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

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

Petitioner,

v.

PAVONIA LIFE INSURANCE COMPANY OF MICHIGAN,

Respondent.
____________________________________/

Case No. 19-504-CR

Hon. Wanda M. Stokes

Christopher L. Kerr (P57131)
Assistant Attorneys General
Corporate Oversight Division
P. O. Box 30736
Lansing, MI 48909
(517) 335-7632
KerrC2@michigan.gov
Counsel for Petitioner

Peter B. Kupelian (P31812)
Clark Hill PLC
151 S. Old Woodward Ave., Ste. 200
Birmingham, MI 48009
(248) 530-6336
pkupelian@clarkhill.com

Ronald A. King (P45088)
Zachary C. Larsen (P72189)
Clark Hill PLC
212 E. Cesar E. Chavez Ave.
Lansing, MI 48906
(517) 318-3015
rking@clarkhill.com
larsenz@clarkhill.com
Counsel for GBIG Holdings, Inc.

____/

GBIG HOLDINGS, LLC'S OBJECTION TO AND BRIEF IN OPPOSITION TO THE REHABILITATOR'S APPLICATION FOR APPROVAL OF AMENDED PLAN OF REHABILITATION

TABLE OF CONTENTS

ClarkHill\J6331\403107\265361966.v2-1/7/22

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

We know how this movie ends because we have seen it all before. Nonetheless, DIFS does not seem to have learned from the past. Just nine months ago, after this Court compelled the forced sale of Pavonia under a Stock Purchase Agreement with Aspida Holdco, LLC ("Aspida"), the Michigan Court of Appeals unequivocally held that DIFS had no authority to unilaterally sell GBIG Holdings' stock in Pavonia. *Director of the Department of Ins and Fin Servs v GBIG Holdings, Inc*, unpublished opinion of the Court of Appeals, issued Mar 25, 2021 (Docket No 354182), p 16 (Ex. A). The Court affirmed under basic corporate law principles that Pavonia's stock is separate property that belongs to GBIG Holdings. *Id*. at 15. And the Court further held that Section 8114(4) of the Insurance Code does not provide any basis for DIFS to sell the stock of Pavonia that GBIG owns without GBIG's consent. *Id*. In other words, asking whether the Rehabilitator had the power to sell Pavonia on her own—as this Court enabled her to do in its July 10, 2020 order—the Court of Appeals resoundingly answered "no."

Those holdings are now the "law of the case" in this matter. They bind both DIFS as the Rehabilitator and this Court. Nonetheless, the Rehabilitator returns to this Court asking for *another* forced sale of GBIG Holdings' stock in Pavonia. (Rehabilitator's Appl. for Approv. of Amended Plan, ¶¶ 19–23) (proposing "a sale process"). She relies on *the same* statutory provision that the Court of Appeals held provided no authority to act on her own (*i.e.*, MCL 500.8114(4)). Even worse: this time, she seeks a forced sale without even the pretext of enforcing an existing contract for sale. She merely proposes to stand in the place of GBIG Holdings as a prospective seller, bid the stock in the company, select a purchaser, and sell GBIG Holdings' stock. Because the Court of Appeals has already held there is no legal support for the Rehabilitator to sell GBIG Holdings' stock, this Court is bound to reject the Rehabilitator's proposed Amended Plan.

Even if this Court were to consider the Rehabilitator's proposed Amended Plan on its merits, it has none. The proposed Amended Plan is not "fair and equitable" to the sole shareholder of Pavonia (*i.e.*, GBIG Holdings) because it significantly injures the value of GBIG Holdings' ownership interest through an expensive and inefficient fire sale of Pavonia that does not bring the right bidders to the table in order to maximize the value that GBIG Holdings receives from that sale. The purported purpose of the Rehabilitator's proposed Amended Plan is to separate Greg Lindberg and GBIG Holdings from Pavonia. That purpose can be accomplished through less injurious means via a voluntary sale by GBIG Holdings.

Thus, although the Rehabilitator's current proposal is legally baseless, GBIG Holdings is sensitive to concerns that the Rehabilitation of Pavonia must move toward a resolution. As a result, GBIG Holdings has been actively engaged in negotiating a sale of Pavonia to Axar Capital, LLC. Those parties have reached an agreement-in-concept for Pavonia's sale and expect a fully executed SPA very soon. A voluntary sale would accomplish the Rehabilitator's objectives while complying with the law of the case laid down by the Court of Appeals' opinion and respecting GBIG Holdings' legal rights. Moving forward with that transaction will also be much more expeditious than the Rehabilitator's proposal. The Rehabilitator's proposal requires retaining an outside brokerage firm who will need time to conduct due diligence, finding a bidder, selecting a bidder, drafting a contract, obtaining regulatory approval, and closing. With the Axar transaction, the SPA is largely drafted and only regulatory approval and closing will remain.[1] Therefore, this Court

[1] The Rehabilitator references in the proposed Amended Plan a concern that a sale process is more efficient than waiting for "one transaction" to close. It is not—for those reasons. Additionally, as GBIG Holdings can demonstrate once finalized, the SPA with Axar has few contingencies to close and the regulatory approval from DIFS will be the principal determinant of the closing date. Significantly, unlike the Aspida Holdco SPA, there is no open-ended termination right giving GBIG Holdings the prerogative to terminate simply upon payment of a break-up fee.

should reject the Rehabilitator's proposed Amended Plan, and it should allow GBIG Holdings to conduct a voluntary sale of Pavonia.[2]

BACKGROUND

GBIG Holdings need not exhaustively detail the history of this case. It is familiar to this Court. Though this Rehabilitation Proceeding was initially filed as a means of selling Pavonia from GBIG Holdings, Inc. to Aspida, the economics of that transaction increasingly became unfavorable for GBIG Holdings due to complicated calculations baked into the purchase price of that deal. Faced with a decision whether to close on the transaction, GBIG Holdings asked for more time. This Court initially granted that request. Even after approving the sale to Aspida as the adopted Plan of Rehabilitation, this Court gave the parties a month of time to negotiate an acceptable resolution. But Aspida refused to accept this Court's timeline. Instead, Aspida sought to compel closing on a sale on an expedited basis. The Rehabilitator joined Aspida's motion and went further—asking for the authority to implement the sale without GBIG Holdings' consent. This Court acquiesced and ordered GBIG Holdings to close on the sale to Aspida and granting the Rehabilitator the ability to close on GBIG Holdings' behalf, including the very act of signing away the stock of Pavonia that GBIG Holdings owns.

That order was in error. After this Court denied a stay, GBIG Holdings filed an emergency application for leave to appeal on the day the transaction was to take place. The Court of Appeals granted an emergency stay. Three weeks later, after briefing on the application, the Court granted leave. And, after full briefing and oral argument on the appeal, the Court of Appeals reversed this Court's holdings. The Court of Appeals determined, among other things, that: (1) the stock of

[2] GBIG Holdings anticipates that the SPA with Axar Capital will be executed shortly. But, if for any reason, the Axar transaction does not move forward as expected, GBIG Holdings can commit to conduct its own sales process of Pavonia and will provide an Order to the Court for the same.

Pavonia belongs to GBIG Holdings; (2) Section 8114 does not grant the Rehabilitator the authority to sell the stock of a company in rehabilitation; and (3) "there is no clear statutory language evidencing the rehabilitator's authority to sell the shares in Pavonia." *Dir of DIFS v GBIG Holdings, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Mar 25, 2021 (Docket No 354182), pp. 13–16 (Ex. A).

After remand, GBIG Holdings promptly negotiated a settlement with Aspida. Part of the settlement involved a sale of GBIG, LLC—which this court approved on June 24, 2021. Part of that settlement granted GBIG Holdings time to refinance the debt that Aspida held in Pavonia. With that time, GBIG Holdings successfully refinanced the Aspida debt through Axar Capital, LLC. That was no small feat in light ongoing threats of foreclosure from Aspida and the requirement of obtaining the approval by the North Carolina Rehabilitator of an amendment to a Subordination Agreement. Not only that, but GBIG Holdings' refinancing efforts also landed a potential sale: Axar Capital requested and was granted a fully executed Stock Purchase Agreement ("SPA") as a condition of the Loan. (Ex. B, Transaction Letter Agreement or "TLA.")

Axar then had until November 30, 2021, to decide whether to move forward with the deal. While conducting its due diligence, Axar Capital requested and received a meeting with DIFS and GBIG Holdings to discuss the proposed SPA. DIFS raised concerns during that meeting about a proposed Seller's Note that would provide for debt owed to GBIG Holdings as a part of the overall purchase price. That debt would be paid in kind by Axar (*i.e.*, interest would capitalize so no actual monetary payments would need to be exchanged during the term of the Note). And the Note would come due only after five years from the closing date. GBIG Holdings communicated to both Axar and DIFS that it intended to sell the Note and not to hold the debt. Further, upon a default, GBIG

Holdings would not be able to retake stock in Pavonia without DIFS' "Form A" approval—as required by statute. See MCL 500.1311(1), MCL 500.1312(1), and MCL 500.1315(1).

Nonetheless, though the Note gave GBIG Holdings no control over the operations of Pavonia nor any ability to obtain control without DIFS' pre-approval, DIFS insisted that this debt indicated continuing involvement by Greg Lindberg—to which it objected. As a result of DIFS' concerns, Axar Capital asked for a brief extension of time under the TLA to evaluate whether to execute the SPA as drafted or how to address DIFS' concerns in the proposed transaction. While awaiting Axar's decision, DIFS then filed this motion for Amended Plan—citing the delay by Axar in response to DIFS' concerns as a reason why this Court should force GBIG Holdings to sell Pavonia. In other words, DIFS' unfounded concerns caused the delay in GBIG Holdings' transaction with Axar, and now the Rehabilitator has used that delay as a basis to ask this Court to approve the Rehabilitator's proposed Amended Plan as an alternative disposition for Pavonia.

After DIFS' communications and filing, Axar determined not to execute the SPA as initially drafted. Instead, Axar Capital sought to renegotiate the deal around the concerns raised by DIFS. Thereafter, Axar and GBIG Holdings have negotiated diligently through the holidays to address DIFS' concerns and arrived at an agreement in principal for the sale of Pavonia that addresses DIFS concerns, removes the Seller's Note, and otherwise simplifies the transaction's structure to ensure a smooth closing. GBIG Holdings and Axar are in the process of "papering" those revised terms by revising the previous draft SPA and expect an executed SPA in short order.

Now—and with that deal pending—the Rehabilitator once again seeks court approval to conduct a unilateral sale of GBIG Holdings' stock in Pavonia, property she does not control based on legal authority she does not have (as the Court of Appeals already held). This Court should reject her request to conduct a unilateral sale of Pavonia and instead allow GBIG Holdings to proceed with a voluntary sale of Pavonia.

ARGUMENT

I. This Court cannot approve a sale of Pavonia without GBIG Holdings' consent because the Rehabilitator lacks authority to sell Pavonia on her own.

From the outset, the Rehabilitator's proposed Amended Plan is a non-starter. The question is not simply whether her proposed Amended Plan is "fair and equitable to all parties concerned." MCL 500.8114(4). (Spoiler alert: it's not—see Section II, below.) The threshold question is whether MCL 500.8114 grants her authority to enact the proposed Amended Plan in the first place. It does not.

The Rehabilitator yet again arrogates to herself the power to sell the stock in Pavonia that GBIG Holdings owns. That is beyond the authority given to the Insurance Commissioner in insurance rehabilitations under Chapter 81 of the Insurance Code. MCL 500.8101 *et seq*. Moreover, this Court does not even need to independently determine that legal question: the Court of Appeals already did. The Court of Appeals held just months earlier ***<u>in this matter</u>*** that: (1) the Rehabilitator does not control the stock of Pavonia; and (2) the Rehabilitator has no authority to sell the stock that GBIG Holdings owns on her own and without GBIG Holdings' consent. *Dir of DIFS v GBIG Holdings, Inc*, unpublished opinion per curiam of the Court of Appeals, issued Mar 25, 2021 (Docket No 354182), pp 15–16 (Ex. A).

