STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

ANITA G. FOX, Director of the Michigan CR Department of Insurance and Financial Services, Petitioner, v. PAVONIA LIFE INSURANCE COMPANY OF MICHIGAN, Respondent.	Case No. 19-504- Hon. Wanda M. Stokes

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GBIG HOLDINGS, INC'S ("GBIG") BRIEF IN SUPPORT OF EMERGENCY MOTION FOR RECONSIDERATION, TO REVISE THE COURT'S JULY 10, 2020 ORDER TO REMOVE THE AUTHORITY OF REHABILITATOR, FINDINGS OF NONCOMPLIANCE WITH SPA, AND THREAT OF SANCTIONS OR, IN THE ALTERNATIVE, TO STAY THE EFFECT OF ITS ORDER

INTRODUCTION

This Court's July 10, 2020 Order Granting In-Part Buyer's Motion for Emergency Relief does not merely "grant in part" Aspida's motion, but rather finally resolves the parties' rights and places GBIG on a super-highway with few exits towards a closing that GBIG expressed significant reservations about—without any required due-process safeguards. This Court rightfully noted at the hearing the prior afternoon that it wanted all parties to come to the closing table knowing that each had done its due diligence and was agreeable to the deal. But that is not what this Court's order does. Rather, it makes any pre-closing due diligence a façade, because, if GBIG does not close (under threat of sanctions), the Rehabilitator may sell the company anyway.

Moreover, the Court's order takes simply unprecedented and unconstitutional steps by forcing GBIG to sell Pavonia upon the threat of sanctions and without an opportunity for any meaningful appeal of this Court's order. Though relying on MCL 500.8106 to issue such an injunction and to threaten such sanctions, the Court contravenes that statute, which says that "[t]his section *shall not be construed to abridge otherwise existing legal rights . . . .*" (Emphasis added.) Yet the Court does just that—implying that any action by GBIG to protect its rights other than agreeing to an unacceptable closing (appeal, termination, or other) may result in contempt. Additionally, the Court confers on the Rehabilitator authority to assume *ownership* of Pavonia, an authority the statute does not provide and which impairs GBIG's constitutional rights.

This Court perhaps unintentionally takes these unlawful steps, and it should reconsider its order and instead revert to its prior Order, which preserved the parties' rights. Alternatively, this Court should revise its Order as proposed. But if it chooses to do neither, the Court should recognize the infirmities in and the far-reaching and irreversible impact of its order and grant a stay pending GBIG's appeal. **Because the Court ordered closing by 5 p.m. Tuesday, GBIG respectfully requests a ruling by 12 p.m. Monday.**

STANDARD OF REVIEW

Under MCR 2.119(F)(3), a motion for reconsideration should be granted where the moving party demonstrates "a palpable error by which the court and the parties have been misled and show[s] that a different disposition of the motion must result from correction of the error." This rule does not restrict the court's discretion to give a second look at the issues. *In re Estate of Moukalled*, 269 Mich App 708, 714; 714 NW2d 400 (2006). Instead, the court rule "allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Kokx v Bylenga,* 241 Mich App 655, 659; 617 NW2d 368 (2000).

This Court also has considerable discretion to revise its orders. In particular, MCR 2.612(C)(1)(a) & MCR 2.612(C)(1)(f) enable this Court to revise its judgments due to "mistake, inadvertence, surprise" or "any other reason justifying relief from the operation of the judgment." Moreover, although GBIG contests this Court's determination that an order granting specific performance and compelling closing is not "final," this Court has marked its July 10, 2020 order as a non-final order, and such orders are "subject to revision before entry of final judgment" at any time. MCR 2.604(A).

Finally, an automatic stay applies for 21 days before any proceedings to enforce this Court's final orders. MCR 7.209(E)(1). Additionally, this Court may grant a discretionary stay under MCR 7.209(E)(2)(b).

ARGUMENT

I. This Court should hear this motion on an emergency basis.

Though Aspida's motion and demand for immediate closing on the proposed sale of Pavonia presented no real emergency, the Court has now created an emergency by its July 10, 2020 order. By compelling an immediate closing, backing that order with threats of sanctions, and

authorizing the Rehabilitator to exercise powers "on behalf of Seller" (on a time frame of just four calendar days and two business days) , the Court has provided GBIG with no choice but to request this emergency relief on a short turn-around.

