have the burden of establishing two key elements. First, "[o]ne who seeks to challenge governmental action must show a direct and substantial interest." *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 202 (1975). Second, they "must show a sufficiently close causal connection between the challenged action and the asserted injury to qualify the interest as 'immediate' rather than 'remote.'" *Id.* Thus, "the possibility that an interest will suffice to confer standing grows less as the causal connection grows more remote." *Id.* at 197. Moreover, harm is not "direct or immediate" if it is based on speculation. *Crosby Valve v. Dep't of Ins.*, 131 A.3d 1087, 1097 (Pa. Commw. Ct. 2015); *accord Tacony Civic Ass'n v. Com., Pennsylvania Liquor Control Bd.*, 668 A.2d 584, 589 (Pa. Commw. Ct. 1995) ("potentiality of harm" alone insufficient to establish "likelihood of immediate harm").

The Health Insurers cannot establish that they will suffer any harm, let alone a direct and immediate harm supporting intervention. *First*, the Health Insurers' proffered interest is entirely derivative from the interests of guaranty associations, and thus, they have no direct and immediate interest here. That is, the Health Insurers are a group of independent health insurance companies that have no relationship, be it contractual, ownership, or otherwise, with SHIP. They have no independent interests, separate and apart from those of the guaranty associations.

Second, the Health Insurers' proffered interest is entirely speculative and wholly dependent on a chain of events that have not occurred—and may never occur. Only if all six events in the chain described below occur, could the Health Insurers arguably be affected materially. Moreover, many relevant intervening events (such as one or more of the Health Insurers exiting assessed markets) may also occur in the intervening years, eliminating the feared harm.

Whether the Health Insurers' asserted interest will ever actually materialize is far from certain. The Health Insurers essentially assert that, if the Proposed Plan of Rehabilitation fails, and if SHIP is later placed in liquidation, and if the guaranty associations are then triggered, and if the health insurers are then assessed by the guaranty associations and pay those assessments, and if, once triggered, the Health Insurers are unable to recoup the full amount of their assessments under statutory mechanisms, then their interest will be implicated. That interest would therefore be

contingent on the occurrence of at least six separate events, none of which has occurred, and which may never occur. It is contingent on: (1) the Rehabilitation Plan failing, which has not occurred; (2) SHIP being placed in liquidation, which has not occurred; (3) the guaranty associations being triggered, which has not occurred; (4) the Health Insurers being assessed by guaranty associations on account of SHIP's liquidation, which has not occurred; (5) the Health Insurers paying those assessments; which has not occurred, and (6) the Health Insurers being unable to recoup their assessments, which has not occurred. Not only is it uncertain whether any of these events will actually occur, it is speculative to even suggest when in the future any of them *might* occur. The Health Insurers' purported derivative interests—contingent on an entire chain of events occurring at some indeterminate point in the future—does not confer standing.

In addition, no other intervening event must occur in the interim to eliminate the potential harm. Thus, for example, (1) no other workout must occur for SHIP that does not entail assessing the Health Insurers, (2) no federal bailout of troubled LTC companies must be implemented in the interim, (3) no sale of SHIP must be consummated, (4) none of these five Health Insurers must fail; (5) none of them must exit the assessed markets, and (6) no intervening change in the law must eliminate their feared harm. This last point is not mere speculation. Pending now before the General Assembly is SB 1195, which would substantially reduce the Health

Insurers' assessment burden if SHIP were liquidated resulting in assessments on the Health Insurers. We don't know what form the bill will take when finally passed. We also don't know whether any other legislation, state or federal, may take effect before SHIP is liquidated (if liquidation ever occurs) that would change or even eliminate the Health Insurers' feared harm. The Health Insurers may believe that they can better predict whether all six of the necessary events will occur without the occurrence of any mitigating events, but that does not make their asserted interest less speculative or less contingent. Even assuming *arguendo* that at some indeterminate time in the future the Rehabilitation Plan will fail, it is not inevitable that SHIP will then be placed in liquidation and the Health Insurers assessed, as they fear.

