APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-3008

[Filed April 21, 2023]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
STATE OF DELAWARE DEPARTMENT OF INSURANCE, Appellant	)

On Appeal from the United States District Court
For the District of Delaware
(D.C. No. 1-20-cv-0829)
District Judge: Honorable Maryellen Noreika

Argued
November 8, 2022

Before: JORDAN, SCIRICA, and RENDELL,
Circuit Judges

(Filed: April 21, 2023)

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OPINION OF THE COURT

JORDAN, *Circuit Judge*.

This case pits Delaware's authority to protect corporate privacy against the power of the IRS to enforce the tax laws of the United States. The dispute arises from the refusal of the Delaware Department of Insurance (the "Department") to comply with an IRS summons. The Department relies on Title 18, Section 6920 of the Delaware Code, which generally prohibits the Department from disclosing certain information about captive insurance companies to anyone, including the federal government, absent the companies' consent.[1] But § 6920 does allow disclosure to the federal government if it agrees in writing to keep the disclosed information confidential. The government did not and instead petitioned the District Court to enforce its summons. The Court granted that petition.

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[1] A captive insurance company is an insurance company that is wholly owned and controlled by its insureds. *Avrahami v. Comm'r of Internal Revenue*, 149 T.C. 144, 176 (T.C. 2017).

The Department argues that, under the McCarran-Ferguson Act ("MFA"), 15 U.S.C. § 1011 et seq., Delaware law as embodied in § 6920 overrides the IRS's statutory authority to issue and enforce summonses, so the District Court's order should be reversed.

While the MFA does protect state insurance laws from intrusive federal action when certain requirements are met, the District Court concluded that, before any such reverse preemption occurs, our precedent requires that the conduct at issue – in this case, the refusal to produce summonsed documents – must constitute the "business of insurance" within the meaning of the MFA. **[J.A. at 008, 012-17, 024-33.]** The District Court held that this threshold requirement was not met here, and we agree. We will therefore affirm.

I. BACKGROUND

A. Origin of the McCarran-Ferguson Act and Its Relevant Text

The MFA was Congress's response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Before that decision, "it had been assumed that '[i]ssuing a policy of insurance [wa]s not a transaction of commerce,' subject to federal regulation." *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 499 (1993) (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869)). That changed when *South-Eastern Underwriters* held that "insurance transactions were subject to federal regulation under the Commerce Clause, and that the

antitrust laws in particular[] were applicable to them." *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 458 (1969).

Fearing that *South-Eastern Underwriters* would "undermine state efforts to regulate insurance," Congress enacted the MFA. *Humana Inc. v. Forsyth*, 525 U.S. 299, 306 (1999). Relevant to our inquiry today are the provisions of the statute codified at §§ 1011 and 1012 of Title 15 of the United States Code.[2] The first, denominated "Declaration of policy," states:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011. Then, § 1012 provides:

> **(a) State regulation**
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> **(b) Federal regulation**
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or

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[2] All references herein to the MFA are to its provisions as codified.

> tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012.

The Supreme Court later, in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), "explained the legislative intent behind the statute's preclusionary approach to federal intrusion on state insurance laws." *Sabo v. Metro. Life Ins. Co.*, 137 F.3d 185, 189 (3d Cir. 1998). It said, among other things, that Congress's "purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co.*, 328 U.S. at 429. Those closing words – "the business of insurance" – have high salience in this dispute over captive insurance companies.

B. Overview of Captive Insurance

A "captive" insurance company is one that is wholly owned and controlled by its insureds. *Avrahami v. Comm'r of Internal Revenue*, 149 T.C. 144, 176 (T.C. 2017). This type of entity protects the owner-insured while simultaneously allowing the benefit of reaping the captive company's underwriting revenues.

Businesses that are experienced in establishing and managing captive insurance companies are called "captive managers." (J.A. at 241 at ¶14.) Captive managers facilitate the creation and management of captive insurers in jurisdictions that have passed captive insurance enabling legislation, as has Delaware.

Captive insurance is effectively a kind of self-insurance, but one with an added tax benefit: "Amounts paid for insurance are deductible under [26 U.S.C. § 162(a)] as ordinary and necessary expenses paid or incurred in connection with a trade or business[,]" as opposed to "amounts set aside in a loss reserve as a form of self-insurance," which are not deductible. *Avrahami*, 149 T.C. at 174. The upshot is that a company that wishes to hold money aside in case of loss can reduce its taxable income by paying such money as premiums to its captive insurer and then deducting the premiums.

Title 18 of the Delaware Code (the "Delaware Insurance Code") governs insurers and insurance professionals licensed under Delaware law. Chapter 69 of the Delaware Insurance Code is the part of the state's statutory scheme governing the formation, licensing, and regulation of captive insurers. Under Chapter 69, corporations and various alternative entities can apply for certificates of authority from the Insurance Commissioner of the State of Delaware to operate as captive insurance companies.[3] If a certificate

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[3] A would-be captive insurance company may apply for a "certificate of authority" from the Commissioner, as provided in 18

is granted, the resulting Delaware captive insurance company is generally subject to triennial examinations in which the Department "thoroughly inspect[s] and examine[s] [the company's] affairs to ascertain its financial condition, its ability to fulfill its obligations and its compliance with the provisions of [Chapter 69]." 18 Del. Code Ann. § 6908.

Section 6920 of the Delaware Insurance Code, which is central to the present controversy, relates to the confidential treatment of materials and information that captive insurers are required to submit to the Department. It provides, in pertinent part:

> All portions of license applications reasonably designated confidential by … an applicant captive insurance company, … and all examination reports, … recorded information, [and] other documents, … produced or obtained by or submitted or disclosed to the Commissioner that are related to an examination pursuant to this chapter must, unless the prior written consent … of the captive insurance company … has been obtained, be given confidential treatment …, and may not be … disclosed to any other person at any time except:

Del. Code Ann. § 6903 ("License application; certificate of authority"). Once issued a "certificate of authority," a captive insurance company is "authoriz[ed] … to do insurance business in th[e] State." *Id*. § 6903(f). The terms "Commissioner" and "the Department" will be used herein interchangeably, as there is no issue in this case relating to delegation of the Commissioner's authority.

> …
>
> To a law-enforcement official or agency of … the United States of America so long as such official or agency agrees in writing to hold it confidential and in a manner consistent with this section.

§ 6920.

In short, § 6920 prohibits the Department from disclosing covered information to anyone, including the federal government, unless the captive insurance company consents, or, as relevant here, the federal government agrees in writing to treat the information as confidential.

C. Overview of "Micro-Captive" Insurance and Tax Concerns

As mentioned above, captive insurance can be used to obtain a tax benefit for the insureds by permitting them to claim deductions for the premiums they pay. But that does not prevent the IRS from taxing the captive insurers. "While the [Internal Revenue] Code permits the deduction of insurance premiums *paid*, it also taxes insurance premiums *received*." *Avrahami* 149 T.C. at 174 (emphasis in original); *see also id.* at 175 ("Insurance companies – other than life-insurance companies, … – are generally taxed on their income in the same manner as other corporations.").

There is, however, an exception of particular relevance here: insurance companies whose annual net written premiums do not exceed a specified maximum and meet certain other requirements may elect tax

treatment under 26 U.S.C. § 831(b).[4] *See id*. at 176, 178-79 & n.46. That election allows a captive insurance company to pay no taxes on the premiums it receives. *IRS Notice of Transaction of Interest – Section 831(b) Micro-Captive Transactions* ("2016 IRS Notice"), 2016-47 I.R.B. 745 (2016). Instead, it only pays tax on any eligible investment income it may have. *Id*.; *see also Avrahami*, 149 T.C. at 176 (explaining that such an entity is "subject to tax only on its taxable investment income"). In that circumstance, then, the insured can deduct premiums from its taxable income without its captive insurer being taxed on those same premiums.

Insurance companies that are both "captive insurers" and taxed under 26 U.S.C. §831(b) are known as "micro-captives". The term "micro-captive" does not appear anywhere in the Delaware Captive Law or the Internal Revenue Code. It is simply an apt description used by the IRS and the Tax Court, among others, to designate a captive insurance company whose annual

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[4] That section generally provides that instead of paying taxes computed using their taxable income, insurance companies that have elected this treatment have their "tax computed by multiplying" their "taxable investment income" "by the rates provided in [26 U.S.C.] section 11(b)." 26 U.S.C. § 831(b)(1) (setting the general tax consequence for certain small insurance companies). The 2015 amendments to 26 U.S.C. § 831(b) set the threshold at $2.2 million and provided that this will periodically be "increased for inflation." *Avrahami*, 149 T.C. at 176 n.46. The federal government represents that as of the time it filed its Answering Brief, the maximum still stands at $2.2 million. The 2015 amendments to 26 U.S.C. § 831(b) "added new diversification requirements that an insurance company must meet in order to receive the favorable tax treatment of subsection (b)." *Id*. at 176 n.46.

net written premiums do not exceed the maximum allowed for it to elect the special tax treatment available under § 831(b). *See Avrahami*, 149 T.C. at 176, 178-79 (discussing such companies and transactions, their tax consequences, and their potential for abuse).

While the IRS has explicitly "recognize[d] that related parties may use captive insurance companies that make elections under § 831(b) for risk management purposes that do not involve tax avoidance," it has identified "micro-captive" transactions as having "a potential for tax avoidance or evasion." 2016 IRS Notice, 2016-47 I.R.B. 745. For example, "[u]nscrupulous promoters" may "persuade closely held entities to … create captive insurance companies onshore or offshore, drafting organizational documents and preparing initial filings to state insurance authorities and the IRS." IRS News Release IR-2015-19 (Feb. 3, 2015), https://www.irs.gov/pub/irs-news/IR-15-019.pdf. Too often, these micro-captives are not providing bona fide insurance. "Underwriting and actuarial substantiation for the insurance premiums paid are either missing or insufficient." *Id.* Instead, their purpose is to serve as a conduit for inflated premiums that their insureds can deduct as business expenses, while the faux insurer, by keeping the premiums below the threshold for § 831(b), is taxed only on the investment income it may have. *Id.* The promoters help paper over the charade and may "assist[] with creating and 'selling' to the entities often times poorly drafted 'insurance' binders and policies to cover ordinary business risks or esoteric, implausible risks for exorbitant 'premiums[.]'" *Id.* All the while, the

insured may retain actual commercial insurance coverage from traditional insurers. *Id*.

Accordingly, "the IRS has applied increased scrutiny to these transactions, adding them to [its] 'dirty dozen' list of tax scams in 2015 and declaring them 'transactions of interest' in 2016." *Avrahami*, 149 T.C. at 173. A 2016 IRS Notice declared micro-captive transactions satisfying certain criteria as "transactions of interest" that must be reported to the IRS. IRS Notice, 2016-47 I.R.B. 745.

D. Factual Background

The summons enforcement action now on appeal arises from the IRS's investigation of Artex Risk Solutions, Inc. ("Artex"), and Tribeca Strategic Advisors, LLC ("Tribeca"), the latter entity being wholly owned by Artex. The investigation seeks to determine whether Artex and Tribeca are liable for penalties under 26 U.S.C. § 6700 for promoting abusive tax shelters.[5] The federal government successfully enforced two summonses issued to Artex, leading to a production of documents in 2014. Those documents included two email chains between Artex and the Delaware Department of Insurance that piqued the interest of the IRS and led to the summons at issue here. The first email chain related to the issuance by the Department of certificates of authority in December 2012 to an Artex client. The second involved the Department's Director of Captive and Financial Insurance Products, who declined a dinner invitation

[5] The origins of that investigation are immaterial to the issues before us now.

from Artex but scheduled a breakfast meeting the following day with six Department employees and Artex.

On October 30, 2017, the IRS issued an administrative summons to the Department for testimony and certain records relating to filings by and communications with Artex, Tribeca, or others working with those companies. Of main concern is what the parties and District Court refer to as "Request 1" of the summons. Request 1 seeks "all electronic mail between [the Department] and Artex and/or Tribeca related to the Captive Insurance Program." (J.A. at 065.) The "Captive Insurance Program" is broadly defined in the summons as "any arrangement managed by Artex or Tribeca wherein captive insurance companies, defined by [Chapter 69 of the Delaware Insurance Code], provide either insurance and/or reinsurance." (J.A. at 063.) At the time of the summons, it seems the IRS believed that the Department had issued 191 certificates of authority to insurance companies created by Artex and Tribeca.[6] It directed the Department to appear before a revenue agent to give testimony and produce requested documents by November 29, 2017.

The Department responded with objections to the summons, including confidentiality objections pursuant to § 6920 of the Delaware Insurance Code. The IRS declined the Department's request to agree in writing to abide by the confidentiality requirements of § 6920.

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[6] The Department has represented that it actually issued 225 certificates of authority to companies created by Artex and Tribeca.

The Department has thus continued to refuse to produce any emails or other documents responsive to Request 1 that relate to specific captive insurers created by Artex and Tribeca, absent the affirmative consent of the relevant captive insurers, and no representative of the Department has ever appeared to provide testimony. Any limited compliance with the summons was tailored to avoid violating § 6920 and does not bear on the issues before us.

E. Procedural Background

Given the Department's refusal to comply with the summons, the federal government filed in the District Court a petition to enforce it, supported by a declaration from IRS Revenue Agent Bradley Keltner. Specifically, the government sought an order directing the Department to comply with Request 1 of the summons and the demand for testimony. A Magistrate Judge, the Honorable Christopher J. Burke, issued an order to show cause why the Department should not be compelled to comply with the summons. The Department opposed the petition for enforcement and moved to quash the summons. Of importance here, the Department argued that, under the MFA, § 6920 reverse-preempts the IRS's summons authority.[7]

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[7] To make out a prima facie case for the validity of a summons, the federal government must show each of the following: (1) "that the investigation will be conducted pursuant to a legitimate purpose"; (2) "that the inquiry may be relevant to the purpose"; (3) "that the information sought is not already within the [IRS's possession"; and (4) "that the administrative steps required by the [United States Tax] Code have been followed." *United States v. Rockwell Int'l*, 897 F.2d 1255, 1262 (3d Cir. 1990) (quoting *United States v.*

The Magistrate Judge issued a thorough Report and Recommendation concluding that the petition to enforce the summons should be granted. He recommended against any holding of reverse-preemption under the MFA, after analyzing the question at length. First, he explained how MFA reverse-preemption is "an exception to the general rule" that a "state statute yields under the doctrine of preemption" in the face of a conflicting federal statute. (J.A. at 025.) Specifically, he explained that, unlike the normal situation, the MFA "permits state laws to trump federal laws in certain circumstances (or to 'reverse preempt' those laws)." (J.A. at 025.) Further, he described how the MFA's reverse-preemption provision, codified in § 1012(b), contains two clauses, with the first addressing "federal laws in general," and the second addressing "application of federal antitrust laws." (J.A. at 025 (quoting *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 167 n.1 (3d Cir. 2001)).)

The Magistrate Judge then said that in a non-antitrust matter, such as this case, the first clause of

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Powell, 379 U.S. 48, 57-58 (1964)) (internal quotation marks omitted). Before Judge Burke, the Department argued the third prerequisite had not been shown. He decided that the federal government had met its burden on the challenged *Powell* factor and that the Department had not rebutted it. The Department did not object to that finding, which also underpins the District Court's decision based on the Report and Recommendation of Judge Burke. Likewise, the Department has not raised that point on appeal and thus it is forfeited. *See Geness v. Cox*, 902 F.3d 344, 355 (3d Cir. 2018) (explaining that an appellant forfeits an argument in support of reversal if it is not raised in the opening brief).

§ 1012(b) asks three questions (the "first clause requirements" that must be answered in the affirmative before reverse-preemption is appropriate under the MFA. Those questions are: "(1) whether the state law is enacted 'for the purpose of regulating the business of insurance'; (2) whether the federal law does not 'specifically relat[e] to the business of insurance'; and (3) whether the federal law would 'invalidate, impair, or supersede' the State's law." (J.A. at 026 (citing *Humana*, 525 U.S. at 307).)

Argued by the federal government, the Magistrate Judge went on to say "that before the Court applies the above-referenced three-factor test drawn from [§ 1012(b)], it must first assess whether an additional, threshold element … has been met: 'whether the activity complained of constitutes the "business of insurance."'" (J.A. at 026 (emphasis removed) (quoting *Highmark*, 276 F.3d at 166 (quoting *Sabo*, 137 F.3d at 191)).) He observed that our precedent has "clearly and repeatedly instructed that … [courts] must first assess whether the movant has satisfied the threshold element, before applying [§ 1012(b)]'s three-part test." (J.A. at 028.) Further, he rejected the argument that, based on the Supreme Court's decisions in *U.S. Department of Treasury v. Fabe*, 508 U.S. 491 (1993), and *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999), our threshold "business of insurance" inquiry is no longer good law.

With that said, the Magistrate Judge recommended the conclusion that, under our threshold inquiry, the challenged conduct did not constitute the "business of insurance" and so was not subject to the reverse-

preemption provision of the MFA. He suggested that, in determining whether the reverse-preemption provision in § 1012(b) applies, courts should look at the discrete conduct in question (here, resisting an IRS summons, as dictated by § 6920), rather than examining how the ostensibly reverse-preempting provision of state law fits into the State's overarching regulatory scheme. He agreed with the federal government that the conduct at issue in this case is "fairly characterized as '[r]ecord maintenance' or 'the dissemination and maintenance of information, documents, and communications [maintained by the state.]'" (J.A. at 029 (quoting D.I. 23 at 12-23).) Parsing the language of § 6920, he determined that the "entire focus is on the type of access that [the Department] may or may not provide to third parties (including federal law enforcement officers) regarding a captive insurer's confidential information." (J.A. at 029.) He thus recommended concluding such conduct does not constitute the "business of insurance."

In sum, the recommended holding was that the MFA does not apply to the particular conduct of the Department now at issue and, accordingly, that the petition to enforce the IRS summons should be granted and the motion to quash should be denied. The Department filed timely objections to the Magistrate Judge's Report and Recommendation, and the District Court overruled them, adopting the Report and Recommendation, granting the petition to enforce the summons, and denying the motion to quash. This timely appeal followed.

II. DISCUSSION[8]

The Department argues, first, that our threshold inquiry is no longer good law and, second, that even if it remains good law, the District Court erred in saying it was not satisfied here. Both of those arguments proceed from a fundamental misreading of our precedent. Accordingly, before turning to either argument, we review our holding in *Sabo v. Metropolitan Life Insurance Co.*, 137 F.3d 185 (3d Cir. 1998), and our reaffirmance of *Sabo* in *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160 (3d Cir. 2001).