GBIG has moved forward with due diligence on closing as this Court allowed. But GBIG is concerned that it has no recourse under this Court's order if, upon completion of that due diligence, it determines to exercise its right to terminate "for any reason or for no reason" under Section 12.01(h) of the SPA. It is unclear whether this Court will view such an action as an act of contempt or view the Rehabilitator as authorized to sell the company *despite* the lack of a valid contract authorizing such a sale.

To protect its rights, GBIG is prepared to immediately appeal to the Michigan Court of Appeals. Nonetheless, GBIG is required to return to this Court first to request a stay, MCR 7.209(A)(2), and provide this Court with an opportunity to correct its mistakes before GBIG is irreparably harmed by this Court's orders. Accordingly, this motion presents a real emergency: if GBIG does not receive relief from this Court by noon on Monday, it will need to appeal to have any opportunity to obtain a response from the Court of Appeals before 5 p.m. on Tuesday. Therefore, GBIG respectfully asks this Court to reconsider, revise, or stay its order.

II. This Court should either wholly reconsider its order or at least revise its order to remove: (1) the unlawful grant of authority to the Rehabilitator; (2) the threat of sanctions for a party's exercise of contractual rights; (3) and its summary findings regarding the parties' contract dispute.

This Court's order far overstepped the Court's and the Rehabilitator's authority, by summarily disposing of a contractual dispute, compelling a sale contrary to GBIG's contractual rights, and authorizing the Rehabilitator to act as an owner of Pavonia without statutory authority for doing so. This Court should merely reconsider its ruling and restore the status quo. Or, alternatively, the Court should revise its order to remove these unfounded findings and demands.

a. The Court's order unlawfully authorizes the Rehabilitator to perform acts on behalf of Seller.

First, this Court's Order improperly authorizes the Rehabilitator to perform acts "on behalf of Seller" (i.e., GBIG). That authorization is without any legal support for the reasons explained in GBIG's Response to Court Order Providing Rehabilitator Authority to Act on GBIG's Behalf in Selling Pavonia. This Court should revise its order and remove the authorization under Paragraph 6 for those reasons.

b. The Court's order improperly threatens sanctions for the exercise of a parties' contractual and due-process rights—contrary to statute.

Second, this Court's inclusion of a threat of sanctions for failure to comply with its orders leaves GBIG in an untenable position: close upon unacceptable terms or face a forced closing and sanctions (with no prospect of a meaningful appeal). The Court has ordered an immediate closing on Tuesday. It has authorized the State to proceed without GBIG's consent if GBIG does not close. And Paragraph 8 of this Court's Order provides that the "failure of any party to Comply with this Order shall result in sanctions." Compelling GBIG to close without any prospect of a meaningful appeal of this Court's order and upon threat of sanctions is contrary to GBIG's contractual rights, its due-process rights, First Amendment, and other constitutional rights, and the very statutory authority that the Court cites as the basis for its order.

Taking the easiest of those first, this Court cited as the basis of its order MCL 500.8106. But MCL 500.8106(3) specifically preserves "existing legal rights," stating that "*this section shall not be construed to abridge otherwise existing legal rights,* ***including the right to resist*** *a petition for liquidation* ***or other delinquency proceedings or orders***." In other words, Section 8106 cannot be used to punish the exercise of "existing legal rights," including challenging the orders of this Court in this proceeding.

No other result would be constitutional. The U.S. Constitution preserves the right to access to courts under both the Petition Clause of the First Amendment and under the Due Process Clause. *Swekel v City of River Rouge*, 119 F3d 1259, 1261 (CA6 1997). GBIG's exercise of appeal rights is equally an exercise of the constitutional right to access the courts. Further, it is axiomatic in constitutional law that the government cannot take action that retaliates against a party for the exercise of its constitutional rights. *Holzemer v City of Memphis*, 621 F3d 512, 520 (CA6 2010). Accordingly, this Court's order is not only contrary to MCL 500.8106 but also constitutionally infirm because the directive for an immediate closing under the threat of sanctions and with the backstop of being conducted against GBIG's consent—without any recourse to appeal and with potential sanctions for exercise of GBIG's contractual rights, including termination—is contrary to these constitutional guarantees.