Even the Health Insurers recognize that their asserted interest arises only if the guaranty associations assume SHIP's policyholder obligations. The guaranty associations, in turn, are funded by assessing their member companies, of which the Health Insurers comprise a minority of those member companies. *See* Application, ¶¶ 2, 14, 17, 18-19. Thus, although the guaranty associations may have an interest should SHIP be placed in liquidation, its member companies have, at most, a derivative interest from the guaranty associations. These derivative interests are neither direct nor immediate to confer standing. Rather, the causal connection between rehabilitation and the Health Insurers' derivative interests in the event of

liquidation is several steps removed. The Health Insurers' allegation of possible future harm as a result of their interest in the guaranty associations—even if accepted as true—is akin to that of a corporate shareholder, who has no standing to intervene absent a "direct, personal injury" to the "shareholder as an individual," rather than the corporation. *Morrison Informatics, Inc. v. Members 1st Credit Union*, 97 A.3d 1233, 1237-38 (Pa. Super. Ct. 2014); *Hill v. Ofalt*, 85 A.3d 540, 548-49 (Pa. Super. Ct. 2014). This general rule of Pennsylvania law applies equally to insurance insolvency proceedings; Rule 3775 specifically requires a "direct" and individual interest before a party may seek to intervene.

The Health Insurers' purported harm is purely speculative, arising from *potential* exposure contingent on a number of future events first occurring. That is: (a) the Rehabilitator must first be unsuccessful in her efforts to rehabilitate SHIP, *then* (b) SHIP must be placed into liquidation with a finding that it is insolvent, triggering the obligations of state guaranty associations, *then* (c) each guaranty association must determine how to fund its obligations—which they can do by collecting premiums from policyholders (*e.g.*, 40 P.S. § 991.1706(d) and (g)), through distributions from the insolvent company (*e.g.*, 40 P.S. § 991.1706(m)), and/or through assessments of their member companies (*e.g.*, 40 P.S. § 991.1707). Assuming each guaranty association decides to assess their member companies, *then* (d) the Health Insurers must be assessed and unable to pass through to policyholders

the cost of its assessments or otherwise recoup that cost.[2] None of these requisite events may occur. At this stage, the Health Insurers have identified merely "the potentiality of harm," which is insufficient to constitute the direct and immediate harm necessary for intervention. *Tacony Civic Ass'n*, 668 A.2d 584, 589.

Third, the Health Insurers cannot establish, with any specificity, the extent of their potential harm and whether it is substantial. Rather, the Health Insurers vaguely assert that in the event that the Rehabilitation is unsuccessful, and if SHIP is placed in liquidation, the guaranty associations may assess the Health Insurers "hundreds of millions of dollars." Application ¶¶ 2, 14. But the purported amount of the Health Insurers' potential exposure is, at best, a guess. That is because there has been no assessment from a guaranty association, *let alone* the triggering of the guaranty associations' obligations, *let alone* an unsuccessful rehabilitation. Moreover, the Health Insurers do not know what portion of the costs of any *eventual* assessments they will be able to pass through or recoup, even assuming such hypothetical assessments actually take place. Speculative and unsupported allegations regarding a possible loss do not constitute a "substantial" interest. *See Penn Parking*, 464 Pa. at 191-95 (requiring substantial and specific adverse pecuniary effect).

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[2] Member insurers of a guaranty association may generally pass the cost of assessment obligations onto its policyholders or offset state premium tax obligations by the amount of assessments. *E.g.*, 40 P.S. §§ 991.1707(g) and 991.1711.

Finally, allowing the Health Insurers to intervene based on hypothetical derivative interests would be contrary to the statutory frameworks in place for both rehabilitation and guaranty associations. Article V of the Insurance Department Act provides that receivership proceedings, including rehabilitation, are designed to protect the interests of "insureds, creditors, and the public generally." 40 P. S. § 221. The Health Insurers' interests are notably absent, and thus, their interests in rehabilitation proceedings are remote.

Moreover, the Health Insurers are statutorily obligated to rely on state guaranty associations to speak on their behalf. Indeed, there is an entire system of administrative remedies in place for the Health Insurers to challenge the actions of a guaranty association or its board. *E.g.*, 40 P.S. § 991.1709(c); Life and Health Insurance Guaranty Association Model Act § 11C. And tellingly, most states have adopted statutes providing that the guaranty associations have standing to intervene in any rehabilitation proceeding, *without* providing independent standing to their members.[3] Allowing the Health Insurers to intervene could very well create a

[3] *See* Life and Health Insurance Guaranty Association Model Act § 8(J) (providing that a guaranty association has the "right to appear or intervene before a court or agency in another State with jurisdiction over an impaired or insolvent insurer for which the Association is or may become obligated." Similarly, Pennsylvania law provides that the Pennsylvania Life and Health Insurance Guaranty Association has "standing to appear before any court in this Commonwealth with jurisdiction over an impaired or insolvent insurer concerning which the [guaranty] association is or may become obligated[.]" 40 P.S. § 991.1706(l).

scenario where individual members of guaranty associations are litigating their disputes with guaranty associations in Commonwealth Court, rather than following the administrative remedies available by statute to resolve intra-guaranty association disputes.

