Received 10/17/2022 11:38:55 PM Commonwealth Court of Pennsylvania

Filed 10/17/2022 11:38:00 PM Commonwealth Court of Pennsylvania
1 SHP 2022

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of Pennsylvania in his capacity as the Statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania, Plaintiff	:	
	:	DOCKET NO.: 1 SHP 2022
v.	:	
Brian Wegner 12862 Tuskany Boulevard Carmel, IN 46032	:	
Paul Lorentz: 214 Wellington Parkway Noblesville, IN 46060	:	JURY TRIAL DEMANDED
Barry Staldine 6789 South Foster Branch Court Pendleton, IN 46064	:	
Protiviti Inc. 2884 Sand Hill Road Menlo Park, CA 94025 Defendants.	:	

COZEN O'CONNOR
Michael J. Broadbent, PA ID 309798
Dexter R. Hamilton, PA ID 50225
Eric D. Freed, PA ID 39252
Matthew J. Siegel, PA ID 82406
1650 Market Street, Suite 2800
Philadelphia, PA 19103
(215) 665-2000

TUCKER LAW GROUP
Leslie Miller Greenspan
PA ID 91639
Ten Penn Center
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Counsel for Michael Humphreys,
Acting Insurance Commissioner of the Commonwealth of Pennsylvania,
as Statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT PROTIVITI INC.'S OBJECTIONS TO THE AMENDED COMPLAINT

Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, in his capacity as the Statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania ("SHIP")[1], by and through his undersigned counsel, files this Brief in Opposition to the Preliminary Objections filed by Defendant Protiviti Inc. ("Protiviti") and respectfully requests that the Court overrule the objections and order Defendant Protiviti to file an Answer to SHIP's Amended Complaint within twenty (20) days.

I. INTRODUCTION

Protiviti's preliminary objections rest upon mischaracterizations of both Pennsylvania law and the averments in the Amended Complaint. Protiviti ignores Pennsylvania's discovery rule and the public policies surrounding rehabilitation to argue, incorrectly, that SHIP's claims are untimely on the face of the Amended Complaint. Protiviti ignores Pennsylvania Supreme Court precedent and attempts to expand the scope of the gist of the action and economic loss doctrines far beyond their true limits. And Protiviti conveniently ignores the material factual allegations supporting SHIP's claims against Protiviti for breach of contract, negligence, breach

[1] As used throughout this Brief, the term "SHIP" refers to both the Senior Health Insurance Company of Pennsylvania and, where indicated by context, the Acting Insurance Commissioner of the Commonwealth of Pennsylvania, in his capacity as Statutory Rehabilitator.

of fiduciary duty, and civil conspiracy. SHIP's claims against Protiviti are well-pled and should be permitted to proceed.

II. RELEVANT ALLEGATIONS IN AMENDED COMPLAINT

This action was initiated on January 28, 2022, by Michael Humphreys, acting on behalf of SHIP in his role as SHIP's statutory Rehabilitator by virtue of his appointment as the Acting Insurance Commissioner of the Commonwealth of Pennsylvania (the "Rehabilitator"), to recover funds SHIP lost as a direct result of Defendants' malfeasance and misrepresentations. SHIP filed its Amended Complaint on June 22, 2022, asserting the following claims: Breach of Fiduciary Duty against Defendants Wegner, Lorentz, and Staldine (Count 1); Breach of Fiduciary Duty against Defendant Protiviti (Count 2); Civil Conspiracy against all Defendants (Count 3); Negligence against all Defendants (Count 4); Breach of Contract against Protiviti (Count 5); and Negligent Misrepresentation against Defendants Wegner, Lorentz, and Staldine.

Each of the four Defendants, including Defendant Protiviti, filed Preliminary Objections to the Amended Complaint. As explained below, Protiviti's objections are entirely without merit and improperly rest upon its disagreement with the facts alleged in the Amended Complaint and the reasonable inferences drawn therefrom. While some of Protiviti's arguments may be appropriate for consideration at summary judgment or trial, they are not proper at the pleadings stage.

The claims in the Amended Complaint are based upon misconduct the Defendants committed principally between 2014 and 2020. SHIP's claims relate to three categories of egregious mismanagement, each of which was concealed by the Defendants, who acted in concert to prevent SHIP's Trustees and the PID from discovering or remedying their malfeasance, including: (1) the Beechwood Re investments; (2) the Roebling Re transactions; and (3) underpricing of SHIP's premiums and underestimation of its future liabilities. The specific allegations supporting each instance of misconduct are set forth in SHIP's Amended Complaint. Because Protiviti' s misconduct focused upon the Beechwood Re investments, for the purpose of brevity SHIP will limit its recitation of facts to those issues.

The Beechwood Transactions

Between May 2014 and March 2015, Defendants Wegner, Lorentz, and Staldine caused SHIP to enter into a series of investments totaling $320 million with a group of reinsurance and asset management companies called Beechwood Re. SHIP was induced to make these investments, and to enter related Investment Management Agreements ("IMAs"), based upon several material misrepresentations, including false statements about the quality and risk of the investments, SHIP's rights under the relevant agreements, and the guaranteed rate of return. (*Id.*, ¶ 43-79.)

SHIP alleges in the Amended Complaint that Defendants either knew of these misrepresentations or consciously avoided specific knowledge of them. SHIP further alleges that each of the Defendants failed to advise SHIP's board of the misrepresentations or take any action consistent with their fiduciary duties to either prevent SHIP from investing or avoid the substantial financial losses that resulted.

In truth, Beechwood either did not invest SHIP's funds at all, instead using those funds to pay themselves or other investors, or Beechwood invested SHIP's funds in extremely risky assets, some of which financially benefitted Defendant Wegner's family. None of the Defendants informed SHIP's Trustees or the PID of these misrepresentations.

In June 2016, a co-founder of one of the funds under the Beechwood umbrella was arrested on bribery charges and the offices were raided under suspicion of running a Ponzi scheme that potentially implicated SHIP's $320 million investment. Following that arrest, SHIP requested that Protiviti and another third-party consultant investigate the Beechwood investments. That investigation and analysis confirmed that there was insufficient oversight and deficient documentation of the Beechwood investments, but it did not reveal the extent of Beechwood's misrepresentations or the extent of malfeasance by the Defendants.

