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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	:	
	:	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.	:	

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PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT PAUL LORENTZ'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 Paul Lorentz ("Lorentz") and respectfully requests that the Court overrule the objections and order Defendant Lorentz to file an Answer to SHIP's Amended Complaint within twenty (20) days.

I. INTRODUCTION

Defendant Lorentz's Preliminary Objections mischaracterize the law governing the statute of limitations and either dispute or flatly ignore the facts averred in the Amended Complaint. They directly violate the standard of review at the preliminary objection stage and must be overruled.

The Amended Complaint alleges years of clear misconduct and misrepresentations instigated by Lorentz, in his role as Chief Financial Officer, as well as Wegner in his role as Chief Executive Officer and Staldine, who began as a consultant but proved valuable to Wegner and Lorentz by assisting and joining their

[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.

malfeasance and misrepresentations, eventually becoming an officer and CEO himself. SHIP claims that Lorentz and his co-defendants caused SHIP to execute the Beechwood Re and Roebling Re transactions by misrepresenting them as beneficial to SHIP despite knowing that they were extraordinarily risky, likely to lose SHIP hundreds of millions of dollars, designed to conceal or misrepresent SHIP's true financial condition, and violated regulatory oversight requirements. Moreover, Defendant Lorentz knew – and failed to disclose – that the Beechwood transactions would benefit Wegner's own family, who was financially tied to one of the Beechwood funds, and therefore represented an impermissible conflict of interest.

SHIP further alleges that Lorentz consistently and repeatedly misrepresented SHIP's financial position by manipulating its actuarial and liability estimates. SHIP asserts that Lorentz engaged in this malfeasance and made these misrepresentations as part of a conspiracy with the other Defendants, who were also officers at SHIP. The Defendants' aim was to continuously conceal SHIP's true financial position and avoid regulatory, employment, or other consequences for their egregious mismanagement and falsehoods. Their plan was successful for many years.

Because Lorentz, Wegner, and Staldine conspired with each other, and those Defendants managed SHIP as officers from 2014 through 2020, the Defendants were able to continue their misconduct up until the time SHIP was placed into rehabilitation. Lorentz, like Wegner before him and Staldine after, controlled SHIP,

controlled SHIP's information, controlled SHIP's consultants, and prevented its Trustees and the PID from discovering their malfeasance or SHIP's true financial problems until such rehabilitation. Under these circumstances, Pennsylvania law provides that SHIP's claims did not accrue until after the rehabilitator was appointed on January 29, 2020, rendering SHIP's claims timely.

Lorentz attempts to confuse these well-pled claims by disputing the facts in the Amended Complaint. Those arguments are simply inappropriate at this stage. For the reasons set forth below, Defendant's preliminary objections must be overruled.

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 filed Preliminary Objections to the Amended Complaint. As explained below, Lorentz's objections are entirely without merit and improperly rest upon his disagreement with the facts alleged in the Amended Complaint and the reasonable inferences drawn therefrom. While some of Lorentz'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. The specific allegations supporting each instance of misconduct are set forth in SHIP's Amended Complaint, and, for brevity, are merely summarized below.

Failing to Request Appropriate Rate Increases and Underestimation of Future Liabilities

As alleged in the Amended Complaint, Defendants Wegner, Lorentz and Staldine were aware of the underpricing of SHIP's policies due to the underestimation of future policy liabilities. In particular, these Defendants knew or should have known that SHIP's actuarial projections were based on faulty

assumptions that, for example, understated morbidity, overstated morbidity improvement, overstated mortality, and overstated policy lapse and termination rates. (Am. Compl. ¶¶ 30 – 41). Defendants failed to request appropriate rate increases to respond to this problem.

Defendants Wegner (as CEO), Lorentz (as CFO) and Staldine (as COO and then CEO) operated in concert to oversee and maintain an interactive process with SHIP's appointed actuary, Milliman, that resulted in the faulty actuarial assumptions. Those faulty assumptions resulted in erroneous actuarial reports, memoranda, and opinions that led to gross understatements of SHIP's future liabilities. These gross understatements appeared in SHIP's official Annual Statements at least for the years 2014 through 2019. (*Id.*, ¶ 32), and led to an overstatement of SHIP's financial strength by creating the appearance of surpluses that did not exist, at least for the years 2014, 2015, 2016, 2017, and 2018. (*Id.*, ¶ 33).

Defendants Wegner, Lorentz and Staldine operated in concert to oversee and maintain a management enterprise that overstated SHIP's projected investment income and failed to acknowledge and properly account for lower-than-anticipated yields and other poor investment results. (*Id.*, ¶ 34).

They also operated in concert to oversee and maintain a management enterprise that initiated, designed, contributed to, oversaw, maintained and/or failed to report to the PID the grossly understated future liabilities and the grossly

overstated projected investment income. The concerted activity was ongoing and deliberate and sought to evade discovery, scrutiny, oversight and/or intervention by the PID. (*Id.*, ¶ 35).