The law-of-the-case doctrine binds the Court and the Rehabilitator to those holdings. Thus, this Court must reject her proposed Amended Plan of Rehabilitation both because it is contrary to the law-of-the-case and because the proposed plan is otherwise beyond the power of the Rehabilitator to enact.

a. The law-of-the-case doctrine prevents this Court from adopting any Plan of Rehabilitation that approves a sales process where the sale of Pavonia is not ultimately subject to GBIG Holdings' consent.

The law-of-the-case doctrine requires this Court to adhere to two fundamental holdings of the Court of Appeals in the prior appeal of this case: (1) GBIG Holdings, LLC owns and controls the stock of Pavonia—not the Rehabilitator; and (2) MCL 500.8114 does not grant the Rehabilitator the authority to unilaterally sell the stock. (Ex. A, pp. 15–16.) Those holdings alone prevent this Court from approving a sales process where the Rehabilitator sells the stock of Pavonia to the highest bidder as she proposes to do in her Amended Plan of Rehabilitation.

The law-of-the-case doctrine is, "in a sense, the 'analytical cousin of the doctrines of claim and issue preclusion.'" *AFT v State*, 334 Mich App 215, 225; 964 NW2d 113 (2020), quoting *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991). It generally holds that "an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals." *Grievance Adm'r v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The law-of-the-case is limited to "issues actually decided, either implicitly or explicitly, in the prior appeal." *Id*. But an appellate court's holding on those explicitly or implicitly decided issues is final where the facts remain materially the same. *Id*. at 259–260. The doctrine thus promotes consistency, "avoid[s] reconsideration of matters once decided during the course of a single lawsuit," promotes finality, and prevents forum-shopping. *AFT*, 334 Mich App at 225.

There is no doubt that these exact issues were explicitly decided in the prior appeal. The Rehabilitator's proposed Amended Plan asks this Court to approve "a sale process whereby ***the Rehabilitator will solicit bids for a third-party entity(ies) purchase*** and/or reinsure all or a portion ***of Pavonia's business . . . after which the Rehabilitator will select the successful bidder(s)*** following separate Court approval." (Rehabilitator's Appl. for Approv. of Amended Plan, ¶ 19) (emphasis added). She states that, after conducting that sales process, ***she "will then prepare***

transaction contract(s) with the successful, Court-approved bidder(s), ***and*** following any required Form A approval by DIFS, ***the Rehabilitator will*** file another petition requesting Court approval to ***close on these transaction contract(s)***." (*Id.*) (Emphasis added.) In other words, the Rehabilitator proposes to unilaterally conduct a sale of GBIG's stock in Pavonia from cradle to grave—from the "solicit[ing]" of "bids," to the selection of the "successful bidder," to the "prepar[ation of the] transaction contract(s)," and up to and including the closing of the sale and transfer of the stock of Pavonia. She proposed to do subject only to this Court's approval and without GBIG Holdings' consent to either the process or the result. She rests her purported authority to conduct such a sales process *solely* on her ability to "reform and revitalize the insurer" under MCL 500.8114(2). (*Id.*, at ¶ 5.)

The Rehabilitator's proposed Amended Plan leaves anyone familiar with this matter to wonder—did she even read the Court of Appeals' opinion? Her proposal is simply "*déjà vu* all over again."[3] When seeking to force the earlier sale to Aspida through on an existing contract, the Court of Appeals addressed the "Power of the Rehabilitator to Act on Her Own," and it plainly told her that she lacked that power. *Dir of DIFS v GBIG Holdings, Inc*, p. 13. Responding to the Rehabilitator's and Aspida's contention that "the rehabilitator had full authority to stand in the shoes of GBIG and sell Pavonia stock over any objections of GBIG," that Court disagreed. *Id.* Importantly here, the Court noted that Section 8114 grants no such authority. *Id.* at 14. The Court explained instead that Section 8114(2) grants authority to "take such action as he or she considers necessary or appropriate to reform and revitalize the insurer"—but that does not include the power to sell the stock of Pavonia. *Id.* Nor, the Court held, does MCL 500.8114(4) "speak to selling the

[3] This quote is widely attributed to and claimed by New York Yankees baseball great Yogi Berra. See https://yogiberramuseum.org/about-yogi/yogisms/.

shares in the company." *Id*. at 15. Indeed, as the Court explained, because "stock is considered the property of the stockholder separate and distinct from the property of the issuing corporation," **that property is "held by and, therefore, owned by third party GBIG.**" *Id*. (emphasis added). Pavonia's stock is not within the property encompassed by the Rehabilitation Estate. *Id*. Consequently, the Court of Appeals concluded "[t]here is no clear statutory language evidencing the rehabilitator's authority to sell the shares in Pavonia." *Id*. at 16.

Given that the Court of Appeals held that the Rehabilitator had no authority to force a sale without GBIG Holdings' consent when a GBIG-Holdings-signed contract was already in place, the obvious question arises: why does the Rehabilitator believe she can now force a sale where GBIG Holdings has never signed a contract for such sale (and there is not even an identified purchaser)? The Court of Appeals specifically held she lacks the authority to sell GBIG Holdings' shares in Pavonia. *Id*. at 16. And that Court specifically rejected interpreting MCL 500.8114 as giving the Rehabilitator that authority. *Id*. at 14–15. That holding is binding as the law of the case. *Lopatin*, 462 Mich 260. Indeed, even the Rehabilitator earlier acknowledged the binding nature of the Court of Appeals' ruling on this point in her Response to GBIG Holdings' Objection to *Ex Parte* Order Approving Willis Towers Watson's Compensation As Valuation Actuaries. There, she conceded that "***the Court of Appeals ruled that some form of GBIG Holdings involvement with, and consent to, a sale of Pavonia was required*** . . . ." (Rehabilitator's Resp. to Objection, p. 7) (emphasis added).[4] The Court of Appeals' holding is dispositive. This Court must reject the Rehabilitator's proposed Amended Plan because she lacks the authority to carry it out.

[4] The Rehabilitator also incorrectly further suggested that GBIG Holdings' power to withhold consent to a forcible sale of its property is limited. She cited no law either for that proposition or to contradict the Court of Appeals' holding that the stock of Pavonia is not the property of the rehabilitation estate to begin with and that MCL 500.8114 does not grant that power. Before the

b. MCL 500.8114 limits the Rehabilitator's authority in proposing a Plan of Rehabilitation.

Yet even if the law-of-the-case doctrine did not apply here, the Rehabilitator would still be flatly wrong in her assessment that MCL 500.8114 allows her to sell the stock of Pavonia as part of an Amended Plan of Rehabilitation for at least two reasons. *First*, basic corporate law is clear that the stock is the property of the shareholders and not part of the rehabilitation estate. (Again, we've established that once before in this matter.) *Second*, Section 8114 does not grant authority to conduct a sale. Each of those is independently sufficient to reject her proposed Amended Plan.

i. The shares held by GBIG Holdings in Pavonia are separate property from the Estate of Pavonia.

Start with the basics: stock is not the property of the company that issues it; stock is separate and distinct property that is held by shareholders. *Detroit v Kresge*, 200 Mich 668, 673; 167 NW2d 39 (1918). Though a simple enough axiom, this principle has eluded the Rehabilitator twice now in this case. Pavonia does not own its stock; GBIG Holdings does. Therefore, GBIG Holdings' stock in Pavonia is not property of the rehabilitation estate, and the fact that the Rehabilitator has displaced Pavonia's management per MCL 500.8113 does not give her power to sell GBIG Holdings' separate property. The property of GBIG Holdings still belongs to GBIG even if it relates to the corporate entity of Pavonia. That unassailable legal principle alone precludes her from attempting to sell stock she does not hold. And it sinks her proposed Amended Plan.

ii. Chapter 81 does not give a Rehabilitator the authority to hold a sale of the company through Rehabilitation.

Next, let's look at the statute. Reading Chapter 81 of the Insurance Code, MCL 500.8101 *et seq*, as implicitly providing the DIFS the authority to sell a company ***that DIFS does not own*** on

---

reasonableness of withholding consent even becomes relevant, the threshold question is whether the Rehabilitator has authority to sell GBIG Holdings' property. She plainly does not.

GBIG's behalf and against GBIG's consent violates basic principles of Michigan administrative law. It also contradicts the legislative directive to construe Chapter 81 in a way that protects shareholders.

In administering a rehabilitation under Chapter 81, the head of a state department (*i.e.*, DIFS) acts as the Rehabilitator exercising authority on behalf of the state agency. It is elementary administrative law that agencies are creatures of statute. *York v City of Detroit*, 438 Mich 744, 767; 475 NW2d 346 (1991). "The 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). Pointedly, 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).

This background administrative law requirement is instructive here. DIFS seeks to sell a company it does not own and execute contractual duties on GBIG's behalf when GBIG is not the entity in rehabilitation. Yet nowhere in Chapter 81 of the Insurance Code**Error! Bookmark not defined.** is there "clear and unmistakable" authority for the Rehabilitator to sell stock she does not own or to act on a parent company's behalf in exercising rights and executing duties that belong to the parent company. (Not to beat a dead horse, but the Court of Appeals has already said exactly that: "***[t]here is no clear statutory language evidencing the rehabilitator's authority to sell the shares in Pavonia***." *Dir of DIFS v GBIG Holdings, Inc*, p. 16. This Court is bound by that holding.)

Equally significant, Chapter 81 announces that its purpose is "the protection of the interests of insureds, claimants, creditors and the public *with minimum interference with the normal prerogatives of the owners and managers of insurers* . . . ." MCL 500.8101(3). Given that legislative purpose, the powers conferred on the Rehabilitator and the rehabilitation court under Chapter 81 cannot be construed to allow an order that transforms a consent rehabilitation into a forced sale and thereby forcefully deprives shareholders of their property. The various provisions of Chapter 81 must be construed as a uniform whole. *Midamerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014) ("When construing statutory language, [the court] must read the statute as a whole . . . ."); see also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (2012), pp 167–169 ("A legal instrument typically contains many interrelated parts that make up the whole. The entirety of the document thus provides the context for each of its parts."). And the protection of shareholders and the "minimum interference" with their "normal prerogatives" that is demanded by MCL 500.8101(3) cannot be squared with a reading of MCL 500.8114 that grants the Rehabilitator the power to forcibly separate shareholders from their ownership interest.

Allowing the Rehabilitator to stand in the shoes of an owner and alienate the owner from their own property—which is not even property of the rehabilitation estate—is the greatest possible "interference" with "normal prerogatives" of shareholders imaginable. (Again, the Court of Appeals already acknowledged this. (Ex. A, COA Opinion, at p. 15.)) For the second time, the Rehabilitator ignores her lack of authority. This Court should reject her proposed Amended Plan.

II. The proposal to remove owner GBIG Holdings, LLC from a sales process for its own property—its stock in Pavonia—is not "fair and equitable" given that GBIG Holdings, LLC is the principal interested party.

Assuming for the sake of argument that the Rehabilitator had authority to sell stock it does not own and can take actions that the Court of Appeals has held she does not have the statutory power to take, this Amended Plan is nonetheless not "fair and equitable to all parties concerned." MCL 500.8114(4). Namely, it places two entities (the Rehabilitator and Willis Securities, Inc. a/k/a Willis Re Securities) in charge of a process to sell GBIG Holdings' property when: (1) they have no incentive to maximize the sale value to GBIG Holdings; (2) Willis Securities' ("Willis") fees are expensive and unnecessary in comparison to other means of sale; and (3) Willis will need time to get up to speed while the asset of Pavonia is wasting away. This is neither "fair" nor "equitable" to GBIG Holdings—the principal party concerned as the sole shareholder whose stock is proposed to be sold.