Unbeknownst to the rest of SHIP's Board, this was not the first time that Protiviti had been engaged to review the Beechwood transactions. In fact, at the end

of 2014, Defendants Wegner and Lorentz, in secret and without informing the Trustees or the PID, requested that Protiviti review the Beechwood IMAs. Protiviti agreed and concealed their work for Wegner and Lorentz from the Trustees. In February 2015, Protiviti completed its review and provided Defendants with a report identifying several problems with the IMAs underlying SHIP's Beechwood Re investments. This Protiviti report was not delivered to the appropriate committees or individuals at SHIP until November 2016.

By the end of 2016, SHIP began the process of ending its relationship with Beechwood Re. Yet as a result of the secretive actions of the Defendants, which includes Protiviti's concealment of its findings and analysis, complete and accurate information regarding the Beechwood Re transaction remained hidden from SHIP, its Board, and later, the Rehabilitator. (*Id.*, ¶¶ 60, 72, 115.)

Protiviti's role in Beechwood Re and other misconduct

Protiviti is a global consulting firm that provides consulting on a range of topics including internal audit, risk and compliance. Protiviti served as SHIP's internal auditor from 2013 through 2016. (Am. Compl. ¶ 7.)

Protiviti was engaged by SHIP in January 2015 to: (1) assist in identifying and mitigating risks with regard to the Beechwood Re transaction, including, especially, reviewing due diligence material; (2) assist in reviewing economic assumptions used to calculate the economic impact of the transactions; and (3) assist

in reviewing the transaction documents themselves by confirming that risk mitigation steps were provided for in the transaction documents and making recommendations to monitor compliance with risk mitigation steps. However, as the foregoing makes clear, Protiviti fell far short in its role. (*Id.*, ¶ 179.)

In February 2015, Protiviti performed a review and analysis of a proposed Surplus Loan Transaction with Beechwood. In this analysis ("the Protiviti memo"), Protiviti noted that "[t]ypical due diligence information about the counterparties [*i.e.*, Beechwood] (financial statements, ownership structures, biographies and/or background checks of the principals) were not made available to [Protiviti] for this review." As a result, Protiviti was unable to "assess qualitatively the credit default risk being borne by SHIP." (*Id.*, ¶ 180.)

Protiviti promptly provided SHIP's senior management – *i.e.*, Wegner, Lorentz, and Staldine – with their report, which identified potential problems with the IMAs that supported SHIP's Beechwood Re investments. Protiviti noted that it was unable to obtain from SHIP management any standard due diligence regarding Beechwood Re. Accordingly, Protiviti was unable to qualitatively assess the credit default risk borne by SHIP. This Protiviti report was apparently commissioned outside of established protocols and not delivered to appropriate committees or individuals at SHIP until a SHOT executive session in November 2016. (*Id.*, ¶ 18.)

Protiviti's analysis was based upon the January 5, 2015 version of the specific Beechwood Re agreements that were being negotiated. Protiviti confirmed that "[a]s of [the] writing, Beechwood has not provided the ownership structure to determine how BRe (Beechwood Re), BRIL (Beechwood Bermuda), BAM (B Asset Management), and BRILLC relate and who owns them, nor have they provided financial statements and biographies of the principals involved in the transactions." In Protiviti's opinion, that information should have been a "non-negotiable condition to closing." Despite reaching such conclusions, Protiviti failed in its obligation to ensure that SHIP's Board, and in particular, the Audit Committee, was aware of its concerns. (*Id.*, ¶ 181.)

In September 2016, SHIP again retained Protiviti to audit the Beechwood Re investments. (*Id.*, ¶ 22.) Protiviti still did not report its earlier findings to the Board or the Audit Committee.

Protiviti attended formal quarterly meetings with SHIP's Audit Committee. Throughout the year, in addition to these formal meetings, members of Protiviti's staff met with the Audit Committee on several occasions. Although many of these meetings were intentionally organized so that SHIP's management was not in attendance, and while SHIP's management alluded to the fact that Protiviti may be engaged in additional assignments outside of their formal agreement with SHIP,

Protiviti, and SHIP's management, failed to inform the Trustees of Protiviti's review of the Beechwood IMAs. (*Id.*, ¶ 182)

Indeed, Protiviti's co-Defendants separately engaged Protiviti and instructed Protiviti not to inform the Trustees of this assignment and to withhold the Protiviti memo (which was, of course, critical of the Beechwood transaction) from the Trustees. Protiviti was performing off-the-book projects directly for SHIP management and without the knowledge of SHIP's Audit Committee, then withheld essential information related to those projects from SHIP's board and Audit Committee at the request of management because sharing that information would have impeded management's desired goal of obtaining approval for the Beechwood transaction. (*Id.*, ¶ 183.)

Protiviti's February 2015 memo did not circulate amongst the members of the Board of Trustees until November 2016, after Beechwood's fraudulent investment scheme was discovered and the damage was done. Indeed, although Protiviti promptly shared its February 2015 memo with management by sending it to both Mr. Wegner and Mr. Lorentz (the latter of whom, upon information and belief, represented to the Trustees that he never saw the memo) at the time it was prepared, the February 2015 memo was concealed and not presented to the Board until much later. (*Id.*, ¶ 184.)

As a Trustee and chair of SHIP's Audit Committee, Tom Hampton's role was to coordinate Protiviti's work and compensation on SHIP's behalf. Upon information and belief, because the Audit Committee was never made aware of the Beechwood side project, SHIP management paid fees separately to Protiviti that were not reviewed by and/or approved by Mr. Hampton. (*Id.*, ¶ 185.)

By engaging separately with Mr. Wegner and Mr. Lorentz, without the knowledge of SHIP's Board or the Trustees, and by failing to raise red flags identified in its February 2015 memo regarding the Beechwood transaction, Protiviti engaged in willful misconduct and grossly negligent acts evincing reckless disregard for SHIP's wellbeing and for the wellbeing of SHIP's policyholders. (*Id.*, ¶ 186.)

Protiviti, aware of the serious and risky nature of the red flags it identified in the Beechwood IMAs, acted unreasonably in its role as SHIP's internal auditor. As a result, SHIP continued to invest significant sums of money with Beechwood, further compounding this risk (and ultimately, causing more damage to SHIP). (*Id.*, ¶ 187.)

