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1 SHP 2022

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL HUMPHREYS, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA IN HIS CAPACITY AS THE STATUTORY REHABILITATOR OF SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Plaintiff, v. BRIAN WEGNER, PAUL LORENTZ, BARRY STALDINE, AND PROTIVITI INC., Defendants.	:	No. 1 SHP 2022

[PROPOSED] ORDER OF COURT

AND NOW, this _____ day of _____, 20__, upon consideration of Defendant Protiviti, Inc.'s Preliminary Objections to Plaintiff's Complaint, it is hereby ORDERED, ADJUDGED and DECREED that the Preliminary Objections of Protiviti, Inc. are hereby sustained and all causes of action alleged against Protiviti, Inc. in Plaintiff's Complaint are dismissed with prejudice.

BY THE COURT:

_____, J.

cc: All Counsel of Record

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, v. BRIAN WEGNER, PAUL LORENTZ, BARRY STALDINE, AND PROTIVITI INC., Defendants.	:	No. 1 SHP 2022 **DEFENDANT PROTIVITI, INC.'S PRELIMINARY OBJECTIONS TO PLAINTIFF'S COMPLAINT**

NOTICE TO PLEAD

To: Plaintiff
You are hereby notified to file a written response to the enclosed preliminary objections within twenty (20) days from service hereof or a judgment may be entered against you.

By: */s/ Perry A. Napolitano*
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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, v. BRIAN WEGNER, PAUL LORENTZ, BARRY STALDINE, AND PROTIVITI INC., Defendants.	:	No. 1 SHP 2022

DEFENDANT PROTIVITI INC.'S PRELIMINARY OBJECTIONS TO PLAINTIFF'S COMPLAINT

Defendant Protiviti, Inc. ("Protiviti") submits these Preliminary Objections to Plaintiff's Complaint and in support states as follows:

I. Background[1]

1. On January 28, 2022, the Insurance Commissioner of the Commonwealth of Pennsylvania ("Plaintiff"), in its Capacity as the Statutory

[1] Protiviti assumes Plaintiff's well-pleaded factual allegations are true only for purposes of these Preliminary Objections. *See Young v. Wetzel*, 260 A.3d 281, 287 (Pa. Commw. Ct. 2021) (preliminary objections "are deemed to admit all well-pleaded material facts" (citation omitted)).

Rehabilitator of Senior Health Insurance Company of Pennsylvania ("SHIP"), filed a Complaint in the Commonwealth Court of Pennsylvania against Brian Wegner, Paul Lorentz, Barry Staldine, and Protiviti (collectively, "Defendants").[2]

2. SHIP is a Pennsylvania stock limited life insurance company. Compl. ¶ 2.

3. Protiviti is a consulting firm that, in addition to performing certain consulting projects, performed internal audit services for SHIP for a period of time. *Id.* ¶ 6.

4. As set forth in the exhibits attached to the Complaint, SHIP and Protiviti's relationship arose solely from written agreements that defined the scope of their relationship and the services to be provided by Protiviti to SHIP, beginning with SHIP and Protiviti's 2009 Master Services Agreement ("MSA"). *See* Compl. Ex. A.

5. In January 2015, pursuant to a statement of work (the "SOW") incorporated into the MSA,[3] SHIP retained Protiviti to assist SHIP in evaluating a proposed transaction with Beechwood Re and related entities. Compl. Ex. B § 4; *see* Compl. ¶ 141. Pursuant to the SOW, Protiviti was retained to, *inter alia*,

[2] Of the 206 paragraphs in the Complaint, only 16 paragraphs specifically relate to Protiviti. *See* Compl. ¶¶ 6, 51, 55, 141-43, 145, 157-59, 191-93, 195-97. These paragraphs fail to allege actionable conduct on the part of Protiviti.

[3] The MSA and SOW are referred to collectively as the "Agreement".

"[r]eview due diligence materials on Beechwood Re, Beechwood Bermuda International, Ltd, and Beechwood Capital Group (parent)[.]" Compl. Ex. B § 4.

6. The SOW provided that SHIP "acknowledge[d] that Protiviti's work is highly dependent on the availability of [SHIP] personnel, other contractors of [SHIP] and other factors beyond the control of Protiviti" and that "[a]ll Deliverables are based upon information made available by [SHIP] to Protiviti as of the date such Deliverables are provided to [SHIP]. Protiviti has no obligation to update any Deliverable." *Id.* §§ 8, 9.

7. The SOW further provided that Protiviti's contact for the project was SHIP's Chief Financial Officer, Paul Lorentz, and that Protiviti would "[p]rovide input to SHIP management on Board presentation materials, participation in meetings with the Board and SHIP management ***as requested***." *Id.* §§ 2, 4 (emphasis added).