There is no need to circumvent these statutory frameworks and allow a minority of insurers to separately intervene, bypassing the guaranty associations, their boards, and the majority of their members, based on potential derivative interests. That is because NOLHGA, which already adequately represents any possible interest, *vel non*, of the Health Insurers, has submitted an application to intervene, and the Rehabilitator has not opposed NOLHGA's limited intervention. Thus, there is no need for Health Insurers to intervene based on derivative interests when NOLHGA more directly represents those same interests. By granting statutory standing to the guaranty associations but not their members, the Pennsylvania legislature (like the drafters of the model act and legislatures in other states) concluded that the guaranty associations will adequately represent the interests of their members. Moreover, even without intervention, Paragraph 8 of the Court's June 12, 2020 Case Management Order permits the Health Insurers to file Formal Comments in support of or in objection to the Proposed Plan of Rehabilitation and participate in the hearing on the Proposed Plan of Rehabilitation.

A review of the application also reveals that what the Health Insurers *really* seek is the ability to substitute their judgment for that of the Commissioner as Rehabilitator. *See* Application ¶¶ 3, 10, and 12. That, the intervention rules do not contemplate.

Accordingly, for the reasons stated, the Rehabilitator respectfully requests that the Court deny the Application. Below are the Rehabilitator's responses to the allegations in the Application.

RESPONSE TO *"Interests of the Applicants"*

1. The first sentence of Paragraph 1 is Admitted. The remaining allegations in Paragraph 1 are denied as stated. With respect to allegations that purport to characterize the Application for Order Placing SHIP in Rehabilitation, the Rehabilitator asserts that is a written document, filed of record in this proceeding, that speaks for itself. Any characterizations of that document in Paragraph 1 are deemed denied. By way of further answer, the allegations in the last sentence of Paragraph 1 are denied. The Rehabilitator is without knowledge or information sufficient to form a belief beyond the statements in the Proposed Plan of Rehabilitation as to the truth of the allegations in the last sentence of Paragraph 1.

2. To the extent the allegations in Paragraph 2 seek to paraphrase or characterize the contents of any statutes or model laws, those statutes or model laws speak for themselves, and the allegations in Paragraph 2 are denied to the extent they

are inconsistent with those statutes or model laws. With respect to the allegations regarding "Guaranty Association assessments resulting from a liquidation of SHIP," the Rehabilitator is without knowledge or information sufficient to form a belief as to the truth of those allegations and they are therefore deemed denied. By way of further response, SHIP has not been placed in liquidation. One of the stated hopes of carrying out the Proposed Plan of Rehabilitation is that it will never be necessary to place SHIP in liquidation. Thus, the possibility of SHIP being placed into liquidation is, at a minimum, several steps removed from the current rehabilitation proceeding and may never occur. The last sentence of Paragraph 2 is a legal conclusion to which no answer is required. By way of further response, the Rehabilitator denies that the Health Insurers have a direct and substantial interest in the success of SHIP's rehabilitation and restoration to solvency. To the contrary, the Health Insurers' interest is, at most, derivative, speculative and remote.

RESPONSE TO *"Purposes For Which Applicants Seek to Intervene"*

3. The Rehabilitator is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 3, and they are therefore deemed denied. The allegations in the second sentence of Paragraph 3 are admitted. To the extent the allegations in Paragraph 3 purport to characterize the Proposed Plan of Rehabilitation, the Rehabilitator asserts that the Proposed Plan is a written document, filed of record in the proceeding, that speaks for itself. Any characterizations of that document in Paragraph 3 are deemed denied. By way of further answer, the Rehabilitator denies that rate increases and benefit modifications proposed in the Plan may impinge on the jurisdiction and authority of insurance regulators in other states.

4. The allegations of Paragraph 4 are legal conclusions to which no answer is required. To the extent a response is required, it is denied that the Proposed Plan of Rehabilitation is not feasible.

5. The Rehabilitator is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first two sentences of Paragraph 5 or the penultimate sentence of Paragraph 5, and they are therefore deemed denied. By way of further answer, it is admitted only that two states submitted an Application to Intervene in these proceedings in the time required by the Court's June 12, 2020 Case Management Order.

