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November 1, 2019

Via Hand-Delivery

Clerk of the Court
Ingham County Circuit Court
341 S Jefferson St
Mason, MI 48854

Re: *Anita G. Fox v. Pavonia Life Insurance Company of Michigan*
Case No. 19-504-CR

Dear Clerk:

Enclosed for filing is the original and Judge's copy of Buyer's Response to Objection of Independent Insurance Group, as well as Certificate of Service that also reflects service of the Pro Hac Vice Order dated 10/22/19. Please file in your usual manner. Thank you.

Sincerely,

Karlene K. Zale
Legal Administrative Assistant to
Lori McAllister

Enclosures

cc: Christopher L. Kerr (w/encl.)
Jonathan E. Raven (w/encl.)
Timothy W. Volpe (w/encl.)

118738.000001 4815-2887-5178.1

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF INGHAM

ANITA G. FOX, Director of the Michigan Department of Insurance and Financial Services,

Plaintiff,

v.

PAVONIA LIFE INSURANCE COMPANY OF MICHIGAN,

Defendant.

Case No. 19-504-CR

Hon. Wanda M. Stokes

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2019, I caused to have served by first class mail, with postage prepaid a copy of the *Order Granting Temporary Admission Pro Hac Vice of Attorneys Carl H. Poedtke, III and Stephen W. Schwab*, and a copy of *Buyer's Response to Objection of Independent Insurance Group,* upon:

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118738.000001 4852-9168-9898.1

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

ANITA G. FOX, DIRECTOR OF THE DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES,

Petitioner,

v

PAVONIA LIFE INSURANCE COMPANY OF MICHIGAN,

Respondent.

Case No. 19-504-CR

Hon. Wanda M. Stokes

BUYER'S RESPONSE TO OBJECTION OF INDEPENDENT INSURANCE GROUP

Independent Insurance Group ("**Objector**") has no right or standing to object to the Plan of Rehabilitation ("**Plan**") that the Michigan Director of Insurance and Financial Services (the "**Director**" or "**Rehabilitator**") has proposed to protect Pavonia Life Insurance Company of Michigan ("**Pavonia**" or the "**Company**"), its policyholders, creditors and the public. For this reason alone, the Objection should be overruled. But there is more. Even though Pavonia is solvent, the Director has found that implementation of the Plan will completely secure protection of Pavonia's policyholders against risks arising from the Company's affiliation with four financially troubled North Carolina insurers ("**NC Insurer Affiliates**") and a federally indicted individual who is their collective ultimate controlling shareholder.

The Plan is based on separating Pavonia and its administration from the NC Insurer Affiliates and the controlling shareholder through a sale of Pavonia's shares by Pavonia's stockholder GBIG Holdings, Inc. ("**Seller**") to Aspida Holdco, LLC, a Delaware holding

company affiliate of Ares Management Corp. ("**Buyer**")). The sale is subject to the Director's approval of the Buyer's acquisition of control of Pavonia, and the Court's approval of the Plan. (See July 9, 2019 Stock Purchase Agreement ("**SPA**") for the transaction ("**Transaction**") that is attached to and embedded in the Plan.) Following months of arms-length negotiations between third parties against the backdrop of what Seller declared was a competitive process with multiple bidders, the SPA required Seller to consent to Pavonia's rehabilitation in order to best protect both Pavonia's policyholders and future shareholder, thereby facilitating Pavonia's rehabilitation and ensuring its future operations. The Rehabilitator has endorsed the SPA and Buyer's acquisition.

Objector would pervert a narrowly circumscribed "superior proposal" provision of the SPA into a purported opportunity to bid for Pavonia. The SPA establishes, however, that no purported "superior" offer (which Independent has *not even made*) can trump its provisions. Nor can Objector establish that the Rehabilitator has abused her considerable *receiver's* discretion in proposing the Plan. In the final analysis, Objector has only raised concerns about some of the terms of the sale, which the Director will resolve in the exercise of her exclusive *regulatory* jurisdiction outside this proceeding. The Court should summarily overrule the "objection" and approve the Director's Plan.

SUMMARY OF ARGUMENT

This proceeding and the Plan are unique: while the Company and its wholly-owned administrative services subsidiary Global Bankers Insurance Group, LLC ("**ServiceCo**") are in no financial distress (Rehab Order at 3), the circumstances require regulatory and judicial intervention. The Company's NC Insurer Affiliates are financially troubled due to transactions with non-insurance affiliates ("**Affiliate Investments**") within the Eli Global, LLC ("**Eli**")

holding company system, all under the ultimate control of shareholder Greg Lindberg (the "**Controlling Shareholder**"), who has been indicted for bribing another state's insurance regulator. (*Id.* at 4). The sale embedded in the Plan will fully protect the Company and its policyholders and shield them from the Eli group and the Controlling Shareholder (*id.* at 5-7).