A. Our Threshold Inquiry Precedent

1. Origin and General Principles

In *Sabo*, we interpreted subsections 1012(a) and 1012(b), as well as the import of the Supreme Court's discussion of the MFA in *SEC v. Nat'l Sec., Inc.* ("*National Securities*"), 393 U.S. 453 (1969). We concluded that there is a "threshold question in determining whether the antipreemption mandate of . . . § 1012(b) applies," and that the inquiry is "whether the challenged conduct broadly constitutes the 'business of insurance' in the first place." *Sabo*, 137

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[8] The District Court had jurisdiction under 26 U.S.C. §§ 7604(a), 7402(b), and 28 U.S.C. §§ 1340, 1345. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review for clear error whether the factual prerequisites for enforcement of an IRS summons have been met, and we review questions of law de novo. *United States v. Ins. Consultants of Knox, Inc.*, 187 F.3d 755, 759 (7th Cir. 1999). The issue of reverse-preemption under the MFA is one of law. *Weiss v. First Unum Life Ins. Co.*, 482 F.3d 254, 263 (3d Cir. 2007).

F.3d at 189-91. Only when that question is answered in the affirmative do the "three distinct requirements" from the first clause of § 1012(b) come into play. *Id.* at 189. For reverse-preemption to be appropriate, all three of those "first clause" requirements must be met: "(1) the federal law at issue does not specifically relate to the business of insurance; (2) the state law regulating the activity was enacted for the purpose of regulating the business of insurance; and (3) applying federal law would invalidate, impair, or supersede the state law."[9] *Id.*

In *Sabo*, we were at pains to demonstrate that the threshold inquiry – again, whether the challenged conduct constitutes the "business of insurance" – had a firm foundation in § 1012(a). The issue presented in *Sabo* was whether reverse-preemption under the MFA barred an insurance salesman from suing his former employer under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-68, when the "challenged predicate acts ar[o]se [out] of the defendant's insurance business." *Sabo*, 137 F.3d at 187. The parties' disagreement focused on "the scope of the 'insurance business' covered by [the MFA], and

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[9] This is the test applicable in all but antitrust cases. In antitrust cases, the second clause, or "antitrust clause," of § 1012(b) provides a statutory exemption from antitrust liability "for activities that (1) constitute the 'business of insurance,' [and] (2) are regulated pursuant to state law," so long as they "(3) do not constitute acts of 'boycott, coercion or intimidation,'" under § 1013(b). *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1133 (3d Cir. 1993). Antitrust issues are not in play here, but the distinction between antitrust and non-antitrust cases under the MFA is noteworthy because of the different treatment the two categories receive under § 1012(b).

whether it applied to" the conduct at issue in the dispute. *Id*. at 187-88. That conduct was a churning scheme involving the fraudulent trading of insurance policies, the fraudulent advertising of insurance policies as a retirement savings plan, and the coercing of employees to engage in those acts. *Id*.

We decided that those activities constituted the "business of insurance," after analyzing the proper role and basis for the threshold inquiry. *Id*. at 188-92. We stated that "Section [1012(a)] by its terms, affirmatively subjects the business of insurance to state regulation." *Id*. at 189. We then explained that the MFA took the "further step of proscribing unintended federal interference of state insurance laws by a general mandate," quoting the requirements of the first clause of § 1012(b). *Id*. We noted that our preemption analysis would focus on "the first clause of section 1012(b)," rather than the second clause because the complaint was not "grounded in federal antitrust law." *Id*. at 189 n.1.

We then analyzed the interplay between § 1012(a) and § 1012(b), saying, "[i]f it is determined that the alleged conduct at issue broadly constitutes the 'business of insurance,' and is therefore subject to state regulation under section 1012(a), the next issue is whether the anti-preemption mandate of section 1012(b) precludes a federal cause of action." *Id*. at 189. We did not engraft an atextual limitation onto the requirements of the first clause of § 1012(b). Rather, citing *National Securities*, we made it clear that we were relying on the text of § 1012(a) for the threshold inquiry:

> The threshold question in determining whether the antipreemption mandate of 15 U.S.C. § 1012(b) applies is whether the challenged conduct broadly constitutes the "business of insurance" in the first place. 15 U.S.C. § 1012(a). If the contested activities are wholly unrelated to the insurance business, then the [MFA] has no place in analyzing federal regulation because only when "[insurance companies] are engaged in the 'business of insurance' does the act apply."

Id. at 190 (citing *National Securities*, 393 U.S. at 459–60). We concluded by observing again that, "[i]f the defendant's conduct does not constitute 'the business of insurance,' then the Act simply does not apply and there is no need to confront preclusion issues under § 1012(b)." *Id*.

Re-emphasizing the point, and, relying on another Supreme Court opinion, *U.S. Department of Treasury v. Fabe*, we noted that reverse-preemption applies when "the activity in question constitutes the business of insurance and … the specific state law was enacted with the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Sabo*, 137 F.3d at 191 (quoting *Fabe*, 508 U.S. at 505).[10]

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[10] The phrase "the specific state law was enacted with the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance" derives from the Supreme Court's construction of the phrase: "for the purpose of regulating the business of insurance." *See Fabe*, 508 U.S. at 505 ("The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or

After *Sabo*, we reaffirmed the threshold inquiry in *Highmark*. "If the activity does not constitute the 'business of insurance,' then the [MFA] does not apply," we said.[11] 276 F.3d at 166 (citing *Sabo* 137 F.3d at 190-91). If, however, the threshold inquiry is satisfied, "we then look to whether § 1012(b)" reverse-preempts the federal law in question. *Id.*

2. The Breadth of the Phrase "Business of Insurance"

The Supreme Court has provided further guidance on the meaning of the phrase "business of insurance," as used in the MFA. The phrase is undefined in the statute, so the Court has looked to "the ordinary understanding of that phrase, illumined by any light to be found in the structure of the Act and its legislative history." *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979). We do likewise, looking to how the Supreme Court employed that phrase in *National Securities*.

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controlling the business of insurance." (citing Black's Law Dictionary 1236, 1286 (6th ed. 1990)).

[11] In *Highmark* an insurance company sued a rival seeking injunctive relief and damages for advertisements that allegedly included misleading statements about the plaintiff's insurance, in violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). 276 F.3d at 163-64. The defendant moved to dismiss on two bases: first, that the advertisement did not substantially affect interstate commerce and, therefore, the Lanham Act did not apply, and, second, that the Lanham Act claims were reverse-preempted by the Pennsylvania Unfair Insurance Practices Act. *Id.* at 164. The district court denied the motion to dismiss and entered a preliminary injunction. *Id.* We affirmed. *Id.*

In its opinion there, the Court noted that Congressional debates surrounding the MFA were "mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies," none of which was then at issue in the case before it. *National Securities*, 393 U.S. at 458-59. Accordingly, the Court analyzed the phrase "business of insurance" in the broader context of Congress's reaction to *South-Eastern Underwriters*, and, in so doing, found "it [was] relatively clear what problems Congress was dealing with." *Id*. at 459. "Congress was concerned" with preserving for state regulation that which had been understood as beyond the Commerce Clause before *South-Eastern Underwriters*, specifically, "the type of state regulation that centers around the contract of insurance." *Id*. at 460.

Having thus set the stage, the Supreme Court identified the "more of the 'business of insurance'" as "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement[.]" *Id*. In addition, *National Securities* provided several examples of that "core" "the fixing of [insurance] rates"; "the selling and advertising of [insurance] policies"; and the "licensing of companies and their agents." *Id*. *National Securities*, however, made clear that the sweep of the "business of insurance" goes beyond the core to reach "other activities of insurance companies [that] relate so closely to their status as reliable insurers that they too must be placed in the same class." *Id* "[W]hatever the exact scope of the statutory term," the touchstone remains

the impact on the "relationship between the insurance company and the policyholder." *Id*.

The Court later admonished that not everything that "indirect[ly] [a]ffects" policyholders or "redounds to the[ir] benefit" in some way falls within the "business of insurance." *Fabe*, 508 U.S. at 508-09 (citing *Royal Drug*, 440 U.S. at 216-17). After all, the "statute d[oes] not purport to make the States supreme in regulating all the activities of insurance companies[.]" *National Securities*, 393 U.S. at 459. Thus, "terms such as 'reliability' and 'status as a reliable insurer'" cannot "be interpreted" so "broad[ly]" that "almost every business decision of an insurance company could be included in the 'business of insurance.'" *Royal Drug*, 440 U.S. at 217.

B. *Sabo* and *Highmark* Remain Good Law

In this appeal, the Delaware Department of Insurance argues that our decisions in *Sabo* and *Highmark* are no longer good law, citing three reasons. First, the Department argues that *Sabo* conflicts with the Supreme Court's earlier decision in *Fabe*, 508 U.S. 491. Second, it argues that *Sabo* was implicitly overruled by a later Supreme Court decision, *Humana Inc. v. Forsyth*, 525 U.S. 299. And third, it argues that our own decisions after *Sabo* and *Highmark* conflict with those two cases. More specifically, the Department says that the lack of any mention of the threshold inquiry in *Suter v. Munich Reinsurance Co.*, 223 F.3d 150 (3d Cir. 2000), represents the true post-*Humana* precedent of our Court, replacing *Sabo* and *Highmark*. None of those arguments holds water, and, contrary to each of them, the threshold inquiry

prescribed in *Sabo* and reiterated in *Highmark* remains the law of this Circuit.

The Department's arguments contain two foundational flaws. First, they misread the origins of the threshold inquiry. The contention that the threshold inquiry does not derive from § 1012(a) is plainly wrong, as demonstrated by the description we have just given of *Sabo*. *See* supra Section II.A.1.[12] As already noted, *Sabo* expressly cites § 1012(a) when stating that "[t]he threshold question in determining whether the antipreemption mandate of 15 U.S.C. § 1012(b) applies is whether the challenged conduct broadly constitutes the 'business of insurance' in the first place." *Sabo*, 137 F.3d at 190; *see also id*. at 189 ("If it is determined that the alleged conduct at issue broadly constitutes the 'business of insurance,' and is therefore subject to state regulation *under section 1012(a)*, the next issue is whether the anti-preemption mandate of section 1012(b) precludes a federal cause of

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[12] The Department misunderstands footnote two of *Sabo*. We said there "that federal courts have seemingly disagreed as to the proper analytic inquiry into [MFA] preclusion[,]" and, therefore, we thought it important "to discuss our analysis in detail." *Id*. at 189 n.2. That footnote observed that some courts had adopted a three-part test "that does not require a specific conclusion that the defendant's conduct constitutes the business of insurance," but others had adopted a four-part test that did require such a specific conclusion. *Id*. Our holding that there is a threshold inquiry deriving from § 1012(a) relied on none of those cases. Indeed, it would have been difficult to do otherwise, as none of them relies on § 1012(a) for a threshold inquiry, and no one here suggests they do. In that context, our statement that "it is important to discuss our analysis in detail" is more naturally read as divergence from – not a subscription to – the position stated in those other cases.

action" (emphasis added)). The quoted language from *Sabo* speaks for itself.

Second, as we proceed to discuss now, the Department perceives jurisprudential conflict where there is none. Those supposed conflicts are instances where we or the Supreme Court analyzed MFA reverse-preemption under the first clause of § 1012(b), focusing on what was at issue in those cases. Whether reverse-preemption is warranted under the first clause of § 1012(b) when it is implicated is a separate question from whether reverse-preemption is implicated in the first place under § 1012(a).

1. *Sabo* does not conflict with *Fabe*

By way of example, the Department wrongly asserts that *Fabe* conflicts with *Sabo*. *Fabe* stands for the unremarkable proposition that the first clause of § 1012(b) has three requirements, but it does not foreclose a threshold inquiry derived from § 1012(a). In *Fabe*, the liquidator of an insurance company brought a declaratory judgment action in federal court "seeking to establish that [a] federal priority statute [did] not preempt [an] Ohio law designating the priority of creditors's claims in insurance-liquidation proceedings." 508 U.S. at 495. The federal statute "accord[ed] first priority to the United States with respect to a bankrupt debtor's obligations[,]" while the Ohio statute "confer[red] only fifth priority upon claims of the United States in proceedings to liquidate an insolvent insurance company[.]" *Id*. at 493.

Fabe quoted the first clause of § 1012(b) and gave passing acknowledgment to uncontested points. *Fabe*, 508 U.S. at 500-01. After that, "[a]ll that [was] left" for analysis, under the first clause, was "whether the Ohio priority statute [was] a law enacted 'for the purpose of regulating the business of insurance.'" *Id*.

The Supreme Court's treatment of that contested point included analysis akin to our threshold inquiry. The Court first clearly stated that "the Ohio statute" was "a law 'enacted for the purpose of regulating the business of insurance,' within the meaning of the first clause of § [1012(b)]." *Id*. at 505. It then backtracked, refusing to fully reverse-preempt the federal law with respect to creditors who were not policyholders, holding that the state law was "not a law enacted for the purpose of regulating the business of insurance" to the extent it benefited such creditors. *Id*. at 508 & n.8. Additionally, it refused to hold that the portion of the state law providing for administrative costs for creditors other than policyholders reverse-preempted federal law. *Id*. at 509. It reasoned that the provision's "connection to the ultimate aim of insurance [wa]s too tenuous." *Id*. Although pressed by the dissent to justify such a "compromise holding," *id*. at 518 (Kennedy, J., dissenting), the majority provided no textual hook for its holding. *See id*. at 508-09 & n.8 (arguing that the dissent had conceded that statute need not "stand or fall in its entirety" and observing that the dissent had cited nothing preventing the majority from finding certain parts of the statute had effected a reverse-preemption and others had not). Of more importance for present purposes, it never foreclosed § 1012(a) from playing the role we have concluded it plays.

Simply put, while *Fabe* focuses on § 1012(b), it is not irreconcilable with our threshold inquiry or the conclusion that § 1012(a) is the source of it.

2. *Sabo* does not conflict with *Humana*

Nor does *Humana* conflict with *Sabo* or overrule it. In *Humana*, insurance policy beneficiaries alleged that an insurance company engaged in a scheme to hide discounts that the company had received from a hospital, and that it did so to prevent the beneficiaries from sharing in the savings. 525 U.S. at 303-04. The plaintiffs contended that this violated both the Nevada law regulating insurance fraud and RICO. *Id*. at 302. Although the state and federal laws represented "differ[ing]" "remedial regimes," the Supreme Court concluded that "RICO can be applied in this case in harmony with the State's regulation," and, therefore, "the [MFA] does not bar the federal action." *Id*. at 303.

Humana touched only on the first clause of § 1012(b), without suggesting a rejection of a threshold inquiry under § 1012(a). The first sentence of the opinion introduced the case as one "concern[ing] the regulation of insurance by the states, as secured by the [MFA], 59 Stat. 33, as amended, 15 U.S.C. § 1011 et seq." *Id*. at 302. But that same paragraph made it apparent that the Court was going to limit its discussion solely to the one requirement of the first clause of § 1012(b) then in dispute[13] – whether RICO

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[13] Recall that the three requirements for application of MFA reverse preemption, as set forth in the first clause of § 1012(b), are as follows: "(1) the federal law at issue does not specifically relate to the business of insurance; (2) the state law regulating the

"'invalidate[d], impair[ed], or supersede[d]' the State's regulation." *Id*. at 302-03. Although *Humana* states that § 1012(b) is "the centerpiece of this case," *id* at 306, it discusses only two of the three "first clause" requirements, and one of those only in passing, with the remaining one being assumed to be satisfied. *Id*. at 307 ("RICO is not a law that 'specifically relates to the business of insurance.' This case therefore turns on the question: Would RICO's application to the employee beneficiaries' claims at issue 'invalidate, impair, or supersede' Nevada's laws regulating insurance?").

That *Humana* proceeded to examine whether RICO conflicted with state law without tarrying along the way does not mean that *Humana* addressed the existence of a threshold inquiry derived from § 1012(a). It did not, and thus does not foreclose it. The Department's suggestion that *Humana* sets out the first clause of § 1012(b) as the exclusive "test for the [MFA]" preemption ignores what *Humana* makes plain in context – that the Court was quickly getting to the heart of the issue without purporting to write a treatise on every aspect of the MFA.[14] *Cf. United States v.*

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activity was enacted for the purpose of regulating the business of insurance; and (3) applying federal law would invalidate, impair, or supersede the state law." *Highmark*, 276 F.3d at 166.

[14] While we refer to the inquiry derived from Section 1012(a) as a "threshold" one, it need not be addressed in every case. Sound advocacy may well lead parties to concede or assume the threshold inquiry has been met, thus allowing them to address other requirements for MFA reverse preemption that may be more readily dispositive. Judicial economy may likewise prompt a court to resolve an MFA reverse preemption question in a similar way.

Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) ("[Courts] wait for cases to come to them, and when [cases arise, courts] normally decide only questions presented by the parties.") (discussing the "principle of party presentation"); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) ("[T]his Court does not decide important questions of law by cursory dicta inserted in unrelated cases."); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 738 n.41 (3d Cir. 1988) (declining appellee's "invitation to transform what is in essence stray language and at best no more than dicta into a binding holding").

3. *Sabo* does not conflict with *Suter*

Also contrary to the Department's assertion, our own decision in *Suter v. Munich Reinsurance Co.* does not suggest there is a conflict between *Humana* and *Sabo*, or that *Humana* implicitly overrules *Sabo*.