8. In February 2015, Protiviti provided SHIP "senior management" (Mr. Lorentz) with a report (the "Report") identifying potential issues with the Beechwood Re transaction. Compl. ¶¶ 51, 142-43.

9. In the Report, 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." *Id.* ¶ 51; *see also id.* ¶ 142.

10. SHIP did not enter into any Investment Management Agreements ("IMAs") with Beechwood Re or its related entities after Protiviti provided its Report to Mr. Lorentz in February 2015. *Id.* ¶¶ 50, 110 (indicating that SHIP entered into various IMAs with Beechwood Re-related entities between mid-2014 and January 2015, and then declined to enter into revised IMAs).

11. In contradiction to the controlling SOW attached to the Complaint, which did not require Protiviti to provide the Report to anyone other than SHIP's management, Plaintiff vaguely alleges that the Report was "apparently commissioned outside of established protocols" and not delivered to "appropriate committees or individuals at SHIP" – including SHIP's board of directors and/or the board's audit committee – until November 2016. Compl. ¶¶ 51, 143.

12. Ultimately, SHIP's investments in Beechwood Re and related entities, among other investments and decisions by SHIP, contributed to SHIP's financial decline, which resulted in Plaintiff being appointed as SHIP's Statutory Rehabilitator in January 2020. *Id.* ¶¶ 1, 22.

13. Plaintiff now brings claims against Protiviti for breach of fiduciary duty, civil conspiracy, negligence, and breach of contract, asserting that Protiviti "failed to obtain standard due diligence regarding Beechwood, was as such unable to qualitatively assess the Beechwood transaction, and failed in its obligation to

ensure that the necessary individuals at SHIP were aware of its analysis." *See id.* ¶ 158.

II. Applicable Legal Standard

14. "[W]hen faced with a demurrer, the pertinent inquiry for a reviewing court is to determine whether the petitioner has stated on the face of his petition a cause of action that, if proved, would entitle him to relief[.]" *Young v. Wetzel*, 260 A.3d 281, 287 (Pa. Commw. Ct. 2021) (quoting *Mueller v. Commw.*, 532 A.2d 900, 902 (Pa. Commw. Ct. 1987)).

15. While preliminary objections "are deemed to admit all well-pleaded material facts and any inferences reasonably deduced therefrom[,]" the Court "is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion[.]" *Id.* (quoting *Lennitt v. Dep't of Corr.*, 964 A.2d 37, 40 (Pa. Commw. Ct. 2008); *Thomas v. Corbett*, 90 A.3d 789, 794 (Pa. Commw. Ct. 2014)).

16. Further, the court is "not bound to accept as true any averments in a complaint which are in conflict with exhibits which are attached to the complaint." *Jenkins v. County of Schuylkill*, 658 A.2d 380, 383 (Pa. Super. Ct. 1995); *see Baravordeh v. Borough Council*, 699 A.2d 789, 792 (Pa. Commw. Ct. 1997) (affirming trial court's dismissal of complaint where the allegations of the complaint were contradicted by the attached exhibit).

III. Preliminary Objection No. 1 Pursuant to Pa. R.C.P. 1028(a)(4): Demurrer as to All Claims Against Protiviti Based on Statute of Limitations[4]

17. Under Pennsylvania law:[5]

a. Plaintiff's breach of fiduciary duty and negligence claims are subject to a two-year statute of limitations, *see* 42 Pa. Cons. Stat. § 5524(7);

b. Plaintiff's conspiracy claim is also subject to a two-year statute of limitations, based on the underlying torts, *see Kingston Coal Co. v.*

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[4] A defendant may raise a statute of limitations defense via preliminary objections where "the application of the relevant statute of limitations is apparent on the face of the Amended Complaint[.]" *Baney v. Fisher*, 239 A.3d 1148, at *10 n.16 (Pa. Commw. Ct. 2020) (per curiam).

[5] Although the Agreement provides that New York law governs the parties' rights and duties thereunder, *see* Compl. Ex. A § 18, a choice of law provision in a contract does not apply to the question of which state's statute of limitations applies unless the provision expressly so provides. *See Unisys Fin. Corp. v. U S Vision, Inc.*, 630 A.2d 55, 58 (Pa. Super. Ct. 1993) ("Regarding the choice of law provision . . . , such clauses do not apply to questions of applicability of the chosen state's statute of limitations unless they expressly so provide."). Because the Agreement's choice of law provision does not expressly provide that New York's statutes of limitations apply, Pennsylvania's shorter statutes of limitations apply to this dispute. *See* 42 Pa. Cons. Stat. § 5521 ("The period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim."); *Unisys*, 630 A.2d at 57-58 (applying 42 Pa. Cons. Stat. § 5521 in the context of a contractual choice-of-law provision and finding that because (1) the Pennsylvania statute of limitations provided for the shorter period of time to bring a claim after accrual, and (2) the contract did not provide that the chosen state's statute of limitations applied, the lower court was correct that the Pennsylvania statute of limitations applied). However, to avoid any doubt, Protiviti also analyzes the application of New York's statutes of limitation, in the event that they are deemed to apply. New York statutes of limitations similarly bar Plaintiff's claims.