Protiviti's misconduct was not limited to the Beechwood transactions; rather, Protiviti also failed to detect and report issues of poor management and internal governance at SHIP. Protiviti staff was provided access to SHIP's personnel, vendors, SHIP management, SHIP's records, and other sources of information. In addition, as SHIP's internal auditor, Protiviti was often in SHIP's/Fuzion's offices

in Indiana, putting Protiviti in a position to investigate and identify problems through direct and indirect means. (*Id.*, ¶ 188.)

Despite its extensive access to important information, Protiviti never informed SHIP's Board or the Trustees of Mr. Wegner's inappropriate behavior, nor that Mr. Wegner's children were working with SHIP and receiving fees. Rather, SHIP's Board became aware of this inappropriate behavior from an external auditor when its internal auditor (*i.e.*, Protiviti) either failed to do its due diligence or knew, but did not raise these issues with the Board. (*Id.*, ¶ 189.)

The consistent pattern over several years demonstrates that Protiviti continuously engaged in misrepresentations of SHIP's financial health and ability to exist as a going concern, reflected in years of overly optimistic and/or inappropriate or inaccurate estimates, assumptions, and calculations. SHIP relied on Protiviti to help make critical financial decisions in the management of SHIP's business. This reliance ultimately inured to SHIP's detriment. (*Id.*, ¶ 190.)

SHIP's True Financial Position and Defendants' Misconduct is Uncovered

By March 2019, SHIP's management could no longer misrepresent SHIP's deeply troubling financial position. On March 1, 2019, SHIP filed with the PID its statutory financial statement for the year ending December 31, 2018. (Am. Compl. ¶ 102.) That financial statement reflected that SHIP had declined from a reported surplus of more than $12 million as of year-end 2017 to a reported deficit of more

than $466 million, a drop of $478 million in just one year, apparently rendering the Company statutorily insolvent as defined in 40 P.S. § 221.3.[2] (*Id.*, ¶ 103.)

The Company's most recent RBC report indicated that its reported total adjusted capital was substantially below its mandatory control-level RBC, thereby triggering a "mandatory control level event" as defined in 40 P.S. § 221.1-A.[3] (*Id.*, ¶ 104.) SHIP was directed to provide the PID a corrective action plan to remedy this decline, but failed to do so. (*Id.*, ¶ 105.)

On January 29, 2020, the Commonwealth Court of Pennsylvania placed SHIP into rehabilitation at the request and application of the then Pennsylvania Insurance Commissioner. (*Id.*, ¶ 106.) The purpose of this rehabilitation is, *inter alia*, to identify and address the causes of SHIP's financial deterioration for the benefit of policyholders and creditors. (*Id.*, ¶ 107.) The Court then appointed Commissioner Altman and her successors, including Acting Commissioner Humphreys, as Rehabilitator. (*Id.*, ¶ 108.)

---

[2] SHIP remains in rehabilitation, not liquidation, and no court has declared SHIP to be insolvent such that it should be liquidated. While SHIP's deficit appears to bring SHIP within the definition of insolvency in § 221.3, the Rehabilitator maintains that SHIP should remain in rehabilitation and he does not indicate through this allegation that SHIP should be liquidated.

[3] When a mandatory control level event is triggered, insurance regulators are required to take control of an insurer (as they did in this case) for the protection of policyholders and creditors.

As Rehabilitator, the Commissioner appointed Patrick H. Cantilo as SDR, and subject to the oversight of the Commissioner and the Commonwealth Court, Mr. Cantilo has been tasked with designing and implementing SHIP's rehabilitation and exercising the Rehabilitator's authority. (*Id.*, ¶ 109.) On August 24, 2021, the Commonwealth Court approved the Rehabilitator's proposed Plan of Rehabilitation ("the Plan"). While certain intervening insurance regulators from other states appealed the Plan's approval, their request for stay was denied, and thus the Rehabilitator is proceeding with the implementation of the Plan, which involves, *inter alia*, offering policyholders certain options for modifying their policies. (*Id.*, ¶ 110.)

Promptly following the order of rehabilitation on January 29, 2020, the Rehabilitator began to investigate the events that led to the dramatic deterioration in SHIP's financial condition. For the first time, the PID had unimpeded access to SHIP's financial and operating documents, analyses, communications, and attorney-client materials. This access allowed the PID to see how SHIP's management mismanaged its actuaries and auditors, and to see how Protiviti (together with Wegner, Lorentz, and Staldine) concealed their poor and injurious management of SHIP. Ultimately, the investigation has revealed that the imprudent Beechwood Re investment, the truth about which Protiviti concealed from the Trustees, caused or contributed to SHIP's financial difficulties.

Moreover, this investigation revealed that the Defendants knew – or consciously avoided knowing – that SHIP's prior financial statements were materially false because they incorporated incorrect or inappropriate actuarial assumptions and mischaracterized the imprudent Beechwood Re and Roebling Re investments. (*Id.*, ¶ 140). It also revealed that the Defendants knew that the Beechwood Re and Roebling Re transactions were ill-advised, lacked appropriate due diligence, and ultimately were likely to prove harmful to SHIP. Yet Defendants concealed these facts from the PID, SHIP's policyholders and creditors, and the public. (*Id.*, ¶ 141). As a result of Defendants' misconduct, including Defendant Protiviti's concealment and coordination with its co-Defendants, SHIP suffered extraordinary financial losses leading to its current rehabilitation.

III. RESPONSE TO PRELIMINARY OBJECTION 1: SHIP'S CLAIMS AGAINST PROTIVITI ARE TIMELY

Protiviti's objection pursuant to the relevant statutes of limitations is an improper attempt to benefit from its own misconduct, including withholding the Protiviti memo from SHIP's Board and Audit Committee (or anyone except for co-Defendant Lorentz) and agreeing with the co-Defendants to perform unauthorized and secretive projects aimed at obtaining approval for the Beechwood transaction despite its defects and risks. Where, as here, a defendant's own misconduct prevents the plaintiff from learning of its claim, dismissal at the pleading stage for timeliness is entirely inappropriate.

Protiviti's statute of limitation defense is properly raised in "New Matter," not by preliminary objection. *See* Pa. R.C.P. 1030(a) ("all affirmative defenses including but not limited to . . . statute of limitations . . . shall be pleaded in a responsive pleading under the heading 'New Matter.'"). Indeed, the rule governing Preliminary Objections specifically states that "[t]he defense of the bar of a statute of frauds or statute of limitations can be asserted only in a responsive pleading as new matter under Rule 1030" rather than by Preliminary Objection.

