

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

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

[IN REHABILITATION]

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**REHABILITATOR'S RESPONSE IN OPPOSITION TO
INDEPENDENT INSURANCE GROUP, LLC'S OBJECTION TO
THE REHABILITATOR'S PLAN OF REHABILITATION**

Anita G. Fox, Director ("Director") of the Michigan Department of Insurance and Financial Services ("DIFS"), in her capacity as the statutory and Court-appointed Rehabilitator (the "Rehabilitator") of Pavonia Life Insurance Company of Michigan ("Pavonia"), by and through her attorneys, Dana Nessel, Attorney General, and Christopher L. Kerr and Aaron W. Levin, Assistant Attorneys General, submits this Response in support of her Plan of Rehabilitation filed with

this Court on August 8, 2019 (“Plan of Rehabilitation” or “Plan”), and more specifically, in opposition to Independent Insurance Group, LLC’s (“Independent’s”) Objection to the Plan of Rehabilitation (“Independent’s Objection”) filed with the Court on October 4, 2019. The Rehabilitator states the following in support of her Response, and respectfully asks this Court to deny Independent’s Objection and allow the Rehabilitator’s Plan of Rehabilitation to proceed.

I. INTRODUCTION

Independent’s Objection is directly at odds with the Rehabilitator’s Plan of Rehabilitation. That Plan, assuming Form A approval by DIFS, will sell Pavonia to a non-affiliated third party, Aspida Holdco LLC (“Aspida”) (a Delaware holding company and an affiliate of ARES Management Corporation), under an existing, signed Stock Purchase Agreement that the Rehabilitator filed with the Court along with the Plan.

Independent’s Objection and requested relief are not supported by any provision in Chapter 81 of the Michigan Insurance Code, MCL 500.8101 – 500.8159 (“Chapter 81”), which governs this Pavonia rehabilitation. First, Independent is not a Pavonia insured, claimant, creditor, or other entity with a vested legal or equitable interest in Pavonia or its assets, and therefore lacks standing to object to the Plan of Rehabilitation. Second, Chapter 81 authorizes and vests the Rehabilitator with broad discretion to rehabilitate Pavonia in a manner that protects the Company’s insureds and creditors, including by conducting a private sale of Pavonia. Third, the Stock Purchase Agreement creates no rights in

Independent or obligations on the part of the Rehabilitator or the Seller to consider Independent's untimely, speculative purchase offer. Fourth, this is a solvent rehabilitation, meaning the Rehabilitator has no obligation to maximize Pavonia's sale price because the sale proceeds will only benefit the Seller, not insureds and creditors. Fifth, Independent's purchase offer is expressly conditional and may never be actually made, which only serves to unduly delay implementation of the Plan of Rehabilitation. Finally, Independent's allegations about the current Pavonia management team, "conflicts of interest," and "self-dealing" lack evidentiary support. Moreover, if the Rehabilitator determines that any current management team members are unqualified, those members will be promptly removed.

For each of these reasons, the Rehabilitator respectfully asks this Court to deny Independent's Objection and to allow the Rehabilitator to proceed with her Plan of Rehabilitation.

II. ARGUMENT

A. Independent lacks standing to assert any objection to the Plan of Rehabilitation.

Under MCL 500.8101(2), Chapter 81 must "be liberally construed to effect the purpose stated in" MCL 500.8101(3). The express purpose of Chapter 81 and the receivership proceedings provided for therein (including this rehabilitation of Pavonia) "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). The focus of this rehabilitation is

therefore to protect the interests of those individuals and entities, namely insureds, claimants, and creditors, that have a direct interest in the Rehabilitator's decisions relating to Pavonia and its rehabilitation.

Independent is merely an untimely prospective buyer of Pavonia that does not fall within the purpose or protections of MCL 500.8101(3). Pavonia owes Independent no legal obligations as an insured under an existing insurance contract. Nor is Independent a creditor or claimant that is legally or equitably owed any money by Pavonia. Because Independent is not an insured, a claimant, a creditor, or a member of the public that has any concrete, vested legal or equitable interest in Pavonia or its assets, it lacks standing to object to the Plan of Rehabilitation. See *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 359 (2010) (To establish standing “[i]n a case involving private rights . . . the litigant should have “some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.”) (quoting *Bowie v Arder*, 441 Mich 23, 42 (1992)).

Put simply, Independent is a complete stranger to Pavonia and this Rehabilitation proceeding, and possesses only an untimely, speculative desire to purchase the company. This does not confer standing on Independent to object to the Plan of Rehabilitation, and, therefore, the Court should deny Independent's Objection based on its lack of standing.