Felton Mining Co., 690 A.2d 284, 287 n.1 (Pa. Super. Ct. 1997) ("It is well-settled that the statute of limitations for conspiracy is the same as that for the underlying action that forms the basis of the conspiracy."); and

c. Plaintiff's breach of contract claim is subject to a four-year statute of limitations, 42 Pa. Cons. Stat. § 5525(a)(8).

18. SHIP's claims accrued no later than February 2015, when, as alleged in the Complaint, Protiviti provided the Report to SHIP's senior management. Compl. ¶ 51.

19. Plaintiff filed its Complaint on January 28, 2022, nearly seven years after SHIP's claims accrued.

20. Each of Plaintiff's claims is thus barred by the applicable two- and four-year Pennsylvania statutes of limitations.

21. Alternatively, if New York law applies:

a. Plaintiff's breach of fiduciary duty, negligence, and conspiracy claims are barred as they are subject to a three-year statute of limitations, *see Stearns v. Kenny & Stearns*, 23 N.Y.S. 3d 886, 887 (App. Div. 2016) (breach of fiduciary duty claim seeking monetary damages barred by three-year statute of limitations); *Huss v. Rucci Oil Co.*, 68 N.Y.S.3d 298, 300 (App. Term 2017) ("A cause of action alleging negligence

must be commenced within three years from the time the wrong or injury has arisen even though the injured party may be ignorant of the existence of the injury[.]"); *Schlotthauer v. Sanders*, 545 N.Y.S.2d 197, 199 (App. Div. 1989) (conspiracy claim was time-barred "because conspiracy is not an independent tort, and is time barred when the substantive tort underlying it is time barred"); and

b. Plaintiff's breach of contract claim is also barred as it is subject to a six-year statute of limitations, *see* N.Y. C.P.L.R. § 213(2).

22. Because Plaintiff's Complaint was filed more than six years after SHIP's claims accrued in February 2015, SHIP's claims are barred by the relevant New York statutes of limitations.

23. Although Plaintiff may assert that SHIP's board of directors did not discover Protiviti's alleged lack of due diligence until the Report was delivered to SHIP's board in November 2016,[6] purportedly implicating the discovery rule, the discovery rule cannot save Plaintiff's claims because:

[6] The purported November 2016 discovery date is generous considering that SHIP's board of directors knew prior to November 2016 that its Beechwood Re investments had "glaring problems[.]" *See* Compl. ¶ 60 (explaining that in October 2016, Mr. Wegner told the board that SHIP would fully divest from Beechwood Re investments by the end of that year); *see also id.* ¶ 54 ("[I]n September 2016, SHOT held an executive session at which they acknowledged that SHIP's $320 million investment with Beechwood Re was in jeopardy.").

a. Under Pennsylvania law, the discovery rule does not apply to a breach of contract claim. *Carulli v. N. Versailles Twp. Sanitary Auth.*, 216 A.3d 564, 583 (Pa. Commw. Ct. 2019) (declining to apply the discovery rule to a breach of contract claim involving an express written contract). Additionally, under New York law, the discovery rule does not apply to Plaintiff's breach of fiduciary duty, negligence, and breach of contract claims, *see Demian v. Calmenson*, 66 N.Y.S.3d 462, 463 (App. Div. 2017) (discovery rule not applicable to a breach of fiduciary duty claim based on economic loss[7]); *Playford v. Phelps Mem'l Hosp. Ctr.*, 680 N.Y.S.2d 267, 268 (App. Div. 1998) (three-year statute of limitations for negligence claims "commences to run on the date of the 'occurrence' of the injury, not on the date when it was 'discovered'"); *ACE Sec. Corp., Home Equity Loan Tr., Series 2006-SL2 v. DB Structured Prods., Inc.*, 25 N.Y.3d 581, 594 (2015) ("New York does not apply the 'discovery' rule to statutes of limitations in contract actions[.]");[8] and

[7] Plaintiff alleges only economic losses. *See, e.g.*, Compl. ¶¶ 159, 168, 187, 193, 197.