In a desperate attempt to establish that the Plan *might* not be "fair or equitable," Objector can only express "concerns" about the process by which the Plan has been presented to the Court (see Obj. at 9, ¶4(c)), a "belie[f]" that the Company's current management and the Buyer are somehow tainted (*id.* at 5-6, ¶3(b), (c), (d)) by "app[arent]" potential conflicts of interest that "may" have had an adverse impact on the process (*id.* at 9, ¶4(c)), and a "belie[f]' in, and "appear[ance] of, a possibly inflated value for a future real estate transaction (*id.* at 7, ¶3(e)). Knowing full well that the SPA gives it no right to make a "nonbinding and conditioned" (*id.* at 3 n 1) but somehow "superior proposal" to Seller, Objector begs the Court for more time and "consideration" of an as yet unwritten offer or contract by which Objector *might* infuse more capital into the Company and *might* pay more money to the Seller after an undetermined period of discovery (to which Objector is not entitled[1]), due diligence and then negotiation and drafting of one or more contracts (*id.* at 10; Fraser Trebilcock Oct. 15, 2019 letter to the Court) which then must be newly submitted for regulatory review and re-vetted here with due process.

Not only has Objector failed to identify any legal or equitable interest in the Company, but Exhibit A to its "objection" shows that Objector has already made the very same arguments against the Transaction to the Director who is overseeing the separate and distinct Form A regulatory process under exclusive administrative jurisdiction. In other words, Objector has

[1] *See, e.g., In re Ambac Assur Corp*, 351 Wis 2d 539, 605; 841 NW2d 482 (Wis App, 2013) ("Because the interested parties are not parties within the meaning of the discovery statute, we conclude that the circuit court properly denied the interested parties' requests for discovery [in this rehabilitation proceeding]."); *accord* MCR 2.302(B)(1)("*Parties* may obtain discovery . . . .") (emphasis added). A rehabilitation proceeding is not an adversarial action; the only parties are regulator/receiver and the subject insurer.

elected but failed to exhaust an administrative remedy. The Plan, Transaction closing ("**Closing**") and the Plan's implementation and enforcement are subject to the Court's approval; the *bona fides* of the Buyer and Seller, the deal's viability, and satisfaction of other regulatory requirements are not.

Not one of the "concerns" is sufficient to disqualify the Plan. In point of fact, the Director declared in her rehabilitation petition (Rehab Pet at 8-9, ¶18), and the Rehabilitation Order entered July 9, 2019 (Rehab Order at 6-7) confirms, that rehabilitation *will fully protect and secure* Pavonia, its assets, policyholders and creditors, and implementation of the Plan will mitigate the Affiliate Investments and Ultimate Shareholder risks. As a result, the issue for the Court is whether the Director abused her discretion in developing this Plan and reaching these determinations. Absent demonstrated abuse, the Plan should – indeed, must - be approved.

Nor is there any merit to Objector's due process challenge. The extensive notice, transparent Plan, proof of claim procedure, and right to be heard (from truly *interested* persons) speak for themselves.

In the final analysis, no real interested party has objected. And even if Objector had a right to be heard (and it does not), it cannot prevail because the Company is financially sound so there is no need for a capital infusion. Most importantly the Plan secures performance of policyholder contracts and ensures the continuity of insurance coverage (see Plan at 10) by removing the Company from affiliation with financially troubled insurers and the ultimate control of their federally indicted shareholder, and placing experienced Company management - whom rehabilitators in two states have retained - under the control of an eminently qualified purchaser, all to the benefit and protection of the Company's policyholders, creditors and the

public (see *id.* at 7). Objector's suggestion that it *might* pay more to Seller adds nothing to such protection, and is a blatant attempt to wrongfully interfere with Buyer's contract.

ADDITIONAL BACKGROUND[2]

Buyer Aspida[3] Holdco, LLC is a Delaware-domiciled company and indirect, wholly-owned subsidiary of Ares Management Corporation ("**Ares**"). (See generally Form A Statement Regarding the Acquisition of Control of or Merger with a Domestic Insurer, available at https://difs.state.mi.us/FormA/Mainview/OpenPDF?BlobID=0860175.) Ares is a NYSE publicly-traded Delaware corporation and a leading global manager of $142 billion of assets. (See Ares June 30, 2019 10-Q at 38, available at https://q10k.com/ARES.) Ares 1,000+ employees include a dedicated insurance team in Ares Insurance Solutions that helps a broad array of US and non-US insurance companies achieve enhanced risk- and capital-adjusted returns within regulatory, rating agency and transactional limitations while employing proper asset-liability management practices. (See Form A.) Ares is headquartered in Los Angeles and has offices across the US, Europe, Asia and Australia. (*Id.*)