The standard under MCL 500.8114(4) that a plan must be "fair and equitable to all parties concerned" plainly implicates the interest of the shareholders who are statutorily protected under Chapter 81 in addition to the interests of the insureds, claimants, and creditors of Pavonia. See, e.g., MCL 500.8101(3); MCL 500.8105(1)(k); MCL 500.8109a(c) & (d); MCL 500.8142(1)(*i*); MCL 500.8145(1). In other words, the proposed plan must balance whatever benefit is provided to insureds, claimants, or creditors of Pavonia with the detriment to the shareholders compared to other alternative proposals that could accomplish the same purposes or provide the same value to those interested persons.

The Rehabilitator's proposed Amended Plan does not. To the contrary, the proposed Amended Plan offers no greater benefits to insureds, claimants, or creditors that a voluntary sale of Pavonia would provide. The Rehabilitator's purported justification is simply to separate GBIG Holdings (and Greg Lindberg) from Pavonia. (Appl. for Approv. of Amended Plan, ¶¶ 15–16 & 27.) Yet that end is equally accomplished by the less injurious means of a voluntary sale. And the Rehabilitator's chosen means here—a forcible sale in which GBIG Holdings gives no consent and does not have even a seat at the table—greatly injures GBIG Holdings' interest as shareholder.

Bob Alban is an insurance industry advisor with substantial experience in insurance acquisitions, mergers, and reinsurance transactions who has been working with GBIG Holdings in relationship to Pavonia. (Ex. C, Aff. of Alban, ¶¶ 2–8.) He has spent over 500 hours on the Pavonia matter. (*Id*. at ¶ 8.) Mr. Alban has reviewed the proposed Amended Plan, the application for approval of the proposed Amended Plan, and has reviewed in detail each of the Willis contracts.

(*Id*. at ¶¶ 9–10.) Based on his review, Mr. Alban agrees that the Rehabilitator's proposed plan is not "fair and equitable" to GBIG Holdings, LLC for several reasons. (*Id*., ¶ 11.)

First, as Mr. Alban explains, a transaction run by Willis at the behest of the Rehabilitator is unlikely to provide an optimum value to GBIG Holdings. The Rehabilitator's objectives are principally focused on protecting policyholders and not maximizing shareholder values. (*Id*., ¶ 13.) Likewise, the proposed Willis' agreements do not incentivize Willis to maximize value. (*Id*., ¶ 14.) Partly, that disincentive to maximize value to GBIG Holdings as the shareholder of Pavonia is inherent in the "unusual" relationship created by the proposed contract whereby the broker is engaged by someone other than the shareholders, meaning that the broker's duty runs to the client and not the shareholders. (*Id*., ¶ 14.a.) But it is also due to the unfavorable compensation terms of the agreement, whereby Willis has a very substantial "minimum compensation amount" of $1 million for conducting this transaction regardless of the value obtained from the sale. (*Id*., ¶ 14.b.) Perversely, this minimum amount is guaranteed "without any apparent minimum performance obligation." (*Id*., ¶ 14.c.) In other words, Willis gets paid regardless of whether it procures the sale. So, if Willis does not work, but Pavonia is nonetheless sold, it collects a fee of at least $1 million. (*Id*.) Similarly, if Pavonia is sold to Axar based on GBIG Holdings efforts—for which GBIG Holdings has expended significant sums in expense reimbursements for Axar's diligence—Willis would receive a fee of $1.125 million for absolutely no work. (*Id*.)

This result is evident from the language of the proposed Letter Agreement. That document says that "**[i]f**, during the term of Willis Re Securities' engagement hereunder or at any time during a period of 12 months following the effective termination date of Willis Re Securities' engagement under this Agreement, **an agreement to affect a sale is entered into that subsequently results in a sale**, or a Buyer is identified by Willis Re Securities . . . ***the Company shall pay an advisory***

<u>fee equal to the greater of (i) 1.50% of the Consideration involved in such Sale or (ii) $1,000,000</u>." (Rehab. App, Ex. A, Willis Re Securities Letter Agr., Para. 4(n).) In other words, any sale entered into after the engagement—even up to 12 months following the termination of Willis—provides the company with a minimum compensation of $1 million and possibly more.

Beyond these performance disincentives and fee guarantees, the agreement is unreasonable as it allows Willis to "double dip on compensation" because it can be paid *<u>both</u>* to sell the company and to arrange the reinsurance of all of the business of Pavonia. (*Id*., ¶ 14.c.) That could net Willis nearly $2.5 million on this deal—a gross overpayment for resolving Pavonia's fate. On top of those amounts, Willis is to receive a "retainer fee" of $200,000. (Securities Letter Agr., Para. 4(a).) Plus, it will receive reimbursement of "all reasonable expenses" including "professional and legal fees"—without any stated limitation. (Securities Letter Agr., Para. 5.)

<u>Second</u>, the proposed Willis sales-process proposal will be lengthy compared to the sale of Pavonia to Axar—and the value of Pavonia will erode as time wears on. (Ex. C, Alban Aff., ¶ 15.) Pavonia currently has "sub-optimal asset allocation" resulting in returns of approximately 100 basis points below the industry market yield. (*Id*. at ¶¶ 15–16.) On top of that, the Services Agreement with Aspida is extraordinarily expensive compared with alternatives. Aspida is receiving nearly $760,000 per month (or over $9.1 million per year) whereas similar services can realistically be provided for a fraction of that ($1 million per year) from other companies. (*Id*. at ¶ 17.) As a result, the longer a sales process lasts, the less value the process will obtain for Pavonia because potential purchasers will see that ongoing erosion of value. (*Id*.) Because only the shareholder can properly evaluate those tradeoffs—yet GBIG Holdings is not even given a seat at the table—the proposal is not "fair and equitable." (*Id*. at ¶ 18); MCL 500.8114(4).

__Third__, because the business of Pavonia and the nature of this Rehabilitation proceeding is very complex, that will add to the delays—as well as the erosion of value of Pavonia through a sales proceeding. Likely, it will take 6 to 8 weeks for Willis to get up-to-speed regarding the business of Pavonia before it can engage in a sales process because of the allocation of Pavonia's assets and complexity of its financials. (*Id*. at ¶¶ 19–20.) That delay alone may cost $2 to $3 million. (*Id*. at ¶ 20.) On the opposite end of the transaction, buyers will similarly struggle with due diligence, and it is reasonable to expect due diligence to take four to six months to accomplish, as it took for Axar Capital. (*Id*. at ¶ 21.) The complexity of Pavonia also adds a cost component: many potential buyers will be reluctant to approach Pavonia without asking for Pavonia to front expense reimbursements and/or work fees for their due diligence and without obtaining "exclusivity" periods where they are the sole purchaser considered. (*Id*. at ¶ 22.) Those costs can run in the millions all told. (*Id*.)

__Fourth__, the fees proposed by Willis Towers Watson ("Willis Towers") to conduct a valuation is both expensive and unnecessary. (*Id*. at ¶ 25.) Willis Towers' proposed $250,000 to $275,000 in a valuation expense (on top of the millions it will obtain from the transaction, as discussed above) is unreasonably expensive compared to other companies who would charge $50,000. (*Id*. at ¶¶ 25–26.) Not only so, but the Rehabilitator has failed to explain the point of a valuation. Potential bidders will form their own view of value, and Willis Towers' valuation can only reduce the amount bid by prospective purchasers. (*Id*. at ¶ 27.)

All of these concerns point to the same conclusion. Even if the Rehabilitator had authority to sell GBIG Holdings' stock (and, as the Court of Appeals established, she doesn't), this Court should not approve a costly process that will merely enrich Willis while eroding the value of GBIG

Holdings' assets. The proposed Amended Plan is not "fair and equitable" to the most interested person in this sales process, GBIG Holdings, LLC. This Court should reject the Amended Plan.

III. GBIG Holdings is prepared to conduct a voluntary sale of Pavonia to Axar Capital, LLC on satisfactory terms.

Lastly, as discussed above, there are better alternatives to the Amended Plan. GBIG Holdings is not seeking to stymie this Rehabilitation proceeding. GBIG Holdings recognizes that a sale of Pavonia will achieve the Rehabilitator's goals for rehabilitation, and it is open to conducting its own sale of the company. To that end, GBIG Holdings' has negotiated with its lender, Axar Capital, LLC, a sale of Pavonia that will provide a better return on its asset than a sales process run by the Rehabilitator and Willis will achieve while accomplishing the regulator's objectives. This Court should either: (a) hold off on issuing any decision for a period of time to allow Axar and GBIG Holdings to complete their transaction; or (b) reject the proposed Amended Plan and allow GBIG Holdings to move forward with a voluntary sale.

Axar and GBIG Holdings negotiated through the holidays around DIFS' concerns with the initially proposed SPA that was discussed with DIFS in a meeting in late November 2021. The resulting negotiated deal is an agreement-in-concept that was achieved just days before this writing. The initial draft of the SPA that was shared with DIFS in November 2021 is being revised accordingly. A fully executed SPA is expected within a couple of weeks, and will be provided as soon as it is available. That sale of Pavonia will meet legal requirements under Chapter 81 as it can be accomplished voluntarily by GBIG Holdings. It is a better deal economically than the sale to Aspida Holdco, LLC that was initially proposed and is based on a fixed price—unlike the Aspida Holdco deal that had fluctuating economic value. And, importantly, the SPA will not include any provision for termination of the deal without cause (as was the case in the Aspida Holdco SPA).

Because this alternative achieves the Rehabilitator's objectives without violating GBIG Holdings' rights and GBIG Holdings is in a much better position to conduct a voluntary sales process than Willis, this Court should either hold in abeyance any decision on the Rehabilitator's proposed plan for a short period of time to allow GBIG Holdings and Axar to sign the SPA or instead reject the Rehabilitator's proposed Amended Plan and allow a voluntary sale by GBIG Holdings.

CONCLUSION AND RELIEF REQUESTED

For the above reasons, GBIG Holdings, LLC objects to the Rehabilitator's application to approve the proposed Amended Plan of Rehabilitation. The Court of Appeals' decision, which is binding under the law-of-the-case doctrine, prevents the Rehabilitator from selling property she does not control and that is not part of the rehabilitation estate as part of the Amended Plan of Rehabilitation. Not only that but she simply lacks legal authority to carry out the proposed Amended Plan period. And the proposed Amended Plan is not "fair and equitable" to GBIG Holdings as it unfairly injures GBIG Holdings' property interests. This Court should reject the Rehabilitator's proposed Amended Plan and allow GBIG Holdings to proceed with a voluntary sale of Pavonia.

Respectfully Submitted,

CLARK HILL PLC

/s/ Zachary S. Larsen

Zachary C. Larsen (P72189)
Ronald A. King (P45088)
Clark Hill PLC
212 E. Cesar E. Chavez Ave.
Lansing, MI 48906
(517) 318-3015
larsenz@clarkhill.com
Counsel for GBIG Holdings, Inc.

Dated: January 7, 2022

EXHIBIT A

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

DIRECTOR OF THE DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES,

Petitioner-Appellee,

v

PAVONIA LIFE INSURANCE COMPANY OF MICHIGAN,

Respondent,

and

GBIG HOLDINGS, INC.,

Appellant,

and

ASPIDA HOLDCO, LLC,

Appellee.

UNPUBLISHED
March 25, 2021

No. 354182
Ingham Circuit Court
LC No. 19-000504-CR

Before: BOONSTRA, P.J., and BORRELLO and RICK, JJ.

PER CURIAM.

This interlocutory appeal arises from a rehabilitation proceeding initiated by the Director (director or rehabilitator) of the Michigan Department of Insurance and Financial Services (DIFS) under Chapter 81 of the Insurance Code of 1956, MCL 500.8101, *et seq*. The director initiated, by consent, the underlying court-supervised rehabilitation proceedings over Pavonia Life Insurance Company of Michigan (Pavonia) to separate and disassociate Pavonia from its relationship with four financially-troubled North Carolina insurer affiliates, and the legal and financial issues generated by the actions of its "upstream owner," Greg Lindberg (Lindberg), a

North Carolina resident and now convicted felon[1], and his holding company, GBIG Holdings, Inc (GBIG). The rehabilitation plan explicitly incorporated a stock purchase agreement (SPA), whereby GBIG agreed to sell its stock in Pavonia to Aspida Holdco, LLC (Aspida), a Delaware holding company. GBIG appeals by leave granted[2] a July 10, 2020 order entered by the Ingham Circuit Court, which granted the emergent motions of Aspida for specific performance of the SPA, and moved the closing date for the stock purchase from July 31, 2020, to "on or before July 14, 2020." The trial court advanced the closing date after finding that GBIG had taken actions that were in violation of the Rehabilitation Order and that were inconsistent with the preparations for the closing of the stock sale. GBIG also challenges the trial court's denial of its motion for reconsideration. GBIG argues that the trial court improperly decided issues delegated to the exclusive jurisdiction of New York courts and otherwise overstepped its authority.