This Court should therefore revise its order to remove the threat of sanctions or, at a minimum, clarify that GBIG will not be sanctioned if it chooses to appeal this Court's order or terminate the SPA to prevent such action.

c. The Court improperly made summary findings on the parties' contractual dispute.

Third, this Court erroneously made summary findings regarding the parties' contractual dispute. To GBIG's great surprise, and although the Court said on the record at the hearing on Thursday afternoon that it would not be granting "specific performance" to Aspida, that is precisely what it did by its Order on Friday morning.

The Court found that "[t]he circumstances described in the Motion present an emergency requiring judicial relief pursuant to MCL 500.8105 *and Sec. 14.14 of the Stock Purchase Agreement* . . . " (Order, p. 2, ¶ 1.) The Court found that GBIG took "actions . . . contrary to pursuing closing as described in the SPA, including Section 7.01(a) and (ee), 7.03(a), and 8.09(a)."

(*Id.* at ¶ 3.) And the Court held that "Seller is compelled to specifically perform its SPA obligations . . . and to close the transaction by 5:00 p.m. EDT on Tuesday, July 14, 2020." (*Id*. at p. 3, ¶ 2.) In other words, this Court adjudicated the contractual dispute between the parties *without a complaint, without an answer, and without a motion for summary disposition or trial*—all in just eight days on an "emergency" basis. Moreover, the Court purported to provide Aspida a remedy under Section 14.14 of the SPA even though the SPA grants "exclusive" jurisdiction to New York courts, (SPA Section 14.11(a)), and despite a pending action between the parties in New York to resolve these exact claims.

This Court's decision to summarily decide a contract dispute that was not properly in front of the Court, despite its comments on the record that it would not do so, was gravely mistaken. The Court should reconsider or revise its order to remove its summary findings and conclusions on the parties' contract dispute.

d. This Court can immediately correct its errors by reconsidering its ruling entirely or entering the attached proposed order revising its ruling.

This Court should immediately correct its errors and reconsider its ruling entirely, leaving in place its prior June 25, 2020 and June 29, 2020 orders.[1] If it does not reconsider entirely, this Court should revise its orders by entering the attached Order that would: (1) eliminate any assertion that the Rehabilitator can sell a company it does not own; (2) expressly preserve the parties' exercise of contractual and constitutional rights; and (3) remove this Court's findings and order on the parties' contract rights. (Ex A, Proposed Amended Order.)

[1] The June 25, 2020 order, in particular, was carefully drafted to preserve the parties' rights under the SPA. (Par. L.)

III. Alternatively, this Court must stay the effect of its July 10, 2010 Order during the pendency of an appeal by GBIG.

In the alternative, if this Court does not modify its Order consistent with the attached proposal, then GBIG intends to immediately appeal in order to preserve its contractual rights and to avoid any potential sanctions or contempt from this Court. Therefore, this Court should stay the effect of its judgment pending appeal. In light of the direct and immediate impact of this Court's order and the significant legal concerns with the validity of this Order, a stay is justified and should be granted per MCR 7.209(E)(2)(b).

Because similar concerns are implicated in both entering a stay and entering a preliminary injunction, there is substantial overlap in the test governing the Court's exercise of discretion in each of those actions. *Nken v Holder*, 556 US 418, 434 (2009). Generally, therefore, the test for whether to grant a stay of the proceedings pending an appeal considers:

> (1) the likelihood that the party seeking a stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting a stay. [*Crookston v Johnson*, 841 F3d 396, 398 (CA6 2016); compare *Thermatool Corp v Borzym*, 227 Mich App 366, 376 (1998) (listing the factors for deciding a preliminary injunction in Michigan).]

Each of these favors individually—and the balance of all of them together—weighs heavily in favor of a stay pending appeal.

a. GBIG is likely to succeed on the merits of its appeal, because this Court's order erroneously rewrites the parties' contract, extends authority to the State that it does not have, and violates GBIG's constitutional rights.

On the first, GBIG has a strong likelihood of succeeding on its appeal. Respectfully, this Court's order strays far beyond the Court's authority under any provision of Chapter 81 of the Insurance Code, wrongfully rewrites the SPA, purports to grant authority to the State that it does not have, and deprives GBIG of significant constitutional rights.