Ares currently manages $16.5 billion of assets for 100+ insurance companies. Team members have significant relevant industry experience; *i.e.*, prior executive roles at major U.S. insurers TIAA, Northwestern Mutual, MassMutual, AIG and General Reinsurance Corp. (*Id.*)

Ares has underwritten $105 billion in credit and lending strategies, including high yield bonds, syndicated loans, alternative credit and direct lending. (*Id.*) A key focus area of this business is mid-market private companies, a profile that includes Eli companies.[4] Consistent

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[2] This brief incorporates by reference the facts already established in the Stipulated Petition and concomitant Stipulated Order for rehabilitation respectively filed and entered on July 9, 2019, and the Order Preliminarily Approving the Plan entered on August 8, 2019.

[3] Upon closing of the SPA, Pavonia will change its name to Aspida. Pronounced "aspeeda," the name is Greek and means shield.

[4] These matters are the subject of Form A review. Buyer provides this information only because Objector has disparaged Buyer and questioned its Transaction intent.

with this strategy, negotiated loans were made to Eli affiliates in the ordinary course of business, at arm's length. These loans are wholly different from those made by Eli-controlled insurers to their affiliates. None of the Ares loans were made to Pavonia or ServiceCo, and none (aggregating less than one percent of assets under Ares' management) were or are material to Ares' overall operations or assets under management.

Objector disingenuously refers to "ARES/GBIG," and wrongfully conflates Ares, ServiceCo's current management (which does not include Lindberg, among others) and Eli. The current management of ServiceCo has been the administrative service provider of Pavonia and the NC Insurer Affiliates, and in the exercise of their discretion, both the NC and MI rehabilitators have retained them as managers. And, while Ares is aware of a US Department of Justice investigation regarding certain financial activities of Eli and Lindberg, Ares is not aware that either it, Pavonia, or ServiceCo are under investigation.

Objector compounds its disinformation campaign by ignoring the following points:

- After many months of arms-length negotiation with an unrelated seller in a competitive process, Buyer required that the Company be placed into rehabilitation and that the Plan be approved as a condition to the acquisition.
- Buyer's acquisition is also conditioned on approval of the Buyer and the acquisition by the Michigan Insurance Commissioner under a Form A application.
- Buyer has acted in good faith (see Plan at 8), and Seller received an opinion of an independent investment bank of national reputation that the "**Consideration**" Buyer will pay for the Pavonia shares and assets is fair from a financial point of view to Seller (see SPA at 76).
- There is no evidence that Pavonia or ServiceCo were part of any illegal activity in connection with Pavonia's assets or "Scheduled Liabilities."
- Pavonia's assets and Scheduled Liabilities are separate from those of the NC Insurer Affiliates. (See Rehab Order at 4).
- No evidence has been presented that Lindberg or any other Eli controlling person exercised unlawful or financially detrimental control over Pavonia or ServiceCo.

- Upon Closing neither Lindberg nor any other Eli controlling person will exercise any control over Pavonia or ServiceCo.

- Buyer retained third party advisors to thoroughly diligence and vet management, and the MI and NC rehabilitators approved retention packages for them. No evidence has been presented that any senior managers of Pavonia or ServiceCo, who will be retained by such companies after Closing, has committed any unlawful acts in their operation or management of such entities.

BUYER'S RESPONSES TO "OBJECTIONS"

Objector is Not an Interested Party and has No Right to be Heard

Objector has no enforceable, legally cognizable interest: it is not a policyholder, creditor, obligor, or equity property interest holder or claimant of either Pavonia or GBIG. In a desperate attempt to derail these proceedings, Objector mistakenly relies upon an inapplicable provision of the SPA and purports to address the needs of policyholders and creditors. The Court should overrule Objector's submission and hold that Objector is not an "interested party."

This Court's Order of August 8, 2019 directed that "Interested parties" desiring to submit comment or objection to the Plan could do so pursuant to the terms of the Order. Perforce, an objecting party must be "interested." Chapter 81 ("**Ch 81**") of the Insurance Code of 1956 ("**Code**"), MCL 500.100 *et seq.* does not define the term, but its use in various provisions makes clear that some cognizable legal or equitable right or obligation must be implicated. *See, e.g.*, MCL 500.8101(3) ("The purpose of this chapter is the protection of the interests of insureds, claimants, creditors, and the public"), 8103(q) ("'Transfer' shall include . . . parting with property or an interest in property"), 8109(6) ("a party to the proceedings whose interests are substantially affected"), 8110(1)(b) ("the interests of policyholders, creditors, or the public will be endangered by the delay") and (6) ("a person whose interest is or will be substantially affected by the order"), 8115a(10)(h) ("'Securities contract' means . . . an interest therein"), 8118(2) ("the rights and liabilities of the insurer and of its creditors, policyholders, shareholders, members, and