The company management enterprise which injured SHIP included, but was not limited to:

a) Oversight and maintenance of the interactive process with the appointed actuary, Milliman, that resulted in grossly understating future liabilities of SHIP;

b) Working with investment advisors to conceive of and implement the Beechwood transaction which cost SHIP millions of dollars in losses;

c) Working with investment advisors to conceive of and implement the Roebling Re transaction which resulted in misrepresenting SHIP's financial condition and cost SHIP millions of dollars in losses;

d) Intentionally designing the Roebling Re transaction to conceal SHIP's true financial condition so that it would not require PID approval;

e) Seeking to convert SHIP to a property and casualty company to avoid PID intervention;

f) Seeking to re-domesticate SHIP to a different state to avoid PID intervention;

g) Failing to alert the Trustees and PID of Defendant Wegner's self-dealing and un-waivable financial conflicts that directly injured SHIP; and

h) Failing to alert the Trustees and PID of Defendant Wegner's inexcusable personal failures that directly injured SHIP.

(*Id.*, ¶ 36).

The company management enterprise operated and maintained by Defendants Wegner, Lorentz and Staldine was in place at least from 2014, and remnants of that management enterprise continued to impact SHIP and SHIP's business operations until SHIP was placed in rehabilitation in January 2020. (*Id.*, ¶ 37). It was only then that the PID, through Special Deputy Rehabilitator Patrick Cantilo, had sufficient access to SHIP's financial and operating documents, analyses, communications, and attorney-client materials to discover and address Defendants' injurious concerted activity that caused injury to SHIP and its policyholders.

The Beechwood Transactions

First, between May 2014 and March 2015, Defendants 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 Trustees and the PID 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 its internal auditor, Protiviti, and another third-party consultant investigate the Beachwood 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. 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 Defendants Wegner and Lorentz—as well as the actions of Defendant Staldine, the admitted driver of the Beechwood deal—complete and accurate information regarding the Beechwood Re transaction remained hidden from SHIP, its Board, and later, the Rehabilitator. (*Id.*, ¶¶ 60, 72, 115.)

Roebling Re

Between September 2016 and April 2018, the Defendants engaged in additional malfeasance and misrepresentations related to the Roebling Re re-insurance scheme. (*See* Am. Compl. ¶¶ 80-101). Roebling Re was created through the Bruckner Investment Trust ("BIT") for purposes of receiving and re-insuring up to 49% of SHIP's long-term care policy liability. However, Roebling Re was entirely funded by SHIP, which transferred $100 million to the BIT in exchange for a note with a 2.5% coupon rate and a 15-year maturity date.

Because Roebling Re had no other funding, it was not a legitimate re-insurer and it would have been unable to meet its future obligations as they arose. Millions of SHIP's funds were spent on management and consulting fees. The BIT invested

$88.2 million of SHIP's funds into securities, which Defendants Wegner and Lorentz misrepresented as having almost twice that value. The remaining funds were re-paid to SHIP to avoid penalties under the note. Within 15 months of the initial September 2016 investment, nearly all of Roebling Re's and BIT's assets were exhausted.

With no material reinsurance protection, SHIP had expended millions of dollars with nothing to show for it except a worsened financial position.

Defendant Lorentz's Involvement

Defendant Lorentz was an officer at SHIP from the beginning of the Defendants' schemes until 2017, when he was replaced by his co-defendant and co-conspirator, Barry Staldine. Defendant Lorentz joined Defendant Wegner from the beginning in the Defendants' malfeasance and misrepresentations related to the Beechwood Re and Roebling Re transactions, as well as those related to false actuarial assumptions and financial statements that were designed to make SHIP's financial position appear far better than it was and avoid investigation, employment action, or regulatory oversight.

Defendant Lorentz was an officer of SHIP working closely with its CEO, Brian Wegner, when the Beechwood Re scheme was hatched in late 2013. In December 2013, Defendant Wegner contacted Beechwood Re regarding a potential investment in his company, Triliant LLC d/b/a Kala ("Triliant"). Also in December

2013, Mr. Wegner arranged for his son, Ryan Wegner, to join him for a meeting with Beechwood Re leadership regarding this potential investment. (Am. Compl. ¶ 112).

In January 2014, Defendant Wegner emailed Ryan Wegner expressing optimism that the December 2013 meeting would lead to a payment of $250,000 for the Wegners. The relationship the Wegners developed with Beechwood Re led SHIP to make its massive investment in Beechwood Re. (*Id.*, ¶ 113).