Courts often assume satisfaction of some analytical steps, where appropriate, to get to the heart of a matter. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 234-43 (2009) (loosening the rigidly ordered two-step analysis of the qualified immunity inquiry and allowing courts to begin with either step to prevent the misuse of "substantial expenditure[s] of scarce judicial resources … [on matters that] have no effect on the outcome of the case"); *United States v. Leon*, 468 U.S. 897, 924 (1984) ("There is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated."); *Strickland v. Washington*, 466 U.S. 668, 697 (1984) ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

Indeed, *Suter* mentions neither case. *Suter* involved a suit brought in state court by the liquidator of an insurance company against a German reinsurance company over an alleged breach of "certain reinsurance treaties." 223 F.3d at 152. The reinsurance treaties "include[d] arbitration clauses governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards." *Id*. Congress enacted a removal provision, 9 U.S.C. § 205, as a part of an act to enforce that convention (the "Convention Act"). *Id*. at 154-55. Relying on those procedural tools, the defendant first removed the case to district court under 9 U.S.C. § 205, and then tried to both compel arbitration and stay the district court proceedings pending arbitration. *Id*. at 152. The plaintiffs argued for remand on three grounds, two of which are relevant here: first, that a provision in the reinsurance treaty waived the defendant's right to remove and, second, that the Convention Act and Federal Arbitration Act (the "FAA") were reverse-preempted by the MFA. *Id*. The district court remanded the case to state court on the first ground without reaching the plaintiffs' other arguments or ruling on the defendant's motion. *Id*. After reversing the district court on the only ground that it examined, we declined to affirm on the basis of MFA reverse-preemption. We examined only one of the three requirements of the first clause of § 1012(b) and found it was not satisfied. *Id*. at 162. To begin, we noted that "there is no contention that either the Convention Act or the FAA 'specifically relate to the business of insurance.'" *Id*. at 160. We briefly identified the remaining requirements of the first clause of § 1012(b) and assumed one of them away without discussion. *See id*. at 160-61 ("Thus the only issues are

whether these statutes as applied in the instant case invalidate, impair or super[s]ede a New Jersey statute that was enacted for the purpose of regulating the business of insurance."); *id*. at 161 ("For purposes of this decision, we will assume that [the statutory] provisions were enacted for the purpose of regulating the business of insurance[.]"). We then briefly explained why "application of the Convention Act to th[e] suit does not impair the New Jersey Liquidation Act." *Id*. at 162. Nothing in that analysis overrides *Sabo*, even if the approach looked at § 1012(b) without pausing at § 1012(a). Given *Sabo*'s status as pre-existing precedent, *Suter* could not have overruled *Sabo*, *see* Third Circuit I.O.P. 9.1, and there is no indication that it intended to.

4. The Department's remaining arguments

The Department makes two additional points that warrant brief mention. First, it notes that we are alone in holding that there is a threshold inquiry derived from § 1012(a). Second, it contends that each of the other circuits that previously used a four-factor test have abandoned it. Neither point would, of course, overrule *Sabo* or *Highmark*, but they might provide a basis for en banc review if they were persuasive. *Cf. In re Krebs*, 527 F.3d 82, 86 (3d Cir. 2008) (a panel may neither overrule a prior precedential opinion "because we are no longer persuaded by its reasoning" nor because "[s]everal of our sister courts of appeal have decided the … issue" contrary to that precedent). They are not. The Department identifies no post-*Humana* precedential opinion of our sister circuits that engages

in legal analysis grappling with (let alone dispensing with) something akin to *Sabo*'s threshold inquiry under § 1012(a).

The one pre-*Humana* case that explicitly parts ways with *Sabo* is *Autry v. Nw. Premium Servs., Inc.*, 144 F.3d 1037 (7th Cir. 1998), and it misreads *Sabo*. Without explanation or analysis, *Autry* lumps *Sabo* in with opinions applying a four-factor test derived from § 1012(b). *Autry*, 144 F.3d at 1041. Hence, the reasons articulated in *Autry* for rejecting a four-factor test derived from § 1012(b) are errantly applied to *Sabo* because, as we have explained, *Sabo*'s threshold inquiry derives from § 1012(a).[15]

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[15] *Autry* declined to find that its own four-part precedent was no longer good law. In a footnote, the opinion acknowledges the three-factor test that it recited does not square with *American Deposit Corp. v. Schacht*, 84 F.3d 834, 838 (7th Cir. 1996). But *Autry* suggests that it might be appropriate to apply the fourth factor later in the MFA analysis:

> In *Schacht* we first addressed whether the state statute was "enacted ... for the purpose of regulating the business of insurance." After answering that question in the affirmative, we asked whether the particular activity at issue in the case was part of the "business of insurance." No doubt we took this second step because *Fabe* counsels that a statute "need not be treated as a package which stands or falls in its entirety," *Fabe*, 508 U.S. at 509 n.8, and instead that a state statute should only displace federal law "to the extent that it regulates policyholders," *id*. at 508. Because we find that the Illinois statute regulating premium financing agreements is not one "enacted ... for the purpose of regulating the business of insurance," we need go no further.

Autry, 144 F.3d at 1042 n.3.

C. The Threshold Inquiry is Not Satisfied

We now turn to the task of applying the threshold inquiry. That involves identifying the conduct being challenged by the party asserting federal supremacy and then asking if that conduct constitutes the "business of insurance."

1. The Challenged Conduct is Non-Disclosure of Records Maintained by the State Absent a Confidentiality Agreement

To recap, the federal government brought this summons enforcement action to force the Department to provide information related to certain micro-captives. The Department has steadfastly refused to provide that information without the federal government first signing a confidentiality agreement. Th Department's refusal, and that alone, is the challenged conduct. More specifically, the challenged conduct is the Department's insistence that it need not provide documents and related testimony that are responsive to Request 1 of the summons. The Magistrate Judge's Report and Recommendation, adopted by the District Court, characterized the conduct in fundamentally the same way, while noting that the conduct tracks the pertinent exception to the general disclosure proscription in § 6920 of the Delaware Insurance Code.

The Department proposes that, to define the challenged conduct for purposes of the threshold inquiry, we should examine the purpose of § 6920 and how it fits into the State's overall regulatory scheme.

But that proposal is tantamount to asking us to skip the threshold inquiry. The Department wants us to characterize the challenged conduct by asking, effectively, whether § 6920 was "enacted … for the purpose of regulating the business of insurance." Transforming the threshold inquiry into that post-threshold requirement from the first clause of § 1012(b) cannot be reconciled with *Sabo*'s admonition that those are separate questions. *Sabo*, 137 F.3d at 191.

Furthermore, the Department's proposal is not faithful to how we went about characterizing the conduct at issue in *Sabo* and *Highmark* for purposes of the threshold inquiry. In *Sabo*, we defined the challenged conduct as a "churning scheme" involving fraudulently trading insurance policies, fraudulently advertising an insurance policy as a retirement savings plan, and coercing employees to engage in those activities. *Sabo*, 137 F.3d at 187, 191. Although such conduct, if it occurred, would violate state law, no reference was made to state law in characterizing that conduct. *Id*. at 191-92. In *Highmark*, the plaintiff alleged that a rival's advertisements included misleading statements about the plaintiff's insurance, ostensibly running afoul of the Pennsylvania Unfair Insurance Practices Act. *Highmark*, 276 F.3d at 163-64. We characterized "the action complained of" as "the advertising" or the "advertising practices of the parties," with no mention of the state law. *Id*. at 166. Thus, in keeping with *Sabo* and *Highmark*, we reject the contention that defining the challenged conduct for purposes of the threshold inquiry entails examining the purpose of § 6920 and how it fits into Delaware's overall regulatory scheme.

2. The Challenged Conduct Does Not Constitute the Business of Insurance

The Department's refusal to provide documents and testimony responsive to Request 1 of the summons is not the "business of insurance."[16] As an initial matter, it is plainly not the "core of the 'business of insurance.'" *See National Securities*, 393 U.S. at 460 ("The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these [are] the core of the 'business of insurance.'"). It also cannot reasonably be understood as "[an]other activit[y] of insurance companies [that] relate[s] so closely to [their] status as reliable insurers that [it] must be placed in the same class." *Id*. It stands, rather, somewhat removed from the "relationship between the insurance company and the policyholder." *Id*.

The Department nevertheless presses the argument that, even if the challenged conduct is its adherence to the strictures of § 6920 in the face of an action to enforce Request 1 of the summons, such conduct constitutes the "business of insurance." That conclusion

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[16] The Report and Recommendation indicated the parties were generally in agreement that, if the petition were granted, the IRS would get both the documents and the testimony. The Magistrate Judge noted that the Department made a passing argument that the federal government forfeited its ability to get testimony. But he rejected that argument as being without legal support and that rejection was adopted by the District Court in its overall endorsement of the Report and Recommendation. The Department does not mention the forfeiture argument before us and, thus, we do not address it. *See Geness*, 902 F.3d at 355 (*supra* at note 10).

follows, the Department says, because the confidentiality provision at issue deals with materials submitted in connection with the licensure of would-be captive insurers and examinations of already-approved captive insurers "for the purpose of determining the solvency and safety of insurers, and for the protection of its policyholders." (Answering Br. at 38.) If § 6920 does not reverse-preempt the IRS's summons authority, the Department claims, then applicants and already-approved captive insurers will be less forthcoming with the Department. The Department therefore contends that affirming the District Court will indirectly endanger those who are insured. By that route, the Department reasons that its adherence to § 6920 should be placed in the category of the "business of insurance."

For that argument to hold water, however, we must accept that affirming the District Court would lead to a change in behavior by captive insurers (or their managers) that would reduce the reliability of captive insurers. That is a contention that cannot survive scrutiny. As an initial matter, the substantive requirements for licensure and continued permission to operate under certificates of authority issued by the Department is not altered by our affirmance of the District Court's ruling. The Department has the authority to obtain documents it requires for licensure and subsequent examinations and can impose consequences on companies that will not provide them. *See*, *e.g.*, 18 Del. Code Ann. §§ 6903, 6908, 6909.[17]

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[17] Although no case has been cited to us construing any of these provisions of the Delaware Insurance Code, it seems clear on their

Simply put, the Department will be no less entitled to the information it currently receives to license captive insurance companies than it has previously been. The same is true of the Department's entitlement to information to determine whether already-licensed captive insurance companies should be allowed to continue to operate.

Moreover, according to the Department and Amici, the information sought here is as legally obtainable by a direct summons or subpoena to the captive insurance companies (or, perhaps, to their managers) as a

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face that they endow the Department with such powers. For example, one provision provides in part: "Before receiving a certificate of authority, an applicant captive insurance company shall file with the Commissioner a certified copy of its organizational documents, a statement under oath of its president or other authorized person showing its financial condition, and any other statements or documents required by the Commissioner." 18 Del. Code Ann. § 6903(c)(1). It, further, indicates that the Department has the authority not to approve the certificate in the first instance if its filings do not comply with Delaware Captive Law. *See id*. § 6903(f) ("If the Commissioner is satisfied that the documents and statements that such captive insurance company has filed comply with the provisions of this chapter, the Commissioner may grant a certificate of authority authorizing it to do insurance business in this State…"). As previously mentioned, captive insurance companies are generally examined triennially to determine, among other things, their "ability to fulfill [their] obligations and [their] compliance with the provisions of this chapter." 18 Del. Code Ann. § 6908. The Department may "suspend or revoke" a captive insurance company's certificate of authority, if, "upon examination, hearing or other evidence," the Department finds that the company has "refus[ed] or fail[ed] to submit … any … report or statement required by law or by lawful order of the Commissioner" or "fail[ed] otherwise to comply with the laws of" Delaware. 18 Del. Code Ann. § 6909.

summons directed to the Department. Accepting those arguments on their own terms, insurance companies will have no plausible reason to withhold information from the Department that turns on the outcome of this case. That is, we are being asked to accept that, but for the potential availability of the novel argument that § 6920 reverse-preempts the IRS's summons authority, a prospective or existing captive insurer will intentionally withhold required information from the Department.

But if a captive insurer is so well informed about the IRS's enforcement powers and defenses against them that it thinks of MFA reverse-preemption in this context, such a company is almost certainly aware of the obvious threat of a direct IRS summons or subpoena. And it must also be aware that being less than forthcoming with the Department risks foregoing or losing a certificate of authority to operate as an insurer. In short, it is hard to see the causal connection the Department is trying to draw. If enforcement of the summons is not the but-for cause of a company's changing its transparency (or lack thereof) with the Department, then the Department is in the same position regardless of how we decide the present dispute. And if that is so, then affirming the District Court will neither undermine the insurer-insured relationship nor the insurer's reliability as an insurer. Accordingly, we reject the Department's argument that its adherence to § 6920 constitutes the "business of insurance."

III. CONCLUSION

For the foregoing reasons, the District Court's order will be affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-3008

[Filed April 21, 2023]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
STATE OF DELAWARE DEPARTMENT OF INSURANCE, Appellant	)

On Appeal from the United States District Court
For the District of Delaware
(D.C. No. 1-20-cv-0829)
District Judge: Honorable Maryellen Noreika

Argued
November 8, 2022

Before: JORDAN, SCIRICA, and RENDELL,
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of Delaware and was argued on November 8, 2022. On consideration whereof,

It is now hereby ORDERED and ADJUDGED that the Judgment of the District Court entered on September 29, 2021, is hereby Affirmed. All of the above in accordance with the opinion of this Court. Each party to bear its own costs.

ATTESTED:

s/Patricia S. Dodszuweit
Clerk

DATE: April 21, 2023

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

C.A. No. 20-829 (MN) (CJB)

[Filed September 29, 2021]

UNITED STATES OF AMERICA, Petitioner,	)
v.	)
DELAWARE DEPARTMENT OF INSURANCE, Respondent.	)

MEMORANDUM OPINION

David A. Hubbert, Acting Assistant Attorney General, David C. Weiss, United States Attorney, Ward W. Benson, Kyle L. Bishop, Trial Attorneys, Tax Division, U.S. Department of Justice, Washington, DC – Attorneys for United States of America

Kathleen P. Makowski, Deputy Attorney General, State of Delaware Department of Justice; Willington, DE; Patricia A. Davis, Deputy State Solicitor, State of Delaware Department of Justice, Dover, DE; James J. Black, III, Jeffrey B. Miceli, Mark W. Drasnin, BLACK & GERNGROSS, P.C., Philadelphia, PA – Attorneys for Delaware Department of Insurance

September 29, 2021
Wilmington, DE

/s/ Maryellen Noreika
NOREIKA, U.S. DISTRICT JUDGE:

Presently before the Court are the objections (D.I. 29) of Respondent Delaware Department of Insurance ("DDOI" or "Respondent") to Magistrate Judge Burke's July 16, 2021 Report and Recommendation (D.I. 28) ("the Report"). The Report recommended (1) granting a petition ("the Petition") brought by Petitioner United States of America ("the Government" or "Petitioner") to enforce an Internal Revenue Service ("IRS") summons ("the Summons") and (2) denying DDOI's corresponding motion to quash the summons ("the Motion") (D.I. 16). The Court has reviewed the Report (D.I. 28), Respondent's objections (D.I. 29) and Petitioner's response thereto (D.I. 33), and the Court has considered *de novo* the objected-to portions of the Report, the relevant portions of the Petition and supporting documentation (D.I. 1, 3 & 5), as well as the Motion and the responses and replies thereto (D.I. 16, 17, 18, 19, 24 & 25). The Court has also afforded reasoned consideration to any unobjected-to portions of the Report.[1] *EEOC v. City of Long*

[1] DDOI does not object to the Report's recommendation (D.I. 28 at 7 n.5) that the Court deny the motion to quash because DDOI failed to meet the requirements of Internal Revenue Code regulations regarding who may seek to quash a petition. Similarly, DDOI does not object to the Report's rejection (D.I. 28 at 10-15) of its argument that the information sought was already in the possession of the IRS. Finding no clear error on the face of the record, this Court adopts the Report as to those issues.

Branch, 866 F.3d 93, 99-100 (3d Cir. 2017). For the reasons set forth below, Respondent's objections are OVERRULED, the Report is ADOPTED, the Petition (D.I. 1) is GRANTED and the Motion (D.I. 16) is DENIED.

I. BACKGROUND

The Report sets forth a detailed description of the factual and procedural background underlying the Petition (and the Motion). (*See* D.I. 28 at 1-6). The parties have not objected to any of those sections of the Report and the Court finds no error in those sections. The Court therefore adopts those sections and incorporates them here:

A. Factual Background

> The facts underlying this dispute involve the IRS' investigation of the role of certain entities that have been involved in transactions related to micro-captive insurance companies. (D.I. 1 at ¶¶ 4-5) DDOI has issued insurance certificates to these insurance companies. (Id. at ¶ 8) Below, the Court will first discuss facts relevant to captive insurance companies, and then it will discuss facts related to the Summons giving rise to the instant dispute.
>
> #### 1. Captive Insurance Companies and Relevant Provisions of the Delaware Insurance Code
>
> A captive insurance company (or "captive insurer") is an insurance company that is wholly

owned and controlled by its insureds. (D.I. 17 at ¶ 11) Its primary purpose is to insure the risks of its owners, who in turn benefit from the captive's insurer's underwriting profits. (*Id.*) Business entities that are experienced in establishing and managing captive insurance companies are called "Captive Managers"; these Captive Managers facilitate the creation, formation and management of captive insurers in certain jurisdictions that have passed captive insurance legislation, like Delaware. (*Id.* at ¶ 14)

Chapter 69 of the Delaware Insurance Code, also known as "Delaware Captive Law," is a part of the state statutory scheme that governs the formation, licensing and regulation of captive insurers. (*Id.* at ¶ 9) Under Chapter 69, a captive insurer can be formed and structured in a number of ways. (*Id.* at ¶ 12) Relevant to this case are "micro-captive" insurers, which are small captive insurance companies that are taxed under Section 831(b) of the United States Tax Code. (*Id.* at ¶¶ 12-13) Section 831(b) permits micro-captive insurers to be taxed not on underwriting income, but on investment income at or below a certain threshold for that tax year. 26 U.S.C. § 831(b). This tax treatment can be favorable to micro-captive insurers.

Section 6920 of the Delaware Insurance Code ("Section 6920") relates to the confidential treatment of materials and information that captive insurers submit to the state tax commissioner, either directly or through DDOI,

as part of the application and licensing process. (D.I. 17 at ¶ 20) Section 6920 reads as follows:

> All portions of license applications reasonably designated confidential by or on behalf of an applicant captive insurance company, all information and documents, and any copies of the foregoing, produced or obtained by or submitted or disclosed to the Commissioner pursuant to subchapter III of this chapter of this title that are reasonably designated confidential by or on behalf of a special purpose financial captive insurance company, and all examination reports, preliminary examination reports, working papers, recorded information, other documents, and any copies of any of the foregoing, produced or obtained by or submitted or disclosed to the Commissioner that are related to an examination pursuant to this chapter must, unless the prior written consent (which may be given on a case-by-case basis) of the captive insurance company to which it pertains has been obtained, be given confidential treatment, are not subject to subpoena, may not be made public by the Commissioner, and may not be provided or disclosed to any other person at any time except:

> (1) To the insurance department of any state or of any country or jurisdiction other than the United States of America; or
>
> (2) To a law-enforcement official or agency of this State, any other state or the United States of America so long as such official or agency agrees in writing to hold it confidential and in a manner consistent with this section.