all other persons interested in its estate"), 8118a(1) ("any person having an interest in the trusteed assets"), 8123(1) ("if the agent has a property interest"), 8128(10) ("all parties in interest [in respect of preferences and liens]"), 8130(a) ("any other party with a bona fide interest"), and 8142(1)(i) ("disinterested shareholders have priority over interested shareholders who are directors or officers who fail to exercise their duties"). Interest is not coextensive with intellectual curiosity or hope to acquire a legal or equitable interest – and that is all that Objector has here.

"Interested" generally means directly affected by a case and the relief that may be granted. In the current context, this means a policyholder, creditor, obligor, or equity interest holder or claimant. *Ambac*, 351 Wis 2d at 561 n 5 (identifying various lending and financial institutions of an insurer in rehabilitation as "interested parties").[5]

Objector admits that its "interest" derives from "its desire and intent to make a 'Superior Proposal . . . .'" (Obj. at 2.) Objector "objects to the Plan on the ground that the [Objector's] Proposal (as defined below) is a 'Superior Proposal' as defined in the [SPA] . . . ," (Obj. at 3.), relying on the materiality and purchase price components of the definition provided in §12.04. (Obj. at 8.) Objector misconstrues the Plan, the Court's Order, and the SPA, and ignores the law.

Nowhere does the Plan or the Court's Order suggest that an entity with no legal or equitable interest may request discovery, delay these proceedings, and interfere with the SPA in order to have a competing proposal "considered." The Plan establishes that the "Transaction Parties negotiated the Stock Purchase Agreement at arms' length and in good faith over the

[5] As a procedural matter, whether someone is "interested" raises a question of standing, and is a threshold determination. *See Lansing Schools Ed Ass'n, MEA/NEA v Lansing Bd of Ed,* 487 Mich 349, 372; 792 NW2d 686 (2010) ("Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant."); Black's Law Dictionary (11th ed 2019) **(interested party.** (17c) "A party who has a recognizable stake (and therefore standing) in a matter").

course of several months before finally executing the document, which addresses all material terms of Seller's sale of Pavonia to Buyer." (Plan at 8.) It makes clear that the "Rehabilitator's Plan for Pavonia, subject to the [Form A regulatory approval and the] Court's approval in a final order approving the Plan, is to consummate the Company's sale from Seller to Buyer pursuant to the terms of the Stock Purchase Agreement, together with additional procedures and conditions contained in Section IV." (*Id.*) There is no auction, bidding process or invitation to make offers. Indeed, the Rehabilitator is not a party to the SPA and cannot renegotiate the sale with the Seller.

Nor does SPA §12.04 give Objector "a right to appear to object to the Plan." (Obj. at 8.) Section 12.04 is part of SPA Article XII related to "Termination and Waiver" (see SPA, Art XII at 100-101), and only determines when Buyer or Seller must pay a "Break-Up Fee." (See SPA, §12.04 at 100.) Such a fee is often negotiated in transactions to guard against termination of a deal to the prejudice and financial detriment of a negotiating party who has invested substantial resources. In this case, a Break-Up Fee would be due only following a termination of the SPA. Section 12.04 provides limited relief to the Buyer or Seller, not a third party right to object.

Other courts considering the issue have held that a frustrated bidder has no interest in an insurer's receivership. *See, e.g., In re Pacific Standard Life Ins Co*, 9 Cal App 4th 1197, 1200; 12 Cal Rptr 2d 50 (1992) (Texas insurer LOA which sent California Insurance Commissioner a letter offering to purchase assets of insolvent insurer was not an aggrieved party); 9 Cal App 4th at 1203 ("Having no immediate, pecuniary, and substantial interest that was injured, LOA has no standing to appeal.").

At bottom, Objector's voice is neither authorized as a matter of law, nor needed or helpful. In her administration and enforcement of Ch 81 and subject to interim disputes or objections that may arise, the Rehabilitator represents the interests of all insureds, creditors and

shareholders of Pavonia in developing and implementing a rehabilitation plan. *See, e.g.*, MCL 500.8101(3) *supra.*, 500.8121(s) (the Director may "exercise and enforce all the rights, remedies, and powers of a creditor, shareholder, policyholder, or member"); *see also Trosper v Ingham*, 293 Mich 438, 440; 292 NW 360 (1940) ("the common interests of all policyholders is, by the insurance law, entrusted to the commissioner of insurance"); *Relfe v Rundle*, 103 US 222, 225 (1881) ("[the receiver is] the person designated by law to take the property of any dissolved life insurance corporation of th[e] State, and hold and dispose of it in trust for the use and benefit of creditors and other persons interested"); and MCL 500.8114(4) ("If the rehabilitator determines that . . . transformation of the insurer is appropriate, he or she shall prepare a plan to effect those changes").