[8] In any event, New York law provides for only a two-year discovery rule period, which also would bar Plaintiff's claims. *See* N.Y. C.P.L.R. § 203(g) ("[W]here the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced

b. Those claims to which the discovery rule may apply (breach of fiduciary duty and negligence under Pennsylvania law) are nevertheless time-barred based on the alleged discovery of the Report by SHIP's board in November 2016, *see* 42 Pa. Cons. Stat. § 5524(7) (providing two-year statute of limitations for breach of fiduciary duty and negligence claims under Pennsylvania law).[9]

24. Therefore, each of Plaintiff's claims is barred by the applicable statute of limitations and should be dismissed pursuant to Pa. R.C.P. 1028(a)(4).

IV. Preliminary Objection No. 2 Pursuant to Pa. R.C.P. 1028(a)(4): Demurrer as to Counts I, II, IV Based on Duplication with Breach of Contract Claim

25. Under New York law, breach of fiduciary duty and negligence claims that are duplicative of a breach of contract claim must be dismissed. *See Perl v. Smith Barney Inc.*, 646 N.Y.S.2d 678, 680 (App. Div. 1996) (dismissing plaintiff's breach of fiduciary duty claim because it was duplicative of breach of contract claim); *Dormitory Auth. of the State of N.Y. v. Samson Constr. Co.*, 30 N.Y.3d 704, 711 (2018) (dismissing negligence claim as duplicative of breach of contract claim

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within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer.").

[9] Plaintiff's claim for conspiracy is similarly barred because the underlying torts are barred. *See Kingston Coal*, 690 A.2d at 287 n.1; *Schlotthauer*, 545 N.Y.S.2d at 199.

and explaining that where damages alleged "were clearly within the contemplation of the written agreement . . . [m]erely charging a breach of a 'duty of due care,' employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim" (alterations in original) (citation omitted)).

26. In the event it applies, Pennsylvania law also requires dismissal of duplicative tort claims. *See Reardon v. Allegheny Coll.*, 926 A.2d 477, 485, 487 (Pa. Super. Ct. 2007) (affirming dismissal of negligence claim under gist of the action doctrine where it was "nothing more th[a]n a re-characterized contract claim"); *Todd Heller, Inc. v. Cardinal Grp.*, 33 Pa. D. & C. 5th 403, 413 (C.P. Northampton Cty. 2013) (dismissing breach of fiduciary duty claim based on gist of the action doctrine).

27. Here, SHIP and Protiviti's relationship arises solely under and is defined by the Agreement, *see* Compl. Ex. A, and Plaintiff's breach of fiduciary duty and negligence claims are an attempt only to re-characterize the breach of contract claim that arises under and is governed by the Agreement.

28. Therefore, Plaintiff's negligence and breach of fiduciary duty claims should be dismissed pursuant to Pa. R.C.P. 1028(a)(4).

29. And because the underlying negligence and breach of fiduciary duty claims should be dismissed, both New York and Pennsylvania law compel the

conspiracy claim that is based on those torts to also be dismissed. *See Arvanitakis v. Lester*, 44 N.Y.S.3d 71, 73 (App. Div. 2016) ("A cause of action alleging conspiracy to commit a tort stands or falls with the underlying tort . . . ."); *Knit With v. Knitting Fever, Inc.*, CIVIL ACTION NO. 08-4221; CIVIL ACTION NO. 08-4775, 2009 U.S. Dist. LEXIS 98217, at *58-59 (E.D. Pa. Oct. 20, 2009) (dismissing conspiracy claim where underlying tort was dismissed based on gist of the action doctrine), *aff'd*, 625 F. App'x 27 (3d Cir. 2015).

V. Preliminary Objection No. 3 Pursuant to Pa. R.C.P. 1028(a)(4): Demurrer as to Counts I, II, IV Based on Economic Loss Doctrine

30. Under New York's economic loss doctrine, "if the parties have a remedy in contract, they may not also bring claims sounding in tort that claim only economic damages independent of physical injury or damage to property." *Holborn Corp. v. Sawgrass Mut. Ins. Co.*, 304 F. Supp. 3d 392, 397 (S.D.N.Y. 2018) (dismissing breach of fiduciary duty and negligence claims).

31. Pennsylvania recognizes a similar doctrine. *See Gernhart v. Specialized Loan Servicing, Inc.*, CIVIL ACTION NO. 18-2296, 2019 U.S. Dist. LEXIS 44246, at *11 (E.D. Pa. Mar. 18, 2019) ("The economic loss doctrine . . . continues to preclude actions where the duty arises under a contract between the parties.").

32. Here, Plaintiff alleges only economic losses, not physical injury or property damage. *See, e.g.*, Compl. ¶¶ 159, 168, 187, 193, 197 (describing SHIP's financial damages).

33. Further, Plaintiff can pursue – and has pursued – remedies under the parties' Agreement. *See id.* ¶¶ 194-97 (SHIP's breach of contract claim against Protiviti).

34. Also, Plaintiff has not sufficiently alleged – nor can it allege – any duty Protiviti owed to SHIP that arises independent of the parties' Agreement.