Starting with the authority of the Court to act, the Order purports to be based on MCL 500.8105 and MCL 500.8106. But, as noted above, MCL 500.8106(3) specifically prevents this Court from crafting an order that abridges GBIG's "otherwise existing legal rights." That includes GBIG's contractual rights under the SPA to set the terms of the closing purchase price, (SPA Section 2.03), and, if it so decides, to terminate the SPA "for any reason or for no reason," (SPA Section 12.01(h)), including for the reason that the closing purchase price does not accurately reflect the value of Pavonia. All of these rights were expressly reserved to GBIG by the June 25, 2020 Order Approving Plan of Rehabilitation, which—in adopting the Plan—stated that "*[n]othing in this Order will affect, relinquish, modify, or waive any Closing condition, termination right, or other right or obligation due under or set forth in the SPA and any related agreements*." (Order Approving Plan, p. 23, Para. L) (emphasis added). The Court's apparent reversal, purportedly to effectuate an order that preserved GBIG's rights ***and*** based on authority that expressly carves out pre-existing rights is improper. Further, by statute, the "otherwise existing legal rights" of GBIG also expressly extends to "the right to resist . . . delinquency proceedings or orders." MCL 500.8106(3).

In other words, this Court cannot craft an order that rewrites the SPA (and its prior order) in a supposed "enforcement" of the SPA (and its prior order) based on a statute that preserves "otherwise existing legal rights." And it cannot craft an order that impairs GBIG's due process right to file a meaningful appeal. But that is precisely what it purports to do. The Court has ordered GBIG to close by 5 p.m. on Tuesday, on the threat of both: (1) sanctions if it does not do so; and (2) the threat that if it chooses to appeal, the Rehabilitator will nonetheless move forward with selling a company the State does not own. This alone is significant legal error, and GBIG has a strong likelihood of success on appeal.

GBIG is also likely to succeed in challenging this Court's wrongful exercise of jurisdiction over a contract dispute and rewriting of the SPA on that basis. Section 14.11(a) could not be more clear in its broad scope: the parties submitted "*any* Action arising out of or *relating to this Agreement*, the Transactions, the formation, breach, termination or validity of this Agreement . . . *to the* ***exclusive*** *jurisdiction of the courts of the State of New York . . . [or] the federal courts for the Southern District of New York*." (Emphasis added.) "Any" means "all." Merriam-Webster.com (defining "any" to include "every" and "all"), accessed July 12, 2010. Thus, contrary to Aspida's counsel's assertions at hearing that this provision somehow applied *only* to "post-closing disputes," the SPA is plain that "any" dispute "relating to this Agreement" or to the "breach . . . of this Agreement" belongs in the "exclusive" jurisdiction of New York. (Section 14.11(a)). By granting "specific performance" to Aspida and summarily resolving the contract dispute, (Order at p. 3, ¶ 2), this Court erred, and there is a strong likelihood of reversal on appeal.

GBIG also has a strong likelihood of success in challenging the Court's purported grant of authority to the Rehabilitator that the State does not possess under Chapter 81. Reading MCL 500.8105 and MCL 500.8106 as implicitly providing the Department of Insurance and Financial Services with the authority to sell a company ***that DIFS does not own*** on GBIG's behalf and against GBIG's consent, without any textual basis in the statute for so holding, violates basic principles of Michigan administrative law. Administrative agencies are creatures of statute. *York v City of Detroit*, 438 Mich 744, 767; 475 NW2d 346 (1991). As such, "[t]he powers of administrative agencies are thus inherently limited." *Herrick Dist Library v Library of Michigan*, 293 Mich App 571, 582; 293 Mich App 571 (2011). An agency has no power in the absence of "clear and unmistakable language" in a statute "since a doubtful power does not exist." *Mason Cty Civil Research Council v Mason Cty*, 343 Mich 313, 326–27; 72 NW2d 292 (1955). There is no such "clear and unmistakable" authority for the Rehabilitator to sell stock it does not hold under

Chapter 81 of the Insurance Code. Accordingly, this Court erred in allowing the Rehabilitator to sell Pavonia "on behalf of Seller," and GBIG has a strong likelihood of success on appeal.

Moreover, GBIG is likely to succeed in raising constitutional challenges to this Court's order. GBIG noted its due process and First Amendment Petition Clause concerns with the order, above. Further, this Court's order purports to delegate all of GBIG's contractual rights regarding closing—down to the very question of *whether* and *if* GBIG can agree to close for the dollar amount on the closing statement—to the State of Michigan.