Protiviti argues that, despite these rules, the defense of statute of limitations may be considered at the preliminary objections stage where the untimeliness of the claims is apparent from the face of the complaint. *Baney v. Fisher*, No. 752 M.D. 2018, 2020 WL 5033421, at *4, n. 16 (Pa. Commw. Ct. 2020) (citing cases). This exception, even if it exists, does not overcome the underlying rule that, at the preliminary objection stage, the Court is obligated to accept the allegations in the complaint as true and to draw all reasonable inferences in favor of the plaintiff.

Protiviti's objection to the timeliness of the claims against it fails because (1) SHIP's complaint establishes on its face that SHIP's claims are timely under fundamental application of the discovery rule; and (2) SHIP's claims are timely because the public policies "surrounding the rehabilitation process" warrant a finding that SHIP's claims did not accrue until it was placed under supervision by the PID.

Furthermore, the Rehabilitator should be given the opportunity to conduct discovery on these matters to build its case to hold Defendants accountable and to pursue redress for SHIP's policyholders.

A. SHIP'S claims are timely under Pennsylvania's discovery rule

First, SHIP's claims are timely under the discovery rule, which tolls the statute of limitations "until a plaintiff could reasonably discover the cause of his action, including in circumstances where the connection between the injury and the conduct of another are not readily apparent." *In re Risperdal Litig.*, 665 Pa. 649, 661 (Pa. 2019) (citing *Wilson v. El-Daief*, 964 A.2d 354, 365 (Pa. 2009)).

Under the rule, a claim accrues only when the plaintiff would have discovered both the injury and its cause at the hands of the defendant through reasonable diligence. *Gleason v. Borough of Moosic*, 15 A.3d 479, 485 (Pa. 2011). Reasonable diligence is a question for the *jury at trial*, and not one for the Court to resolve at preliminary objections. *Id.*

It is well settled that "under the law of Pennsylvania . . . if through fraud *or concealment* the defendant causes the plaintiff to relax vigilance or deviate from the right of inquiry, the defendant is estopped from invoking the bar of limitation of action." *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 556 (3d Cir. 1985) (emphasis added) (internal citations omitted).

When there is concealment by a fiduciary as with Protiviti, it is well settled that there is a relaxed duty of reasonable diligence, because one of the primary purposes of a fiduciary's duties is to put the recipient at ease. *Perelman v. Adams* exemplifies this principle well: as the court explained "'the existence of a fiduciary relationship is relevant to a discovery rule analysis precisely because it entails such a presumptive level of trust in the fiduciary by the principal, that it may take a 'smoking gun' to excite searching inquiry on the principal's part into its fiduciary's behavior.'" 945 F. Supp. 2d 607, 616 (E.D. Pa. 2013). The duty of diligence, which begins as relaxed, may get ignited if some behavior, action or event happens when the principal gains requisite knowledge of said behavior, action or event.

Here, SHIP has alleged it was prevented from discovering its claims against the Defendants until after the Rehabilitator was appointed on January 29, 2020. The Amended Complaint avers in detail how each of the Defendants, and Protiviti in particular, concealed the true facts relating to the Beechwood Re investments in particular, but also relating to other areas of malfeasance by Wegner, Lorentz, and Staldine described in the Amended Complaint.

The Amended Complaint establishes that Protiviti had a fiduciary duty as SHIP's internal auditor to accurately provide its material findings to SHIP's Board and Audit Committee, particularly where those findings concerned improper conduct by SHIP's officers. *See* § IV, *infra*.

Instead of complying with that duty, Protiviti concealed its findings. It did not provide its candid memo expressing concern about the Beechwood transaction to the Board or Audit Committee, but provided it only to Defendant Lorentz, whose own conduct and performance were at issue. Representatives of Protiviti attended quarterly meetings with SHIP's Audit Committee and met with the Audit Committee on several other occasions. SHIP's Audit Committee specifically organized some meetings to exclude Wegner, Lorentz, and Staldine to allow Protiviti to openly discuss its findings. Despite all of these meetings and opportunities, Protiviti never informed SHIP of its findings regarding Beechwood or other concerns it uncovered during its work. Instead, Protiviti aligned itself with Wegner, Lorentz, and Staldine, and agreed with them to conceal Protiviti's findings and obtain approval for additional Beechwood investments based on misrepresentations. (Am. Compl. ¶ 182-183.)

The Defendants, as senior officers of SHIP, controlled the flow of information related to these transactions and SHIP's financial and actuarial position. Those same Defendants used their position as officers of SHIP to make both affirmative misrepresentations and material omissions regarding the true nature of these transactions and their impact on SHIP's financial position, effectively preventing SHIP from discovering the facts underlying its claims. SHIP's Audit Committee hired Protiviti as a check on their senior officers and trusted Protiviti, its internal

auditor, to ensure that Wegner, Lorentz, and Staldine were performing their duties competently and with candor and loyalty. Protiviti betrayed that trust and helped Wegner, Lorentz, and Staldine conceal their misrepresentations and malfeasance. (*Id.*)

Against this clear application of the discovery rule, Protiviti essentially alleges that SHIP failed to exercise reasonable diligence because it was aware of certain facts prior to January 29, 2020. This argument is not proper at the preliminary objection stage, which requires the Court to accept the facts pled as true and to make all reasonable inferences in favor of SHIP. Indeed, the Pennsylvania Supreme Court has instructed trial courts to avoid resolving the question of reasonable diligence at any stage and instead advised them to leave the question for the jury. *See Gleason v. Borough of Moosic*, 15 A.3d 479, 484-88 (Pa. 2011) (reasonable awareness of injury and cause of injury are to be decided by jury unless "facts are so clear that reasonable minds cannot differ").

Protiviti's argument relies heavily upon disputing the allegations in the Amended Complaint which aver that SHIP was not aware of "the injurious management enterprise operated, maintained, continued, and protected at various points in time by Defendants Wegner, Lorentz and Staldine." (Am. Compl. ¶ 41). That is entirely improper at the preliminary objection stage and should not be entertained by the Court. *E.g.*, *Common Cause/Pennsylvania v. Commonwealth*, 710

A.2d 108, 119 (Pa. Commw. Ct. 1998). Instead, the Court "must accept as true all of the well-pleaded allegations of material fact and all inferences reasonably deducible therefrom." *Id.* at 114.

