

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

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

Case No. 19-504-CR

Hon. Wanda M. Stokes

Petitioner,

v.

PAVONIA LIFE INSURANCE COMPANY  
OF MICHIGAN,

Respondent.

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**GBIG HOLDINGS, INC'S ("GBIG") BRIEF IN RESPONSE TO COURT ORDER  
PROVIDING REHABILITATOR AUTHORITY TO ACT ON GBIG'S BEHALF  
IN SELLING PAVONIA**

## INTRODUCTION

This Court grievously erred by including language within its Order Granting In-Part Buyer’s Motion for Emergency Relief (the “July 10 Order”) that purports to grant the Rehabilitator authority to act “on behalf of Seller”—GBIG—without any factual or legal findings that would support such an authorization. GBIG is not in rehabilitation; its asset, Pavonia, is. Nor has the Rehabilitator or this Court cited any grounds upon which the Rehabilitator can make multimillion-dollar decisions on GBIG’s behalf or rewrite GBIG’s contractual rights and obligations.

Simply put, there is no legal basis for the Rehabilitator to act on behalf of GBIG or to sell stock the Rehabilitator does not own. This Court should amend its Order.

## ARGUMENT

### **I. The Rehabilitator has no power to act on GBIG’s behalf.**

First, and most directly, the Rehabilitator has no power to act on GBIG’s behalf. The Stipulated Order Placing Pavonia Life Insurance Company of Michigan (“Pavonia”) into rehabilitation gave the Rehabilitator control *only* over Pavonia—not over GBIG. (Stipulated Order, p 11, ¶ 1.) The effect of the Order was to allow the Rehabilitator to “take immediate possession of *the assets of the insurer*” (again: Pavonia) “and to administer [those assets] under the court’s general supervision.” MCL 500.8113. The assets that are in the possession of the rehabilitator are the “general assets”—in other words, “all property, real, personal, or otherwise” of the company. MCL 500.8103(g); *Commissioner of Ins v Arcilio*, 221 Mich App 54, 64; 561 NW2d 412 (1997).

Notably, only “the assets of the insurer” are placed into Rehabilitation; not the stock of the company. *Id.* Consistent with the basic tenet of corporate law that recognizes a separation of ownership and control, see, e.g., *Dole Food Co v Patrickson*, 538 US 468, 474 (2003) (“A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities.”), the Rehabilitator controls management of the business and disposition of the property of Pavonia

through the receivership. But she has no power over who owns the shares of the company.<sup>1</sup>

Nothing in the Stipulated Order authorized the Rehabilitator to act on GBIG's behalf. Nothing in any subsequent order granted such authority. Nor does anything else in Chapter 81 of the Insurance Code. Yet that is precisely what Paragraph 6 of the Court's July 10 Order purports to do: give the Rehabilitator "*authority to execute all documentation and take all necessary actions on behalf of Seller (GBIG) to consummate the closing on the transaction . . .*" (July 10 Order, p 4, ¶ 6.) There is no basis for such a grant of authority.

To put a finer point on it, the Court's authorization to "take all necessary actions on behalf of Seller to consummate the closing" would include the very act of relinquishing ownership in the company—signing over the shares of Pavonia. As an essential closing deliverable (perhaps *the* essential deliverable), Section 3.04(a) provides GBIG with the right and obligation to endorse and transfer the stock certificates in Pavonia. This Court's order would authorize the Rehabilitator to transfer stock certificates that *she does not hold*, and to sell a company that *she does not own*. In doing so, this Court stepped *far* outside its authority, and the Court must revise its order.

**II. The general authorization of injunctions to facilitate the receivership does not justify converting a *consent* rehabilitation and *voluntary* contractual sale into a forced sale of Pavonia by the Rehabilitator.**

GBIG anticipates that Aspida or the Rehabilitator may claim the general provisions under MCL 500.8105 or MCL 500.8106 authorize the Rehabilitator to sell Pavonia on GBIG's behalf (despite the fact that she does not own the company). Those provisions do not.