For reasons explained below, we reverse the decision of the trial court granting specific performance, vacate the July 10, 2020 and July 14, 2020 orders memorializing the trial court's rulings, lift our stay of the trial court proceedings[3], and remand this matter to the trial court for further proceedings.

I. FACTS

A complete and detailed recitation of the facts and procedural history of this case is necessary for our resolution of the issues pending before us. Lindberg owns GBIG Holding, GBIG Capital, LLC, and Global Bankers Insurance Group, LLC. Global Bankers, also referred to as ServiceCo, is a managing company for and wholly-owned subsidiary of Pavonia, a Michigan-

---

[1] In April 2019, Lindberg was indicted on federal criminal charges of public corruption and bribery. A federal jury sitting in Charlotte, North Carolina, convicted Lindberg in March of 2020 of conspiracy to commit honest services wire fraud and bribery for orchestrating a bribery scheme involving independent expenditure accounts and improper campaign contributions. The purpose of this scheme was to cause the elected Commissioner of Insurance for the North Carolina Department of Insurance to take official action favorable to Lindberg's business interests. On August 19, 2020, a federal district judge sentenced Lindberg to 87 months in prison and three years of supervised release. United States Department of Justice Website, <justice.gov/opa/pr/founder-and-chairman-multinational-investment-company-and-company-consultant-convicted>, accessed 3/5/21.

Lindberg was also involved in a campaign financing scandal involving multiple Florida elected officials and candidates. United States Department of Justice Website, <justice.gov/opa/pr/federal-jury-convicts-founder-and-chairman-multinational-investment-company-and-company>, accessed 7/21/20.

[2] *Dep't of Ins and Financial Services/Director v Pavonia Life Ins*, unpublished order of the Court of Appeals, entered August 3, 2020 (Docket No. 354182).

[3] *Dep't of Ins and Financial Services/Director v Pavonia Life Ins*, unpublished order of the Court of Appeals, entered July 14, 2020 (Docket No. 354182); *Dep't of Ins and Financial Services/Director v Pavonia Life Ins*, unpublished order of the Court of Appeals, entered August 3, 2020 (Docket No. 354182).

domiciled life insurer, and four North Carolina insurer affiliates of Pavonia. As noted, Lindberg is also the "upstream" owner of Pavonia and the four North Carolina Companies. He is the upstream owner of Pavonia because he controls GBIG, and GBIG owns Pavonia. The Commissioner of Insurance for the North Carolina Department of Insurance placed the four North Carolina insurer affiliates of Pavonia into court-supervised rehabilitation on June 27, 2019. Although Pavonia is "financially stable and ha[d] not engaged" in the activities encumbering its affiliates, the DIFS had concerns about financial risk to Pavonia because of its association with the affiliates and with Lindberg, and it therefore initiated the Michigan rehabilitation proceedings. The July 9, 2019 stipulated order initiating rehabilitation indicates that Pavonia had developed a plan to "protect its assets, policyholders, and creditors." The plan included the SPA.

Under the terms of the SPA, Aspida agreed to purchase Pavonia's issued and outstanding capital stock for $75 million, which served as the "Base Purchase Price" of Pavonia. Aspida also agreed to pay and did pay a $25 million advance to GBIG in the form of a "loan," which was secured by a pledge of the Pavonia stock that GBIG was to deliver to Aspida. The $75 million base price was to be adjusted at closing for this indebtedness of GBIG, certain costs associated with the settlement of intercompany bills, certain expense "overruns," amounts to be held in escrow, and "Banker Fees." GBIG was to provide a closing statement setting forth the adjustments. The proceeds to be paid to GBIG at closing consisted of the base price minus the various allowed adjustments. The parties to the SPA simultaneously agreed that Pavonia would be placed in court-supervised insurance rehabilitation administered by the director and DIFS.

On July 9, 2019, the director and DIFS commenced court-supervised rehabilitation proceedings in the Ingham Circuit Court. As required by MCL 500.8113(1), the trial court entered the Rehabilitation Order that appointed the director of DIFS as the rehabilitator of Pavonia. The order directed the rehabilitator to take immediate possession of all Pavonia's assets and to administer those assets under the court's supervision. MCL 500.8113(1). It vested legal title to all assets, accounts, and moneys of Pavonia in the rehabilitator. MCL 500.8113(1). In addition, the order authorized the rehabilitator to:

> take such action as he or she considers necessary or appropriate to reform and revitalize the insurer including, but not limited to, the powers in section 8121(1)(f), (l), (m), (r), and (u). The rehabilitator has all the powers of the directors, officers, and managers, whose authority shall be suspended, except as they are redelegated by the rehabilitator. The rehabilitator has full power to direct and manage, to hire and discharge employees subject to any contract rights they may have, and to deal with the property and business of the insurer. [MCL 500.500.8114(2).]

Under MCL 500.8114(4) and the terms of the Rehabilitation Order, the rehabilitator was given the authority to effect changes to the plan upon determination that "reorganization, consolidation, conversion, reinsurance, merger, or other transformation of the insurer is appropriate[]" and to implement the plan upon court approval. Further, the rehabilitator was vested with "such additional powers as the Court shall grant from time to time upon petition of the rehabilitator." Finally, the order authorized the rehabilitator to "conduct receivership proceedings in accordance with the powers granted to her under Chapter 81."

The parties filed their rehabilitation plan with the trial court on August 8, 2019. That same day, the trial court gave preliminary approval to the plan at the request of the rehabilitator. The SPA is part of and fully integrated into the plan.

Objections to the preliminarily-approved rehabilitation plan were to be filed in the supervising court by October 4, 2019. Neither Lindberg nor GBIG filed an objection. In fact, when Independent Insurance Group, LLC (Independent Insurance), filed an objection and requested an opportunity to "submit a proposal for the acquisition of Pavonia," GBIG replied:

> Consistent with its voluntary stipulation to these [rehabilitation] proceedings, GBIG desires a swift and efficient return of Pavonia to its normal operations (albeit under a new ultimate controlling person). Among other reasons for this desire is that delay in the confirmation of the proposed Rehabilitation Plan increases the risks to Pavonia's successful operations and to its policyholders. As previously discussed in GBIG's submissions to this [c]ourt, delay would increase the costs of estate administration (which are to be paid by Pavonia), increase the likelihood that key employees will depart for other opportunities if they believe their position to be in jeopardy, and increase execution risk on the purchase deal that has already been negotiated over many months of good faith efforts by GBIG, Aspida . . . and DIFS.

GBIG also acknowledged the fairness of the purchase price negotiated.

At a January 2020 hearing, counsel for GBIG acknowledged that "the parties are represented by sophisticated counsel, negotiated the terms of the stock purchase agreement at arm's length and then presented it to the rehabilitator." On February 24, 2020, GBIG once again argued, in response to actions by Independent Insurance, that the court should "overrule Independent's objection and immediately approve the plan of rehabilitation." The trial court denied the objection of Independent Insurance by order entered on March 9, 2020. The court stated, in part, that "there's no meaningful evidence . . . that the sale process was not fair and equitable" and "no basis on which this [c]ourt can reasonably conclude that the SPA between GBIG . . . and Aspida . . . is not fair and equitable to all parties." The trial court then directed that the matter proceed to an approval hearing on the rehabilitation plan.

On March 12, 2020, the rehabilitator issued a Form A Order Approving Acquisition of Pavonia by Aspida. On May 18, 2020, the rehabilitator moved for entry of a Final Approval Order and accompanied that motion with a proposed Final Approval Order.

The trial court scheduled the final approval hearing of the plan for May 26, 2020. Shortly before the scheduled hearing, Lindberg and GBIG objected to the "Estimated Closing Statements," which had been prepared by Pavonia's chief financial officer. GBIG averred that the ultimate amount to be received at closing by GBIG was now only $7.5 million, despite the base price of $75 million, because of "an enormous [amount] in expense overruns" and because the $25 million in loan money had been paid to "Colorado Bankers Life Insurance Co. rather than GBIG." Lindberg and GBIG threatened to invoke their contractual right to terminate the SPA unless the rehabilitator and Aspida agreed to adjourn the hearing to allow GBIG time to review the documentation supporting the figures used in the Estimated Closing Statements and to consider whether potential amendments to the SPA were warranted. The parties agreed to an adjournment, which the trial court approved, and the hearing was rescheduled to June 16, 2020.

Following the adjournment of the May 26th final approval hearing, GBIG proposed that the SPA be amended such that, among other significant modifications: the Base Purchase Price be increased from $75 million to $120 million; the balance of Aspida's $25 million loan to GBIG be forgiven before closing; the required escrow be reduced by fifty percent; and payment of fifty percent of the Acquired Companies' management long-term incentive plan, which was payable by GBIG, be delayed. Essentially, GBIG sought to wholly rewrite the SPA at the eleventh hour. GBIG also complained that the initial sale price was unfair to its sole shareholder, Lindberg, and that it was entitled to be paid "adjusted" capital and surplus, which it defined as including the values of Pavonia's interest maintenance reserve and its asset valuation reserve.

On June 11, 2020, GBIG requested another adjournment of the final approval hearing, asserting that entry of a final approval order would be premature "at this time." GBIG explained:

> While preparing for the initially scheduled hearing date on this motion, GBIG identified several material issues related to the changing economics of the sale and the logistics of closing on this transaction that have given GBIG pause and required the parties to the proposed sale to work through in negotiation. Those discussions are ongoing. But because they have not been resolved, GBIG does not believe the time is right for this [c]ourt to enter a final order . . . . Notably, GBIG does not suggest any blame in the Rehabilitator's filing. Nonetheless, it does not make sense to ask this [c]ourt to approve the transaction that may be materially different at the conclusion of the parties' discussions.

Also on June 15, 2020, Aspida sent a breach notice and "request for cure" to GBIG, alleging that GBIG had "variously demanded additional consideration and purchase price not provided for in the SPA." Aspida averred that GBIG had breached § 7.03 of the SPA by failing to employ reasonable best efforts to consummate the closing. GBIG's attorney replied that "'reasonable best efforts' does not require Seller to waive concerns over ballooning and unexplained Expense Overruns many millions of dollars above the parties' pre-signing expectations without further investigation."

The trial court adjourned the final approval hearing to June 25, 2020.

GBIG engaged in almost no preparation for closing between May 26, 2020 and June 25, 2020, to the dismay of Aspida. Instead, GBIG sought to secure an alternative buyer for Pavonia or refinancing using stock exclusively held by the rehabilitator in violation of the rehabilitation order and the SPA's "no-shop" provisions.[4] As a consequence, on June 22, 2020, Aspida filed its objection to adjournment, or in the alternative, motion for specific performance. The motion was never noticed for hearing, however.

[4] Section 7.01 of the SPA precludes GBIG from selling or encumbering Pavonia's capital stock. Section 8.09 precludes GBIG from pursuing an alternative buyer for Pavonia.

The trial court held the June 25, 2020 final approval hearing as scheduled. Following comprehensive argument and spirited commentary by all interested parties, the trial court rejected GBIG's objections, finding there was no need for further delay. It entered an order "Approv[ing] . . . Plan of Rehabilitation and Related Closing of Stock Purchase Agreement" and "Approv[ing] All Actions Taken or Not Taken by the Director as Rehabilitator." It also ordered that upon closing of the SPA, the rehabilitator would be discharged and the rehabilitation would be terminated.