Accordingly, the discovery rule renders SHIP's claims timely and Protiviti's arguments to the contrary, while perhaps appropriately raised at trial, are no basis for dismissal at the preliminary objection stage.

B. SHIP's claims are timely in light of the public policies surrounding rehabilitation.

SHIP's claims are also timely because, in this case, the public policy "surrounding the rehabilitation process" weighs heavily in favor of a finding that SHIP's claims did not accrue until the order of rehabilitation was entered on January 29, 2020. While rehabilitators are not exempt from the statute of limitations, courts must weigh the public policies "surrounding the rehabilitation process . . . in determining when the action accrues." *Foster v. Alexander & Alexander Servs.*, No. 91-1179, 1995 U.S. Dist. LEXIS 711, at *19 (E.D. Pa. Jan. 20, 1995).

The purpose of Pennsylvania's insurance receivership statutory scheme "is to protect the general public against the substantial costs and exigencies related to a major commercial insolvency." *Foster v. The Mutual Fire, Marine & Inland Ins. Co.*, 614 A.3d 1086, 1084 (Pa. 1992), *cert denied sub nom. Allstate Ins. Co. v. Maleski*, 113 S. Ct. 1047 (1993). Accordingly, the Commissioner is afforded broad

powers to "effectuate equitably the intent of the Rehabilitation statutes, i.e., to minimize the harm to all affected parties." *Id.* The Commissioner has a fiduciary duty to "marshall [sic] and preserve all assets of the insolvent entity," and due to the exigent circumstances surrounding a major insolvency, it may be necessary to compromise "individual interests…to avoid greater harm to a broader spectrum of policyholders and the public." *Id.* at *19-20 (citing *Vickodil v. Commonwealth Ins. Dep't*, 559 A.2d 1010, 1013 (1989)).

Foster is strikingly on point. In materially identical circumstances – where the Pennsylvania insurance company plaintiff brought claims under the direction of Rehabilitator – the *Foster* court found that the plaintiff's claims did not accrue until it requested supervision from the PID and was further tolled until the Order of Rehabilitation pursuant to 40 P.S. § 221.17(b). In so doing, the court rejected the very same argument that Defendant Protiviti raises here – that the plaintiff and the PID were aware of the losses resulting from the defendant's alleged misconduct prior to requesting supervision by PID. *Id.* The court noted that "indeed, [the insurer] must have been aware of its losses, as it sought supervision from the Insurance Department." *Id.* But the insurer did not know who was responsible for those losses, and reasonable diligence did not include discovering the defendants' wrongdoing because the defendants had fiduciary obligations to the plaintiff. *Id.*

Courts in other jurisdictions have reached similar results, adding to the persuasiveness of *Foster's* reasoning. *See Ky. Cent. Life Ins. Co. v. Deloitte & Touche LLP*, 2001 Ky. App. LEXIS 73 (Ky. Ct. App. 2001); *Banco de Desarrollo Agropecuario, S.A. v. Gibbs*, 709 F. Supp. 1302 (S.D.N.Y. 1989) ("Where an action is brought by a trustee or liquidator on behalf of a corporation that has been looted by persons who completely dominated and controlled it, the statute of limitations is tolled as against the control persons until the appointment of the independent trustee or liquidator."); *Washburn v. Brown*, 1987 U.S. Dist. LEXIS 495 (N.D. Ill. 1987); *Shapo v. O'Shaughnessy*, 246 F. Supp. 2d 935 (N.D. Ill. 2002).

The case at bar is materially identical to *Foster*. The Defendants owed fiduciary duties to SHIP; they used those fiduciary duties to conceal their wrongdoing from the Trustees and the PID; while SHIP (and, to a lesser extent, PID) had some indication that it had suffered financial losses, it did not know – and had no reason to investigate – that those losses were caused by malfeasance and deception by the Defendants; and, the Defendants were officers of SHIP who controlled the company until supervision by the PID was requested.

Pursuant to *Foster*, public policy considerations dictate that Defendants – who were the officers and consultants in control of SHIP until its entry into Rehabilitation – be precluded from avoiding liability for the extraordinary financial losses caused by their malfeasance by virtue of their coordinated concealment. Multiple

Pennsylvania legal doctrines are designed specifically to avoid such an unjust result, particularly at the pleading stage.

Accordingly, Defendant Protiviti's preliminary objection based upon the statute of limitations must be overruled.

IV. RESPONSE TO PRELIMINARY OBJECTION 2: SHIP'S TORT CLAIMS IN COUNTS II, III, AND IV ARE NOT DUPLICATIVE OF ITS BREACH OF CONTRACT CLAIM

Protiviti next argues that SHIP's tort claims are barred merely because there was also a contract between Protiviti and SHIP. This argument turns the gist of the action doctrine on its head and is entirely devoid of merit. Indeed, Protiviti's legal argument would preclude essentially all professional malpractice claims and is plainly not the law in Pennsylvania. Its objection must be overruled.

Pennsylvania has adopted § 299A of the Restatement (Second) of Torts, which provides:

> Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

"This standard has been followed uniformly by the courts of this Commonwealth in determining claims predicated upon alleged negligence on the part of other professional persons." *Robert Wooler Co. v. Fidelity Bank*, 479 A.2d 1027, 1031-32 (Pa. Super. Ct. 1984) (citing cases).

Unsurprisingly, the existence of a contract for professional services does not preclude a tort claim. *See id.*; Restatement (Second) of Torts § 299 cmt. c (1965); *O'Neill v. Atlas Automobile Fin. Corp.*, 11 A.2d 782, 785 (Pa. Super. Ct. 1940). Instead, where professionals have an "express service contract, the scope of their duty to plaintiff is defined by the terms of the contract, so long as they perform the contract like a reasonable [profession] would in their position." *In re CITX Corp., Inc.*, 2004 WL 2850046, at *4 (E.D. Pa. Dec. 8, 2004) (citing *O'Neill*, 11 A.2d at 785). "Although the scope of the [professional's] duties are defined by the contract, [they] may still breach their professional duties to their client if they encounter glaring irregularities or illegal activities – 'red flags' – which they fail to disclose." *Id.* (citing *Wooler*, 479 A.2d at 1032; *Computer Personalities Sys., Inc. v. Stockton Bates, LLP*, No. 01-14231-DWS, 2003 WL 22844863 at *6 (Bankr. E.D. Pa. Nov. 13, 2003)).