DEL. CODE ANN. tit. 18, § 6920 (2007).

2. IRS Summons and Subsequent Events

The facts giving rise to this dispute arose from an IRS investigation of the role of nonparties Artex Risk Solutions, Inc. ("Artex"), Tribeca Strategic Advisors, LLC ("Tribeca") (which is owned by Artex) and others, in transactions involving micro-captive insurance plans. (D.I. 1 at ¶¶ 4-5; D.I. 3 at ¶ 3) The IRS was investigating, *inter alia*, whether Artex or Tribeca violated federal laws by promoting micro-captive insurance schemes. (D.I. 1 at ¶ 5; D.I. 3 at ¶ 4) The IRS has designated such micro-captive insurance schemes (*e.g.*, schemes in which the taxpayer inappropriately seeks to shield income from taxation through the use of sham insurance companies) as a "Transaction of Interest," and both the IRS and the United States Tax Court have found that the schemes

can be used to avoid or evade taxes.[2] (D.I. 1 at ¶ 6 (citing I.R.S. Notice 2016-66, 2016-47 I.R.B. 745 (Nov. 21, 2016))) As part of the Artex investigation, in December 2013, the IRS issued two administrative summonses to Artex. *United States v. Artex Risk Sols., Inc.*, No. 14 C 4081, 2014 WL 4493435, at *1 (N.D. Ill. Sept. 11, 2014) (cited in D.I. 1 at ¶ 9). Artex ultimately produced certain documents pursuant to these summonses, including certain e-mail correspondence between Artex and DDOI. (D.I. 1 at ¶¶ 9-11; D.I. 3 at ¶ 5)

On October 30, 2017, the IRS issued to DDOI the Summons at issue here; the Summons seeks information pertaining to approximately 200 insurance certificates of authority that DDOI issued to micro-captive insurance companies associated with Artex and Tribeca.[3] (D.I. 1 at

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[2] Artex and Tribeca have also been sued by 49 plaintiffs seeking to bring a class action lawsuit alleging damages "sustained in connection with . . . micro-captive insurance strategies that [Artex and Tribeca] 'designed, developed, promoted, sold, implemented[] and managed[.]'" (D.I. 1 at ¶ 7 (citation omitted)) Those plaintiffs sought compensation for damages arising from micro-captive insurance strategies that they entered into and utilized on their federal and state tax returns, on the advice of Artex and Tribeca, from 2005 onwards. (*Id.*)

[3] In its filings, the Government asserted that DDOI has issued approximately 191 insurance certificates of authority to micro-captive insurance companies associated with Artex. (D.I. 1 at ¶ 8; D.I. 3 at ¶ 6) In its briefing, DDOI states that it has licensed 225 captive insurance companies managed by Artex, of which 210 are micro-captives, with only 68 of those being currently active. (D.I. 19 at 5)

¶¶ 4, 8, 14; D.I. 3 at ¶¶ 6, 16; D.I. 5) The Summons included a request for testimony and four requests for records; the first such records request ("Request 1") asked that DDOI "[p]rovide all electronic mail between [DDOI] and Artex and/or Tribeca related to the Captive Insurance Program[.]" (D.I. 5 at 1, 17; *see also* D.I. 19 at 5)

On November 28, 2017, DDOI issued to the IRS its objections and responses to the Summons, including confidentiality objections brought pursuant to Section 6920. (D.I. 19 at 5) On the same date, DDOI also produced approximately 169 documents to the IRS, and on April 30, 2018, DDOI produced an additional approximately 125 pages of documents. (D.I. 1 at ¶¶ 17-18; D.I. 3 at ¶¶ 10-11) None of these additional documents included any e-mails. (D.I. 1 at ¶ 18; D.I. 3 at ¶ 11) Thereafter, counsel for the Government and the DDOI had further discussions, in which the Government sought to obtain DDOI's voluntary compliance with Request 1. (D.I. 1 at ¶ 19) As a result of those discussions, DDOI agreed to produce documents on a rolling basis that DDOI believed were responsive to the subpoena but that were not client-specific. (*Id.*) Between 2018-2019, DDOI produced approximately 1,591 pages of such documents; DDOI represents that these constitute all non-client specific documents in its possession, custody or control that are responsive to Request 1. (*Id.*; D.I. 3 at ¶ 12; *see also* D.I. 19 at 5-6)

As for the client-specific documents in DDOI's possession responsive to Request 1, DDOI refused to produce those to the IRS. Instead, in October 2019 and again in February 2020, DDOI sent communications to all of the micro-captive insurance companies associated with Artex; in these communications, DDOI asked the companies to voluntarily consent to DDOI's release of the documents to the IRS. (D.I. 1 at ¶ 20; D.I. 3 at ¶ 13) In total, only 19 of the affected micro-captive insurance companies consented to such production, and DDOI later produced to the IRS responsive files (totaling over 1,800 pages) for those entities.[4] (D.I. 1 at ¶ 20; D.I. 3 at ¶ 13; *see also* D.I. 19 at 6-7 & n.3)

At present, then, DDOI has not produced documents responsive to Request 1 that are client-specific and relate to micro-captive insurance companies that have not consented to the production. (D.I. 1 at ¶¶ 9, 12, 16; D.I. 3 at ¶ 15; *see also* D.I. 5, exs. 3-4) DDOI also has not provided the testimony demanded by the IRS in the Summons. (D.I. 1 at ¶ 16; D.I. 3 at ¶ 9) With the instant Petition, the Government seeks these outstanding documents and testimony. (D.I. 1 at ¶ 26) . . .

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[4] In its Petition, the Government alleged that DDOI had produced such records for 16 micro-captive insurance companies. (*See* D.I. 1 at ¶¶ 8, 20; D.I. 3 at ¶ 13) In its briefing, DDOI contended that the correct number was 19, as it has subsequently produced three more company-specific files after receiving the relevant consents. (D.I. 19 at 6-7 & n.3)

B. Procedural Background

> The Government filed the Petition on June 19, 2020, along with a supporting declaration authored by IRS Revenue Agent Bradley Keltner (the "Keltner Declaration"). (D.I. 1; D.I. 3) On October 15, 2020, [the undersigned judge] referred this case to [Magistrate Judge Burke] to hear and resolve all pre-trial matters up to and including expert discovery matters. (D.I. 6)
>
> On January 11, 2021, [Judge Burke] entered an Order to Show Cause directing DDOI to submit its defense or opposition to the Petition; [he] also set a show cause hearing for February 22, 2021. (D.I. 8) On February 8, 2021, DDOI filed its opposition to the Petition, (D.I. 15), and on the same day, DDOI also filed the instant Motion, (D.I. 16) Because briefing on the Motion would not have been completed prior to the scheduled February 22nd hearing, [Judge Burke] rescheduled a hearing on the Petition and the Motion for March 12, 2021. (D.I. 22) On February 24, 2021, briefing was completed on the Petition, (D.I. 23), and on March 3, 2021, briefing was completed on the Motion, (D.I. 25). On March 12, 2021, [Judge Burke] held the hearing and heard argument on the Petition and the Motion. (Docket Item, March 12, 2021 (hereinafter, "Tr.")).

(D.I. 28 at 1-6 (emphases and some alterations in original)).

On July 16, 2021, Judge Burke issued the Report recommending that the Petition be granted and the corresponding Motion be denied. (D.I. 28). DDOI timely objected to select portions of the Report (D.I. 29) and the Government responded (D.I. 33).

II. LEGAL STANDARDS

A. Review of Reports and Recommendations

The power vested in a federal magistrate judge varies depending on whether the issue to be decided is dispositive or non-dispositive. "Unlike a nondispositive motion (such as a discovery motion), a motion is dispositive if a decision on the motion would effectively determine a claim or defense of a party." *City of Long Branch*, 866 F.3d at 98-99 (citations omitted). For reports and recommendations issued for dispositive motions,[5] "a party may serve and file specific written objections to the proposed findings and recommendations" within fourteen days of the recommended disposition issuing and "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." FED. R. CIV. P. 72(b)(2)-(3); *see also* 28 U.S.C. §§ 636(b)(1)(B)-(C); *Brown v. Astrue*, 649 F.3d

[5] Judge Burke issued the Report pursuant to 28 U.S.C. § 636(b)(1)(B), noting that courts generally have found that petitions to enforce IRS summonses should be considered dispositive motions. (*See* D.I. 28 at 34; *see also id.* at 1 n.1). Neither party argues that the Government's Petition should have been considered a nondispositive motion and subject to § 636(b)(1)(A). And this Court also agrees that a Report and Recommendation under § 636(b)(1)(B) was the appropriate procedure here.

193, 195 (3d Cir. 2011). When no timely objection is filed (including as to select portions of the report), "the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." FED. R. CIV. P. 72(b) advisory committee notes to 1983 amendment. "[B]ecause a district court must take some action for a report and recommendation to become a final order and because '[t]he authority and the responsibility to make an informed, final determination . . . remains with the judge," however, district courts are still obligated to apply "reasoned consideration" in such situations. *City of Long Branch*, 866 F.3d at 99-100 (citing *Mathews v. Weber*, 423 U.S. 261, 271 (1976); *see also Henderson v. Carlson*, 812 F.2d 874, 878 (3d Cir. 1987)).

B. McCarran-Ferguson Act

As a general rule, when a federal statute and a state statute conflict, the state statute yields under the doctrine of preemption. Courts regularly apply this rule in various contexts, including in summons enforcement actions. *See, e.g.*, *United States v. First Bank*, 737 F.2d 269, 271-75 (2d Cir. 1984). The McCarran-Ferguson Act ("MFA") creates an exception to this general rule. The MFA provides, in pertinent part:

> **(a) State regulation**
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

> **(b) Federal regulation**
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance:
> . . .

15 U.S.C. § 1012. In enacting the MFA, "Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies." *S.E.C. v. Nat'l Sec., Inc.*, 393 U.S. 453, 458-59 (1969) (citing 91 Cong. Rec. 1087-1088). The MFA attempted "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *Nat'l Sec.*, 393 U.S. at 459. It did not "purport to make the States supreme in regulating all the activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the business of insurance.' Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the [MFA] apply." *Id.* at 459-60.

III. DISCUSSION

As set forth above, the Report rejected DDOI's argument that dismissal of the Petition was warranted based on reverse preemption, which would mean that Delaware law (Section 6290) applies and prohibits DDOI from disclosing to the IRS the requested

confidential information about captive insurers (without consent or confidentiality protections). (*See* D.I. 28 at 15-34). Underlying the Report's rejection of this argument was the conclusion that the MFA does not permit reverse preemption here because it simply does not apply – *i.e.*, the MFA only allows for reverse preemption when the conduct at issue is the "business of insurance," which was found missing here. (*Id.* at 25-34). On this point, DDOI argues that the Report erred in two ways: (1) by applying a "threshold test" of whether the conduct at issue constitutes the business of insurance for a non-antitrust case; and (2) by determining that the challenged conduct does not constitute the "business of insurance." DDOI also argues that the Report erred by failing to recommend dismissal of the Petition on the grounds that the MFA reverse-preempted the Summons. The Court will address each objection in turn.

A. Application of a "Threshold Test"

DDOI asserts that the Report "committed an error of law by requiring a 'threshold' determination: whether the challenged conduct constitutes the 'business of insurance,' in a non-antitrust case." (D.I. 29 at 2). More specifically, DDOI objects on the grounds that the Report's application of the Third Circuit's threshold framework in *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 166 (3d Cir. 2001), was inconsistent with the Supreme Court's decisions in *Humana Inc. v. Forsyth*, 525 U.S. 299, 308-09 (1999), and *United States Department of Treasury v. Fabe*, 508 U.S. 491 (1993), as well as inconsistent with subsequent decisions by the Third Circuit that did not

reference the threshold test. (*See* D.I. 29 at 2-3). This Court disagrees that the Report committed legal error on this issue.

First, it is noteworthy that more than one Third Circuit case explicitly notes a threshold requirement exists when evaluating whether reverse preemption under the MFA applies. For example, in *Sabo v. Metropolitan Life Insurance Co.*, the Third Circuit explained:

> The threshold question in determining whether the antipreemption mandate of 15 U.S.C. § 1012(b) [the MFA] applies is whether the challenged conduct broadly constitutes the "business of insurance" in the first place. 15 U.S.C. § 1012(a). If the contested activities are wholly unrelated to the insurance business, then the McCarran-Ferguson Act has no place in analyzing federal regulation because only when "[insurance companies] are engaged in the 'business of insurance' does the act apply." *National Securities*, 393 U.S. at 459-60[].

137 F.3d 185, 190 (3d Cir. 1998); *see also id.* at 191 ("We first ask whether the challenged activity alleged in the complaint constitutes the 'business of insurance' in order to determine whether the [MFA] applies."). There, the Third Circuit agreed that the threshold requirement for application of the MFA was satisfied by the character of MetLife's sales and marketing practices. *See id.* ("MetLife's '50/50 plan,' 'churning' trades, and management's organized intimidation of sales agents, all strike at the insurance business 'core' enumerated in *National Securities* because they

directly impact on the sale of insurance policies and ultimately affect the relationship between insurer and insured."). Three years later, in *Highmark*, the Third Circuit again found it appropriate to apply the threshold question at issue:

> To determine whether the McCarran Act applies, this Court considers the threshold question to be whether the activity complained of constitutes the "business of insurance." *Sabo v. Metropolitan Life Ins. Co.*, 137 F.3d 185, 191 (3d Cir. 1998). If the activity does not constitute the "business of insurance," then the McCarran Act does not apply. *Id.* at 190. If, on the other hand, the activity does constitute the "business of insurance," we then look to whether § 1012(b) precludes a federal cause of action. *Id.* at 189. Federal jurisdiction is barred if three requirements are met: (1) the federal law at issue does not specifically relate to the business of insurance; (2) the state law regulating the activity was enacted for the purpose of regulating the business of insurance; and (3) applying federal law would invalidate, impair, or supersede the state law. *Id.*

276 F.3d 160, 166 (3d Cir. 2001). There, the Third Circuit agreed that the threshold requirement was satisfied for certain advertising performed by Highmark in connection with its insurance policies. *See id.* ("The Ad dealt with the scope and services offered by the insurers to their subscribers and thus concerned the 'business of insurance.'"). As the Court understands it, DDOI's argument is that the threshold test in *Sabo*

and *Highmark* is no longer controlling as those cases are either overruled by or inconsistent with the Supreme Court's decisions in *Humana* and *Fabe*.

In *Humana*, decided after *Sabo* but before *Highmark*, the Supreme Court was confronted with the question of whether RICO's application to certain employee beneficiary claims should yield to Nevada state insurance law based on application of the MFA. *See Humana*, 525 U.S. at 307. There, the Supreme Court concluded that RICO did not "impair" the Nevada law within the meaning of the MFA because RICO did not directly conflict with the Nevada law, nor did it frustrate any Nevada policy or interfere with the state's administrative regime.[6] The other Supreme Court decision identified by DDOI is *Fabe*, which was also decided after *Sabo* but before *Highmark*. In *Fabe*, the parties had agreed that the federal law at issue was not enacted to regulate insurance and, further, that it did "invalidate, impair, or supersede" the Ohio law at issue within the meaning of the MFA. *See Fabe*, 508 U.S. at 501. The only issue for the Court to decide was whether the Ohio statute was enacted for the purpose of regulating insurance, in which case it would preempt the federal law by operation of the MFA. *Id.* The Court concluded that the Ohio law was enacted for regulating insurance and was therefore controlling. *See Fabe*, 508 U.S. at 504 ("The Ohio priority statute is designed to carry out the enforcement of insurance contracts by ensuring the payment of policyholders'

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[6] The Supreme Court also agreed that RICO did not invalidate or supersede the Nevada law at issue. *See Humana*, 525 U.S. at 307-08.

claims despite the insurance company's intervening bankruptcy. Because it is integrally related to the performance of insurance contracts after bankruptcy, Ohio's law is one 'enacted by any State for the purpose of regulating the business of insurance.'" (quoting 15 U.S.C. § 1012(b))).

The Court must reject DDOI's argument that *Humana* and *Fabe* implicitly overrule *Sabo* or that the threshold analysis in *Sabo* and *Highmark* is inconsistent with these Supreme Court decisions. Notably missing from the Supreme Court's analysis in both *Humana* and *Fabe* is any consideration of the propriety of the threshold analysis challenged here. Thus, as the Report recognized (D.I. 28 at 23-25), because no Supreme Court precedent has "clearly and unambiguously" spoken on the threshold issue, the Court should follow Third Circuit precedent and apply the threshold requirement that the conduct at issue be in the "business of insurance."

That raises DDOI's additional objection: that the Report erred by not considering post-*Highmark* Third Circuit decisions that purportedly did not apply a threshold test. (*See* D.I. 29 at 2-4). In particular, DDOI points to the decisions in *South Jersey Sanitation Co. v. Applied Underwriters Captive Risk Assurance Co.*, 840 F.3d 138 (3d Cir. 2016), and *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300 (3d Cir. 2010). Initially, in *South Jersey Sanitation*, the conduct at issue was entering into (and ultimately failing to pay pursuant to) a reinsurance participation agreement relating to worker's compensation insurance, and the issue before the Court was whether the contract

required arbitration. *S. Jersey*, 840 F.3d at 140-42. The Third Circuit found that arbitration was required and reversed the district court's denial of the defendant's motion to compel arbitration. *Id.* at 144. In its decision, the Third Circuit did not discuss reverse-preemption under the MFA. *Id.* at 145-46 & 145 n.8.

That being said, even assuming that later Third Circuit opinions were in conflict with *Sabo* and *Highmark*, "'the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding in a precedential opinion of a previous panel. Court *en banc* consideration is required to do so.'" *Reilly v. City of Harrisburg*, 858 F.3d 173, 177 (3d Cir. 2017), *as amended* (June 26, 2017) (quoting Policy of Avoiding Intra-circuit Conflict of Precedent, Internal Operating Procedures of the Third Circuit Court of Appeals § 9.1). Accordingly, the Third Circuit "has long held that if its cases conflict, the earlier is the controlling authority and the latter is ineffective as precedents." *Pardini v. Allegheny Intermediate Unit*, 524 F.3d 419, 426 (3d Cir. 2008). Both *Sabo* and *Highmark* were precedential opinions and neither of the later Third Circuit opinions identified by DDOI were *en banc* considerations. Indeed, the Court is not aware of any later Third Circuit *en banc* decision that calls into question the threshold analysis at issue here. There is no basis to disregard the threshold analysis set forth in *Sabo* and *Highmark* in view of later panel decisions. Therefore, the Report was correct in concluding that, before addressing the substance of the reverse-preemption

inquiry, a threshold analysis is required to determine whether the conduct at issue is the "business of insurance" such that MFA applies.