On June 26, 2020, counsel for the rehabilitator issued the following cautionary notice on the rehabilitator's behalf:

> Notice to Seller, Buyer, and Pavonia Entities:
>
> This notifies the parties that based on the Court's ruling yesterday granting final approval to the Plan of Rehabilitation ("Plan"), the Rehabilitator fully expects the parties to close on the transaction pursuant to the Plan-incorporated Stock Purchase Agreement by June 30, 2020. Any failure to close by this deadline without good cause or mutual agreement of the parties approved by the Rehabilitator will be deemed by the Rehabilitator to constitute obstruction and/or interference with the Court-approved Plan and the conduct of this rehabilitation proceeding, in violation of MCL 500.8105(1)(c), MCL 500.8106(2), and paragraphs 18 and 19 of the Rehabilitation Order. The Rehabilitator will seek all available remedies against any party engaging in such obstruction and/or interference, including but not limited to the following remedies under MCL 500.8106(4) and paragraph 19 of the Rehabilitation Order:
>
> (a) A sentence requiring the payment of a fine not exceeding $10,000.00, or imprisonment for a term of not more than one year, or both; and
>
> (b) After a hearing, the imposition by the DIFS Director of a civil penalty not to exceed $10,000.00, or the revocation or suspension of any insurance licenses issued by the Director, or both.
>
> The Rehabilitator appreciates the parties' anticipated cooperation in consummating a timely closing of the transaction. Thank you.

After receiving this notice, GBIG "request[ed] access to all books and records of Pavonia, including those documents provided in the Ares data room as part of the deal." The requested documentation was not provided to GBIG.

On June 29, 2020, the trial court sua sponte entered an order that amended the June 25, 2020 order giving final approval to the rehabilitation plan. The amended order provided in pertinent part:

> **IT IS ORDERED** that this Courts [sic] June 25, 2020 Order is amended to extend only the deadline for Closing of Stock Purchase Agreement until July 31, 2020. All other deadlines related to the closing are likewise adjusted consistent with the July 31, 2020 closing date.

On July 1, 2020, Aspida filed an emergency motion for specific performance. It argued that "[t]here is now good cause to believe that Seller is seeking financing using the stock of Pavonia as collateral, in violation of the SPA, in order to conduct another long, contentious, difficult sales process during which value will deteriorate and staff will leave, or to contest the Rehabilitation and seek to retake control of Pavonia." It asserted that GBIG was not facilitating the closing and that "specific performance is the proper remedy for Seller's breach of the SPA." The rehabilitator joined in the motion.

GBIG responded that the SPA explicitly provided that disputes about the SPA were to be resolved in New York courts and that Michigan courts only had jurisdiction over the rehabilitation and the assets of Pavonia. It also noted that a contract dispute such as that raised by Aspida could not be summarily resolved when no complaint or motion for summary disposition had even been filed. GBIG argued that the court "should reject Aspida's attempt to transform a voluntary sale into a forced sale." It also noted that even if a breach of the SPA did occur by GBIG, the SPA, by its terms, allowed for a cure.

On July 7, 2020, GBIG filed an action for declaratory judgment in a New York court, seeking a declaration of its rights under the SPA and the loan agreement. GBIG requested "declarations that the agreements require Aspida to accept payoff of the loan, accept the termination fee [for the SPA], and release its possession and interest in GBIG['s] . . . assets, including the stock in [Pavonia]."

Also on July 7, 2020, GBIG filed another response in the Michigan court to Aspida's motion, reiterating that the courts of New York had jurisdiction over contractual disputes and alleging that its request to review the books of Pavonia before closing was reasonable, contrary to assertions made by Aspida and the rehabilitator. GBIG stated, "GBIG has no intention of violating this [c]ourt's orders. GBIG will either close upon negotiated terms by July 31 or terminate under the SPA, as expressly allowed by Paragraph L of this [c]ourt's June 25, 2020 order, and present an alternative plan for Rehabilitation. Until then, this [c]ourt need not act." GBIG alleged a violation of due process because it did not have adequate time to address the alleged breaches of contract and it also raised the issue of a constitutional prohibition on state actions impairing contracts. Aspida filed a response, arguing, in part, that "Seller does not have the right to close on economic terms acceptable to it, but rather must close on the economic terms agreed by it in the SPA." It argued that the Michigan court had sole jurisdiction over the matter by virtue of the rehabilitation proceedings in which GBIG had acquiesced.

The hearing on Aspida's emergent motion for specific performance took place on July 9, 2020. The trial court granted Aspida's motion from the bench, in part. The trial court effectuated its bench ruling by order entered on July 10, 2020. The text of the order provides in part as follows:

> 1. The 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 ("SPA") that forms an integral part of the Rehabilitation Plan, which the Court approved on June 25, 2020;
>
> 2. The Court has jurisdiction of the parties, including Mr. Greg Lindberg, and the subject matter;

3. Seller GBIG Holdings, Inc., by or through its ultimate controlling person Mr. Lindberg (collectively "Seller"), has taken actions they (sic) are contrary to pursuing closing as described in the SPA, including Sections 7.01(a) and (ee), 7.03(a), and 8.09(a);

4. During the hearing, the Seller described other acts or omissions that are in violation of the Rehabilitation Order entered on July 9, 2019, including paras. 18, 19 and 21, Michigan law, including MCL 500.8105 and 8106, and the Rehabilitator is entitled to relief pursuant to par. 22.

5. The Court is satisfied that the Buyer is prepared to close as outlined in the SPA, and the Rehabilitator is prepared to proceed with full implementation of the Rehabilitation Plan.

6. To avoid any unnecessary delay or jeopardize the protection of Pavonia and its subsidiary GBIG, LLC (collectively, the "Pavonia Entities"), along with their policyholders and staff, this court orders closing to take place on or before July 14, 2020.

7. Good cause exists for the court to clarify any covenants and obligations under the Stock Purchase Agreement, and to specifically enforce such covenants and obligations; and

8. Notwithstanding cost overruns documentation that may have been disclosed, the Court finds no reason to further delay closing of the transactions in the Stock Purchase Agreement.

9. Any efforts by any party to delay the sale are in violation of the Rehabilitation Order, the Plan of Rehabilitation and Michigan law as aforesaid; and

10. The Rehabilitator has plenary authority over the Pavonia Entities under Chapter 81 of the Michigan Insurance Code, the Rehabilitation Order that the Court entered on July 9, 2019, and the Order Approving the Plan of Rehabilitation that the Court entered on July 25, 2020.

IT IS ORDERED THAT Buyers' Specific Performance Motions are **GRANTED-IN PART**, and the Court orders as follows:

1. Closing under the terms of the Stock Purchase Agreement approved by this Court on June 25 and 29, shall take place on or before July 14, 2020.

2. The Seller is compelled to specifically perform its SPA obligations in accordance with SPA Articles II and III, and Sec's 7.01(a) and (ee), 7.03(a), and 8.09(a), without posting of a bond or other security, and to close the transaction by 5:00 p.m. EDT on Tuesday, July 14, 2020 in accordance with Articles II and III, and to deliver to Buyer before such time the Estimated Closing Statement and such other closing deliverables as are required to be delivered by Seller under the SPA in connection with the Closing; and

3. Mr. Lindberg, Seller, and their affiliates, associates, agents, and representatives, shall otherwise comply with Sections 7.01 and 8.09 of the SPA without breach or violation; and

4. Mr. Lindberg, Seller, and their affiliates, associates, agents and representatives, pursuant to SPA Sec. 809, shall produce to the Michigan Department of Insurance and Financial Services and Buyer any offer that either or any of them has provided, solicited, made, received, or receives, including, without limitation, offers with respect to or that would or may involve Pavonia's stock, including, but not limited to, any pledge, transfer, sale, or recapitalization, and any similar transaction to anyone other than Buyer on or before 5:00 pm, EDT, Monday, July 13, 2020.

5. The Seller is entitled to documents explaining current cost overruns. Buyer shall immediately provide to Seller all such records not previously provided since June 19, 2020. Seller may petition this Court with a list of specific cost overrun documents outstanding no later than 5:00 pm on July 10th, 2020, if such records are not received for review.

6. In the event that the parties to the SPA do no[t] close on the transaction by the deadline ordered by the Court, the Court affirms the Rehabilitator's authority to execute all necessary documentation and take all necessary actions on behalf of the Seller to consummate the closing on the transaction as soon thereafter as possible.

On July 11, 2020, the rehabilitator provided copies of all cost overrun material to GBIG for a second time.

On July 12, 2020, GBIG moved for reconsideration of the July 10, 2020 order. The next day, Aspida presented GBIG with all closing deliverables. That same day, GBIG served Aspida and DIFS with two notices of termination of the SPA. The first notice, signed by Lindberg, provides in pertinent part:

> On behalf of GBIG Holdings, Inc. ("Seller") and in accordance with the Article XII ("Termination and Waiver"), Section 12.01(h) we are providing this Notice of Termination of the Stock Purchase Agreement ("SPA") dated July 9, 2010 to Buyer with respect to the sale of Pavonia Life Insurance Company of Michigan ("PLICMI") and indirectly, PLICMI's Subsidiary, Global Bankers Insurance Group, LLC.
>
> We maintain that the Michigan Court erred in ordering the Parties to close by July 14 under the threat of contempt, and potential implication that the Rehabilitator can proceed to close over the rights of the Seller, gives us no reasonable choice than to issue this Notice.
>
> We will withdraw this termination notice and agree to reinstate the SPA, if the Michigan Court grants the relief requested in our Emergency Motion for Reconsideration filed on Sunday, July 12. In the alternative, we agree to withdraw

> this termination notice and reinstate the SPA, if Aspida agrees to proceed in accordance with the terms of the SPA.

The second notice of termination acknowledged the prior notice of termination issued by GBIG and reflects the intent to supplant that notice. The second notice provides in part:

> As previously noted, we maintain that the Michigan Court erred in ordering the Parties to close by July 14 under the threat of contempt, and potential implication that the Rehabilitator can proceed to close over the rights of Seller, gives us no reasonable choice than to issue this Notice.
>
> To avoid any doubt, Seller is terminating the SPA in accordance with Section 12.01(h) without condition and without prejudice to the Seller's rights and remedies, all of which are hereby expressly reserved.

The trial court denied GBIG reconsideration motion by order entered on July 14, 2020.

GBIG filed a claim of appeal with this Court from the July 10, 2020 order, accompanied by an emergency motion to stay lower court proceedings pending appeal and a motion for immediate consideration. This Court administratively dismissed the claim of appeal and motions for lack of jurisdiction by order entered on July 14, 2020.[5]

GBIG then filed the underlying application, accompanied by motions to stay lower court proceedings and for immediate consideration. This Court, by order entered on July 14, 2020, temporarily stayed proceedings in the trial court in order to allow the Court time to meaningfully consider the merits of the issues raised by GBIG in its application.[6] Thereafter, we granted the leave to allow plenary consideration of the issues advanced by GBIG. We also directed that the stay provision in this Court's July 14, 2020 order remain in effect until further order of this Court.

GBIG ascribes error to the trial court in multiple regards. GBIG argues that it has a contractual right under § 12.01(h) of the SPA to terminate the SPA "for any reason or for no reason," including for the reason that the closing purchase price does not accurately reflect the value of Pavonia. The July 10, 2020 order granting specific performance essentially rewrites the SPA by eliminating the right of termination granted under the agreement. As such, the order deprives GBIG of this contractual right in violation of MCL 500.8106(3), which specifically bars the supervising court from crafting an order that abridges GBIG's "otherwise existing legal right." GBIG further argues that the trial court lacked jurisdiction to summarily resolve contractual disputes between the parties because § 14.11(a) of the SPA clearly requires that "any action arising out of or relating to this Agreement, the Transactions, the formation, breach, termination, or validity of this Agreement . . . [falls within] the exclusive jurisdiction of the courts of the State of New York . . . [or] the federal courts for the Southern District of New York." Next, GBIG argues

---

[5] *Dep't of Ins and Financial Services/Director v Pavonia Life Ins*, unpublished order of the Court of Appeals, entered July 14, 2020 (Docket No. 354176).