SHIP's tort claim for breach of fiduciary duty similarly relies upon common law duties recognized by Pennsylvania courts for over a century. *Darlington's Appeal*, 5 W.N.C. 529, 86 Pa. 512 (1878). Indeed, Pennsylvania common law recognizes fiduciary duties in a variety of relationships. Some relationships carry fiduciary duties as a matter of law because of the "unique degree of trust and confidence involved in these relationships typically allows for one party to gain easy access to the property or other valuable resources of the other, thus necessitating

appropriate legal protections." *Yenchi v. Ameriprise Fin., Inc.*, 161 A.3d 811, 820–21 (Pa. 2017).

For other relationships, "Pennsylvania courts have nevertheless long recognized the existence of confidential relationships in circumstances where equity compels that we do so." *Id.* (citing *Darlington's Appeal*, 5 W.N.C. 529, 86 Pa. 512 (1878)). A fiduciary relationship exists "where the relative position of the parties is such that the one has the power and means to take advantage of, or exercise undue influence over, the other." *Id.* Whether the circumstances of a relationship give rise to fiduciary duties is a fact-specific inquiry that "cannot be reduced to a particular set of facts or circumstances." *Id.* These common-law antecedents give rise to the duties upon which SHIP's claim rests. They are not duplicative of its breach of contract claim.

SHIP's tort claims against Protiviti fall squarely within the standards adopted in Pennsylvania. Protiviti was engaged to provide professional services as SHIP's internal auditor – *i.e.*, to "render services in the practice of a profession or trade." Rest. 2d Torts § 299A. And SHIP has alleged it failed to "exercise the skill and knowledge normally possessed by members of that profession or trade." *Id.* Specifically, SHIP has alleged that Protiviti's examination of the Beechwood investments and the conduct of co-Defendants Wegner, Lorentz, and Staldine revealed "glaring irregularities or illegal activities – 'red flags' – which [Protiviti]

failed to disclose" to SHIP's Board or Audit Committee. *In re CITX*, 2004 WL at *4.

The mere existence of a contract between SHIP and Protiviti does not absolve Protiviti of tort liability for its professional negligence, breaches of fiduciary duty, or its misrepresentations. The court should overrule Protiviti's preliminary objection.

V. RESPONSE TO PRELIMINARY OBJECTION 3: THE ECONOMIC LOSS DOCTRINE DOES NOT PRECLUDE SHIP'S TORT CLAIMS.

Protiviti significantly misconstrues and expands the economic loss doctrine to justify its argument that the doctrine precludes SHIP's tort claims. The economic loss doctrine does not bar tort claims seeking economic damages where, as here, the defendant's duty is independent of those set forth in the parties' contract.

Notably, Protiviti quotes *Gernhart v. Specialized Loan Servicing, LLC*, No. 18-2296, 2019 WL 1255053, at *4 (E.D. Pa. March 18, 2019), for the proposition that "The economic loss doctrine . . . continues to preclude actions where the duty arises under a contract with the parties." (P.O. ¶ 32.) But Protiviti's quote is incomplete and deeply misleading. The full quote from *Gerhart* demonstrates that the doctrine, in fact, does not preclude SHIP's tort claims:

> The economic loss doctrine does not preclude all negligence claims seeking solely economic damages, but continues to preclude actions where the duty arises under a contract between the parties. Only where the duty arises

> independently of any contractual duties between the parties may a breach of that duty support a tort action.

Id. (citing *Dittman v. UPMC*, 196 A.3d 1036, 1054 (Pa. 2018)).

Indeed, the Pennsylvania Supreme Court expressly rejected the argument Protiviti raises in its preliminary objection, explaining:

> Pennsylvania has long recognized that purely economic losses are recoverable in a variety of tort actions and that a plaintiff is not barred from recovering economic losses simply because the action sounds in tort rather than contract law. In so doing, the [Pennsylvania Supreme] Court set forth a reasoned approach to applying the economic loss doctrine that turns on the determination of the source of the duty plaintiff claims the defendant owed. Specifically, if the duty arises under a contract between the parties, a tort action will not lie from a breach of that duty. However, if the duty arises independently of any contractual duties between the parties, then a breach of that duty may support a tort action.

Dittman, 196 A.3d at 1054 (internal quotations omitted) (citing *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 866 A.2d 270, 288 (Pa. 2005)).

SHIP's tort claims each rest upon duties Protiviti owed independent of the terms of the parties' contract. SHIP's negligence claim arises from duties owed by Protiviti under Pennsylvania common law consistent with § 299A of the Restatement (Second) of Torts. SHIP's breach of fiduciary duty claim arises from Pennsylvania common law's recognition that confidential relationships like those between SHIP and Protiviti, its internal auditor, give rise to those duties. *See Yenchi v. Ameriprise*

Financial, Inc., 161 A.3d 811, 820 (Pa. 2017). And SHIP's misrepresentation claim arises from Pennsylvania common law consistent with § 551 of the Restatement.

Protiviti's preliminary objection is a complete distortion of Pennsylvania's economic loss doctrine. It must be overruled.

VI. RESPONSE TO PRELIMINARY OBJECTION 4: SHIP HAS PROPERLY PLED A CLAIM FOR BREACH OF CONTRACT

The averments in the Amended Complaint properly allege a claim that Protiviti breached its obligations under its contracts with SHIP. Protiviti simply ignores those averments. Protiviti's preliminary objection to SHIP's breach of contract claim must be overruled.

Protiviti correctly identifies the elements of a breach of contract claim under Pennsylvania law as (a) the existence of a contract, (b) a breach of a duty imposed by the contract, and (c) resulting damages. *Boyd v. Rockwood Area Sch. Dist.*, 907 A.2d 1157 (Pa. Commw. Ct. 2006). Pennsylvania law also imposes a duty of good faith and fair dealing in the execution of a party's obligations under the contract. *LSI Title Agency, Inc. v. Eval. Servs., Inc.*, 951 A.2d 384, 391 (Pa. Super. 2008), *appeal denied*, 960 A.2d 841 (Pa. 2008).