6. The Rehabilitator is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first three sentences of Paragraph 6, and they are therefore deemed denied. The remaining allegations of Paragraph 6 are legal conclusions to which no answer is required. To the extent a response is required, it is denied that the hypothetical scenario described by the Health Insurers provides a sufficient interest in the rehabilitation of SHIP for the Health Insurers to satisfy their burden for intervention. To the contrary, the Health Insurers' interest is, at most, derivative, speculative and remote.

7. To the extent the allegations in Paragraph 7 seek to paraphrase or characterize the contents of the rehabilitation plans, communications, docket, pleadings, filings, opinions, orders, or other documents arising out of or related to the liquidations of Penn Treaty Network America Insurance Company or American Network Insurance Company, or the Proposed Plan of Rehabilitation for SHIP filed on April 22, 2020, those documents speak for themselves. The allegations in Paragraph 7 are denied to the extent they are inconsistent with those documents.

8. The Rehabilitator is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 8, and they are therefore deemed denied. By way of further answer, it is denied that the hypothetical scenario described by the Health Insurers provides a sufficient interest in the rehabilitation of

SHIP for the Health Insurers to satisfy their burden for intervention. To the contrary, the Health Insurers' interest is, at most, derivative, speculative and remote.

9. The Rehabilitator is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9, and they are therefore deemed denied. By way of further answer, it is denied that the hypothetical scenario described by the Health Insurers provides a sufficient interest in the rehabilitation of SHIP for the Health Insurers to satisfy their burden for intervention. To the contrary, the Health Insurers' interest is, at most, derivative, speculative and remote.

10. The Rehabilitator is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first two sentences and the last sentence of Paragraph 10, and they are therefore deemed denied. To the extent the allegations in Paragraph 10 seek to paraphrase or characterize the contents of the rehabilitation plans, communications, docket, pleadings, filings, opinions, orders, or other documents arising out of or related to the liquidations of Penn Treaty Network America Insurance Company or American Network Insurance Company, or the Proposed Plan of Rehabilitation for SHIP filed on April 22, 2020, those documents speak for themselves. The allegations in Paragraph 10 are denied to the extent they are inconsistent with those documents. By way of further answer, it is denied that the hypothetical scenario described by the Health Insurers provides a sufficient interest in the rehabilitation of SHIP for the Health Insurers to satisfy their burden

for intervention. To the contrary, the Health Insurers' interest is, at most, derivative, speculative and remote.

11. To the extent the allegations in Paragraph 11 purport to characterize the Proposed Plan of Rehabilitation, the Rehabilitator asserts that the Proposed Plan is a written document, filed of record in the proceeding, that speaks for itself. Any characterizations of that document in Paragraph 11 are deemed denied. It is admitted that the Health Insurers may file a Formal Comment on or before September 15, 2020, in accordance with Paragraph 8 of the Court's June 12, 2020 Case Management Order, without intervention. The second bullet point in paragraph 11 is a legal conclusion to which no answer is required. To the extent a response is required, the Rehabilitator has concluded that the Proposed Plan of Rehabilitation is in accordance with governing law. The Rehabilitator is without knowledge or information sufficient to form a belief beyond the statements in the Proposed Plan of Rehabilitation as to the truth of the remaining allegations in Paragraph 11. To the extent a response is required, the Proposed Plan of Rehabilitation is designed to restore SHIP to solvency if solvency is possible, but the success of the Proposed Plan of Rehabilitation depends upon the resolution of numerous issues still to be decided, including, but not limited to, the plan options selected by policyholders in each phase. To the extent the Health Insurers propose to intervene and obtain discovery regarding policy data and the basis of SHIP's actuarial analyses, any possible

derivative interests, *vel non*, of the Health Insurers are already adequately represented by NOLHGA.

12. To the extent the allegations in Paragraph 12 purport to characterize the Proposed Plan of Rehabilitation, the Rehabilitator asserts that the Proposed Plan is a written document, filed of record in the proceeding, that speaks for itself. Any characterizations of that document in Paragraph 12 are deemed denied. The Rehabilitator is without knowledge or information sufficient to form a belief beyond the statements in the Proposed Plan of Rehabilitation as to the truth of the remaining allegations in Paragraph 12. By way of further answer, it is denied that the hypothetical scenario described by the Health Insurers provides a sufficient interest in the rehabilitation of SHIP for the Health Insurers to satisfy their burden for intervention. To the contrary, the Health Insurers' interest is, at most, derivative, speculative and remote. Moreover, any possible derivative interests, *vel non*, of the Health Insurers are already adequately represented by NOLHGA, which has submitted an application to intervene and the Rehabilitator has not opposed NOLHGA's limited intervention.