B. Whether the Challenged Conduct Constitutes the "Business of Insurance"

DDOI next objects that the Report incorrectly concluded that the "'challenged conduct at issue' does not constitute the 'business of insurance.'" (D.I. 29 at 4; *see also id.* at 4-9). DDOI first argues that the Report erred in finding that the challenged conduct was "'record maintenance' or 'the dissemination and maintenance of information, documents, and communications [maintained by the state]." (D.I. 28 at 25). In DDOI's view, the conduct at issue here is actually "receiving, maintaining and restricting the dissemination of application and licensing information of captive insurers." (D.I. 29 at 6).

As to the characterization of the conduct here, the Court finds no error in the findings of the Report. DDOI attempts to portray the issue as one of statutory intent, arguing that the purpose of Section 6920 is "to promote transparency between the insurer and its regulator and provide a framework for the free flow of information in the licensing process." (D.I. 29 at 5 (citing D.I. 17 ¶ 19)). DDOI insists that the confidentiality restrictions are "necessary to not only receive full information from insurers relating to licensing, but also to receive information from other state insurance departments." (D.I. 29 at 6). Against this backdrop, DDOI asserts that the conduct here is more properly characterized as "receiving, maintaining and restricting dissemination of application and

licensing information of captive insurers," which it argues is fundamental to insurance regulation. (*Id.*). The problem with DDOI's argument is that the ***purpose*** underlying Section 6920 is addressed later in determining whether challenged conduct constitutes the "business of insurance" – *i.e.*, not in simply describing the character of the challenged conduct. Indeed, neither *Sabo* nor *Highmark* looked at any statutory purpose to describe the nature of the challenged activity. *See Highmark*, 276 F.3d at 166 ("The District Court, without discussion, concluded that the advertising practices of the parties involved the business of insurance. Although we are not referred to any appellate case squarely on point, we perceive no error in this conclusion. The Ad dealt with the scope and services offered by the insurers to their subscribers and thus concerned the 'business of insurance.'"); *Sabo*, 137 F.3d at 191 ("In this case, we agree with MetLife and its named employees that their activity constitutes the business of insurance. The challenged conduct appearing in the plaintiff's complaint unquestionably centers around the insurance contract, and specifically the activities surrounding its sale and marketing.").

Here, the Court finds no error in the Report's conclusion that the challenged conduct itself is fairly characterized as "record maintenance" and, more specifically, the dissemination and maintenance of information, documents, and communications maintained by the state. In the Court's view, this is a fair characterization because it flows directly from the language of Section 6920, which is what DDOI argues protects it from complying with the Summons. Section 6920 protects from disclosure broad swathes of

information, not merely application and licensing information of captive insurers (as DDOI suggests). *See, e.g.*, 18 *Del. C.* § 6920 (" . . . all examination reports, preliminary examination reports, working papers, recorded information, other documents, and any copies of any of the foregoing, produced or obtained by or submitted or disclosed to the Commissioner that are related to an examination pursuant to this chapter . . . "). Given the broad scope of documents and information covered by Section 6920, the Report committed no error in characterizing the conduct at issue.

DDOI next argues that the Report erred in using the "wrong standard" to evaluate whether the challenged conduct of "record maintenance" is the "business of insurance." (*See* D.I. 29 at 6). In determining whether conduct constitutes the "business of insurance," courts examine three factors: "(1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry." *Sabo*, 137 F.3d at 191 (citing *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211-20 (1979)); s*ee also Ticor Title Ins. Co. v. F.T.C.*, 998 F.2d 1129, 1133 (3d Cir. 1993) (citing *Union Labor Life Insurance Co. v. Pireno,* 458 U.S. 119 (1982)). In its objections, DDOI does not seriously challenge the actual application of the *Sabo* factors to the conduct at issue. Instead, DDOI's arguments are largely focused on the Report's designation of the conduct at issue

(addressed above) and the purportedly improper use of the *Sabo* test in general (addressed below).

The *Sabo* factors are from the test articulated by the Supreme Court in *Royal Drug*, which involved a price-fixing claim arising under the Sherman Act – *i.e.*, an antitrust case. *See Royal Drug*, 440 U.S. at 207. DDOI seems to argue that application of the test is inappropriate in non-antitrust cases. (D.I. 29 at 8). To be sure, there are distinct clauses in the relevant section of the MFA – the first clause addressing laws enacted for the purpose of regulating insurance and the second clause addressing the reach of antitrust laws to the business of insurance. *See* 15 U.S.C. § 1012(b). But the problem with DDOI's argument is that the Third Circuit addressed that very concern in *Sabo*:

> Some courts have concluded that this three part test is simply not relevant in determining what constitutes the business of insurance in a non-antitrust context. We disagree. As *Fabe* makes clear, the *Royal Drug* test is only a starting point in the analysis for non-antitrust cases. However, because laws "enacted . . . for the purpose of regulating the business of insurance" necessarily encompass more than just the insurance business, the analysis here is broader.

Sabo, 137 F.3d at 191 n.3 (citations omitted); *see also Fabe*, 508 U.S. at 505 ("The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance. This category necessarily encompasses more than just the 'business of

insurance.'" (citation omitted)). Therefore, as the Court understands it, the *Sabo* factors (derived from *Royal Drug*) are an appropriate starting point to determine whether the challenged conduct constitutes the "business of insurance" in non-antitrust cases, provided that the analysis does not end there. In this way, the Court agrees with the Report when it looks to the discussion of the "business of insurance" in the Supreme Court's opinion in *National Securities*. That case, which was not an antitrust case, provided guideposts as to what conduct constitutes the "business of insurance." *See Nat'l Sec.*, 393 U.S. at 460. Activities such as the fixing of insurance rates, selling and advertising of insurance policies, and the licensing of insurance companies and agents are clear examples of the "business of insurance." *Id.* Additionally, conduct relating to the insurance contract itself is also at the "core" of the "business of insurance" – *e.g.*, relationship between insurer and insured, the type of policy that may be issued, as well as "its reliability, interpretation, and enforcement." *Id.* Emphasizing that its list was non-exhaustive, the Supreme Court explained that "whatever the exact scope of the statutory term, it is clear where the focus [i]s – it [i]s on the relationship between the insurance company and the policyholder." *Id.*

The Report concluded that the conduct at issue is not the "business of insurance" because it does not fit within any of the categories of conduct set forth in *National Securities*, nor is it focused on the relationship between an insurance company and policyholder. (*See* D.I. 28 at 28-30). Instead, the conduct centers around the governmental treatment of documents provided by

captive insurance companies – *i.e.*, whether confidential documents may be disclosed and under what conditions. (*Id.* at 29-30). The focus of the conduct is on the relationship between the captive insurance company and regulator(s), not an insurance company and its insureds. This Court finds no error in that conclusion and has already rejected DDOI's attempts to characterize the conduct as fundamentally being about the licensing of insurance companies. (*See infra* at 15).

As noted above, DDOI does not object to the Report's substantive conclusions for the three *Sabo* factors applied to the facts of this case. Finding no clear error on the face of the record, this Court adopts the Report as to *Sabo* factors (D.I. 28 at 26-28), and this Court also adopts the further analysis under *National Securities* and the conclusion that the challenged conduct does not constitute the "business of insurance."

C. Reverse Preemption

Finally, DDOI argues that the Report erred in declining to apply the MFA to Section 6920. (D.I. 29 at 9-10). Having found that the Report correctly determined that a threshold requirement exists and that it was not satisfied in this case, this Court concludes that the Report committed no error in refusing to reach the reverse-preemption issue on the merits.

IV. CONCLUSION

For the foregoing reasons, DDOI's objections are OVERRULED and the Report is ADOPTED. The Government's Petition (D.I. 1) is GRANTED and

DDOI's motion (D.I. 16) is DENIED. An appropriate order will follow.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C.A. No. 20-829 (MN) (CJB)

[Filed September 29, 2021]

UNITED STATES OF AMERICA, Petitioner,	)
v.	)
DELAWARE DEPARTMENT OF INSURANCE, Respondent.	)

ORDER

At Wilmington, this 29th day of September 2021:

For the reasons set forth in the Memorandum Opinion issued this date, IT IS HEREBY ORDERED that Respondent's objections (D.I. 29) are OVERRULED and Magistrate Judge Burke's Report and Recommendation (D.I. 28) is ADOPTED. The Government's Petition (D.I. 1) is GRANTED and Respondent's motion (D.I. 16) is DENIED.

/s/ Maryellen Noreika
The Honorable Maryellen Noreika
United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No. 20-829-MN-CJB

[Filed July 16, 2021]

UNITED STATES OF AMERICA, Petitioner,	)
v.	)
DELAWARE DEPARTMENT OF INSURANCE, Respondent.	)

REPORT AND RECOMMENDATION

Presently pending before the Court is a petition (the "Petition") brought by Petitioner United States of America (the "Government" or "Petitioner"), to enforce an Internal Revenue Service ("IRS") summons (the "Summons") served on Respondent Delaware Department of Insurance ("DDOI" or "Respondent"). (D.I. 1) Also pending is DDOI's motion seeking to quash the Summons, or in the alternative, for a protective order (the "Motion"). (D.I. 16) For the

reasons set forth below, the Court recommends[1] that the Petition be GRANTED and that the Motion be DENIED.

I. BACKGROUND

A. Factual Background

The facts underlying this dispute involve the IRS' investigation of the role of certain entities that have been involved in transactions related to micro-captive insurance companies. (D.I. 1 at ¶¶ 4-5) DDOI has issued insurance certificates to these insurance companies. (*Id*. at ¶ 8) Below, the Court will first discuss facts relevant to captive insurance companies, and then it will discuss facts related to the Summons giving rise to the instant dispute.

1. Captive Insurance Companies and Relevant Provisions of the Delaware Insurance Code

A captive insurance company (or "captive insurer") is an insurance company that is wholly owned and controlled by its insureds. (D.I. 17 at ¶ 11) Its primary purpose is to insure the risks of its owners, who in turn

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[1] Although the law is not entirely clear on this point, Courts have generally held that in reviewing an IRS petition to enforce a taxpayer summons issued pursuant to 26 U.S.C. § 7602, a United States Magistrate Judge should issue a Report and Recommendation, as such petitions are considered dispositive matters. *See, e.g.*, *United States v. Olvany*, Civil Action No. 11-CV-2041, 2012 WL 2357713, at *1 & n.1 (M.D. Pa. Mar. 12, 2012), *report and recommendation adopted*, 2012 WL 2344661 (M.D. Pa. Jun. 20, 2012); *United States v. Bell*, 57 F. Supp. 2d 898, 900-05 (N.D. Cal. 1999).

benefit from the captive's insurer's underwriting profits. (*Id.*) Business entities that are experienced in establishing and managing captive insurance companies are called "Captive Managers"; these Captive Managers facilitate the creation, formation and management of captive insurers in certain jurisdictions that have passed captive insurance legislation, like Delaware. (*Id.* at ¶ 14)

Chapter 69 of the Delaware Insurance Code, also known as "Delaware Captive Law," is a part of the state statutory scheme that governs the formation, licensing and regulation of captive insurers. (*Id.* at ¶ 9) Under Chapter 69, a captive insurer can be formed and structured in a number of ways. (*Id.* at ¶ 12) Relevant to this case are "micro-captive" insurers, which are small captive insurance companies that are taxed under Section 831(b) of the United States Tax Code. (*Id.* at ¶¶ 12-13) Section 831(b) permits micro-captive insurers to be taxed not on underwriting income, but on investment income at or below a certain threshold for that tax year. 26 U.S.C. § 831(b). This tax treatment can be favorable to micro-captive insurers.

Section 6920 of the Delaware Insurance Code ("Section 6920") relates to the confidential treatment of materials and information that captive insurers submit to the state tax commissioner, either directly or through DDOI, as part of the application and licensing process. (D.I. 17 at ¶ 20) Section 6920 reads as follows:

> All portions of license applications reasonably designated confidential by or on behalf of an applicant captive insurance company, all information and documents, and any copies of

the foregoing, produced or obtained by or submitted or disclosed to the Commissioner pursuant to subchapter III of this chapter of this title that are reasonably designated confidential by or on behalf of a special purpose financial captive insurance company, and all examination reports, preliminary examination reports, working papers, recorded information, other documents, and any copies of any of the foregoing, produced or obtained by or submitted or disclosed to the Commissioner that are related to an examination pursuant to this chapter must, unless the prior written consent (which may be given on a case-by-case basis) of the captive insurance company to which it pertains has been obtained, be given confidential treatment, are not subject to subpoena, may not be made public by the Commissioner, and may not be provided or disclosed to any other person at any time except:

(1) To the insurance department of any state or of any country or jurisdiction other than the United States of America; or

(2) To a law-enforcement official or agency of this State, any other state or the United States of America so long as such official or agency agrees in writing to hold it confidential and in a manner consistent with this section.

DEL. CODE ANN. tit. 18, § 6920 (2007).

2. IRS Summons and Subsequent Events

The facts giving rise to this dispute arose from an IRS investigation of the role of non-parties Artex Risk Solutions, Inc. ("Artex"), Tribeca Strategic Advisors, LLC ("Tribeca") (which is owned by Artex) and others, in transactions involving micro-captive insurance plans. (D.I. 1 at ¶¶ 4-5; D.I. 3 at ¶ 3) The IRS was investigating, *inter alia*, whether Artex or Tribeca violated federal laws by promoting micro-captive insurance schemes. (D.I. 1 at ¶ 5; D.I. 3 at ¶ 4) The IRS has designated such micro-captive insurance schemes (e.g., schemes in which the taxpayer inappropriately seeks to shield income from taxation through the use of sham insurance companies) as a "Transaction of Interest," and both the IRS and the United States Tax Court have found that the schemes can be used to avoid or evade taxes.[2] (D.I. 1 at ¶ 6 (citing I.R.S. Notice 2016-66, 2016-47 I.R.B. 745 (Nov. 21, 2016))) As part of the Artex investigation, in December 2013, the IRS issued two administrative summonses to Artex. *United States v. Artex Risk Sols., Inc.*, No. 14 C 4081, 2014 WL 4493435, at *1 (N.D. Ill. Sept. 11, 2014) (*cited in* D.I. 1 at ¶ 9). Artex ultimately produced certain documents

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[2] Artex and Tribeca have also been sued by 49 plaintiffs seeking to bring a class action lawsuit alleging damages "sustained in connection with . . . micro-captive insurance strategies that [Artex and Tribeca] 'designed, developed, promoted, sold, implemented[] and managed[.]'" (D.I. 1 at ¶ 7 (citation omitted)) Those plaintiffs sought compensation for damages arising from micro-captive insurance strategies that they entered into and utilized on their federal and state tax returns, on the advice of Artex and Tribeca, from 2005 onwards. (*Id.*)

pursuant to these summonses, including certain e-mail correspondence between Artex and DDOI. (D.I. 1 at ¶¶ 9-11; D.I. 3 at ¶ 5)

On October 30, 2017, the IRS issued to DDOI the Summons at issue here; the Summons seeks information pertaining to approximately 200 insurance certificates of authority that DDOI issued to micro-captive insurance companies associated with Artex and Tribeca.[3] (D.I. 1 at ¶¶ 4, 8, 14; D.I. 3 at ¶¶ 6, 16; D.I. 5) The Summons included a request for testimony and four requests for records; the first such records request ("Request 1") asked that DDOI "[p]rovide all electronic mail between [DDOI] and Artex and/or Tribeca related to the Captive Insurance Program[.]" (D.I. 5 at 1, 17; *see also* D.I. 19 at 5)

On November 28, 2017, DDOI issued to the IRS its objections and responses to the Summons, including confidentiality objections brought pursuant to Section 6920. (D.I. 19 at 5) On the same date, DDOI also produced approximately 169 documents to the IRS, and on April 30, 2018, DDOI produced an additional approximately 125 pages of documents. (D.I. 1 at ¶¶ 17-18; D.I. 3 at ¶¶ 10-11) None of these additional documents included any e-mails. (D.I. 1 at ¶ 18; D.I. 3 at ¶ 11) Thereafter, counsel for the Government and

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[3] In its filings, the Government asserted that DDOI has issued approximately 191 insurance certificates of authority to micro-captive insurance companies associated with Artex. (D.I. 1 at ¶ 8; D.I. 3 at ¶ 6) In its briefing, DDOI states that it has licensed 225 captive insurance companies managed by Artex, of which 210 are micro-captives, with only 68 of those being currently active. (D.I. 19 at 5)

the DDOI had further discussions, in which the Government sought to obtain DDOI's voluntary compliance with Request 1. (D.I. 1 at ¶ 19) As a result of those discussions, DDOI agreed to produce documents on a rolling basis that DDOI believed were responsive to the subpoena but that were not client-specific. (*Id.*) Between 2018-2019, DDOI produced approximately 1,591 pages of such documents; DDOI represents that these constitute all non-client specific documents in its possession, custody or control that are responsive to Request 1. (*Id.*; D.I. 3 at ¶ 12; *see also* D.I. 19 at 5-6)

As for the client-specific documents in DDOI's possession responsive to Request 1, DDOI refused to produce those to the IRS. Instead, in October 2019 and again in February 2020, DDOI sent communications to all of the micro-captive insurance companies associated with Artex; in these communications, DDOI asked the companies to voluntarily consent to DDOI's release of the documents to the IRS. (D.I. 1 at ¶ 20; D.I. 3 at ¶ 13) In total, only 19 of the affected micro-captive insurance companies consented to such production, and DDOI later produced to the IRS responsive files (totaling over 1,800 pages) for those entities.[4] (D.I. 1 at ¶ 20; D.I. 3 at ¶ 13; *see also* D.I. 19 at 6-7 & n.3)

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[4] In its Petition, the Government alleged that DDOI had produced such records for 16 micro-captive insurance companies. (*See* D.I. 1 at ¶¶ 8, 20; D.I. 3 at ¶ 13) In its briefing, DDOI contended that the correct number was 19, as it has subsequently produced three more company-specific files after receiving the relevant consents. (D.I. 19 at 6-7 & n.3)

At present, then, DDOI has not produced documents responsive to Request 1 that are client-specific and relate to micro-captive insurance companies that have not consented to the production. (D.I. 1 at ¶¶ 9, 12, 16; D.I. 3 at ¶ 15; *see also* D.I. 5, exs. 3-4) DDOI also has not provided the testimony demanded by the IRS in the Summons. (D.I. 1 at ¶ 16; D.I. 3 at ¶ 9) With the instant Petition, the Government seeks these outstanding documents and testimony. (D.I. 1 at ¶ 26)

Additional relevant facts will be provided below in Section II.