Protiviti admits the existence of a contract between the parties. SHIP and Protiviti entered into a Master Services Agreement in 2009 (Am. Compl. Ex. A), and various Statements of Work related to individual projects during the course of

Protiviti's retention. (*Id.*) During its retention, Protiviti acted as SHIP's statutorily required auditor from 2013 through 2016. (Am. Compl. ¶ 7.)

Protiviti agreed to perform several services for SHIP pursuant to these contracts. Protiviti agreed to provide internal auditing services from 2013 through 2016 that required Protiviti to audit SHIP's internal controls and processes and report their findings to SHIP's Board and Audit Committee. (Am. Compl. ¶ 236.) Protiviti reported principally to Mr. Hampton of the Audit Committee but also attended the Audit Committee's quarterly meetings and met frequently on an informal basis with the Audit Committee to discuss its findings during the course of the retention. (*Id.*, ¶ 182.)

In January 2015, SHIP's senior management retained Protiviti to evaluate the Beechwood Re investments, ostensibly to assist the Board and Audit Committee in analyzing the business, credit, and economic risks of the proposed transactions. (Am. Compl. ¶ 179, Ex. B.) Specifically, Protiviti was obligated to (1) assist in identifying and mitigating risks with regard to the Beechwood Re transaction, including, especially, reviewing due diligence material; (2) assist in reviewing economic assumptions used to calculate the economic impact of the transactions; and (3) assist in reviewing the transaction documents themselves by confirming that risk mitigation steps were provided for in the transaction documents and making recommendations to monitor compliance with risk mitigation steps. (*Id.*, ¶ 179.)

Protiviti performed an analysis of the Beechwood Re investments immediately following its retention and drafted a memorandum of its findings only a month later, in February 2015. (*Id.*, at 180.) At the same time, Protiviti continued as SHIP's internal auditor tasked with assessing and advising SHIP on its internal controls.

Protiviti's February 2015 Memorandum identified potential problems with the IMAs that supported SHIP's Beechwood Re investments. Protiviti noted that it was unable to obtain from SHIP management any standard due diligence regarding Beechwood Re. Accordingly, Protiviti was unable to qualitatively assess the credit default risk borne by SHIP. (Am. Compl. ¶ 60.) However, Protiviti never provided any of this information to SHIP's Board or Audit Committee, nor did Protiviti do anything to warn SHIP that Wegner, Lorentz, and Staldine had not performed required due diligence, had misrepresented the Beechwood Re investments, and were advocating for investments that were likely to cause significant financial losses to SHIP. (*Id.*, ¶¶ 181-183.)

Even when SHIP retained Protiviti in September 2016 to perform another audit of the Beechwood Re investments, Protiviti continued to say nothing and failed to provide the Board or Audit Committee with the findings it had made 18 months earlier. (*Id.*, ¶ 64.)

Instead of meeting its contractual obligations, Protiviti joined a conspiracy with Wegner, Lorentz, and Staldine, to conceal the defects in the Beechwood Re transactions, conceal the malfeasance of SHIP's officers and ensure that the Beechwood Re investments were approved. (Am. Compl. ¶ 183.)

Accordingly, the Amended Complaint identifies numerous breaches of contractual obligations by Protiviti and alleges that, as a result of those breaches, SHIP proceeded with the Beechwood Re investments and remained unaware of the misconduct being committed by Wegner, Lorentz, and Staldine. Ultimately, Protiviti's failure to report its findings in accordance with its contractual obligations, and to act in good faith by avoiding joining a conspiracy among the very managers they were tasked with assessing, caused significant financial damages to SHIP.

VII. RESPONSE TO PRELIMINARY OBJECTION 5: SHIP HAS PROPERLY PLED A CLAIM FOR BREACH OF FIDUCIARY DUTY

SHIP has properly pled all of the elements of a breach of fiduciary duty claim against Protiviti. It has pled facts establishing the existence of a fiduciary duty based on the trust and confidence SHIP placed in Protiviti. SHIP has made averments that Protiviti disregarded those duties and instead joined a conspiracy with Wegner, Lorentz, and Staldine to conceal wrongdoing and misrepresent the Beechwood Re investments and SHIP's financial condition to the Board. And SHIP has alleged financial harm as a result.

Fiduciary duties may exist in a variety of relationships under Pennsylvania law. Some, like principal/agent, trustee/cestui que trust, attorney/client, guardian/ward, and partners are considered to carry fiduciary duties as a matter of law. *Yenchi v. Ameriprise Fin., Inc.*, 161 A.3d 811, 820–21 (Pa. 2017). "The unique degree of trust and confidence involved in these relationships typically allows for one party to gain easy access to the property or other valuable resources of the other, thus necessitating appropriate legal protections." *Id.*

For other relationships, "Pennsylvania courts have nevertheless long recognized the existence of confidential relationships in circumstances where equity compels that we do so." *Id.* (citing *Darlington's Appeal*, 5 W.N.C. 529, 86 Pa. 512 (1878)). A fiduciary relationship exists "where the relative position of the parties is such that the one has the power and means to take advantage of, or exercise undue influence over, the other." *Id.* Whether the circumstances of a relationship give rise to fiduciary duties is a fact-specific inquiry that "cannot be reduced to a particular set of facts or circumstances." *Id.*

SHIP has alleged facts about the circumstances of its relationship with Protiviti that plainly give rise to fiduciary duties under Pennsylvania law. Indeed, the alleged facts describe a relationship akin to those that carry fiduciary duties as a matter of law. Protiviti was provided full access to SHIP's confidential financial

data, contracts and internal controls – *i.e.*, it was given "access to the property or other valuable resources of" SHIP and entrusted with those resources.

The fiduciary duty owed by Protiviti "is the highest duty implied by law." *Id.* (citing *Miller v. Keystone Ins. Co.*, 636 A.2d 1109, 1116 (Pa. 1994)). It "requires a party to act with the utmost good faith in furthering and advancing the other person's interests, including a duty to disclose all relevant information." *Id.*, at 821; *see also Basile v. H & R Block, Inc.*, 563 Pa. 359, 761 A.2d 1115, 1120 (2000); *Young v. Kaye*, 443 Pa. 335, 279 A.2d 759, 763 (1971) ("When the relationship between persons is one of trust and confidence, the party in whom the trust and confidence are reposed must act with scrupulous fairness and good faith in his dealings with the other and refrain from using his position to the other's detriment and his own advantage."); *Sylvester v. Beck*, 406 Pa. 607, 178 A.2d 755, 757 (1962); *see also* Black's Law Dictionary (10th ed. 2014) (a fiduciary duty is "a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person").