Finally, Objector ignores the "Exclusivity" clause in SPA §8.09. (See SPA, §8.09 at 84-85.) The SPA followed months of negotiation and due diligence, during which Buyer had no guarantee of success. In order to protect their agreement, buyers often negotiate for exclusivity between signing and closing. Section 8.09 does just that, in pertinent part:

> Section 8.09 Exclusivity. From and after the date of this Agreement, Seller shall not, and shall cause its Affiliates and its and its Affiliates' respective Representatives not to, directly or indirectly,
>
> (a) solicit, initiate, encourage, respond to or facilitate any inquiry, indication of interest, proposal or offer from any Person other than Buyer or its Representatives (an "Alternate Bidder") relating to or in connection with a proposal or offer for, . . . assets or sale of any Capital Stock . . . (. . . or in connection with the acquisition, disposition or custody of Investment Assets in the ordinary course of business, an "Acquisition Proposal");
>
> (b) participate in or attend any discussions or negotiations or enter into any agreement, arrangement or understanding, whether or not legally binding, with, or provide or confirm any information to, any Alternate Bidder relating to or in connection with any Acquisition Proposal by such Alternate Bidder; or

> (c) accept any proposal or offer from any Alternate Bidder relating to a possible Acquisition Proposal or otherwise commit to, or enter into or consummate any transaction contemplated by any Acquisition Proposal with any Alternate Bidder.

(SPA §8.09 at 84-85) (Emphasis added.) Seller thus cannot negotiate with anyone other than Buyer unless the SPA terminates. While Seller was free to entertain proposals prior to entering the SPA, that time has passed.

The Transaction should proceed as provided for in the Plan without Objector's further interference. Objector has no current financial or other interest in the sale proceeds; it is not an "Interested Party." The Court should overrule and dismiss the Objection without more.

Objector has failed to Exhaust an Administrative Remedy

Insurance company M&A is subject to the exclusive review and approval of the Director and the Michigan Department of Insurance and Financial Services ("**DIFS**"). Objector nevertheless purports to be heard based on its unsubstantiated "concern" that the Company's management team "continue to be involved with Pavonia, is not in the best interests of Pavonia, its policyholders, its creditors, and the public," (Obj. at 6), and that "[a]ny continued relationship between [ServiceCo], due to its affiliation with [Seller] and the GBIG Management Team poses significant risks to Pavonia, its policyholders, its creditors and the public." (Obj. at 6-7.) Objector admits that it expressed these concerns directly to DIFS, as evidenced by Exhibit A to the Objection, an August 2, 2019 letter to Randall Gregg, Esq., Senior Deputy Director and General Counsel of DIFS. The Court is without jurisdiction to resolve these issues.

Under the Holding Companies Act, MCL 500.1301 – 1379, the Director exclusively oversees and regulates the acquisitions of domestic insurers in this state. Pursuant to MCL 500.1311(1):

> A person shall not enter into an agreement to merge with or otherwise to acquire control of a domestic insurer or any person controlling a domestic insurer unless, at the time an offer, request, or invitation is made or an agreement is entered into, or before the acquisition of the securities if no offer or agreement is involved, the person has filed with the director . . . a statement containing the information required by this chapter and the offer, request, invitation, agreement, or acquisition has been approved by the director in the manner prescribed in this chapter.

MCL 500.1311(1). "The person who proposes to enter into an agreement to merge with or otherwise acquire control of a domestic insurer shall file a notice with the director, in a form and containing the information prescribed by applicable rule promulgated or order issued by the director." MCL 500.1311(3). The referenced statement is known as the "Form A," is made under oath or affirmation, and must include extensive information on forms specified in Order No. 2018-075-M, issued November 19, 2018.

The issues raised by Objector relate to matters that are within the exclusive purview of the Form A process, by which the Director determines whether an enumerated basis for disapproval exists under MCL 500.1315(1):

> (a) After the change of control, the domestic insurer described in section 1311 would not be able to satisfy the requirements for the issuance of a certificate of authority to write the types of insurance for which it is presently authorized.
>
> (b) The merger or other acquisition of control would substantially lessen competition in insurance in this state or tend to create a monopoly in this state.
>
> (c) The financial condition of an acquiring party might jeopardize the financial stability of the insurer, or prejudice the interest of its policyholders or the interests of a remaining securityholder who is unaffiliated with the acquiring party.
>
> (d) The terms of the offer, request, invitation, agreement, or acquisition described in section 1311 are unfair and unreasonable to the insurer's policyholders or securityholders.
>
> (e) The acquiring party's plan or proposal to liquidate the insurer, sell its assets, consolidate or merge the insurer with a person, or to make any

> other material change in its business or corporate structure or management, is unfair and unreasonable to the insurer's policyholders, and not in the public interest.
>
> (f) The competence, experience, and integrity of the persons who would control the operation of the insurer are such that it would not be in the interest of the insurer's policyholders or the public to permit the merger or other acquisition of control.
>
> (g) The acquisition is likely to be hazardous or prejudicial to the insurance-buying public.