That assumption of all contractual rights by the State is a violation of the United States Constitution, which forbids state laws that impair contracts. US Const, Art 1, § 10, cl. 1; *General Motors Corp v Romein*, 503 US 181, 187 (1992). In particular, GBIG maintains the contractual rights under the SPA to set the Closing Purchase Price by delivering the Estimate Closing Statement, (SPA Section 2.03(a)), to control the payment of long-term incentive payments, (SPA Section 2.03(a)), to terminate the SPA "for any reason or for no reason" if it decides the deal is bad, (SPA Section 12.01(h))—among other rights. Allowing the Rehabilitator to close on GBIG's behalf will impair all of these rights, and indeed force an involuntary sale of the company. Doing so would be unconstitutional.

Consequently, for each of those reasons, GBIG has a strong likelihood of success on the merits on its appeal.

b. There is an immediate threat of irreparable harm—that Pavonia will be sold without GBIG's consent and contrary to its interests.

On the second factor, GBIG easily demonstrates irreparable harm. "[T]o establish irreparable injury, the moving party must demonstrate a non-compensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient

degree of certainty," and "[t]he injury must be both certain and great, and it must be actual rather than theoretical." *Thermatool*, 227 Mich App at 377. The loss of a business "constitutes irreparable injury." *Performance Unlimited, Inc v Questar Publishers, Inc*, 52 F3d 1373, 1382 (CA6 2004).

In this case, the Court's order threatens GBIG's ownership of Pavonia by ordering a closing by Tuesday, July 14 at 5 p.m., and asserting that, if such closing does not happen, the State can sell the company without GBIG's consent. Pavonia is inherently unique—as Aspida has itself argued in contending for specific performance—and the loss of this business would inherently constitute an irreparable injury. *Performance Unlimited,* 52 F3d at 1382. The threatened sale of Pavonia is "certain": the Court has ordered that the sale will happen in one way or another (either by force or threat of sanction). Thus, the injury is not "theoretical" but "actual." *Thermatool*, 227 Mich App at 377. GBIG easily satisfies the irreparable injury prong.

c. There is no harm to Aspida or Pavonia in granting a stay.

On the third factor, there is no harm to either Aspida or Pavonia in granting a stay. As for Aspida, its contractual rights remain regardless of the result of an appeal. Either closing will happen upon terms acceptable to GBIG, or Aspida will be paid the break-up fee and repaid the loan under Section 12.04 of the SPA. In either event, Aspida will stand in the same position under the SPA that it has always been in.

Neither will Pavonia be harmed during the course of an expedited appeal. Pavonia will remain in rehabilitation and under the control of the Rehabilitator for that period. The status quo will not change. Further, contrary to any argument that the Rehabilitator may make regarding financial loss to the company, Pavonia is *solvent* and significantly so. Even by the Rehabilitator's calculations, the company has a capital and surplus of approximately $68 million. By GBIG's calculations, the company is solvent to the tune of $150 to $160 million.

The threat that GBIG will become *insolvent* is not a real threat in the absence of significant mismanagement of the asset. Pavonia has lost some value during Rehabilitation (approximately $5 million); but a continued loss of value is neither certain nor even likely. Yet, even if this Court assumed that Pavonia continued to lose money at the same rate as it has during Rehabilitation, the company would remain solvent for 12 years. The company can withstand an expedited appeal without significant risk.

d. The public interest favors granting a stay.

Finally, the public interest favors granting a stay during the course of GBIG's appeal. GBIG's appeal of this Court's order will raise significant questions of the reach of government authority over the shareholder of an insurer—ultimately, whether the state government may compel the involuntary sale of a solvent insurance company on terms that are unacceptable to the owner and sell a company it does not own. As noted above, this raises constitutional questions as well as significant questions on the reach of Chapter 81 of the Insurance Code and the statutory authority of the Michigan Department of Insurance and Financial Services. The public deserves the opportunity to have such questions answered. A stay is warranted.

CONCLUSION

This Court's order perhaps unintentionally takes unprecedented and unlawful steps in forcing a sale of Pavonia contrary to GBIG's contractual and constitutional rights. This Court should reconsider its order or revise the Order to preserve GBIG's rights. Alternatively, GBIG will be filing an immediate appeal, and asks that this Court grant a stay during the pendency of such appeal.

Respectfully Submitted,

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