SHIP has plainly alleged that Protiviti's conduct breached the fiduciary duties it owed. Instead of acting with "scrupulous fairness" and "the highest degree of honesty and loyalty" toward SHIP, Protiviti conspired with its officers to obtain approval for the Beechwood Re investments by concealing the results of their

analysis thereof, and to conceal its co-conspirators' malfeasance and identified weaknesses in SHIP's internal controls. (Am. Compl. ¶¶ 183-185, 207, 211.)

Protiviti's efforts to reduce its relationship with SHIP to a merely contractual one is directly contrary to more than a century of Pennsylvania jurisprudence. It must be rejected, and Protiviti's preliminary objection must be overruled.

VIII. RESPONSE TO PRELIMINARY OBJECTION 6: SHIP HAS PROPERLY PLED A CLAIM FOR NEGLIGENCE

SHIP has properly pled a claim for negligence against Protiviti under § 299A of the Restatement (Second) of Torts, which provides:

> Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

"This standard has been followed uniformly by the courts of this Commonwealth in determining claims predicated upon alleged negligence on the part of other professional persons." *Robert Wooler Co. v. Fidelity Bank*, 479 A.2d 1027, 1031-32 (Pa. Super. 1984) (citing cases).

Where, as here, professionals have an "express service contract, the scope of their duty to plaintiff is defined by the terms of the contract, so long as they perform the contract like a reasonable [profession] would in their position." *In re CITX Corp., Inc.*, 2004 WL 2850046, at *4 (E.D. Pa. Dec. 8, 2004) (citing *O'Neill*, 11 A.2d at

785). "Although the scope of the [professional's] duties are defined by the contract, [they] may still breach their professional duties to their client if they encounter glaring irregularities or illegal activities – 'red flags' – which they fail to disclose." *Id.* (citing *Wooler*, 479 A.2d at 1032; *Computer Personalities Sys., Inc. v. Stockton Bates, LLP*, No. 01-14231-DWS, 2003 WL 22844863 at *6 (Bankr. E.D. Pa. Nov. 13, 2003)).

That is precisely what SHIP has alleged against Protiviti in its Amended Complaint. Protiviti was engaged to provide professional services as SHIP's internal auditor – *i.e.*, to "render services in the practice of a profession or trade." Rest. 2d Torts § 299A. And SHIP has alleged it failed to "exercise the skill and knowledge normally possessed by members of that profession or trade." *Id.*

More specifically, SHIP avers that Protiviti breached its standard of care by failing to provide its February 2015 memo to the Board or Audit Committee (instead providing it only to Lorentz, whose conduct was the subject of the memo), by performing unauthorized side projects for Wegner, Lorentz, and Staldine, and by concealing the "serious and risky nature of the red flags it identified in the Beachwood IMAs." (Am. Compl. ¶¶ 184-187.)

SHIP's negligence claim against Protiviti squarely meets the standards set forth by Pennsylvania courts for a claim under § 299A of the Restatement (Second) of Torts. Protiviti's preliminary objection is without merit.

IX. RESPONSE TO PRELIMINARY OBJECTION 7: SHIP HAS PROPERLY PLED A CLAIM FOR CIVIL CONSPIRACY

Protiviti's preliminary objection to SHIP's claim for civil conspiracy essentially ignores the averments in the Amended Complaint. Protiviti asserts that SHIP has failed to allege (1) an underlying tort on which the conspiracy claim can be based; (2) an agreement between Defendants regarding the primary tort; and (3) an overt act in furtherance of the agreement. But SHIP has alleged all three in its Amended Complaint.

First, SHIP alleges that Protiviti and the other Defendants entered an agreement to commit intentional misrepresentations against SHIP and its Board. (Am. Compl. ¶ 211.) The Amended Complaint avers that the conspiracy aimed to conceal internal control weaknesses and other wrongdoing and to prepare and publish faulty and misleading financial information to SHIP and PID regulators. (*Id.*) Accordingly, SHIP has alleged the underlying torts of intentional misrepresentation or fraud.

Second, SHIP has alleged the existence of an agreement among the co-conspirator Defendants to carry out these intentional misrepresentations. With regard to Protiviti specifically, the Amended Complaint alleges that it agreed with Wegner, Lorentz, and Staldine in early 2015 to withhold the Protiviti memo from the Trustees, from SHIP's Board and from the Audit Committee, and instead to

perform off-the-book projects aimed at obtaining approval for the Beechwood transaction under false pretenses. (Am. Compl. ¶¶ 183, 211.)

Third, and finally, SHIP has alleged numerous overt acts in furtherance of the conspiracy. SHIP alleges that Protiviti concealed its February 2015 Memo from SHIP's Trustees. (*Id.*) SHIP alleges that Protiviti engaged in secretive and unauthorized projects with its co-conspirators in furtherance of the conspiracy's aims. (*Id.*) And SHIP alleges Protiviti attended numerous meetings discussing the matters Protiviti was tasked with analyzing but Protiviti never disclosed the numerous red flags it had uncovered. (*Id.*, ¶¶ 182-187.) These are in addition to the numerous overt acts by Protiviti's co-conspirators.

Accordingly, Protiviti's preliminary objection is based entirely on misrepresentations of the Amended Complaint and its averments. SHIP has appropriately pled all the elements of a civil conspiracy.

X. CONCLUSION

For the foregoing reasons, SHIP respectfully requests that the Court deny Protiviti's Preliminary Objections and enter an order requiring it to file an Answer to the Amended Complaint within twenty (20) days.

Dated: October 17, 2022

Respectfully submitted,

COZEN O'CONNOR

By: /s/ Michael J. Broadbent

Michael J. Broadbent, PA ID 309798
Dexter R. Hamilton, PA ID 50225
Eric D. Freed, PA ID 39252
Matthew J. Siegel, PA ID 82406
One Liberty Place
1650 Market Street
Suite 2800
Philadelphia, PA 19103
Telephone: 215.665.2000
Toll Free Phone: 800.523.2900
Facsimile: 215.665.2013

TUCKER LAW GROUP
Leslie Miller Greenspan, PA ID 91639
PA ID 91639
Ten Penn Center
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

Attorneys for Plaintiff