Objector's descriptions of itself and its "concerns" plainly implicate MCL 500.1315(1)(d)-(g). Indeed, Objector's Ex. A letter to the DIFS General Counsel has placed its "concerns" squarely within Form A review. This is not a matter for which the Objector may be heard to complain here. The Director has both access to information necessary to evaluate, and the exclusive authority to address, any Objector "concerns" in the Form A regulatory process.

Failure to exhaust the Form A remedy is fatal to Objector's position because it implicates a separation of powers infirmity. *See, e.g., Judges of 74th Judicial Dist v Bay County,* 385 Mich 710, 727; 190 NW 2d 219 (1971) (commenting on separation of powers and doctrine of exhaustion, "[a]n appreciation of the theory of administrative law dictates that courts move very cautiously when called upon to interfere with the assumption of jurisdiction by an administrative agency.").

In the unlikely event the Court considers the "merits" of Objector's "nonbinding and conditional" "superior proposal" and "concerns," Buyer notes:

- The "materially higher" consideration consists of: (i) $5 million in additional cash purchase price that will not benefit policyholders and will be substantially reduced by the BreakUp Fee; (ii) a "capital infusion" that is unnecessary – Pavonia is fully reserved for all liabilities and as the Director unequivocally declared, "in her fiduciary capacity as the statutory and Court-appointed Rehabilitator of Pavonia, the Rehabilitator . . . believes that [the Plan] fully protects the Company, its Policyholders, and Creditors" (Pet. at 11); and (iii) a capital maintenance agreement that Objector was required to post as a 2018 start-

up insurer to secure its statutory obligation to maintain statutory risk-based capital - which Pavonia has already satisfied;

- The "excluded assets" consist of: (i) ServiceCo whose transfer to Pavonia was noticed to and approved by the Director and ensured ServiceCo's independence of the NC Insurer Affiliates; transferring it back to Seller would only revive and exacerbate the Affiliate Investments and Controlling Shareholder risks, as well as shift back onto the NC Affiliate Insurers the cost of ServiceCo's operations or force transition of such services to a new provider with attendant disruption and delay, (ii) a building the purchase of which would augment Pavonia's assets, the value of which was determined by third party appraisal and which Objector has not challenged with any competent evidence, and the closing on which can only be completed with approval of the MI and NC rehabilitators; and (iii) senior managers who have been retained by the MI and NC rehabilitators. *See, e.g.,* MCL.500.408.

- Greg Lindberg's "role in facilitating the transactions contemplated by the Plan" (Obj. at 6 ¶(c)) has already been circumscribed by the Rehab Order and will end at Closing. The Plan reflects Ares' input, which Lindberg did not – and could not – direct.

Thus, Objector has failed to exhaust administrative remedies, offers no substantiated reason to reject the Plan, and the Court should overrule its Objection as a matter of law.

Objector has Not Demonstrated that the Rehabilitator Failed to Follow Law

The Insurance Code provides in MCL 500.8114(4) that:

> Upon application of the rehabilitator for approval of the plan, and after notice and hearings as the court may prescribe, the court may either approve or disapprove the plan proposed, or may modify it and approve it as modified. A plan approved under this section shall be, in the court's judgment, fair and equitable to all parties concerned.

Other state receivership courts afford deference to a rehabilitator under statutory provisions like 8114(4). For example, in *Foster v Mutual Fire, Marine & Inland Ins Co,* 531 Pa 598, 608-11; 614 A2d 1086 (1992), the Supreme Court of Pennsylvania explained:

> Once the Insurance Commissioner and her deputies have designed a plan of rehabilitation it must be submitted to the Commonwealth Court for approval in order that it may have efficacy. The Commonwealth Court is empowered by the General Assembly to supervise and review the activities and proposals of the Insurance Commissioner while she undertakes the rehabilitation of an insolvent insurer. 40 P.S. §221.4(a); 42