13. To the extent the allegations in Paragraph 13 seek to paraphrase or characterize the contents of the rehabilitation plans, communications, docket, pleadings, filings, opinions, orders, or other documents arising out of or related to the liquidations of Penn Treaty Network America Insurance Company or American

Network Insurance Company, or the Proposed Plan of Rehabilitation for SHIP filed on April 22, 2020, those documents speak for themselves. The allegations in Paragraph 13 are denied to the extent they are inconsistent with those documents. It specifically is denied that the Court's decision to allow certain of the proposed-intervenor Health Insurers to intervene on a limited issue in the liquidation of Penn Treaty Network America Insurance Company is binding or persuasive as to their admission as intervenors in this rehabilitation. By way of further answer, it is denied that the hypothetical scenario described by the Health Insurers provides a sufficient interest in the rehabilitation of SHIP for the Health Insurers to satisfy their burden for intervention. To the contrary, the Health Insurers' interest is, at most, derivative, speculative and remote.

RESPONSE TO *"Applicants Satisfy The Rule 3775 Standard For Limited Intervention"*

14. The allegations in Paragraph 14 are legal conclusions to which no answer is required. To the extent the allegations in Paragraph 14 purport to characterize the Proposed Plan of Rehabilitation, the Rehabilitator asserts that the Proposed Plan is a written document, filed of record in the proceeding, that speaks for itself. Any characterizations of that document in Paragraph 14 are deemed denied. By way of further answer, the Rehabilitator denies that the Health Insurers "have a 'direct and substantial interest' in SHIP's rehabilitation and any subsequent liquidation," and denies that the Health Insurers "have a direct, immediate and

substantial pecuniary interest in the successful rehabilitation of SHIP." To the contrary, the Health Insurers' interest is, at most, derivative, speculative and remote. The Rehabilitator is without knowledge or information sufficient to form a belief as to whether "the Health Insurers will collectively face hundreds of millions of dollars in Guaranty Association assessments" if the Plan is unsuccessful, and the allegations are therefore deemed denied. By way of further response, it is denied that the Health Insurers' allegations regarding their purported potential exposure amounts to anything beyond speculation. In order for the Health Insurers to set forth with any specificity the purported potential derivative harm based on guaranty assessments, (a) the Rehabilitator must first be unsuccessful in its efforts to rehabilitate SHIP, *then* (b) SHIP must be placed into liquidation with a finding that it is insolvent, triggering the obligations of state guaranty associations, *then* (c) each guaranty association must determine how to fund its obligations—which they can do by collecting premiums from policyholders (*e.g.*, 40 P.S. § 991.1706(d) and (g)), through distributions from the insolvent company (*e.g.*, 40 P.S. § 991.1706(m)), and/or through assessments of their member companies (*e.g.*, 40 P.S. § 991.1707). Assuming each guaranty association decides to assess their member companies, *then* (d) the Health Insurers must be assessed and unable to pass through to policyholders the cost of its assessments or otherwise recoup that cost. Whether the Health Insurers

have any derivative exposure, and the amount of that purported exposure, is at best a guess contingent on a number of future events first occurring.

15. The allegations in Paragraph 15 are legal conclusions to which no answer is required. By way of further answer, it is denied that the Health Insurers satisfy the standard for traditional legal standing because their interest is, at most, derivative, speculative and remote.

16. The allegations in Paragraph 16 are legal conclusions to which no answer is required. By way of further answer, it is denied that the Health Insurers' purported interests in SHIP's rehabilitation are substantial, direct, or immediate. To the contrary, the Health Insurers' interest is, at most, derivative, speculative and remote.

17. The allegations in Paragraph 17 are legal conclusions to which no answer is required. By way of further answer, it is denied that the Health Insurers have a substantial interest in SHIP's rehabilitation. To the contrary, the Health Insurers' interest is, at most, derivative, speculative and remote. It is denied that the hypothetical scenario described by the Health Insurers provides a sufficient interest in the rehabilitation of SHIP for the Health Insurers to satisfy their burden for intervention.