B. Chapter 81 expressly authorizes the Rehabilitator to exercise broad discretion to rehabilitate Pavonia in a manner that protects the Company's insureds and creditors, including by conducting a private sale of Pavonia.

Chapter 81 vests the Rehabilitator with plenary power to conduct this rehabilitation of Pavonia in her sound discretion. MCL 500.8114(2) authorizes the Rehabilitator to "take such action as . . . she considers necessary or appropriate to reform and revitalize [Pavonia] including, but not limited to, the powers in section 8121(1)(f), (l), (m), (r), and (u)." By its plain language, this list of powers is not exhaustive or "limited to" the subsections cited. Accordingly, the other powers granted under section 8121(1) [MCL 500.8121(1)] are available to the Rehabilitator in an appropriate case.

MCL 500.8121(1)(g) grants the Rehabilitator the power "[t]o conduct public *and private* sales of the insurer's property." (emphasis added). Thus, the Rehabilitator is authorized to proceed with a Plan of Rehabilitation that provides for the sale of Pavonia to Aspida under the executed Stock Purchase Agreement, subject to DIFS' ongoing Form A review and approval. Conversely, Chapter 81 does not require the Rehabilitator to conduct a public bidding process in connection with rehabilitating Pavonia.

Chapter 81 expressly authorizes the Rehabilitator to conduct a private sale of Pavonia without considering Independent's untimely, speculative purchase offer. This statute is controlling and forecloses Independent's Objection to the Plan of Rehabilitation. Consequently, the Court should deny Independent's Objection.

C. The Stock Purchase Agreement does not obligate the Rehabilitator or the Seller to solicit or entertain alternative bids for the sale of Pavonia.

Independent ignores Chapter 81, and instead, attempts to rely on the Stock Purchase Agreement for its purported ability to make a competing offer to buy Pavonia. The Stock Purchase Agreement conveys no such rights to Independent, nor does it obligate the Rehabilitator or the Seller to solicit or entertain alternative bids for the sale of Pavonia. In support of its position, Independent cites “Section 12.04(d)” [sic: Section 12.04(c)] of the Stock Purchase Agreement, which states:

If (i) Seller, the Rehabilitator or any Acquired Company receives an Alternate Proposal that is superior in any material respect to the proposal effected under this Agreement or offers consideration materially in excess of the Purchase Price payable hereunder (a “Superior Proposal”) prior to termination of this Agreement . . . then notwithstanding anything herein to the contrary, (x) no Reverse Break-Up Fee shall be due and payable under Section 12.05(c) and (y) if Seller, its Affiliates, the Rehabilitator, or any Acquired Company consummates such Superior Proposal, or any other Superior Proposal made by the Alternate Bidder that originally made such Superior Proposal, or any of its Affiliates, within eighteen (18) months after termination of this Agreement, then Seller shall pay to Buyer the Break-Up Fee.

This provision does not create any private rights in third parties, such as Independent, nor does it create obligations on the part of the Rehabilitator or the Seller to entertain Independent’s untimely, speculative purchase offer.¹ Rather, this provision clarifies that in the event the Seller were to receive a “Superior

¹ See also Stock Purchase Agreement, Section 14.08 (“[T]his Agreement is for the sole benefit of the parties to this Agreement and their permitted successors and assigns and nothing in this Agreement, express or implied, is intended to or shall confer upon any other Person or entity any legal or equitable right, benefit or remedy of any nature whatsoever under or by reason of this Agreement.”)

Proposal,” and then proceeded to terminate the Stock Purchase Agreement and consummate that Superior Proposal within 18 months after terminating the Agreement: (1) the Buyer would owe the Seller no “Reverse Break-Up Fee”; and (2) the Seller would owe the Buyer the “Break-Up Fee,” which is defined in Section 1.01 as \$2,625,000. In other words, this is simply a provision explaining in detail one post-termination circumstance when the Seller would owe the Buyer the Break-Up Fee. Independent misinterprets Section 12.04(c) of the Stock Purchase Agreement (while ignoring Section 14.08) to confer rights that do not exist. Therefore, the Court should deny Independent’s Objection to the Plan of Rehabilitation.

D. Pavonia is solvent, so an increased sale price would only benefit the Seller and not Pavonia’s insureds or creditors.

This is a solvent rehabilitation, meaning Pavonia has adequate funds to pay all insured obligations and all creditor claims. As of August 31, 2019, Pavonia had assets of \$1,071,065,862, liabilities of \$998,580,800, and resulting capital and surplus (or net worth) of \$72,485,061. Given Pavonia’s solvent financial condition, all creditor claims are being paid in the normal course of business unless the creditor’s claim has been disputed on substantive grounds. Likewise, claims by insureds under their Pavonia insurance policies are being paid when due in the normal course of business, again unless there is a substantive dispute about the insured’s entitlement to benefits.