B. Procedural Background

The Government filed the Petition on June 19, 2020, along with a supporting declaration authored by IRS Revenue Agent Bradley Keltner (the "Keltner Declaration"). (D.I. 1; D.I. 3) On October 15, 2020, United States District Judge Maryellen Noreika referred this case to the Court to hear and resolve all pre-trial matters up to and including expert discovery matters. (D.I. 6)

On January 11, 2021, the Court entered an Order to Show Cause directing DDOI to submit its defense or opposition to the Petition; the Court also set a show cause hearing for February 22, 2021. (D.I. 8) On February 8, 2021, DDOI filed its opposition to the Petition, (D.I. 15), and on the same day, DDOI also filed the instant Motion, (D.I. 16) Because briefing on the Motion would not have been completed prior to the scheduled February 22nd hearing, the Court rescheduled a hearing on the Petition and the Motion for March 12, 2021. (D.I. 22) On February 24, 2021, briefing

was completed on the Petition, (D.I. 23), and on March 3, 2021, briefing was completed on the Motion, (D.I. 25). On March 12, 2021, the Court held the hearing and heard argument on the Petition and the Motion. (Docket Item, March 12, 2021 (hereinafter, "Tr."))

II. DISCUSSION

As was noted above, there are two pending requests for relief: the Petition and the Motion. However, because the Court concludes that DDOI is prohibited from filing the Motion, it recommends that the Motion be denied.[5] Therefore, the Court will address the

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[5] DDOI's Motion is styled as a "Motion of [DDOI] to Quash the Petition to Enforce Summons or in the Alternative, for Protective Order." (D.I. 16) But as the Government notes, (D.I. 24 at 1-3), the Internal Revenue Code includes regulations regarding who may file legal process seeking to quash such a Petition. Those regulations state that: (1) only persons "entitled to notice of a summons" (here, Artex and Tribeca are the parties entitled to notice, not DDOI) may begin a proceeding "to quash such summons" (which the regulations refer to as a "petition" to quash, not a "motion" to quash); (2) those persons must do so "not later than the 20th day after the day such notice is given" (here, since DDOI was not entitled to receive notice, it could not file a petition to quash within 20 days of when any such notice was given; moreover, even if service of the Petition on DDOI is treated as being akin to such notice, DDOI did not file the Motion within 20 days of being served); and (3) the persons must "mail by registered or certified mail a copy of the petition to the person summoned" (here, DDOI itself is the person summoned, and it does not assert that it mailed notice of its Motion to itself). 26 U.S.C. § 7609(a)-(b); *see also Viewtech, Inc. v. United States*, 653 F.3d 1102, 1104 (9th Cir. 2011) ("The issue of who gets notice is highly significant because only a person who is entitled to notice may bring a proceeding to quash such a[n IRS] summons.") (citation omitted). In its answering brief on the Motion, the Government

parties' arguments solely as they relate to the Petition.

In challenging the Petition, DDOI makes two primary legal arguments. The Court will address each argument in turn.

A. DDOI's Argument Regarding the Third *Powell* Factor

In explaining DDOI's first argument, the Court must first set out the relevant law with regard to the Summons and any challenges thereto. After doing so, the Court will analyze DDOI's argument.

1. IRS' Summons Power

The IRS is tasked with the responsibility of administering and enforcing the Internal Revenue Code. 26 U.S.C. § 7601; *Donaldson v. United States*, 400 U.S. 517, 523 (1971). The IRS has the authority under Section 7602 of the IRS Code to examine records,

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explained that DDOI had failed to meet each of these three requirements. (D.I. 24 at 1-3) Yet its reply brief on the Motion, DDOI failed to substantively respond to the Government's arguments in this regard. (*See* D.I. 25 at 9) At oral argument, DDOI's counsel seemed to concede that in light of these failures, DDOI was not permitted to file the Motion. (Tr. at 57-58) So for all three of these reasons, the Court is recommending denial of the Motion.

The Court notes, however, that both sides seem to agree that denial of the Motion would not affect the Court's ability to consider the substance of all of the arguments at issue. This is because DDOI is empowered to make all of the same arguments it pressed in its Motion briefing in opposing the Government's Petition. (D.I. 24 at 2 n.2)

summons persons with relevant information and take testimony relevant to such inquiries. 26 U.S.C. § 7602(a); *United States v. Euge*, 444 U.S. 707, 710-11 (1980); *United States v. Rockwell Int'l*, 897 F.2d 1255, 1261 (3d Cir. 1990). "As a tool of discovery, the [Section] 7602 summons is critical to the investigative and enforcement functions of the IRS[.]" *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 (1984) (noting that "Congress has endowed the IRS with expansive information-gathering authority" and that "[Section] 7602 is the centerpiece of that congressional design") (citation omitted). As a result, courts construe the summons authority in Section 7602 broadly. *See Euge*, 444 U.S. at 714.

In a summons enforcement action, the United States has the initial burden of making a *prima facie* case that its summons is valid. *United States v. Cortese*, 614 F.2d 914, 919 & n.7 (3d Cir. 1980) (citing *United States v. Powell*, 379 U.S. 48, 57-58 (1964)). To meet its burden, the Government must show: (1) "that the investigation will be conducted pursuant to a legitimate purpose"; (2) "that the inquiry may be relevant to the purpose"; (3) "that the information sought is not already within the [IRS'] possession"; and (4) "that the administrative steps required by the Code have been followed." *Rockwell Int'l*, 897 F.2d at 1262 (quoting *Powell*, 379 U.S. at 57-58) (internal quotation marks omitted). The Government typically satisfies its obligation to show the applicability of these four factors (known as the "*Powell* factors") by submitting an affidavit from the investigating agent. *G2A.COM Sp. z.o.o. (Ltd.) v. United States*, 789 F. App'x 296, 300 (3d Cir. 2019) (citations omitted).

Once the United States meets its initial burden, the burden of proof shifts to the respondent to oppose enforcement of the summons and to rebut the Government's allegations. *Id.*; *see also Cortese*, 614 F.2d at 919 n.7. To do so, the respondent must demonstrate that enforcing the summons would result in an "abuse of the court's process." *United States v. Garden State Nat'l Bank*, 607 F.2d 61, 71 (3d Cir. 1979) (internal quotation marks and citation omitted); *see also G2A.COM Sp. z.o.o. (Ltd.)*, 789 F. App'x at 300 (internal quotation marks and citation omitted). This burden is a "heavy" one. *G2A.COM Sp. z.o.o. (Ltd.)*, 789 F. App'x at 300; *Cortese*, 614 F.2d at 919.

A summonsed party may challenge the summons "on any appropriate ground." *Rockwell Int'l*, 897 F.2d at 1262 (internal quotation marks and citation omitted). An "appropriate ground" for challenging the summons exists when the respondent disproves one of the four elements of the government's *prima facie* showing, or otherwise demonstrates that enforcement of the summons will result in an abuse of the court's process. *Id.* (internal quotation marks and citations omitted). A respondent may only assert facts opposing the *prima facie* case by affidavit; "[l]egal conclusions or mere memoranda of law will not suffice." *Garden State Nat'l Bank*, 607 F.2d at 71 (citing *Thornton v. United States*, 493 F.2d 164, 167 (3d Cir. 1974)). Absent such a response, any uncontested allegations "must be accepted as admitted." *Id.* Moreover, if at this stage the respondent cannot refute the Government's *prima facie* showing or cannot support a proper affirmative

defense, the district court should dispose of the proceeding on the papers before it without an evidentiary hearing. *Id.*

2. Argument

DDOI's first argument is that the Government has failed to make out a *prima facie* showing as to the third *Powell* factor (i.e., "that the information sought is not already within the [IRS'] possession"). Alternatively, even if the Government sufficiently made a *prima facie* showing as to this factor, DDOI argues that it has successfully rebutted or disproved the applicability of that factor.

In arguing that the Government failed to make out its *prima facie* case, DDOI points to paragraph 15 of the Keltner Declaration. (D.I. 19 at 19) In that paragraph, Agent Keltner notes that he has compared the documents DDOI has produced to the IRS with documents that Artex produced in its summons enforcement action; Agent Keltner explains that that the comparison indicates that "there are documents responsive to Request 1 of the [S]ummons in the possession of the DDOI that the DDOI has not produced." (D.I. 3 at ¶ 15) Here, the "documents" that Agent Keltner was referring to (at least in part) were two e-mails sent between DDOI and Artex, which had been produced to the IRS in the Artex investigation. (*Id.* at ¶ 5) Agent Keltner's point here was that he knew that DDOI likely possessed at least some unproduced documents responsive to Request 1 —because the IRS had already obtained copies of two DDOI/Artex e-mails from Artex, and copies of those very e-mails (plus other similar e-mails between DDOI

and Artex) would likely be in DDOI's possession too. But DDOI seizes on paragraph 15 and argues that since the IRS already had possession of the content of these two e-mails, this means that the third *Powell* factor cannot be satisfied, since the "documents that are the subject of the Petition are already in the possession of the IRS." (D.I. 19 at 19)

The Court disagrees, and concludes that the Government met its burden as to this third *Powell* factor. After all, the Keltner Declaration explicitly addressed this factor. In doing so, Agent Keltner explained that DDOI had already produced some documents responsive to Request 1, specifically its production of: (1) 169 pages of non-e-mail documents in November 2017; (2) 125 pages of non-e-mail documents in April 2018; (3) 1,591 pages of non-client-specific documents; and (4) over 18,000 pages of documents associated with those micro-captive insurance companies that consented to DDOI's release of their information. (D.I. 3 at ¶¶ 10-13) But the Keltner Declaration also explains that other than these already-produced documents, "the [sought-after] documents described in Request 1 of the [S]ummons are not already in the possession of the IRS." (*Id.* at ¶ 14) Moreover, by referencing at least certain DDOI/Artex e-mails that the IRS had already obtained from Artex (as described above)—e-mails that DDOI had not yet produced to the IRS—Agent Keltner provided some support for his conclusion about the applicability of the third *Powell* factor. An investigating agent's declaration that certain information at issue is not in the IRS' possession is typically sufficient to make out a *prima facie* case as to this factor. *See G2A.COM*

Sp. z.o.o. (Ltd.), 789 F. App'x at 300; *Smith v. IRS*, Misc. No. 16-79-LPS, Misc. No. 16-165-LPS, 2018 WL 605870, at *2 (D. Del. Jan. 29, 2018); *see also Conner v. United States*, 434 F.3d 676, 681 (4th Cir. 2006); *United States v. Swanson Flo-Sys., Co.*, Civil No. 11-mc-0012 (JNE/SER), 2011 WL 1831710, at *4 (D. Minn. Apr. 13, 2011). And we have that here.

To the extent that DDOI attempts to rebut the Government's *prima facie* showing and disprove that the Government has satisfied the third *Powell* factor, the Court concludes that DDOI has failed to meet its "heavy" burden in that regard. The Court understands DDOI's argument to the contrary: that the IRS already has "possession" of the two e-mails called out in the Keltner Declaration, in that it previously received those e-mails from Artex. But even as to these two e-mails alone, the "information sought" by the IRS here is the *versions of the e-mails that are in DDOI's possession*. (D.I. 3 at ¶¶ 5, 15; D.I. 23 at 9 & n.4; Tr. at 60, 62-63) These versions are *not* currently in the IRS' possession, since DDOI has never produced them to the IRS. And obtaining the particular versions of those e-mails that are in DDOI's possession could be of independent evidentiary value to the IRS.[6] *Cf. Tuka v.*

[6] Nor is it clear to the Court that the sought-after versions of these two e-mails are necessarily the "same" versions of the e-mails that have already been obtained from Artex. As Government's counsel noted, even though the Government has already obtained the two e-mails from Artex and now seeks the "same" e-mails from DDOI, the "information sought" from DDOI really is not exactly the "same" as the information that the Government has already sought and obtained from Artex. (Tr. at 63-64) That is because when it comes to electronic discovery like this, the DDOI versions of the e-

United States, No. 2:08-mc-206, 2009 WL 606096, at *2, *4 (W.D. Pa. Mar. 9, 2009) (enforcing an IRS summons after rejecting petitioner's argument that "the substance of the information contained on [the sought-after] Form 1099 is already in the possession of the IRS" where the IRS agent acknowledged that "the IRS can electronically generate an 'IRP Report' that shows information contained on the Form 1099; however the IRS does not have the actual Form 1099s" and where the "Form 1099 is 'sufficiently different in format from the electronic information as to be likely to have independent evidentiary value in an investigation'"); *United States v. Ghafourifar*, No. C14-03819 HRL, 2014 WL 6601858, at *1, *3 (N.D. Cal. Nov. 19, 2014) (enforcing an IRS summons for copies of QuickBooks financial files, where respondent's attorney "exported the financial records from QuickBooks files into Microsoft Excel format[] and emailed them to the [IRS agent,]" with the court noting that "although [r]espondent provided certain information from the QuickBooks files, he has not produced the QuickBooks files themselves. . . . The QuickBooks files are likely to have independent evidentiary value in [the IRS agent]'s investigation. . . . That the IRS is already in possession of some of the requested information does not bar enforcement of the summons") (citation omitted).

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mails will contain metadata unique to those documents—even if the content in the body of the e-mails is "substantially similar" to the version of those e-mails that the Government has already obtained from Artex. (*Id.*)

The Court's decision here is also supported by the outcome in *Sugarloaf Funding, LLC v. U.S. Dept. of the Treasury*, 584 F.3d 340 (1st Cir. 1990). In *Sugarloaf*, the United States Court of Appeals for the First Circuit addressed a challenge to two IRS administrative summonses served on an attorney; the summonses sought, *inter alia*, the production of documents regarding the appellants, in connection with an investigation of potentially improper tax shelters. 584 F.3d at 343-44. The appellants challenged the summons as to the third *Powell* factor, arguing that the IRS was already in possession of the summoned documents, since one of the appellants and the appellants' accountant had already appeared for interviews and produced documents to the IRS. *Id.* at 350. The First Circuit, however, easily dismissed that argument. In doing so, the *Sugarloaf* Court explained that "the IRS is entitled to obtain relevant records from third parties to compare for accuracy any records obtained from the taxpayer."[7] *Id.*; *see also Mollison v.*

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[7] The Court disagrees with DDOI that the circumstances here are similar to those in *United States v. Pritchard*, 438 F.2d 969 (5th Cir. 1971). (D.I. 19 at 19-20) In *Pritchard*, the government sought enforcement of an IRS summons provided to the tax attorney of certain taxpayers; the summons sought, *inter alia*, the attorney's production of certain of his clients' documents. 438 F.2d at 970. The United States Court of Appeals for the Fifth Circuit upheld a district court's dismissal of the Government's petition on the ground that the Government had not made a sufficient showing as to the third *Powell* factor. *Id.* at 971. But in *Pritchard*, the decision was driven, at least in part, by the fact that neither the Government's petition nor an IRS agent's accompanying declaration had even made reference to the third *Powell* factor. *Id.*; *see also Swanson Flo-Sys., Co.*, 2011 WL 1831710, at *4 (citing *United States v. Garrett*, 571 F.2d 1323, 1328 (5th Cir. 1978)).

United States, 481 F.3d 119, 124 (2d Cir. 2007) (concluding the same); *United States v. Luther*, 481 F.2d 429, 432 (9th Cir. 1973) ("The fact that the [IRS] may have had access to [certain of the sought-after records issued or filed by the corporation with or to third parties] does not destroy the Government's right to inspect the original and primary records of the [c]orporation."); *Chen v. United States*, Case No. MC 15-0048 CJC (SSx), 2015 WL 4497751, at *5 (C.D. Cal. June 2, 2015) ("[E]ven if the IRS has some of the requested documents, or at least some version of those documents, it is nevertheless entitled to . . . compare the documents it does have with those in [the summonsed party's] possession to determine if they are consistent.") (citations omitted); *Bodensee Fund, LLC v. U.S. Dept. of Treasury-IRS*, Civil No. 07-MC-0111, 2008 WL 1930967, at *3-4 (E.D. Pa. May 2, 2008) (concluding the same). The *Sugarloaf* Court's conclusion makes good sense, especially in light of the broad investigatory power conferred by Section 7602.

Here, in contrast, Agent Keltner's declaration did address that factor explicitly. Moreover, in *Pritchard* it was undisputed that prior to the service of the summons, the IRS had met with the taxpayers' accountant and spent hours looking at all copies of the taxpayers' papers that were in the accountant's file. 438 F.2d at 971. So whatever the merit of the *Pritchard* decision, there it could at least be said that the IRS had previously obtained access to the documents at issue from the taxpayer through that taxpayer's representative (the taxpayers' accountant), and that the IRS was again attempting to do the same thing again (via the taxpayers' attorney). That is not the situation here. *Cf. United States v. Davis*, 636 F.2d 1028, 1038 (5th Cir. 1981) (noting that the decision in *Pritchard* should be limited to its facts).

Moreover, the record also allows the reasonable inference that there are responsive documents/ information in DDOI's possession that have never been produced *in any form* by Artex. This could be because "Artex [] intentionally failed to produce some of those emails, inadvertently failed to do so, or simply no longer retained them at the time it complied with the summons the IRS issued to Artex." (D.I. 23 at 9; *see also id.* at 10; Tr. at 69-71) It could also be because, so far as the Court can tell, Artex produced records to the IRS in 2014, (D.I. 1 at ¶ 9 (noting that the Government obtained an order to enforce the Artex summonses in 2014); D.I. 23 at 9; Tr. at 102-04), but the Summons at issue here was served well after 2014 and covers email received or sent after that year.