18. The allegations in Paragraph 18 are legal conclusions to which no answer is required. By way of further answer, it is denied that the Health Insurers

have a direct interest in SHIP's rehabilitation. To the contrary, the Health Insurers' interest is, at most, derivative, speculative and remote. It is denied that the hypothetical scenario described by the Health Insurers provides a sufficient interest in the rehabilitation of SHIP for the Health Insurers to satisfy their burden for intervention. It is further denied that any possible derivative interests, *vel non*, of the Health Insurers are not already adequately represented by NOLHGA, which has submitted an application to intervene and the Rehabilitator has not opposed NOLHGA's limited intervention. It is denied that only permitting the guaranty associations or NOLHGA to have standing to intervene in the rehabilitation would "elevate form over substance." To the contrary, the Health Insurers are statutorily obligated to rely on state guaranty associations to speak on their behalf. Most states have adopted statutes providing that guaranty associations have standing to intervene in any rehabilitation proceeding, and there is an entire system of administrative remedies in place for the Health Insurers to challenge the actions of a guaranty association or its board. *E.g.*, 40 P.S. § 991.1709(c); Life and Health Insurance Guaranty Association Model Act § 11C. Allowing the Health Insurers to intervene could very well create a scenario where individual members of guaranty associations are litigating their disputes with guaranty associations in Commonwealth Court, rather than following the administrative remedies available by statute to resolve intra-guaranty association disputes. Moreover, it would open the floodgates on

intervention if the Court permitted intervention by those with, at most, potential derivative claims, such as the Health Insurers.

19. The allegations in Paragraph 19 are legal conclusions to which no answer is required. To the extent the allegations in Paragraph 19 purport to characterize the Proposed Plan of Rehabilitation, the Rehabilitator asserts that the Proposed Plan is a written document, filed of record in the proceeding, that speaks for itself. Any characterizations of that document in Paragraph 19 are deemed denied. By way of further answer, it is admitted that liquidation is not imminent for SHIP. It is denied that the Health Insurers have an immediate interest in SHIP's rehabilitation. To the contrary, the Health Insurers' interest is, at most, derivative, speculative and remote. It is denied that the hypothetical scenario described by the Health Insurers provides a sufficient interest in the rehabilitation of SHIP for the Health Insurers to satisfy their burden for intervention.

20. The allegations in Paragraph 20 are legal conclusions to which no answer is required. By way of further answer, it is denied that the Health Insurers' due process rights would be violated if the Application was denied. The Health Insurers have no independent due process right to intervene because their interest is, at most, derivative, speculative and remote. Not every party that may be affected by a decision has a right to participate in the proceedings. *See Morrison Informatics, Inc. v. Members 1st Credit Union*, 97 A.3d 1233, 1237-38 (Pa. Super. Ct. 2014); *Hill*

v. Ofalt, 85 A.3d 540, 548-49 (Pa. Super. Ct. 2014) (no standing absent a "direct, personal injury" to the "shareholder as an individual," rather than the corporation). It is further denied that, if denied intervention, the Health Insurers "will have no opportunity to meaningfully participate in the proceeding." Even without intervention, Paragraph 8 of the Court's June 12, 2020 Case Management Order permits the Health Insurers to file Formal Comments in support of or in objection to the Proposed Plan of Rehabilitation and participate in the hearing on the Proposed Plan of Rehabilitation. It is denied that no other party adequately represents the Health Insurers' derivative interests. Any possible derivative interests, *vel non*, of the Health Insurers are already adequately represented by NOLHGA, which has submitted an application to intervene and the Rehabilitator has not opposed NOLHGA's limited intervention The Health Insurers are statutorily obligated to rely on state guaranty associations to speak on their behalf, and state statute provides an entire system of administrative remedies for the Health Insurers to challenge the actions of a guaranty association or its board. By granting statutory standing to the guaranty associations but not their members, the Pennsylvania legislature (like the drafters of the model act and legislatures in other states) concluded that the guaranty associations will adequately represent the interests of their members.

WHEREFORE, for the reasons stated herein, the Rehabilitator respectfully requests that the Application be denied and the Health Insurers be denied the opportunity to intervene in these proceedings.

Respectfully submitted,

/s/ Dexter R. Hamilton

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Counsel for Jessica K. Altman, Insurance Commissioner of the Commonwealth of Pennsylvania, as Statutory Rehabilitator of SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA

Date: August 21, 2020

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CERTIFICATE OF SERVICE

I, Michael J. Broadbent, hereby certify that on August 21, 2020 I served the foregoing Response on all parties listed on the Master Service List by electronic mail and that an electronic copy of the foregoing document will be posted on SHIP's website at https://www.shipltc.com/court-documents.

/s/ Michael J. Broadbent