> Pa.C.S.A. §761(a)(3). In overseeing the course of rehabilitation to check any abuse of discretion by the Commissioner, the Commonwealth Court is authorized to "approve or disapprove the plan [of rehabilitation] proposed, or may modify it and approve it as modified. If it is approved, the rehabilitator shall carry out the plan." 40 P.S. §221.16(d). Therefore, in order for the Plan to warrant the Commonwealth Court's imprimatur it must be found to be free from any abuse of the Rehabilitator's discretion.
>
> * * *
>
> [I]t is not the function of the courts to reassess the determinations of fact and public policy made by the Rehabilitator. Rather, the involvement of the judicial process is limited to the safeguarding of the plan from any potential abuse of the Rehabilitator's discretion. . . .
>
> > 'It has been established as an elementary principle of law that courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion *in the absence of bad faith, fraud, capricious action or abuse of power* .... That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; *judicial* discretion may not be substituted for *administrative* discretion.' [Citations omitted] . . .[6]
>
> It is axiomatic, therefore, that judicial discretion is not to be substituted for administrative discretion. . . . [S]hould the Commonwealth Court find such an abuse of discretion . . . , the Commonwealth Court is limited, by statute, to preventing any further abuse of discretion by either rejecting the plan or modifying the plan and then approving it as modified. 40 P.S. §221.16(d).

(Emphasis added.) *Accord Kueckelhan v Federal Old Line Ins Co*, 74 Wash 2d 304, 315; 444 P2d 667 (1968) ("Our statutory provisions, therefore, properly place the responsibility on both the Insurance Commissioner and the courts, the Commissioner being required to follow the statutory mandates and to use reasonable discretion in the rehabilitation of a seized company, *with abuses of discretion to be checked by the judiciary.*") (Emphasis added) (citations omitted).

The abuse of discretion standard for reviewing rehabilitation plans has been broadly applied across the US. *See, e.g., Kreidler v Cascade Nat'l Ins Co*, 179 Wash App 851, 860; 321

[6] Similarly, MCL 500.205 provides that "[o]rders, decisions, findings, rulings, determinations, opinions, actions, and inactions of the commissioner in this act shall be made or reached in the reasonable exercise of discretion." *See also* MCL 500.116(c) (defining "reasonable exercise of discretion").

P3d 281 (2014) ("well settled that the trial court's standard of review is abuse of discretion"); *Ambac,* 351 Wis at 564 ("the circuit court erroneously exercises its discretion when an examination of the rehabilitation plan demonstrates that the circuit court exceeded its statutory authority or the court unreasonably substituted the rehabilitator's beliefs for its own beliefs."); *see also id.* citing *Mutual Fire*, 614 A2d 1086 (*Mutual Fire* provides "the standard of review for . . . rehabilitations").

A lawful plan that is free of abuse and or capricious or arbitrary factors is "fair and equitable" and should be confirmed for implementation. *See, eg, LaVecchia v HIP of NJ, Inc*, 324 NJ Super 85, 91; 734 A2d 361 (Ch Div 1999)("[W]hile the Commissioner's plan for rehabilitation cannot be implemented without a court finding that it is fair and equitable, deference is given to the means the Commissioner chooses to utilize in going forward with rehabilitation. As such, the Rehabilitator's determination concerning the manner in which to proceed will not be set aside unless it is shown to be arbitrary or unreasonable."); *see also Ambac*, 351 Wis at 569 ("testimony established the commissioner appropriately exercised its discretion in formulating a plan that was 'fair and equitable' . . . .").

The standard is easily satisfied here. Pursuant to MCL 500.8114(2), the Director acting solely in her capacity as Rehabilitator, and subject to the approval of this Court as may be required, is authorized to "take such action as he or she considers necessary or appropriate to reform and revitalize the insurer . . .." MCL 500.8114(2). Per MCL 500.8121, this includes the power:

> (h) To use assets of the insurer's estate under a [rehabilitation] order to *transfer policy obligations to a solvent assuming insurer*, if the transfer can be arranged without prejudice to applicable priorities under section 8142.
>
> (i) To . . . effectuate the sale of property or other transaction in connection with the [rehabilitation] . . .

* * *

> (s) To exercise and enforce all the rights, remedies, and powers of a creditor, shareholder, policyholder, or member . . .

The Director also may enter into one or more contracts whereby a company agrees to assume, in whole or in part, or upon a modified basis, the estate liabilities of a company in rehabilitation in a manner consistent with 8114(4).

The Director has broad authority to propose a plan of rehabilitation founded upon a transaction that may fundamentally reform the insurer in the best interests of the policyholders, other creditors, and the public. MCL 500.8114; s*ee also, e.g., Minor v Stephens*, 898 SW2d 71, 80 (Ky, 1995) (recognizing broad discretion of commissioner to rehabilitate a company and to take action "deemed necessary or appropriate to reform or revitalize the insurer."); *see also id.* ("Full powers are granted to deal with the property and business of the insurer.").