For all of the above reasons, the record indicates that the Government has met its burden to make out a *prima facie* case as to the third *Powell* factor. And DDOI has failed to rebut or disprove the Government's showing in that regard. Therefore, DDOI's first argument in opposition to the Petition is not well taken.[8]

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[8] Above, the Court has largely been discussing the dispute over the third *Powell* factor in terms of the IRS' request for access to certain e-mails (i.e., Request 1). As was noted above, in the Summons, the IRS also sought to obtain certain testimony from DDOI about the subject matter discussed therein. The parties generally seem to agree that their arguments about access to the e-mails and access to the testimony rise and fall together. (Tr. at 57) That said, at one point in its briefing, DDOI seemed to suggest that the Government may somehow have forfeited its right to demand this testimony, because it had "never asked" DDOI for the testimony "at any point during the three years since the Summons was issued." (D.I. 19 at

B. Reverse Preemption Under the MFA

The Court next turns to DDOI's second argument for dismissal. There, DDOI raises an affirmative defense, arguing the federal law that empowers the IRS to issue and enforce the Summons (Section 7602) is subject to "reverse preemption," in light of the content of Section 6920 and the dictates of the McCarran-Ferguson Act ("MFA"). In other words, DDOI asserts that Section 6920's requirements (that prohibit DDOI from handing over to the IRS the requested information about captive insurers—unless either the affected insurers consent or the IRS agrees in writing to treat the materials confidentially)[9] trump the requirements of Section 7602 (that would otherwise permit the IRS to obtain the requested information straight away, without the need to obtain consent from any affected insureds or to accede to Section 6920's requirements regarding confidentiality).[10] (Tr. at 9-10)

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2) Yet DDOI provided the Court with no legal theory to support such a conclusion. And so, the Court has no basis to find that any type of forfeiture has occurred here. (D.I. 23 at 20) Therefore, if the Government's Petition is granted, the Government should have the right both to obtain the sought-after e-mails and the sought-after testimony.

[9] Here, the IRS has declined DDOI's request that it agree in writing to treat the requested information as confidential pursuant to Section 6920. (D.I. 19 at 2)

[10] Federal law does otherwise provide some restrictions on the IRS' ability to disclose certain taxpayer information in its possession. *See* 26 U.S.C. § 6103; (D.I. 23 at 6 n.3).

In setting out DDOI's argument, the Court will first explain the law relating to reverse preemption under the MFA. Thereafter, it will address the argument's substance.

1. McCarran-Ferguson Act

Normally, when a federal statute and a state statute conflict, the state statute yields under the doctrine of preemption. Courts regularly apply this rule in various contexts, including in summons enforcement actions. *See, e.g.*, *United States v. First Bank*, 737 F.2d 269, 271-75 (2d Cir. 1984).

However, the MFA is an exception to this general rule, in that it permits state laws to trump federal laws in certain circumstances (or to "reverse preempt" those laws). The MFA was enacted in response to the Supreme Court of the United States' decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). *U.S. Dept. of Treasury v. Fabe*, 508 U.S. 491, 499 (1993). Prior to the *South-Eastern Underwriters* decision, it had been assumed that issuing a policy of insurance was not a transaction of commerce subject to federal regulation. *Id.* (citation omitted). Accordingly, the states enjoyed a virtually exclusive domain over the insurance industry. *Id.* (citation omitted). However, in *South-Eastern Underwriters*, the Supreme Court held that an insurance company conducting a substantial portion of its business across state lines was engaged in interstate commerce and was subject to the antitrust laws. *Id.* Thereafter, in order to allay fears that the state's power to tax and regulate the insurance

industry would be threatened, Congress enacted the MFA. *Id.* at 499-500.

The MFA declares that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. The most relevant portion of the MFA, in light of the nature of the parties' dispute here, is found at 15 U.S.C. §§ 1012(a)-(b) ("Section 2(a)" and "Section 2(b)" respectively), which reads as follows:

> **(a) State regulation**
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> **(b) Federal regulation**
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, [t]hat . . . the Sherman Act, . . . the Clayton Act[] and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012 (certain emphasis omitted). As can be seen above, Section 2(b) of the MFA contains "two separate clauses": a first that "deals with federal laws in general" and a second that "proscribes application of antitrust laws[.]" *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 167 n.1 (3d Cir. 2001). The first clause "was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance" and the second clause "accomplishes Congress' secondary goal [of] carv[ing] out only a narrow exemption for 'the business of insurance' from the federal antitrust laws." *Fabe*, 508 U.S. at 505.

The MFA makes states supreme as "to laws 'regulating the business of insurance[,]'" not as to "regulating all the activities of insurance companies[.]" *SEC v. Nat'l Secs., Inc.*, 393 U.S. 453, 459 (1969) (internal quotation marks); *see also Humana Inc. v. Forsyth*, 525 U.S. 299, 308-09 (1999). In *SEC v. Nat'l Secs., Inc.*, 393 U.S. 453 (1969) ("*National Securities*"), the Supreme Court specifically acknowledged that insurance companies would continue to do "many things" subject to federal regulation; but the Supreme Court emphasized that "only when [such companies] *are engaged in the* '*business of insurance*'" does federal law potentially yield to state law. *Nat'l Secs., Inc.*, 393 U.S. at 459-60 (emphasis added).

2. Argument

The Supreme Court has explained that in a non-antitrust matter, in order to determine whether the MFA precludes application of a federal law in the face of a state law, a district court should consider three

factors (factors drawn from the first clause of the MFA's Section 2(b)): (1) whether the state law is enacted "for the purpose of regulating the business of insurance"; (2) whether the federal law does not "specifically relat[e] to the business of insurance"; and (3) whether the federal law would "invalidate, impair, or supersede" the State's law. *Humana Inc.*, 525 U.S. at 307 (internal quotation marks and citation omitted) (alteration in original); *In re Patriot Nat'l, Inc.*, 623 B.R. 696, 709 (D. Del. 2020). The parties agree that federal jurisdiction is barred in a non-antitrust matter only if all three of these factors are satisfied. *Highmark, Inc.*, 276 F.3d at 166; (D.I. 19 at 10; *see also* D.I. 23 at 11; DDOI's Hearing Presentation, Slide 9).

The parties disagree, however, as to another aspect of the framework for the MFA reverse preemption inquiry. In that regard, the Government argues that before the Court applies the above-referenced three-factor test drawn from Section 2(b) of the MFA, it must first assess whether an additional, threshold element (the "threshold element") has been met: "whether the *activity complained of constitutes the 'business of insurance*.'" *Highmark, Inc.*, 276 F.3d at 166 (quoting *Sabo v. Metro. Life Ins. Co.*, 137 F.3d 185, 191 (3d Cir. 1998)) (emphasis added); *see also* (D.I. 23 at 11). If the activity complained of does not constitute the "business of insurance," the Government argues, then the reverse preemption inquiry is over and the federal law controls. (*See* D.I. 23 at 11) If the activity complained of does constitute the "business of insurance," only then (according to the Government) must the Court go on to assess the three factors discussed above. (*Id.*) For its part, DDOI disputes the Government's reading of the

law in this respect. Instead, DDOI argues that the Court should not consider this threshold element at all, because its use in a non-antitrust case is "outdated" in light of Supreme Court caselaw. (D.I. 19 at 10, 16)

Below, the Court will first address this dispute over application of the threshold element. After concluding that it should analyze the applicability of the threshold element, the Court will then go on to engage in a reverse preemption analysis.

a. The Court Must Assess the Applicability of the Threshold Element

After analyzing controlling case law in this Circuit, the Court concludes that the Government is correct: i.e., that the standard for determining whether the MFA warrants reverse preemption in a non-antitrust case first requires application of the threshold element—one that asks whether the challenged conduct itself constitutes the "business of insurance." To explain why, the Court examines relevant Supreme Court and Third Circuit caselaw regarding the MFA.

The Supreme Court first referenced the three-factor test described above in its 1993 opinion in *U.S. Dept. of Treasury v. Fabe*, 508 U.S. 491, 500-01 (1993). The *Fabe* Court explained that the "starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself." 508 U.S. at 500 (internal quotation marks and

citation omitted). Thereafter, the *Fabe* Court quoted from the text of Section 2(b), and described the analysis required of it by referencing the three-factor test:

> Section 2(b) of the McCarran-Ferguson Act provides: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The parties agree that application of the federal priority statute would "invalidate, impair, or supersede" the Ohio priority scheme and that the federal priority statue does not "specifically relat[e] to the business of insurance." All that is left for us to determine, therefore, is whether the Ohio priority statute is a law enacted "for the purpose of regulating the business of insurance."

Fabe, 508 U.S. at 500-01 (alteration in original). In other words, in *Fabe*, the Supreme Court was focusing on what the first clause of *Section 2(b)* requires; in doing so, it noted that the words of that portion of the statute make plain that three prerequisites need be met in order for reverse preemption to apply.

A few years later, the United States Court of Appeals for the Third Circuit addressed reverse preemption and the MFA in *Sabo v. Metro. Life Ins. Co.*, 137 F.3d 185 (3d Cir. 1998). That case also involved a non-antitrust cause of action: an alleged violation of the Racketeer Influenced and Corrupt Organizations Act, or "RICO" Act. In beginning its reverse preemption analysis, the Third Circuit (as had

the Supreme Court in *Fabe*), noted that "[a]s with any other issue of statutory construction, the starting point in the [MFA's] interpretation is the language of the statute itself." *Sabo*, 137 F.3d at 189 (citation omitted). Importantly, though, the *Sabo* Court first addressed the language of *Section 2(a)* of the MFA, which notes that "*[t]he business of insurance*, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 137 F.3d 185 at 188 (quoting 15 U.S.C. § 1012(a)) (emphasis added). The *Sabo* Court explained that "Section 2(a) of the statute, by its terms, affirmatively subjects *the business of insurance* to state regulation"; it also noted, on the other hand, that "if the contested activities are wholly unrelated to the insurance business, then the [MFA] has no place in analyzing federal regulation because *only when '[insurance companies] are engaged in the 'business of insurance' does the [MFA] apply*.'" *Sabo*, 137 F.3d at 189-90 (quoting *Nat'l Secs.*, 393 U.S. at 459-60) (emphasis added). In other words, according to the *Sabo* Court, if "the defendant's conduct does not constitute the 'business of insurance,' [pursuant to Section 2(a),] then the [MFA] simply does not apply and there is no need to confront preclusion issues under [Section]2(b)" because "[w]e cannot imagine how [S]ection []2(b) protects a state law enacted for the purpose of regulating the insurance business when the activity in question does not relate to insurance" and that "[t]o hold otherwise would require [the Third Circuit] to abandon the structure and purpose of the [MFA]." *Id.* at 190 Lastly, the *Sabo* Court explained how, if the challenged conduct does in fact constitute the "business of insurance," then a court should

address the requirements of the first clause of Section 2(b):

> If it is determined that the alleged conduct at issue broadly constitutes the "business of insurance," and is therefore subject to state regulation under [S]ection []2(a), the next issue is whether the anti-preemption mandate of [S]ection []2(b) precludes a federal cause of action. Here, the statute makes clear that a party is barred from suing under federal law if three distinct requirements are met. First, the federal law at issue does not "specifically relate" to the business of insurance. Second, the state law regulating the challenged conduct was "enacted for the purpose of regulating the business of insurance." Finally, an application of federal law would "invalidate, impair, or supersede" such state law.[] *Fabe*, 508 U.S. 501-02[.]

Id. (footnote omitted).

In other words, the *Sabo* Court explicitly recognized that in order to demonstrate that a federal statute is preempted by a state statute, the MFA first requires the satisfaction of the threshold element. And in doing so, the Third Circuit did not conjure this requirement from thin air—it drew it from the text of Section 2(a) of the MFA itself, which notes that only the practice of the "business of insurance" itself can possibly implicate a reverse preemption analysis.

Less than a year after *Sabo*, the Supreme Court addressed the MFA in a non-antitrust matter in

Humana Inc. v. Forsyth, 525 U.S. 299 (1999). In *Humana*, the question at issue was whether Nevada laws regarding penalties for insurance fraud should be understood to take precedence over the RICO Act's provisions regarding private remedies (including the RICO Act's treble damages provisions). *Humana Inc.*, 525 U.S. at 304-05. In *Humana* (as in *Fabe*), the Supreme Court did not focus on the threshold element, nor apply it to the facts at hand. That was because the "question presented" in the case was focused solely on the meaning of the "invalidate, impair, or supersede" portion of Section 2(b)'s three-factor test. *Id.* at 305. The *Humana* Court went on to analyze that factor, and ultimately concluded that the MFA did not block recourse to RICO. *Id.* at 307-13.

Then in 2001, in another non-antitrust matter, the Third Circuit again had occasion to reference the test for establishing reverse preemption. In that case, *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160 (3d Cir 2001), the question at issue was whether the MFA and a Pennsylvania state insurance law barred application of the Lanham Act. 276 F.3d at 166. The *Highmark* Court cited to *Sabo* in explaining that to "determine whether the [MFA] applies, this Court *considers the threshold question to be whether the activity complained of constitutes the 'business of insurance*'" and that, if it does, it then "look[s] to whether [Section]2(b) precludes a federal cause of action" by applying the three-factor test from Section 2(b). *Id.* at 166 (citing *Sabo*, 137 F.3d at 191) (emphasis added). In applying the threshold element to that case, the *Highmark* Court concluded that the action complained of—there, insurance advertising—did

constitute the "business of insurance."[11] *Id.* at 166-67. The *Highmark* Court then proceeded to apply the three-factor test, ultimately affirming the district court's conclusion that the MFA did not apply there. *Id.* at 167-70.

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[11] During oral argument, DDOI seemed to argue that in a footnote in the *Highmark* decision ("footnote 1"), the Third Circuit suggested that the threshold element need not be evaluated in non-antitrust cases like this one. (Tr. at 16-18; *see also* DDOI's Hearing Presentation, Slide 11) The Court disagrees.

Admittedly, the meaning of footnote 1 is difficult to parse. In it, the Third Circuit acknowledges that the "Supreme Court sees a distinction between the 'business of insurance' [i.e., the type of conduct described in Section 2(a)] and laws that serve the *purpose* of regulating the business of insurance [i.e., one of the factors in the three-factor test drawn from Section 2(b)'s first clause]." *Highmark, Inc.*, 276 F.3d at 167 n.1 (emphasis in original). Additionally, in that footnote, the Third Circuit: (1) references a three-pronged test (further discussed below in this Report and Recommendation) that the Supreme Court set out in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), an antitrust case, in order to help determine what amounts to the "business of insurance"; and (2) asserts that it can sometimes be difficult to use that three-pronged test in a non-antitrust context to assess whether challenged conduct in fact amounts to the "business of insurance." *Id.* But the Court does not see anything in footnote 1 or elsewhere in the *Highmark* opinion to indicate that the Third Circuit believes that the threshold element does not apply to a non-antitrust MFA case. Indeed, as noted above, in *Highmark*, the Third Circuit cited approvingly to *Sabo* for the proposition that the threshold element *did* have a place in the reverse preemption analysis in non-antitrust cases. And the *Highmark* Court then explicitly analyzed that "threshold question[.]" *Id.* at 166.

In sum, in a non-antitrust case like this, the Third Circuit[12] has clearly and repeatedly instructed that the Court must first assess whether the movant has satisfied the threshold element, before applying Section 2(b)'s three-part test. The Supreme Court in *Fabe* and *Humana* has not explicitly mentioned or applied this threshold element. The Court is of course first and foremost obligated to apply the law as it is interpreted by the Supreme Court. However, where the Supreme Court has not spoken "clearly and unambiguously on [an] issue, it is appropriate that this court, as a trial court, continue to follow the precedent of the Court of Appeals in this Circuit."[13] *In re Jacobs*, 381 B.R. 128, 137 n.18 (E.D. Pa. 2008) (citation omitted); *see also Ruffing v. Wipro Ltd.*, CIVIL ACTION NO. 20-5545, 2021 WL 1175190, at *5 (E.D. Pa. Mar. 29, 2021). And in the Court's view, the Supreme Court has not spoken "clearly and ambiguously" in *Fabe* or *Humana* as to whether Section 2(a) of the MFA provides a separate,

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[12] Our Court has only once referenced the test for analyzing a reverse preemption claim in the non-antitrust context. However, there this Court was focused only on the applicability of the "invalidate, impair, or supersede" portion of the three-factor test drawn from Section 2(b), and it only discussed that aspect of the MFA's reverse preemption analysis. *See In re Patriot Nat'l, Inc.*, 623 B.R. at 708-11 (reviewing a decision of the United States Bankruptcy Court for the District of Delaware and concluding that reverse preemption was not implicated).

[13] It is not as if the Third Circuit in *Sabo* or *Highmark* overlooked the fact of the Supreme Court's decisions in *Fabe* and *Humana*. To the contrary, in setting out the appropriate reverse preemption analysis, the *Sabo* Court cited repeatedly to *Fabe*, *see Sabo*, 137 F.3d at 189 & n.1, 191 n.3, and the *Highmark* Court cited to both *Fabe* and *Humana*, *see Highmark, Inc.*, 276 F.3d at 167-68 & n.1.

independent barrier that a party must overcome in order to establish reverse preemption in a non-antitrust case. After all, it could be that the reason why the Supreme Court did not reference the threshold element in those two cases is simply because no party raised the issue, or because the applicability of the element was not in controversy.[14] Therefore, the Court will follow controlling Third Circuit precedent on this point, and will first address whether the challenged conduct at issue constitutes the "business of insurance." *See Ins. Prods. Mktg., Inc. v. Conseco Life Ins. Co.*, Civil Action No. 9:11-cv-01269-PMD, 2011 WL 3841269, at *4 (D.S.C. Aug. 29, 2011) (listing the threshold element of Section 2(a) along with the three-factor test of Section 2(b) as amounting to the controlling standard for MFA reserve preemption review in a non-antitrust context) (quoting *Highmark, Inc.*, 276 F.3d at 166); *Coleman v. Commonwealth Land Title Ins. Co.*, Civil Action No. 09-679, 2010 WL 2545539, at *3 (E.D. Pa. June 18, 2010) (same); *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2006 WL 2850607, at *14 n.13 (D.N.J. Oct. 3, 2006) (same).

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[14] Moreover, the conclusion that the threshold element applies here does gibe with what the Supreme Court previously said in *National Securities*: that pursuant to the MFA, only when an insurance company is actually "engaged in the 'business of insurance'" does federal law yield to state law. *Nat'l Secs., Inc.*, 393 U.S. at 459-60; *see also Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 427-28 (2003) ("The provisions of the [MFA] said to be relevant here specify that '[t]he business of insurance' shall be recognized as a subject of state regulation, 15 U.S.C. § 1012(a), which will be good against preemption by federal legislation unless that legislation 'specifically relates to the business of insurance,' § 1012(b)[.]") (alteration in original).

b. Does the Challenged Conduct Constitute the "Business of Insurance"?