[6] *Dep't of Ins and Financial Services/Director v Pavonia Life Ins*, unpublished order of the Court of Appeals, entered July 14, 2020 (Docket No. 354182).

that the trial court erred when it granted the rehabilitator the authority to surrender the stock of Pavonia and act on GBIG's behalf by closing on the SPA. Neither the Insurance Code nor the SPA authorizes the grant of such power. Finally, GBIG argues that the July 9, 2020 order violates and impairs GBIG's contractual rights in violation of the United States Constitution.

Both the rehabilitator and Aspida respond that GBIG's claims lack both legal and factual support, and seek affirmance of the trial court's grant of specific performance.

II. ANALYSIS

A. STANDARD OF REVIEW

The trial court engaged in contractual and statutory interpretation when deciding whether to grant Aspida's motion for specific performance. We review de novo, as a question of law, the proper interpretation of a contract. *Andrusz v Andrusz*, 320 Mich App 445, 452; 904 NW2d 636 (2017). Likewise, issues concerning the application and interpretation of a statute are reviewed de novo, as questions of law. *In re Petition of Berrien County Treasurer for Foreclosure (On Remand)*, 323 Mich App 600, 607; 919 NW2d 288 (2018).

B. RIGHT OF TERMINATION, BREACH OF CONTRACT, JURISDICTION

MCL 500.8106(1) imposes a statutory obligation to "cooperate with the commissioner in a proceeding" brought under Chapter 81 of the Insurance Code. This obligation is not without its limits, however. Section 8106 of the Insurance Code "shall not be construed to abridge otherwise existing legal rights, including the right to resist a petition of liquidation or other delinquency proceedings or orders." MCL 500.8106(3).

Without question, the SPA "is part of and fully integrated" in the rehabilitation plan, "with all of its recitals, terms, conditions, representations, warranties, covenants, indemnities, and exhibits[.]" Additionally, the June 25, 2020 Order Approving Plan of Rehabilitation provides in part: "Nothing 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."

Section 12.01(h) of the SPA confers upon GBIG the contractual right to terminate the SPA before closing "for any reason or for no reason[.]" A contractual right to terminate the contract is a legal right. See e.g., *Reed v Kurdziel*, 352 Mich 287, 297; 89 NW2d 479 (1958). As previously noted, the statutory obligation to cooperate with the rehabilitator cannot "be construed to abridge otherwise existing legal rights," MCL 500.8106(3), which would necessarily include the legal right to terminate the SPA under the terms of the contract. Additionally, ¶ L of the June 25, 2020 Order Approving Plan of Rehabilitation expressly recognized the continuing vitality of the termination right contained in the SPA after the SPA was integrated into the rehabilitation plan. On the basis of the plain and unambiguous language of MCL 500.8106(3) and the trial court's order, we must conclude that both MCL 500.8106(3) and the order secured GBIG's right to terminate the SPA at any time before the closing of the stock sale or until such time as the exercise of another provision within the SPA rendered termination provision inoperable.

In the present matter, the trial court found that GBIG had breached certain provisions of the SPA, such as the provision prohibiting the seeking of a buyer other than Aspida, and that an order of specific performance was, therefore, appropriate. The parties dispute whether GBIG breached the SPA. In addition, the record reflects that GBIG has notified Aspida and the trial court of its invocation of the right to terminate the SPA. Aspida is disputing, however, whether a notice of termination can be effective once specific performance has already been ordered. Although these arguments and counterarguments raise dispositive questions of law regarding the proper interpretation and application of various provisions within the SPA, we decline to reach the merits of these dispositive questions. The questions are prematurely presented to this Court for resolution as a consequence of error on the part of the trial court.

Section 14.11 of the SPA provides:

> Seller and Buyer irrevocably and unconditionally submits for itself and its property in any Action arising out of this or relating to this Agreement, the Transactions, the formation, breach, termination or validity of this Agreement or the recognition and enforcement of any judgment in respect to this Agreement, to the exclusive jurisdiction of the courts of the State of New York sitting in the County of New York, the federal courts for the Southern District of New York, and appellate courts having jurisdiction of appeals from any of the foregoing, and all claims in respect of any such Action shall be heard and determined in such New York courts or, to the extent permitted by law, in such federal court.

GBIG contends that it contracted, by way of § 14.11 of the SPA, to have certain issues—such as the effectiveness of its notice of termination of the SPA and questions regarding breach of the SPA—addressed by the courts of New York and that the trial court usurped the jurisdiction of these courts. It further contends that the trial court exceeded the scope of the rehabilitation court's jurisdiction when it summarily resolved claims of breach of contract asserted by the parties as part of the court's ruling granting specific performance.

Our Legislature has vested the Ingham Circuit Court with exclusive subject-matter jurisdiction over the supervision and rehabilitation of insurers. MCL 500.8104(3). The Legislature also vested the Ingham Circuit Court with the following authority:

> If the court on motion of any party finds that any action should as a matter of substantial justice be tried in a forum outside this state, the court may enter an appropriate order to stay further proceedings on the action in this state. [MCL 500.8104(3).]

This latter provision clearly reflects the Legislature's acknowledgment that courts outside of Michigan may have subject-matter jurisdiction over matters affecting the implementation of the rehabilitation plan such that a stay of the Michigan rehabilitation proceedings may be appropriate until the pending foreign litigation is resolved. It also reflects the Legislature's intent that the supervising Michigan court proceed with the rehabilitation proceedings unless "substantial justice" is served by the underlying matter being tried in an out-of-state forum. Finally, MCL 500.8115(1) confers the authority on a rehabilitator to petition out-of-state courts "having jurisdiction over . . . litigation for stays necessary to protect the insurer's estate."

Given that the rehabilitation plan specifically incorporated the SPA, which was signed first; given that the language of the SPA unambiguously assigns jurisdiction over the matters at issue to the courts of New York; and given that the order approving the rehabilitation plan specifically indicates that rights under the SPA remain in effect, there are several indications that the disputes surrounding termination and breach should be tried in New York, to give the GBIG the benefit of its bargain with regard to the forum-choice clause in the SPA. Aspida and the rehabilitator make certain arguments, however, against the jurisdiction of New York courts. The plain language of MCL 500.8104(4) leaves it to the trial court to make the determination in the first instance regarding whether substantial justice requires another court to decide a matter in the midst of rehabilitation proceedings. The trial court did not make this "substantial justice" determination.[7] Accordingly, we reverse the trial court's grant of specific performance and direct it to resolve the jurisdictional issue in light of the explicit wording of MCL 500.8104(4). If the trial court finds that the Ingham Circuit Court is the proper venue to resolve questions concerning the effectiveness of GBIG's notice of termination[8] and whether GBIG breached the terms of the SPA such that specific performance is an appropriate remedy, the trial court shall revisit and resolve those questions and state on the record its factual findings and conclusions of the law.

C. POWER OF THE REHABILITATOR TO ACT ON HER OWN

Aspida and the rehabilitator imply that the issue of jurisdiction is irrelevant because the rehabilitator had full authority to stand in the shoes of GBIG and sell Pavonia stock over any objections of GBIG. We disagree.

The court ruled in the July 10, 2020 order, "In the event that the parties to the SPA do not close on the transaction by the deadline ordered by the Court, the Court affirms the Rehabilitator's authority to execute all necessary documentation and take all necessary actions on behalf of the Seller to consummate the closing on the transaction as soon thereafter as possible." GBIG argues that the court erroneously conferred authority upon the rehabilitator that it did not possess under

---

[7] GBIG did not file a separate motion solely on the basis of jurisdiction but clearly, repeatedly, and unambiguously argued before the court, both in writing and orally, that jurisdiction lay with the courts of New York. We conclude that GBIG's submissions were sufficient to trigger the lower court's obligation to determine whether substantial justice required that New York courts be given jurisdiction.

[8] There may be viable challenges to be asserted against GBIG's invocation of its termination rights. For example, Michigan has long recognized that "[t]he power to terminate a contract must be exercised in good faith[.]" *Isbell v Anderson Carriage Co*, 170 Mich 304, 314; 136 NW 457 (1912) (internal punctuation and citation omitted). Here, the statements made by GBIG's counsel at the July 9, 2020 motion hearing make it explicitly clear that GBIG and Lindberg were greatly dissatisfied with the dwindling amount of proceeds they would receive from the sale of the stock, and that they had been using the time they should have been using to prepare for closing to either encumber the stock or to identify a potential new seller. The actions of GBIG and Lindberg may sustain a finding that GBIG invoked § 12.01(h) in bad faith.

Chapter 81 of the Insurance Code, because the rehabilitator had control of *Pavonia*, not GBIG or stock held by GBIG.

In making its ruling, the court relied, in part, on MCL 500.8121(1)(g). MCL 500.8121(1)(g) provides that a liquidator "shall have the power to . . . conduct public and private sales of the insurer's property." This provision is found in § 8121 of the Insurance Code, which is the provision that enumerates the powers of a liquidator. See MCL 500.8121. The director of the DIFS serves as a rehabilitator, not a liquidator, in this matter.[9] Section 8114 of the Insurance Code enumerates the powers of a rehabilitator and confers upon a rehabilitator some of the powers of a liquidator. See MCL 500.8114. MCL 500.8114(2) provides, in part, that "[t]he rehabilitator may take such action as he or she considers necessary or appropriate to reform and revitalize the insurer including, but not limited to, the powers in section 8121(1)(f), (*l*), (m), (r), and (u)." Notably, MCL 500.8114(2) does not refer to § 8121(1)(g). The maxim "expressio unius est exclusio alterius"—the expression of one thing is the exclusion of others—is understood to mean that the express mention of one thing in a statute implies the exclusion of other similar things. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 572 n 8; 592 NW2d 360 (1999); see also *Johnson v Recca*, 492 Mich 169, 176 n 4; 821 NW2d 520 (2012). Because MCL 500.8114(2) specifically refers to the powers of a liquidator detailed § 8121(1)(f), (*l*), (m), (r), and (u)—but not (g)—it can be reasonably inferred that the Legislature did not intend to confer upon a rehabilitator those powers found in § 8121(1)(g).

The rehabilitator and Aspida rely on § 8121(1)(s), and the rehabilitator additionally relies on § 8121(1)(v), in arguing that the rehabilitator could conduct the sale of Pavonia stock. The former subparagraph indicates that a liquidator has the power to "exercise and enforce all the rights, remedies, and powers of a creditor, shareholder, policyholder, or member . . . ." MCL 500.8121(1)(s). The latter indicates that a liquidator has the power to "exercise all powers now held or hereafter conferred upon receivers by the laws of this state not inconsistent with the provisions of this chapter." MCL 500.8121(1)(v). But these liquidation subparagraphs, too, are not referred to in MCL 500.8114(2), and "expressio unius est exclusio alterius" is a properly applicable doctrine. The rehabilitator also relies on MCL 500.8121(4), which states:

> The enumeration in this section of the powers and authority *of the liquidator* shall not be construed as a limitation upon him or her, and it shall not exclude in any manner his or her right to do other acts not specifically enumerated in this section or otherwise provided for if necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation. [Emphasis added.]

But once again, the rehabilitator was simply not appointed as a liquidator in this case.

The plan of rehabilitation refers to liquidation powers under MCL 500.8121 and to the rehabilitator's powers to sell the insurer's property. Aspida contends that by signing the plan, GBIG consented to the rehabilitator's acting as a liquidator. Significantly, however, these powers

---

[9] Pavonia is a solvent and functioning insurance company, and no party points to any appointment of a liquidator for it. The rehabilitator could have petitioned for liquidation under MCL 500.8116(1).

are in a section of the plan summarizing "applicable law," and the plan directs that the rehabilitator can exercise such powers "when appropriate." Again, the rehabilitator was never appointed as a liquidator.

The rehabilitator and Aspida rely on language from MCL 500.8114(4) stating that "[i]f the rehabilitator determines that reorganization, consolidation, conversion, reinsurance, merger, or other transformation of the insurer is appropriate, he or she shall prepare a plan to effect those changes." But this language does not speak to selling the shares in the company.