Section 8116(2), MCL 500.8116(2) further provides that:

> (2) The rehabilitator may petition at any time the circuit court for Ingham county for an order terminating rehabilitation of an insurer. . . . If the court finds that rehabilitation has been accomplished and that grounds for rehabilitation under section 8112 no longer exist, it shall order that the insurer be restored to possession of its property and the control of the business.

These sections empower the Director to propose, and the Court to approve, a plan of rehabilitation that includes an acquisition of operations via an agreement accompanied by an order directing restoration to the insurer of possession of its assets and control of the business, where the assets include reserves and reinsurance supporting insured (here, "Scheduled") liabilities, while leaving behind claims (if any) derivative of toxic Affiliated Investments and the contagion of an indicted Controlling Shareholder (here, "Unscheduled Liabilities").

This is precisely what the Rehabilitator and the Court have done. Entry of the Rehab Order against Pavonia created an estate, comprised of its assets and liabilities, including those

arising under insurance policies and annuities. MCL 500.8112, 8113. Upon notice given individually and by publication, a claims process was initiated to surface Unscheduled Liabilities, and a schedule was set for the submission and resolution of comments and objections to the Rehabilitation Plan, including a hearing on the Rehabilitation Plan on December 5, 2019. Ordinary course of business expenses and insurance claims are being paid as they come due and will not be avoided. The Unscheduled Liabilities include non-insurance claims and liabilities that may arise from the Affiliated Investments and Pavonia's membership in a group under the ultimate ownership of the Controlling Shareholder. The final order approving the Rehabilitation Plan will include provisions enjoining and otherwise precluding the assertion of claims for such Unscheduled Liabilities post-Closing against Pavonia and Aspida Holdco, LLC, and will restore to Pavonia possession of its property and control of its business (including its policies), thereby completing the separation of Pavonia and ServiceCo from the Controlling Shareholder, the NC Insurer Affiliates, and the Affiliated Investments.

The Director has unequivocally declared her concerns over the uncertain financial position of Pavonia affiliates, the federal criminal charges against the Controlling Shareholder, and the North Carolina rehabilitation proceedings. See Rehab Order at 4-5; Rehab Pet at 5-6. With the consent of Pavonia's Board of Directors, this Court entered the Stipulated Order to protect Pavonia, its Policyholders and Creditors.

The Transaction, the Plan, and their protections are reasonable solutions to the current risks facing Pavonia; *i.e.*, the Affiliated Investments, the receivership of the NC Insurer Affiliates, and the Controlling Shareholder's indictment. As the Rehabilitator confirms in the Plan:

> The Stock Purchase Agreement is therefore central to this Plan, and the Rehabilitator finds that it is consistent with the Plan's objectives and

> principles, circumstances, findings, and conclusions set forth herein. Accordingly, the Rehabilitator hereby confirms to the Court that: (a) she or her representatives have reviewed the final version of the Stock Purchase Agreement; (b) the Stock Purchase Agreement and Buyer's acquisition of Pavonia are subject to DIFS' Form A regulatory approval and the Court's approval of this Plan; and (c) she has determined that the rehabilitation process and submission of this Plan for Court approval fully protects Pavonia, its Policyholders, and Creditors; (d) the Transaction Parties have represented that they are ready and willing to perform or cause the performance of the obligations under the Stock Purchase Agreement; and (e) she recommends that the Court approve this Plan which incorporates the Stock Purchase Agreement.
>
> The Rehabilitator has further determined that assuming DIFS' Form A regulatory approval, the rights of the Policyholders to coverage under their Policies will be completely secured as a result of the Stock Purchase Agreement and the Buyer's acquisition of Pavonia.

(Plan at 15-16) (Emphasis added.)

It cannot be reasonably disputed that the Plan is neither arbitrary, capricious, fraudulent, or unlawful, and thus is free from any abuse of discretion. The Plan is the mechanism the Rehabilitator selected to reform and revitalize Pavonia, and protects Pavonia's policyholders, creditors and the public. It circumscribes the liabilities that are ultimately restored to the Company and transferred with the stock for fair consideration.

The Rehabilitator has not abused her discretion in proposing the Plan, and the Court should approve it consistent with law. As demonstrated above, not only does Objector have no interest upon which to object here, but it has not – and indeed cannot -- overcome this conclusion.

CONCLUSION

Objector has no right or other interest upon which to object to the Plan. It has pressed the same "concerns" with the DIFS that is conducting the Form A review, and thus has failed to exhaust a pending administrative remedy. The Director has not abused her discretion in

proposing the Plan. The Plan has been from the start, and remains, fair and equitable to Pavonia, its policyholders, creditors and the public, and should be approved without delay or modification.

Dated: November 1, 2019

Respectfully submitted,

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