MCL 500.8105 permits this Court to authorize injunctions that facilitate the Rehabilitator's authority over the business and assets of an insurer. Those include injunctions that "prevent . . . (a)

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<sup>1</sup> GBIG notes that DIFS, in a separate role as regulator (not as receiver), has regulatory approval power for any sale. See MCL 500.1311. That authority is limited to preventing the sale or transfer of a company. *Id.* That does not indicate *affirmative* authority to cause a transfer the stock of a company or take other similar action due to receivership. *Id.*

the transaction of further *business* by the insurer; (b) the transfer of *property*; . . . (d) waste of the insurer’s *assets*; (e) dissipation and transfer of *bank accounts*; . . . (g) the obtaining of preferences, judgments . . . or liens against the insurer, *its assets*, or its policyholders,” and other items that are focused on what the Rehabilitator controls: the business and assets of the insurer. MCL 500.8105. Likewise, MCL 500.8106 is concerned with preventing interference with the receiver’s exercise of authority over only what it controls (the business and assets of the company). And MCL 500.8106(3) specifically demands that “[t]his 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—asserting a parties’ legal rights in resistance to “delinquency proceedings or orders” is not a basis for an injunction under Section 8106.

The Rehabilitator’s response focuses exclusively on her control of “assets” of Pavonia or to sell those assets under MCL 500.8121. That proves GBIG’s point. The Rehabilitator controls or could sell the “assets” of Pavonia—she does not control GBIG and cannot assume any power to act on GBIG’s behalf or to sell the *stock* of Pavonia.

Moreover, reading any part of Chapter 81 as implicitly providing DIFS with the authority to sell a company on GBIG’s behalf, 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. This Court erred in including language that the Rehabilitator can sell Pavonia “on behalf of Seller.” The Court should amend its order.

**III. Allowing the Rehabilitator to sell Pavonia in place of GBIG is an unconstitutional impairment of GBIG’s contractual rights under the SPA.**

The Court’s authorization for the Rehabilitator to sell GBIG in place of Pavonia is also an unlawful impairment of GBIG’s contractual rights under the SPA. Before this Order, the Court was careful not to take any action that required a result contrary to GBIG’s rights under the SPA. No prior order or other act of this Court before its July 10 Order purported to exercise any control over GBIG or to impair any contractual right of Seller. Rather, *all* prior orders of this Court recognized that GBIG maintained contractual prerogatives.

This Court’s order, however, 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.

**IV. Providing the Rehabilitator with such powers is contrary to this Court’s concern with allowing GBIG due diligence.**

Lastly, authorizing the Rehabilitator to act on GBIG’s behalf is inconsistent with this Court’s apparent attempt to protect GBIG’s right to conduct due diligence prior to closing. The

Court specifically included within its order language intended to enable GBIG to do its due diligence before closing and determine whether this sale is a fair deal. Specifically, the Court allowed GBIG to obtain documentation related to cost overruns. (July 10 Order, p 4 ¶ 5.)

That protection of GBIG’s due diligence is a dead letter if this Court’s order allows the Rehabilitator to sell the company over GBIG’s objection. While appreciating this Court’s concern that GBIG and its counsel be allowed to confirm such information, the Court has removed any remedy if, upon review of such documents, GBIG determines that it cannot move forward with the transaction. In order to strike the balance the Court appeared to take at oral argument—moving forward while not impairing parties’ rights—this Court needs to revise its order.

### CONCLUSION

It is a grievous mistake for this Court to authorize the Rehabilitator to exercise powers “on behalf of” GBIG to sell Pavonia when the Rehabilitator does not own Pavonia, does not hold Pavonia’s stock, and has no statutory or other legal authority to act on GBIG’s behalf. Nothing in Chapter 81 allows such an order, and MCL 500.8106(3) specifically preserves GBIG’s “right to resist . . . delinquency proceedings or orders.” To authorize DIFS to exercise authority not granted by statute and which impairs GBIG’s contractual rights is both unlawful and unconstitutional. This Court should revise its order per MCR 2.612(C) and remove both Paragraph 6 and any other language suggesting an impairment of GBIG’s contractual rights.

Respectfully Submitted,

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