35. Therefore, Plaintiff's negligence and breach of fiduciary duty claims should be dismissed under the economic loss doctrine pursuant to Pa. R.C.P. 1028(a)(4).

36. And because the underlying tort claims should be dismissed, the conspiracy claim that is based on those torts should also be dismissed. *See supra* ¶ 29.

VI. Preliminary Objection No. 4 Pursuant to Pa. R.C.P. 1028(a)(4): Demurrer as to Count V (Breach of Contract) for Failure to State a Claim

37. Under New York law, the elements of a breach of contract claim are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach, and resulting damages. *See Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 921 N.Y.S.2d 260, 264 (App. Div. 2011).

38. Pennsylvania law similarly requires the existence of a contract, a breach of a duty imposed by the contract, and resulting damages in order to establish a claim for breach of contract. *See Boyd v. Rockwood Area Sch. Dist.*, 907 A.2d 1157, 1165 (Pa. Commw. Ct. 2006).

39. Plaintiff alleges facts indicating that *SHIP* failed to perform under the Agreement. Further, Plaintiff fails to allege any facts to establish that Protiviti breached a duty imposed by the Agreement and any resulting damages.

40. ***First***, the Complaint and Agreement indicate that SHIP failed to perform under the Agreement because it did not provide Protiviti with due diligence regarding Beechwood Re. *See, e.g.*, Compl. ¶ 51; Compl. Ex. B § 9 ("All Deliverables are based upon information *made available by [SHIP]* to Protiviti[.]" (emphasis added)); Compl. Ex. A § 8 ("[SHIP] hereby releases Protiviti and its personnel from any liability and costs relating to the services hereunder to the extent such liability and costs are attributable to any information provided by [SHIP] that is not complete . . . .").

41. ***Second***, Plaintiff alleges only that Protiviti failed to obtain due diligence regarding Beechwood Re and failed to provide the Report to SHIP's board until November 2016, *see* Compl. ¶¶ 51, 143. Such allegations cannot establish a breach because the Agreement did not require Protiviti to do either of these things. *See generally* Compl. Ex. B.

42. To the contrary, and as explained above, the Agreement required *SHIP* to provide the due diligence materials for Protiviti's review and indeed indemnified Protiviti for any failure to do so. *See id.* § 9 ("All Deliverables are based upon information *made available by [SHIP]* to Protiviti[.]" (emphasis added)); *see also* Compl. Ex. A § 8 ("[SHIP] hereby releases Protiviti and its personnel from any liability and costs relating to the services hereunder to the extent such liability and costs are attributable to any information provided by [SHIP] that is not complete . . . .").

43. Further, the Agreement indicates that Protiviti was required to provide the Report to Mr. Lorentz – which Protiviti did, *see* Compl. ¶ 51 (indicating that Protiviti provided the Report to SHIP's senior management) – rather than to SHIP's board of directors or audit committee. *See* Compl. Ex. B § 2 (providing that the "Client's Project Manager and Additional Client Contact[]" under the Agreement was Chief Financial Officer Paul Lorentz).[10]

44. Therefore, Plaintiff fails to allege any facts to state a breach of the Agreement.

45. ***Third***, Plaintiff also fails to allege facts even suggesting that any

[10] Further, as Plaintiff acknowledges, Mr. Lorentz was a member of SHIP's board of directors during the relevant time period. Compl. ¶ 4. Thus, Protiviti did provide the report to a member of SHIP's board, even though this was not required by the Agreement.

damages resulted from any purported breach.

46. According to the Complaint, Protiviti completed its Report in February 2015. Compl. ¶¶ 51, 142.

47. However, the Complaint makes clear that SHIP did not enter into any IMAs with Beechwood Re or its related entities after Protiviti completed its Report in February 2015. *Id.* ¶¶ 50-51, 110 (indicating that SHIP entered into various IMAs with Beechwood Re-related entities between mid-2014 and January 2015, and then declined to enter into revised IMAs).

48. Therefore, Protiviti's supposed failure to obtain due diligence regarding Beechwood Re and to provide the Report to SHIP's board could not have caused SHIP any damages because no further IMAs were entered into between SHIP and Beechwood Re.

49. Plaintiff thus fails to allege facts supporting its performance under the Agreement, any breach of a duty imposed by the Agreement, and damages resulting therefrom.

50. Because of Plaintiff's failure to state a claim for breach of contract, Count V should be dismissed pursuant to Pa. R.C.P. 1028(a)(4).