In assessing whether the challenged conduct at issue constitutes the "business of insurance," the Court must first articulate what exactly that challenged conduct *is* (and where the Court should look to identify it). On that score, the Court turns to the particular state statute in question, which is Section 6920.[15] And when examining the words of that statute, and the kind of conduct it regulates, it becomes clear (as the Government argues) that the conduct at issue therein is fairly characterized as "[r]ecord maintenance" or "the dissemination and maintenance of information, documents, and communications [maintained by the state.]" (D.I. 23 at 12-13 (emphasis omitted, internal quotation marks and citation omitted) (alteration in original); *see also* Tr. at 66) Section 6920 expressly forbids DDOI from disclosing to any other person, *inter alia*, "[a]ll portions of license applications reasonably designated confidential by [a captive insurer, or] all information and documents . . . produced or obtained by or submitted or disclosed to [DDOI] pursuant to subchapter III of this chapter of this title that are

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[15] As the Government notes, when the Supreme Court has analyzed reverse preemption questions pursuant to the MFA, it has examined "discrete statutes, not comprehensive statutory schemes." (D.I. 23 at 18); *see Fabe*, 508 U.S. at 493 (analyzing Ohio Rev. Code Ann. § 3903.42 (1989)); *Nat'l Secs.*, 393 U.S. at 462 (analyzing Ariz. Rev. Stat. Ann. § 20-731(B) (Supp. 1969)). So, the right place to focus here is on Section 6920 in particular, not on the entire Delaware Captive Law in general. (D.I. 23 at 18) Both parties agree that this is the correct approach. (*See* Tr. at 37)

reasonably designated confidential" by a captive insurer, as well as various documents the insurer provides to DDOI "that are related to an examination pursuant to this chapter"—all unless the insurer provides "prior written consent[.]" DEL. CODE ANN. tit. 18, § 6920 (2007). The statue also carves out two exceptions to this edict. One of those states that DDOI may provide this information to the insurance department of any state or any country or jurisdiction other than the United States of America. *Id.* And the other exception (the one at issue here) allows DDOI to provide such material to "a law-enforcement official or agency of [Delaware], any other state or the United States of America" but only "so long as such official or agency agrees in writing to hold it confidential and in a manner consistent with this section." *Id.* From the statute's text, then, one can see that its entire focus is on the type of access that DDOI may or may not provide to third parties (including federal law enforcement officers) regarding a captive insurer's confidential information.

With the challenged conduct defined, the Court next asks "Does this conduct amount to the 'business of insurance?'" The Supreme Court has provided significant guidance to help lower courts answer this question. A review of that guidance makes clear that the correct answer is "No."

The Court first turns to three criteria that the Supreme Court has deemed relevant in determining whether a particular practice is part of the "business of insurance": (1) "whether the practice has the effect of transferring or spreading a policyholder's risk";

(2) "whether the practice is an integral part of the policy relationship between the insurer and the insured"; and (3) "whether the practice is limited to entities within the insurance industry."[16] *Sabo*, 137 F.3d at 191 (citing *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211-21 (1979)); *see also In re Ins. Brokerage Antitrust Litig.*, 2006 WL 2850607, at *8 (assessing these three criteria as part of the court's analysis as to whether challenged conduct in a non-antitrust case amounted to the "business of insurance"). "None of these criteria is necessarily determinative in itself[.]" *Pireno*, 458 U.S. at 129. When one looks at these three criteria, it is pretty clear that two of them (the first and second criteria) favor the Government's position. With regard to the first criterion, the conduct at issue in Section 6920 has nothing to do with "the effect of transferring or spreading a policyholder's risk." And with regard to the second criterion, the challenged conduct is not "an integral part of the policy relationship between the insurer and the insured." That said, the third criterion ("whether the practice is limited to entities within the insurance industry") can be read to favor DDOI, in the

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[16] While these three "business of insurance" criteria were originally applied to an analysis of the applicability of the second antitrust clause in Section 2(b), the Third Circuit has made it clear that they "may nevertheless provide guidance in a more generalized analysis under th[e MFA]"; in doing so, the Third Circuit categorically rejected the suggestion that these criteria are "simply not relevant in determining what constitutes the business of insurance in a non-antitrust context." *Sabo*, 127 F.3d at 191 & n.3 (noting, however, that the "test is only a starting point in the analysis for non-antitrust cases") (citing *Fabe*, 508 U.S. at 503-05).

sense that Section 6920 only relates to DDOI's disclosure responsibilities regarding the confidential information of *captive insurers* (and does not relate to the protection of the confidential information of entities involved in *other industries*, such as banking, or health care, or the like).[17] But overall, the majority of these

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[17] In arguing that this third criterion should actually favor its position, the Government in its briefing pointed to several other Delaware statutes that require governmental or private bodies in other fields of industry to keep confidential certain information disclosed to those bodies. (*See* D.I. 23 at 14 n.10) The Government's argument seemed to be that when you consider Delaware law as a whole, "the practice" of safeguarding confidential records is not in fact "limited to entities within the insurance industry." But that cannot be the right way to assess this criterion. Instead, the Court agrees with DDOI that when this third criterion asks "whether *the practice* is limited to entities within the insurance industry," it is focused on "the practice" (i.e., the conduct) that is addressed by the "specific statute" at issue here (Section 6920), not by Delaware law as a whole. (D.I. 25 at 5) Indeed, during oral argument, Government's counsel acknowledged that this view amounts to a "fair criticism" of the Government's position. (Tr. at 94)

Thereafter at oral argument, the Government put forward a different position about why this factor redounds in its favor—one it did not proffer in its briefing. There the Government argued that because Section 6920 is focused on what *DDOI* (a government entity that purportedly is *not itself involved in the insurance business*) may or may not do with certain records, then "the practice" at issue in the statute is not "limited to entities within the insurance industry." (Tr. at 94-95) Whatever the merit of this argument, because the Government did not put it forward in its briefing, it is waived. *See Horatio Wash. Depot Techs. LLC v. TOLMAR, Inc.*, Civil Action No. 17-1086-LPS, 2018 WL 5669168, at *7 n.4 (D. Del. Nov. 1, 2018) (holding that a new argument presented at oral argument was waived where it "was not fairly presented in [the] briefing[]") (citing cases), *report and recommendation adopted*, 2019 WL 1276028 (D. Del. Mar. 20,

criteria suggest that the conduct at issue is not the "business of insurance." *Cf. F.T.C. v. Mfrs. Hanover Consumer Servs., Inc.*, 567 F. Supp. 992, 996 (E.D. Pa. 1983) (applying the three criteria and concluding that the challenged practice, which related to the sale of credit insurance, did not amount to the "business of insurance," where two of the criteria suggested that outcome while the remaining criterion could be "viewed either way").

The Court is mindful that the three above-referenced criteria are merely the "starting point in the analysis" for its "business of insurance" inquiry. *Sabo*, 137 F.3d at 191 & n.3. But when the Court goes a step further and assesses how the Supreme Court described what is the "business of insurance" in *National Securities*, the Government's position seems even stronger. In *National Securities*, the Supreme Court explained:

> Certainly the fixing of rates is part of [the "business of insurance"] . . . [t]he selling and advertising of policies . . . and the licensing of companies and their agents . . . are also within the scope of the statute. Congress was concerned with the type of state regulation that centers around the contract of insurance . . . . The relationship between insurer and insured, the type of policy which could be issued, its

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2019); *cf. Tomasko v. Ira H. Weinstock, P.C.*, 357 F. App'x. 472, 479 (3d Cir. 2009) (holding that arguments raised for the first time at oral argument in the district court were waived because that method of proceeding could "deprive one's opponent of any meaningful opportunity to respond").

> reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they to[o] must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly[,] are laws regulating the "business of insurance."

Nat'l Secs., 393 U.S. at 460 (citations omitted); *see also In re Ins. Brokerage Antitrust Litig.*, 2006 WL 2850607, at *8 (using *National Securities*' description of the "business of insurance" as another method of investigating whether challenged conduct in a non-antitrust case amounted to the "business of insurance"). Obviously, Section 6920 does not deal with the fixing of insurance rates, nor the selling and advertising of insurance policies, nor the type of insurance policy a company can issue, nor anything about such a policy's reliability, interpretation or enforcement. Relatedly, the statue does not appear to be about the "relationship between insurer and insured" or the "relationship between the insurance company and the policyholder."[18] Fundamentally,

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[18] Indeed, at times, DDOI's briefing seemed to underscore this reality. At one point in its briefing, DDOI wrote: "Maintaining confidentiality is important while sharing information because *both regulators and insurance companies* have an interest in

Section 6920 does not deal with the substance of how an insurance company treats or interacts with its insureds; it has to do with how a government agency treats documents that an insurance company provides to it. In other words, it is not about the relationship between the insurer and the insured; it is about the relationship between the insurer and its regulator, or the relationship between the regulator and other insurance regulators or investigatory agencies.[19] (D.I. 23 at 17); *cf. Royal Drug Co.*, 440 U.S. at 216

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ensuring confidentiality." (D.I. 19 at 12 (emphasis added); *see also* D.I. 23 at 18) At another point, DDOI suggested that Section 6920 was important because it helped support a "reciprocal policy among *state insurance commissioners and state and federal agencies*, allowing the sharing of information, so long as it is held confidential." (D.I. 19 at 12 (emphasis added); *see also* D.I. 23 at 18-19) Again, however, a statute directed to the "business of insurance" is one focused on the relationship *between the insurer and the insured*, not the relationship between the insurer and an insurance regulator, or the relationship between insurance regulators and other investigative or regulatory agencies. (*See also* Tr. at 33-35)

[19] Of course, a captive insurance company is an unusual entity, in the sense that the insurer is a company that issues insurance to its parent company or affiliate. (D.I. 19 at 12-13; D.I. 23 at 5; D.I. 25 at 6) And so the "relationship" between the insurer and the insured in a captive insurance context is a bit different than what that relationship would look like in a more "traditional" insurer/insured scenario (i.e., where the insurer insures otherwise unaffiliated third parties). But despite DDOI's suggestion otherwise, (D.I. 19 at 12-13; D.I. 25 at 6), the Court does not see how the unusual nature of a captive insurance company's makeup renders Section 6920 any more directed to the "business of insurance." If Section 6920 only applied to those more traditional insurers, the challenged conduct addressed by the statute would still be the same.

(concluding that certain pharmacy agreements did not amount to the "business of insurance," in part, because they were "not 'between insurer and insured[]' . . . [and instead were] separate contractual arrangements between [an insurer] and pharmacies engaged in the sale and distribution of goods and services other than insurance").

Now, one could really stretch the meaning and import of Section 6920's text and argue that (as DDOI does) the statue is actually about the "licensing" of insurance companies. (D.I. 19 at 11-12) It is true, for example, that the statute regulates how DDOI should protect confidential information that is *obtained through the insurance licensing process*. Moreover, if DDOI shares confidential documents about an entity with another state insurance regulator, for example, the shared documents might end up having a bearing on *whether that entity is ultimately licensed by the other regulator*. (D.I. 25 at 7) Yet to view the gravamen of Section 6920 as being about the "licensing" of insurance companies is to take an unduly broad view of the statute's text. *Cf. Royal Drug Co.*, 440 U.S. at 216-17 (cautioning courts not to analyze the term "business of insurance" in an unduly "broad" manner, because doing so could turn "almost every business decision of an insurance company" into the "business of insurance" in a manner that is contrary to the MFA's language, as the statute exempts only the "business of insurance" and not the "business of insurance companies") (internal quotation marks omitted); *Mfrs. Hanover Consumer Servs., Inc.*, 567 F. Supp. at 996 (concluding that "if the practice sought to be investigated is characterized as the business of insurance because

insurance is somehow involved, the insurance industry would be able to expand its [MFA] protection" in unwarranted ways); (Tr. at 28-29). After all, the *core* conduct regulated by Section 6920 does not have to do with the licensing process. Section 6920 does not speak to the criteria for licensing captive insurance companies, nor to the process by which a captive insurance company can obtain a license.[20] Instead, it speaks to how confidential documents that were submitted during the licensing process are to be maintained and protected. For all of these reasons, the additional direction provided by the Supreme Court in *National Securities* also supports the conclusion that Section 6920 does not relate to the "business of insurance."

Also supporting the Court's conclusion here is the decision in a similar case from the United States District Court for the District of New Jersey: *City of Sterling Heights Gen. Emps.' Ret. Sys. v. Prudential Fin., Inc.*, Civil Action No. 12-5275, 2015 WL 1969368 (D.N.J. Apr. 30, 2015). In *City of Sterling Heights*, a securities class-action case, the lead plaintiffs alleged that defendant Prudential Financial, Inc. ("Prudential") had failed to account for certain life insurance policies in its reserves, which in turn led Prudential to later announce a $139 million charge to its earnings. 2015 WL 1969368, at *1. The lead plaintiffs claimed that

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[20] The Delaware Captive Law deals with such licensing issues in other portions of its statutory scheme. (Tr. at 84-85 (Government's counsel noting that "if [Section] 6920 were repealed tomorrow, the ability of an insurer to be licensed and to apply for a license in Delaware would be unchanged"))

Prudential's and certain of its officers' false or misleading statements about the policies had ultimately caused Prudential's stock price to fall. *Id.* During the case, non-party Verus Financial LLC ("Verus")—an entity that had conducted an examination and audit of Prudential's practices, and that was in close contact with Prudential and state insurance regulators in doing so—appealed a United State Magistrate Judge's order; the order compelled Verus to, *inter alia*, produce documents and communications subpoenaed by the lead plaintiffs. *Id.* at *1-2 & n.1. In appealing the order to the district court, Verus pointed to certain state anti-disclosure statutes that provided for the confidentiality of information gathered during an insurance examination. These statutes are undisputedly very similar to Section 6920, in that they "generally provide that examination-related materials are 'not subject to subpoena[.]'" *Id.* at *6. Verus argued that these state statues and the MFA preempted Federal Rule of Civil Procedure 45 (which would otherwise have permitted the lead plaintiffs to subpoena such documents) and Federal Rule of Evidence 501 (which the Court had construed not to recognize a common law insurance examination privilege). *Id.* at *4, *6.

The *City of Sterling Heights* Court ultimately concluded that the MFA and these state insurance laws did not reverse preempt Rule 45 or Rule 501. In doing so, the district court explained (similar to the Court's conclusion above) that "the activity in question that the [state] anti-disclosure statutes seek to regulate is the dissemination and maintenance of information, documents, and communications developed as a result

of an insurance examination." *Id*. at *6. The Court then applied the threshold element of Section 2(a) and concluded that the activity in question there did not amount to the "business of insurance" because it "has nothing at all to do with the insurer-insured relationship, nor does it have the effect of spreading a policyholder's risk."[21] *Id*.

DDOI argues that the Court should disregard the *City of Sterling Heights* decision for various reasons. (D.I. 19 at 16-18; DDOI's Hearing Presentation, Slides 24-26) None are persuasive.

For example, DDOI argues that the "business of insurance" portion of the decision in *City of Sterling Heights* amounts only to "dicta[,]" because in that case, the Controller of the State of California ("Controller") (an entity in a similar position to DDOI here) only intervened for the purpose of asserting certain privilege rights that were unrelated to an MFA reverse preemption argument. (D.I. 19 at 17) DDOI claims that the "the matter may have been determined differently" had the Controller actually raised a reverse preemption objection. (*Id.*) But it appears that in *City of Sterling Heights*, the Controller and other insurance regulators *did* argue that MFA preemption applied, and the district court simply disagreed with that position. (D.I. 23 at 15 (citation omitted)) Moreover, the district court's decision on the "business of insurance" issue

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[21] The *City of Sterling Heights* Court also went on to conclude, pursuant to one of the three factors relating to an analysis under the first clause of Section 2(b), that the purpose of the state statutes in question was not to regulate the business of insurance. *Id.*

was certainly not dicta; it was central to the resolution of the appeal in question. (*Id.*) DDOI next argues that the *City of Sterling Heights* Court made a legal error in applying Section 2(a)'s threshold element in the first place. (D.I. 19 at 17-18) But as the Court has explained above, applying that threshold element was entirely proper, in light of binding Third Circuit precedent. Lastly, DDOI suggests that the *City of Sterling Heights* Court should have considered other factors before coming to its conclusion as to whether the challenged conduct amounted to the "business of insurance." (*Id.* at 18) But DDOI never says what other factors the *City of Sterling Heights* Court should have considered, or why it would have made a difference. In the end, the decision in *City of Sterling Heights* was on point, it was correct and it thus provides support for the Court's decision here.

Therefore, having determined that the challenged conduct at issue does not constitute the "business of insurance," the Court declines to apply the MFA to Section 6920.[22] As such, the Court recommends that the Government's Petition be granted.[23]

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[22] Because the Court has declined to find that reverse preemption is applicable here, in light of its conclusion that the challenged conduct does not constitute the "business of insurance," it will not address the parties' arguments as to the three factors drawn from the first clause of Section 2(b) of the MFA.

[23] In light of the Court's decision on the Petition, it sees no merit to DDOI's request that the Court issue a protective order. (*See* D.I. 19 at 20; DDOI's Hearing Presentation, Slides 36-37) The Court therefore denies that request. (D.I. 24 at 3-6)

III. CONCLUSION

For the foregoing reasons, the Court recommends that DDOI's Motion be DENIED and that the Government's Petition be GRANTED.

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b)(1), and D. Del. LR 72.1. The parties may serve and file specific written objections within fourteen (14) days after being served with a copy of this Report and Recommendation. Fed. R. Civ. P. 72(b)(2). The failure of a party to object to legal conclusions may result in the loss of the right to de novo review in the district court. *See Sincavage v. Barnhart*, 171 F. App'x 924, 925 n.1 (3d Cir. 2006); *Henderson v. Carlson*, 812 F.2d 874, 878-79 (3d Cir. 1987).

The parties are directed to the Court's Standing Order for Objections Filed Under Fed. R. Civ. P. 72, dated October 9, 2013, a copy of which is available on the District Court's website, located at http://www.ded.uscourts.gov.

Dated: July 16, 2021

/s/ Christopher J. Burke
Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 21-3008

[Filed June 16, 2023]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
STATE OF DELAWARE DEPARTMENT OF INSURANCE, Appellant	)

On Appeal from the United States District Court
For the District of Delaware
(D.C. No. 1-20-cv-0829)
District Judge: Honorable Maryellen Noreika

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, SCIRICA*, and

* Judges Scirica's and Rendell's votes are limited to panel rehearing only.

RENDELL*, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATE: June 16, 2023
Sb/cc: All Counsel of Record