Because Pavonia is solvent, has ample net worth, and is paying all valid insured and creditor claims when due, the Rehabilitator has no obligation or reason

to maximize the sale price of Pavonia.² Increasing the sale price of Pavonia would do nothing but yield more money for the Seller and increase the Seller's profit on the sale, not benefit Pavonia's insureds and creditors. For these reasons, the Rehabilitator believes that the Plan of Rehabilitation and its incorporated Stock Purchase Agreement fully protect Pavonia, its insureds, and its creditors. (See Plan of Rehabilitation, pp 11, 16.)

The Rehabilitator has no obligation to increase Pavonia's sale price in this solvent rehabilitation. Therefore, the Court should deny Independent's Objection.

E. Independent has not actually made a competing offer.

The Court should note the following disclaimer in Independent's Objection, which concedes that any competing offer to purchase Pavonia is far from a certainty and subject to conditions:

The Independent Proposal is non-binding and conditioned upon (i) DIFS providing Independent with access to Pavonia's reports and financial and operating results, and other due diligence information, and (ii) Independent's satisfactory due diligence review of such information

(Independent's Objection, p 3, n 1.)

Thus, Independent is asking this Court to scuttle the executed Stock Purchase Agreement and delay the Rehabilitator's implementation of her Plan of Rehabilitation so that Independent can *consider* making a competing offer.

² This is not a liquidation where the insurer is insolvent and has inadequate funds to pay all insured and creditor claims, in which case the liquidator (as opposed to rehabilitator) would have an affirmative obligation to maximize the insurer's sale price to mitigate insured and creditor losses. Instead, a higher sale price for Pavonia here would only enrich the Seller, which has already negotiated at arm's length and agreed to the sale price contained in the Stock Purchase Agreement.

Independent acknowledges that such an offer may never materialize, because any offer by Independent is wholly contingent on “satisfactory” due diligence. (*Id.*) The Court should not delay the Plan of Rehabilitation under these circumstances and should deny Independent’s Objection.

F. Independent’s other alleged “concerns” about the sale of Pavonia to Aspida are unfounded.

Independent’s Objection is full of unfounded “shock tactics” designed to persuade the Court that it should ignore the Rehabilitator’s Plan of Rehabilitation and, instead, allow Independent to interfere with this rehabilitation despite having no right to do so. The Court should reject these tactics.

First, Independent attacks the current management team of Pavonia without any evidentiary support. The Court should therefore disregard these attacks. Moreover, if the Rehabilitator or DIFS, during its ongoing Form A review, determine that any current management team members are unqualified, those members will be promptly removed. See MCL 500.1315(1)(f); MCL 500.8114(2). Independent’s concern is duly noted, but the Rehabilitator will not act to remove otherwise qualified managers without evidence to support such action.

Second, Independent makes the bald assertion that “certain aspects of the transactions contemplated by the Plan appear to have been impacted by actual and/or potential conflicts of interest (including, without limitation, self-dealing) that may have had a significant adverse impact on the outcome of the process.” (Independent’s Objection, p 9.) Again, Independent makes these scurrilous claims with absolutely no evidentiary support. Moreover, Independent has submitted

numerous documents to DIFS as part of the Form A review process, none of which support, directly or indirectly, its claim that the Plan of Rehabilitation has been tainted or influenced by “conflicts of interest” or “self-dealing.” If Independent has any actual evidence that this has occurred, the Rehabilitator and DIFS’ Form A review team request that it submit such evidence immediately. Otherwise, the Court should treat these claims as nothing more than what they are—unsupported hyperbole.

Because Independent’s allegations regarding the Pavonia management team, “conflicts of interest,” and “self-dealing” lack evidentiary support, the Court should deny Independent’s Objection to the Plan of Rehabilitation.

III. CONCLUSION AND RELIEF REQUESTED

For each of the reasons above, the Rehabilitator respectfully asks this Court to deny Independent's Objection to the Plan of Rehabilitation.

Respectfully submitted,

Dana Nessel
Attorney General

A handwritten signature in black ink that reads "Christopher Kerr". The signature is written in a cursive style with a horizontal line underneath the name.

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Dated: November 1, 2019

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The undersigned certifies that a copy of the Rehabilitator's Response in Opposition to Independent Insurance Group, LLC's Objection to the Rehabilitator's Plan of Rehabilitation was served via US mail upon the above attorneys of record or parties appearing in pro per, in the above cause by mailing the same to them at

their respective addresses with first class postage fully prepaid thereon, on the 1st day of November 2019.


Linda S. Miers, Legal Secretary