VII. Preliminary Objection No. 5 Pursuant to Pa. R.C.P. 1028(a)(4): Demurrer as to Count I (Breach of Fiduciary Duty) for Failure to State a Claim

51. "The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." *Rut v. Young Adult Inst., Inc.*, 901 N.Y.S.2d 715, 717 (App. Div. 2010); *Snyder v. Crusader Servicing Corp.*, 231 A.3d 20, 31 (Pa. Super. Ct. 2020) (the three elements of a breach of fiduciary duty claim under Pennsylvania law are (1) the existence of a fiduciary relationship, (2) that the fiduciary "negligently or intentionally failed to act in good faith and solely for the [plaintiff's] benefit," and (3) that the plaintiff suffered an injury caused by the breach of fiduciary duty).

52. Plaintiff fails to sufficiently allege that Protiviti owed a fiduciary duty to SHIP, that Protiviti breached any purported fiduciary duty, and that any alleged breach caused damages.

53. ***First***, a consultant such as Protiviti does not owe a fiduciary duty to a client. *See TPTCC NY, Inc. v. Radiation Therapy Servs., Inc.*, 784 F. Supp. 2d 485, 506 (S.D.N.Y. 2011) ("[U]nder New York law, a consultant does not ordinarily owe a fiduciary duty to its clients." (citation omitted)), *rev'd in part on other grounds*, 453 F. App'x 105 (2d Cir. 2011); *see also Appmobi, Inc. v. Monastiero*, No. CI-14-00840, 2015 Pa. Dist. & Cnty. Dec. LEXIS 10460, at *22

(C.P. Lancaster Cty. June 11, 2015) ("Parties to arms length business contracts generally do not owe fiduciary duties to each other.").

54. Moreover, Plaintiff fails to plead sufficient facts to establish a fiduciary duty and overcome this general rule – the Complaint's only allegations regarding Protiviti's purported fiduciary duty are insufficient, conclusory allegations that "Protiviti owed to SHIP and SHIP's policyholders[11] a fiduciary duty because it was in a superior or trusted position[,]" which are contradicted by the parties' Agreement.[12] Compl. ¶ 157; *see Suthers v. Amgen Inc.*, 441 F. Supp.

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[11] Protiviti did not owe a fiduciary duty to SHIP's policyholders. The Agreement – which defined the scope of SHIP and Protiviti's relationship – specifically provides that it "was entered into solely between [SHIP] and Protiviti, and no third-party beneficiaries are created hereby[.]" Compl. Ex. A § 7; *see also id.* at 1 ("The deliverables will have been prepared solely for the use of [SHIP's] management, employees and directors. The deliverables may not be relied upon for any purpose by any third party without the prior written consent of Protiviti."); *id.* § 6 ("Protiviti's deliverables are for the use and benefit of [SHIP] only and not for any other party (each a 'Third Party'), including but not limited to [SHIP's] affiliates, shareholders, business partners or advisors. . . . Protiviti accepts no liability or responsibility to any Third Party who benefits from or uses services hereunder or gains access to the deliverables. Because Protiviti accepts no liability to any Third Party with respect to the services or deliverables rendered hereunder, Client agrees to indemnify, defend and hold Protiviti, its affiliates, directors, officers, employees, vendors, and contractors ('Protiviti Parties') harmless against any and all losses, damages, or liabilities (including costs, expenses and reasonable attorney's fees) resulting from or related to a Third Party claim to which Protiviti may become subject arising in any manner out of or in connection with the services or deliverables rendered by Protiviti hereunder[.]").

[12] Rather than indicating that SHIP held Protiviti in a position of trust, the Agreement shows that SHIP retained ultimate responsibility for the provision of information to Protiviti, the evaluation and implementation of Protiviti's recommendations, and oversight over Protiviti's services. *See, e.g.*, Compl. Ex. A

2d 478, 487 (S.D.N.Y. 2006) (dismissing breach of fiduciary duty claim and explaining that "[f]iduciary duties do not arise solely because one party has expertise that is superior to another"); *Lenau v. Co-Exprise, Inc.*, 102 A.3d 423, 443 (Pa. Super. Ct. 2014) (allegations of the existence of a contract and "a relationship of trust and confidence" were insufficient to state a claim for breach of fiduciary duty).