The rehabilitator and Aspida additionally rely on MCL 500.8113(1), which provides, in pertinent part, that "[t]he order to rehabilitate the insurer shall by operation of law vest title to all assets of the insurer in the rehabilitator."[10] They contend that under this language, the rehabilitator had the authority to dispose of Pavonia stock. However, stock is considered the property of the stockholder separate and distinct from the property of the issuing corporation. *Detroit v Kresge*, 200 Mich App 668, 673; 167 NW 39 (1918). Here, the stock is held by and, therefore, owned by third party GBIG. In addition, MCL 500.8101(3) directs, in part, that "[t]he purpose of this chapter is the protection of the interests of insureds, claimants, creditors, and the public *with minimum interference with the normal prerogatives of the owners* and managers of insurers[.]" (Emphasis added.) Also, the SPA directs that *GBIG* "shall sell, convey, assign, transfer and deliver to Buyer . . . all of Seller's right, title, and interest in and to the Shares . . . ." It refers to the seller delivering to the buyer "stock certificates evidencing the Shares" and, again, states that the SPA "may be terminated prior to Closing . . . by Seller, for any reason or for no reason." Also, the rehabilitation plan states that the SPA is "fully incorporated into this Plan," and the court's order approving the plan directs, "Nothing 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 agreement."

---

[10] Chapter 81 does not specifically define the term "assets," but it defines "general assets" as follows:

> "General assets" means all property, real, personal, or otherwise, not specifically mortgaged, pledged, deposited, or otherwise encumbered, for the security or benefit of specified persons or classes of persons. As to specifically encumbered property, "general assets" includes all property or its proceeds in excess of the amount necessary to discharge the sum or sums secured by the property. Assets held in trust and on deposit for the security or benefit of all policyholders or all policyholders and creditors, in more than a single state, shall be treated as general assets. Amounts due an insolvent insurer as indemnification from the catastrophic claims association created in section 3104 shall not be considered to be assets of the receivership, but shall be paid directly to the property and casualty guaranty association under section 7935. [MCL 500.8103(g).]

In *Comm of Ins v Arcilio*, 221 Mich App 54, 63-64; 561 NW2d 412 (1997), this Court used the definition in MCL 500.8103(g) in discussing "assets."

There is no clear statutory language evidencing the rehabilitator's authority to sell the shares in Pavonia; the SPA was incorporated into the rehabilitation plan; the SPA reveals that GBIG was the entity selling the shares and that GBIG had certain rights under the SPA, including the right to back out of the agreement; and the order approving the plan clearly indicated that rights and obligations under the SPA remained in force. Given all these circumstances, the rehabilitator did not have the authority to sell the Pavonia shares on its own. Indeed, to hold otherwise would, in essence, nullify the SPA, which was entered into by *GBIG* and Aspida, not by the rehabilitator and Aspida.

D. CONSTITUTIONAL ISSUES

GBIG raises constitutional issues, arguing, in part, that the trial court's July 10, 2020 order violated the Contract Clause and principles of due process. We conclude that the constitutional issues are not yet ripe for review. At a minimum, the issue of termination has not yet been addressed by the lower court and is outstanding. Again, the SPA states that it "may be terminated prior to Closing . . . by Seller, for any reason or for no reason," and Aspida admits that on July 13, 2020, GBIG sent it notice of termination. The rehabilitator asserted on June 22, 2020, that "neither party has terminated the SPA, which remains in full effect." On that same date, Aspida represented that GBIG had "threatened to terminate the SPA unless the [hearing to finalize the rehabilitation plan] was adjourned." Aspida also stated that "the SPA remains in force, at least until Seller purports to terminate the SPA." In addition, at the June 25, 2020 motion hearing, counsel for the rehabilitator stated:

> Importantly, Your Honor, neither party to the stock purchase agreement has terminated that agreement. That is still a binding document. It's in full force and effect, and under the agreement the seller agreed to sell and buyer agreed to buy the Pavonia entities. So no one has terminated, and we have an active, ongoing, a binding and in force agreement there, Your Honor.

These representations show that the parties opposing GBIG in this appeal acknowledge the termination power held by GBIG. Accordingly, until the issue of termination or other contractual claims are resolved, the constitutional issues are merely hypothetical. This Court does not address hypothetical issues. See *People v Hart*, 129 Mich App 669, 674; 341 NW2d 864 (1983). In addition, this Court "will not reach constitutional issues that are not necessary to resolve a case." *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001) (quotation marks and citation omitted). The resolution of the appeal at this juncture in the proceedings does not require resolution of the constitutional issues.

III. CONCLUSION

The trial court's grant of specific performance is reversed. The trial court erred as a matter of law when it ruled the rehabilitator could simply stand in the shoes of GBIG and force a sale. It also erred when it failed to determine under MCL 500.8104(4) whether substantial justice required a New York court to decide matters concerning the effectiveness of GBIG's notice of termination and questions regarding breach of the SPA. This matter is remanded to the trial court to resolve the jurisdictional issue in light of the explicit wording of MCL 500.8104(4). If the trial court finds that the Ingham Circuit Court is the proper venue to resolve questions concerning the effectiveness of GBIG's notice of termination and whether GBIG breached the terms of the SPA such that specific performance is an appropriate remedy, the trial court shall revisit and resolve those questions, and state on the record its factual findings and conclusions of the law. Otherwise, the trial court shall stay proceedings before it until these dispositive issues are decided by a New York court.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Stephen L. Borrello
/s/ Michelle M. Rick

EXHIBIT B

September 27, 2021

GBIG Holdings, LLC.
c/o Global Growth Holdings, Inc.
2222 Sedwick Road
Durham, NC 27713

Transaction Letter Agreement

Dear Ladies and Gentlemen:

This letter agreement (the "Transaction Letter Agreement") is being entered into in connection with, and as a condition to the extension of credit under, the Loan Agreement (including all schedules, exhibits and amendments hereto, the "Loan Agreement"), dated as of July 9, 2019, is made by and between GBIG Holdings, LLC., a Delaware corporation and successor by conversion to GBIG Holdings, Inc. ("Borrower") and Axar Capital Management LP (as assignee of GBIB Holdings, Inc., the "Lender"). Capitalized terms used but not defined herein have the meanings given them in the Loan Agreement.

As an inducement to the Lender to enter into the Loan Agreement, the Borrower hereby agrees with the Lender as follows:

1. Attached to this Transaction Letter Agreement is a fully negotiated form of Stock Purchase Agreement (the "SPA") with respect to the acquisition of Pavonia Life Insurance Company of Michigan, a Michigan stock life insurance company ("PLICMI") by the Lender or an Affiliate thereof (the "Buyer"). The Borrower shall, and shall cause its Affiliates to, cooperate in good faith with the Buyer to complete its due diligence, finalize disclosure schedules, finalize the terms of the SPA and any other ancillary documents or instruments, and take such other steps (including by holding joint meetings with representatives of the Michigan Department of Insurance and Financial Services ("DIFS") as necessary or appropriate) in order to finalize all terms of the potential acquisition of PLICMI during the period commencing on the date of this Transaction Letter Agreement and ending on November 30, 2021 (the "Negotiation Period").

2. In the event that at any time prior to the end of the Negotiation Period the Buyer delivers a written notice to the Borrower stating that the Buyer has determined to proceed with the acquisition of PLICMI, then the signature page of the Borrower (as Seller under the SPA) shall be deemed released to the Buyer and upon delivery of the

Buyer's signature page to the Seller (whether or not the Buyer has received the physical signature page), the SPA shall be deemed fully executed and shall be deemed a legally binding and enforceable agreement of the parties thereto in accordance with its terms.

3. During the Negotiation Period, neither the Borrower nor PLICMI (to the extent that the Borrower controls PLICMI), nor any of their respective officers, directors, employees, Affiliates or representatives shall: (a) solicit, initiate, or encourage the submission of any proposal or offer from any Person relating to the acquisition of all or any substantial part of the equity or debt securities or business of PLICMI (including any acquisition structured as an asset sale, merger, consolidation, reinsurance transaction, or share exchange); (b) assist or participate in, or facilitate in any other manner any effort or attempt by any Person to do or seek any of the foregoing; or (c) take any actions that would be reasonably likely to interfere with the ability of Buyer to consummate the transaction contemplated by this Transaction Letter Agreement and the SPA (any of the foregoing, an "Acquisition Proposal"). The Borrower shall promptly inform Buyer of any written inquiries or proposals for and provide Buyer with copies of all related documentation concerning, any Acquisition Proposal. Lender agrees that it will immediately notify Borrower in writing if Buyer determines that it will not sign the SPA.

4. The Borrower and the Lender and their respective affiliates will cooperate to approach DIFS a reasonable time prior to execution of the SPA in order to advise DIFS that the SPA will be signed and to discuss any issues or questions that DIFS may have, it being understood that such approach will be informal, is not expected to result in a definitive approval of the SPA by DIFS, but rather is intended to ascertain whether DIFS has any objection to the Buyer entering into the SPA at that time. .

Please indicate your agreement with the foregoing by signing this Transaction Letter Agreement in the space indicated below, whereupon (assuming due execution by the Borrower) this Transaction Letter Agreement shall be a binding agreement of the Borrower and the Lender, enforceable in accordance with its terms, subject only to the effect of any applicable bankruptcy, reorganization, insolvency, moratorium, rehabilitation, liquidation, fraudulent conveyance or similar Laws relating to or affecting creditors' rights generally and subject, as to enforceability, to the effect of general equitable principles (regardless of whether such enforceability is considered in a proceeding in equity or at law).

Sincerely,

Axar Capital Management LP

Agreed and Accepted this 27th day of September, 2021

GBIG Holdings, LLC

DocuSigned by:

By: Greg Lindberg ________

D94F2DEFCB50443...

Name: Greg Lindberg

Title: Manager

Attachment

EXHIBIT C

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,

Petitioner,

v.

PAVONIA LIFE INSURANCE COMPANY OF MICHIGAN,

Respondent.

Case No. 19-504-CR

Hon. Wanda M. Stokes

Christopher L. Kerr (P57131)
Aaron W. Levin (P81310)
Assistant Attorneys General
Corporate Oversight Division
P. O. Box 30736
Lansing, MI 48909
(517) 335-7632
Counsel for Petitioner

Peter B. Kupelian (P31812)
Clark Hill PLC
151 S. Old Woodward Avenue, Suite 200
Birmingham, MI 48009
(248) 530-6336
pkupelian@clarkhill.com

Ronald A. King (P45088)
Zachary C. Larsen (P72189)
Clark Hill PLC
212 E. Cesar E. Chavez Ave.
Lansing, MI 48906
(517) 318-3015
rking@clarkhill.com
larsenz@clarkhill.com
Counsel for GBIG Holdings, Inc.

AFFIDAVIT OF BOB ALBAN IN SUPPORT OF GBIG HOLDINGS, INC.'S OBJECTION TO APPLICATION FOR APPROVAL OF REHABILITATOR'S AMENDED PLAN OF REHABILITATION

State of New Hampshire)
)
County of Hillsborough)

Bob Alban, being first duly sworn, deposes and says as follows:

1. I am over the age of eighteen and have personal knowledge of the facts stated in this Affidavit and, if sworn as a witness, I am competent to testify to these facts.

2. I am currently employed as the Co-Founder and Principal of Montshire Advisors, an insurance advisory firm.

3. In that role, I have brokered reinsurance transactions, advised insurers on product, distribution, and FHLB matters, and represented investments and investment firms to the US life insurance industry. Additionally, I have significant expertise in rating agency and regulatory capital models, reinsurance, Federal Home Loan Bank matters, as well as an understanding of the life and annuity product and distribution marketplace.

4. Prior to co-founding Montshire Advisors, I led corporate development at National Life Group, a Fortune 1000 insurance company where I focused on capital optimization structures and transactions such as reinsurance, corporate owned life insurance, certified capital companies and other tax advantaged investments, interest rate and equity market hedging, and Federal Home Loan bank programs.