55. ***Second***, even assuming Plaintiff sufficiently alleges that Protiviti owed a fiduciary duty to SHIP (it did not), the Complaint's allegations show that

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§ 1 ("[SHIP] understands and accepts responsibility for all decisions related to, and implementation of, policies, processes, models, systems and risk management practice assessments, methods, and assumptions developed in the course of this project."); *id.* § 2 ("[SHIP] is solely responsible for establishing and maintaining its own effective internal control system, record keeping, management decision-making and other management functions. [SHIP] shall be fully and solely responsible for applying independent business judgment with respect to the services and the deliverables provided by Protiviti, to make implementation decisions, if any, and to determine further courses of action with respect to any matters addressed in any advice, recommendations, services, reports or other deliverables to [SHIP]."); *id.* § 8 ("Protiviti shall be entitled to rely on all information provided by, and decisions and approvals of, [SHIP] in connection with Protiviti's work hereunder. [SHIP] hereby releases Protiviti and its personnel from any liability and costs relating to the services hereunder to the extent such liability and costs are attributable to any information provided by [SHIP's] personnel that is not complete, accurate or current in all material respects."); *id.* § 25 ("[SHIP] acknowledges and agrees that it is responsible for its own legal representation and guidance related to the services provided hereunder, and that it will consult its own legal resources before acting upon any deliverables Protiviti provides under this Agreement."). SHIP's claim that it placed special trust in Protiviti is therefore inconsistent with the terms of the Agreement. *See Baravordeh*, 699 A.2d at 792 (affirming trial court's dismissal of complaint where the allegations of the complaint were contradicted by the attached exhibit).

Protiviti complied with any fiduciary duty by acting entirely consistently with its duties as defined by the Agreement Plaintiff attaches to the Complaint by (1) bringing the lack of due diligence to SHIP's attention when it could not obtain due diligence from SHIP's management, (2) identifying possible issues with the IMAs with Beechwood Re (such as Beechwood Re's failure to provide information regarding its ownership structure, principals, or finances, which Protiviti noted should have been a "non-negotiable condition to closing"), and (3) delivering the resulting Report to Mr. Lorentz, a member of SHIP's senior management and board. Compl. ¶¶ 51, 142-43.

56. ***Third***, as explained *supra* in paragraphs 45-48 – which are incorporated by reference as if set forth fully herein – Protiviti could not have caused any damages to SHIP because the investments predated the completion of the Report.

57. Plaintiff's breach of fiduciary duty claim should therefore be dismissed pursuant to Pa. R.C.P. 1028(a)(4).

VIII. Preliminary Objection No. 6 Pursuant to Pa. R.C.P. 1028(a)(4): Demurrer as to Count IV (Negligence) for Failure to State a Claim

58. The elements of a negligence claim under New York law are (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) injury proximately resulting from the breach. *See Solomon v. New York*, 66 N.Y.2d 1026, 1027 (1985).

59. Pennsylvania law is the same. *See Young*, 260 A.3d at 289 (describing the elements of a negligence claim under Pennsylvania law as duty, breach, causation, and damages).

60. Plaintiff fails to adequately plead that Protiviti owed a duty to SHIP, that Protiviti breached any alleged duty, and that the alleged breach caused an injury to SHIP.

61. ***First***, the relationship between SHIP and Protiviti here is a creature of – and is completely governed by – the parties' Agreement. Any dispute regarding this relationship cannot be converted into a tort action. *See supra* ¶¶ 25-28.

62. ***Second***, although Plaintiff alleges that "Protiviti owed SHIP a duty to act with due care, diligence, and competence in carrying out its professional responsibilities—namely auditing SHIP's financial statements in accordance with generally accepted auditing standards and finding them to fairly present, in all material respects, SHIP's financial positions[,]" Compl. ¶ 191, Plaintiff does not allege a single fact regarding how Protiviti breached this alleged duty. *See id.* ¶ 192.

63. Rather, Plaintiff only alleges facts regarding Protiviti's work under the SOW which contemplated consulting with management on the Beechwood Re investments. *See, e.g.*, *id.* ¶¶ 51, 141-43. That SOW explicitly disclaims the duties

Plaintiff seeks to impose and, as stated above, Protiviti complied with any duties owed to SHIP. *Supra* ¶¶ 41-43, 55.

64. Further, Plaintiff's allegation regarding Protiviti's alleged duty to audit SHIP's financial statements in accordance with generally accepted auditing standards is immaterial because Protiviti was not SHIP's accountant/external auditor and the Agreement did not provide for external audit services. Compl. Ex. A § 3 ("[SHIP] understands that Protiviti is not a public accounting firm and does not issue opinions or financial statements or offer any attestation services.").

65. ***Third***, as explained *supra* in paragraphs 45-48 – which are incorporated by reference as if set forth fully herein – Protiviti could not have caused any damages to SHIP.

66. Further, to the extent Plaintiff may attempt to re-characterize Count IV as a claim for professional negligence against Protiviti pursuant to 231 Pa. Code § 1042.1, such a claim has not been pleaded and, in any event, would fail because an internal auditor performing a consulting role is not a "licensed professional" that can be subject to a professional negligence claim under Pennsylvania law. *See* 231 Pa. Code § 1042.1(c); *Hirsch v. Schiff Benefits Grp., LLC*, CIVIL ACTION No. 10-2574, 2011 U.S. Dist. LEXIS 35588, at *12 (E.D. Pa. Mar. 28, 2011) ("To date, the Pennsylvania Courts have allowed professional negligence actions to be maintained only against certain *licensed* professionals. . . . The [Pennsylvania]

Rules of Civil Procedure governing professional liability actions are applicable to attorneys and other persons who are *licensed pursuant to an Act of Assembly*." (emphasis added) (internal citations and quotations omitted) (second alteration in original)).

67. Therefore, Plaintiff's negligence claim should be dismissed pursuant to Pa. R.C.P. 1028(a)(4).

IX. Preliminary Objection No. 7 Pursuant to Pa. R.C.P. 1028(a)(4): Demurrer as to Count II (Civil Conspiracy) for Failure to State a Claim

68. Under New York law, a conspiracy claim may not be asserted where it simply attempts to hold an actor-defendant duplicatively liable for the underlying cause of action. *See Herman v. Herman*, 998 N.Y.S.2d 319, 320 (App. Div. 2014) (concluding that the lower court properly dismissed the conspiracy to breach fiduciary duty claim "as duplicative" because "a separate tort [was] pleaded connecting [the defendant] to plaintiffs' alleged injury").

69. With its civil conspiracy claim, Plaintiff seeks to hold Protiviti duplicatively liable for the underlying torts of negligence and breach of fiduciary duty. Such a claim is not permitted to proceed under New York law and should be dismissed pursuant to Pa. R.C.P. 1028(a)(4).

70. Even if the above New York rule regarding duplicative claims does not apply (it does), in order to assert a conspiracy claim under New York law, a plaintiff must sufficiently allege the occurrence of a primary tort, "coupled with an

agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement[.]" *Palmieri v. Perry, Van Etten, Rozanski & Primavera, LLP*, 160 N.Y.S.3d 67, 71 (App. Div. 2021) (quoting *Perez v. Lopez*, 948 N.Y.S.2d 312, 314 (App. Div. 2012)).

71. Here, Plaintiff fails to sufficiently 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 by Protiviti in furtherance of the agreement.

72. ***First***, as explained above, the underlying claims on which Plaintiff bases its conspiracy claim must be dismissed, and Plaintiff's conspiracy claim therefore fails. *See supra* ¶¶ 17-35, 51-67.

73. ***Second***, the Complaint is devoid of any factual allegations that Protiviti engaged in a conspiracy. *See generally* Compl.; *see also id.* ¶¶ 161-70 (containing conclusory allegations regarding a purported conspiracy). Plaintiff's specific allegations regarding Protiviti, *see, e.g.*, *id.* ¶ 51, do not mention any agreement between Protiviti and the other Defendants regarding the conspiratorial acts listed in the Complaint, *see, e.g.*, *id.* ¶ 162.[13]

[13] In fact, Plaintiff's specific allegations regarding Protiviti support *the opposite* of an agreement or cooperation between Protiviti and the other Defendants. *See, e.g.*, Compl. ¶ 51 ("Protiviti noted that it was unable to obtain from SHIP management any standard due diligence regarding Beechwood Re.").

74. ***Third***, and similarly, Plaintiff does not specifically allege any overt acts performed by Protiviti in furtherance of a purported conspiracy – the overt acts listed in Plaintiff's conspiracy claim do not mention Protiviti or relate to any allegations or facts specific to Protiviti. *See id.* ¶¶ 162, 165.

75. Pennsylvania law recognizes similar elements for a conspiracy claim: "[A] plaintiff must allege facts supporting a claim for conspiracy, namely (1) the persons combined with a common purpose to do an unlawful act or to do a lawful act by unlawful means or unlawful purpose, (2) an overt act in furtherance of the common purpose has occurred, and (3) the plaintiff has incurred actual legal damage." *Weaver v. Franklin County*, 918 A.2d 194, 202 (Pa. Commw. Ct. 2007) (quoting *Brown v. Blaine*, 833 A.2d 1166, 1173 n.16 (Pa. Commw. Ct. 2003)).

76. "Additionally, absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act." *Id.*

77. As explained above, *see supra* ¶¶ 72-74, Plaintiff fails to sufficiently allege (1) that Protiviti combined with the other Defendants with a common purpose to do an unlawful act, (2) that Protiviti completed an overt act in furtherance of any alleged common purpose, and (3) an underlying cause of action on which the conspiracy claim can be based.

78. Therefore, Plaintiff's civil conspiracy claim should be dismissed pursuant to Pa. R.C.P. 1028(a)(4).

WHEREFORE, Defendant Protiviti respectfully requests that this Court enter an order sustaining Defendant's Preliminary Objections and dismissing Plaintiff's Complaint as to Protiviti with prejudice.

Dated: May 2, 2022

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Perry A. Napolitano

Signature: */s/* Perry A. Napolitano

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