5. Additionally, my industry experience includes having led mergers and acquisitions at Sentry Insurance, a Fortune 1000 property and casualty insurer, and holding business development positions with GXS (formerly GE Information Services), ITOCHU International (an $86 Billion Japanese conglomerate) and Westinghouse.

6. I hold a Bachelor of Science degree in Mechanical Engineering from West Virginia University and a Master of Business Administration degree from Georgetown University.

7. I also hold Series 7 and Series 66 securities licenses, my life producer and reinsurance intermediary license, and I am a registered representative of Castle Hill Capital Partners Inc., a registered Broker-Dealer with the SEC, and a member of FINRA, NFA, and SIPC.

8. I am familiar with the affairs and financials of Pavonia Life Insurance Company of Michigan ("Pavonia") having spent at least 500 hours of my time dedicated to Pavonia matters, including proposed or potential acquisition and reinsurance transactions to fully resolve the Pavonia matter, since approximately July 2020 in my capacity as a consultant to GBIG Holdings, LLC.

Fairness of Rehabilitator's Proposed Plan of Sale for Pavonia Life Insurance Company of MI

9. I have reviewed the Rehabilitator's proposed Amended Plan of Rehabilitation put forth by the Rehabilitator in her December 3, 2021 application for approval for an amended plan of rehabilitation.

10. I have also reviewed in detail each of the proposed agreements to engage Willis Towers Watson ("Willis Towers") and its affiliates.

11. In my opinion, the Rehabilitator's proposed plan is not "fair and equitable" to GBIG Holdings, LLC for several reasons.

12. Setting aside the legal questions concerning GBIG Holdings, LLC's ownership interest and the related issues of the Rehabilitator's authority to conduct a sale of this process, a sales process run by the Rehabilitator and Willis Towers as proposed is not "fair and equitable" because: (1) those entities have no incentive to maximize the sale value to shareholder GBIG Holdings, LLC; (2) Pavonia is not currently being managed to maximize value to its shareholder GBIG Holdings, LLC and its value is eroding daily—in particular due to its sub-optimal asset allocation and it's out of market fees being paid to Aspida under a service contract signed in July 2021—so any unnecessary delay further impairs the value realizable to Pavonia's shareholder GBIG Holdings, LLC; (3) Willis Towers will need substantial time to get up to speed on this relatively complex situation while the asset of Pavonia is wasting away; (4) the Rehabilitator's

proposed process timeline seem unrealistic for several reasons, including the enhanced due diligence required for prospective purchasers of Pavonia given the complexity of its liabilities, tax matters, and other considerations;(5) the Rehabilitator's proposed process does not disclose substantial additional costs that are likely to be incurred by Pavonia as a result of the described process; and (6) Willis Towers' fees for valuation work are expensive, unnecessary, and conflict with the other work it proposes to do;

13. *First*, the Rehabilitator's objectives are principally focused on protecting policyholders rather than being concerned with maximizing shareholder value. This is evidenced by actions and inactions that have led to destruction of shareholder value described in Paragraph 15, below.

14. Similarly, the proposed Willis Towers agreements misalign Willis Towers' incentives to maximize value. Among other things:

a. It is unusual that a broker would be engaged to sell a company by a party other than the seller, i.e. its shareholder(s). This construct would seem to place the broker's duty to represent its client, Pavonia (the target company), ahead of maximizing value in a sale to GBIG Holdings, LLC's (as the selling shareholder).This unusual construct may also expose the broker to liability given the potential for conflict between serving the interest of its client (the target company) and performing the scope of services it proposes under the WillisRe Securities contract.

b. The proposed WillisRe securities agreement has a substantial minimum compensation amount regardless of the ultimate consideration paid to the seller. For any transaction with $67 million or less of consideration, Willis would receive a fee of $1 million. Finding incrementally higher bids often requires substantial additional work on the part of the broker. Since Willis receives at least a $1 million fee regardless of the consideration paid , it would seemingly motivate Willis to prefer to complete *any* transaction—regardless of its value—rather than to incentive Willis to maximize shareholder value.

c. The proposed WillisRe securities agreement contracts Pavonia to a twelve month post termination payment obligation without any apparent minimum performance obligation. As an extreme hypothetical, it appears WillisRe could enter into this contract, not do any work on the transaction and then collect a fee of at least $1 million when Pavonia is sold by GBIG or some other broker in the next twelve months. As a more likely hypothetical, it appears that if this contract is executed and the company is sold to Axar under an agreement that GBIG Holdings, LLC has worked diligently to procure and has expended significant sums to facilitate, WillisRe would be owed a fee of approximately $1,125,000 payable by Pavonia upon execution of the sale of the company to Axar—even without WillisRe doing any work on that transaction.

d. The proposed WillisRe securities agreement and proposed WillisRe reinsurance broker of record agreement appear to be constructed in a way that provides Willis the opportunity to "double dip" on compensation by being paid to reinsure the business of Pavonia and separately to sell the company. To illustrate, hypothetically, Willis could arrange the reinsurance of all of the business of Pavonia, collect a fee of $1.45 million and then sell the remaining shell insurance company and receive another fee of $1 million.

15. *__Second__*, it is my belief that the shareholder value of Pavonia is eroding by approximately $1.5M per month, and a lengthy sales process will therefore decrease the value of

from a sale of Pavonia that shareholder GBIG Holdings can obtain. That is driven by, among other things, the facts that: (i) the company while in rehabilitation has not addressed its sub-optimal asset allocation; and (ii) the company entered into a service contract that pays Aspida out of market fees for services.

16. On the first point, the company's investment portfolio has a market yield approximately 100bp below the industry average market yield. Reallocating to a portfolio that earns the industry average market yield would result in $10 million per year of value (pre-tax) accreting to its shareholder GBIG Holdings. While Pavonia remains in Rehabilitation, this below-average performance diminishes the value of Pavonia on sale.

17. The other significant factor in the erosion of value to Pavonia is that the company entered into a service contract with Aspida in July 2021 for which it receives $759,166.67 per month in fees. The bulk of the services provided under this contract are administration of several relatively smaller term life, credit life and accident insurance blocks and the provision of corporate account and regulatory compliance (i.e. statutory filing) work. I have received two proposals for the administration services which price the services at around $1 million per year. Based on my experience, I estimate the cost to provide the accounting and regulatory work would be less than $500,000 per year. Accordingly, it is my belief that the Aspida services contract is overcharging Pavonia by approximately $7.6 million per year. Therefore, while a long sales process might unearth other potential buyers that might be willing to pay more for Pavonia, the ultimate value realizable by its shareholder may be less than the value of accepting a lower bid now.

18. Only the shareholder is in a position to evaluate such tradeoffs of value realizable today versus potential future realizable value, but the proposed sales process does not give GBIG Holdings, LLC as the shareholder even a seat at the table.

19. *Third*, given the complexities associated with Pavonia, it is my belief that Willis Towers will need to invest several hundred hours of time to get up to speed on Pavonia, likely taking 6 to 8 weeks or more before it can even initiate the proposed sales process. Again, that delay has a significant financial cost to GBIG Holdings.

20. The complexity of Pavonia includes the surrounding litigation, and that Pavonia is in rehabilitation, its Canadian business and lack of audited financials for such, its numerous types of insurance liabilities: standard and sub-standard structured settlement annuity, corporate owned life insurance, term life, credit life, and accident insurance; its more than twenty-five reinsurance contracts and numerous service agreements, and its complex tax consideration as a result of its historical ownership structure and its Canadian business. Because of the $1.5m per month of value erosion described above, this delay to accommodate Willis Towers' learning curve is nontrivial to the selling shareholder.

21. *Fourth*, the same complexities described above will result in enhanced due diligence requirements of any potential bidder, making the Rehabilitator's proposed process timeline seem unrealistically optimistic. Exemplary of the level of diligence needed for Pavonia, Axar took approximately four months to complete its diligence with a hyper focus on getting their work completed (*i.e.*, much of this work was done for the loan diligence while under daily threat of foreclosure from Aspida). Accordingly getting multiple potential bidders through diligence will likely take six months or longer. That delay will drive down the value of Pavonia.

22. *Fifth*, Pavonia has a high degree of complexity relative to its size. In order to determine if there is an executable transaction, potential bidders need to do a lot of work at great expense and with significant consumption of their resource time which could be spent pursuing other (potentially larger) opportunities. There is substantial uncertainty that faces a potential bidder

for Pavonia including that Pavonia is a regulated business which requires regulatory approval to be sold, and uncertainty around the time and cost associated with transitioning off of Pavonia's out of market fee contract with Aspida. The dynamic of substantial cost and effort associated with coming to a view on a potential acquisition relative the uncertainty around consummating an acquisition drives bidders to insist on terms that protect them for failing to complete a transaction. These protective terms could include diligence expense reimbursement, work fees, and "exclusivity" periods where they have the exclusive option to close on a transaction.

23. GBIG Holdings' experience with Pavonia here is instructive: GBIG Holdings provided Axar with exclusivity on the sale of Pavonia for it to have adequate time to complete its diligence and consummate a transaction. Further, GBIG Holdings reimbursed Axar a portion of Axar's diligence expenses and paid Axar a nominal work fee to compensate Axar for their potential opportunity cost related to the uncertainty of completing a Pavonia transaction.

24. It is likely that other potential bidders will insist on similar provisions which could easily cost Pavonia several millions of dollars to execute the process as described.

25. *Sixth*, in my opinion, the Willis Tower proposal to be engaged for $250,000 to $275,000 is unreasonably expensive for a valuation.

26. Because there is an existing and current cash flow model to use as a starting point to create a valuation report, a boutique actuarial firm would likely charge less than $50,000 to produce a valuation report.

27. Further, it is unclear what purpose this valuation report would serve and it may be detrimental to the process. A potential bidder will form their own view of value without regard to the valuation Willis Tower determined. On the other hand, in the event potential bidders become

aware of this valuation amount, if they have a higher number in mind, they may reduce their bid to the amount that Willis Tower specified.

28. Moreover, by executing this valuation engagement, given the inherent conflict, Willis should be prohibited from being engaged as broker for the sale of Pavonia. Given that Willis proposes a minimum $1M fee to sell the company, and that generally low-price bids are easier to obtain than higher priced bids, it would be in Willis' self-interest to conclude a low value for Pavonia.

Favorability of the Axar Capital, LLC Deal

29. A prompt disposition of Pavonia seems to benefit all parties. The sales process proposed by the Rehabilitator seems to be an unnecessary, lengthy, and costly detour from a prompt resolution which highly likely can be achieved by focusing on getting closed as quickly as possible on the agreement-in-concept transaction with Axar Capital, LLC. The Axar transaction is expected to be memorialized in an executed Stock Purchase Agreement very soon.

30. Unlike the Stock Purchase Agreement with Ares, the Axar agreement does not have an option for GBIG to terminate for convenience by paying a break fee.

31. Further, based on my involvement with the Axar transaction and my understanding of how their process has progressed, I believe that Axar will submit a Form A filing promptly after executing the stock purchase agreement and that pending Form A approval the transaction can promptly close.

32. As demonstrated in the process to execute the loan with Axar, and in restructuring the transaction to eliminate the seller note, Axar has demonstrated persistence and creativity to overcome any obstacles related to Pavonia transactions.

33. In the unlikely event that a transaction with Axar is not consummated, GBIG and its advisors are best positioned to promptly identify a suitable alternative buyer in communication with the rehabilitator and to negotiate and finalize a transaction subject to regulatory approval.

34. The sale to Axar will provide significant value for Pavonia and allow the parties to close on the transaction much quicker than the Rehabilitator's proposed sales process.

I DECLARE THE ABOVE STATEMENTS TO BE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

Bob Alban
Principal, Montshire Advisors

Subscribed and sworn to before me
this 6 day of January, 2022.

Caitlin Loving, Notary Public
Hillsborough County, New Hampshire
My Commission expires:
Acting in the county of Hillsborough

CAITLIN E. LOVING
Notary Public - New Hampshire
My Commission Expires June 30, 2026