Just a few months after this meeting, in April 2014, Defendant Lorentz informed Defendant Wegner that, after having met with Beechwood Re's leadership, he was comfortable with the concept of investing SHIP's reserves with Beechwood Re. Defendant Lorentz suggested that SHIP did not need to "go overboard" on due diligence in advance of making this investment decision. He further explained that he was unsure whether SHIP would want to be in a position of vetting Beechwood Re's individual investment deals due to resource constraints and because this would be the "job of the asset manager" (*i.e.*, Beechwood itself). (*Id.*, ¶ 114).

In December 2014, Defendant Lorentz presented the Beechwood Re transaction as a means to improve SHIP's declining RBC ratio. (*Id.*, ¶ 120). Mr. Lorentz later was the impetus behind the idea for the surplus note transaction with Beechwood. It was Mr. Lorentz's responsibility to review that transaction. (*Id.*, ¶ 121). At an August 27, 2015, meeting of SHIP's Board of Directors, the Board requested additional due diligence on the Beechwood Re transactions. Defendants

Wegner, Lorentz and Staldine were all present at this meeting. It is unclear what, if anything, came of this request. (*Id.*, ¶ 122).

After September 2016, Defendants Wegner and Lorentz actively tried to avoid regulatory action related to SHIP's declining RBC ratio. At the time, SHIP reported its RBC ratio at 280%, failing to include any devaluation for the Beechwood Re or Roebling Re arrangements. (*Id.*, ¶ 123). Also in September 2016, SHIP's need for solvency was identified as the rationale to enter into the Roebling Re arrangement. Specifically, the Roebling Re arrangement was designed to address SHIP's declining surplus ostensibly by establishing a structure that allowed SHIP to bolster its surplus through apparent (but illusory transfer of liabilities and capital creation, so as to maintain RBC ratios at a level that would stave off regulatory action despite losses from the Beechwood Re investments.

In addition to other conduct described in this Amended Complaint, Defendant Lorentz played a particular role in causing SHIP to suffer losses as a result of the ill-advised Roebling Re transaction. Specifically, on at least three separate occasions, Lorentz provided misleading information on and related to the investment ratings assigned to certain commercial notes issued by Roebling Re's parent (*i.e.*, BIT) despite knowing that the ratings for those notes were vital components of both obtaining approval of the transaction and valuing it for accurate financial reporting.

The details of these averments are set forth in Paragraphs 151 to 171 of the Amended Complaint, which are incorporated herein but not repeated for purposes of brevity.

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

By March 2019, SHIP's management, including most notably Defendant Staldine, could no longer successfully conceal 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.*,

[2] SHIP remains in rehabilitation, not liquidation, and no court has declared SHIP to be insolvent or placed it in liquidation. While SHIP's deficit appears to bring SHIP within the definition of insolvency in § 221.3, the Rehabilitator continues to pursue a Plan for SHIP's rehabilitation and he does not suggest 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.

¶ 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 SHIP's Rehabilitator. (*Id.*, ¶ 108).

As Rehabilitator, the Commissioner appointed Patrick H. Cantilo as Special Deputy Rehabilitator, 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 Wegner, Lorentz, and Staldine concealed their poor and injurious management of SHIP. Ultimately, the investigation has revealed that incorrect or inappropriate actuarial assumptions and the imprudent Beechwood Re and Roebling Re investments caused or contributed to SHIP's financial difficulties.

Moreover, this investigation revealed that each Defendant 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).

Moreover, Defendants knew of SHIP's precarious financial condition, but failed to disclose these facts to the PID, SHIP's policyholders and creditors, and the public. Rather, Defendants worked with SHIP's consultants to produce financial statements and reports, which were required to be submitted to the PID, falsely declaring that SHIP's reserves were adequate and in compliance with Pennsylvania's insurance laws and regulations. (*Id.*, ¶ 143).

Defendants further knew that these statements contradicted the analysis of outside consultants, or otherwise significantly overestimated the adequacy of SHIP's reserves. Throughout the PID's investigation, Defendants concealed these relevant facts from regulators. (*Id.*, ¶ 144). As a result of Defendants' misconduct, including Defendant Lorentz's malfeasance and misrepresentations, SHIP suffered extraordinary financial losses leading to its current rehabilitation.

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

Defendant Lorentz's objection pursuant to the relevant statutes of limitations is little more than an effort to be rewarded for working jointly with his co-Defendants to conceal their wrongdoing, and SHIP's deteriorating financial situation, from the Trustees and the PID. Moreover, Defendant Lorentz misconstrues or ignores the averments of the Amended Complaint to argue that SHIP had inquiry notice of its claims – an argument that under Pennsylvania law is specifically reserved for trial

and is precluded at the preliminary objection stage. It is without merit under fundamental principles of Pennsylvania law and must be overruled.

Lorentz'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. Defendant 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.

Nonetheless, Defendant Lorentz's entire argument rests upon his dispute with the facts alleged and the inferences to be drawn from them. Under the appropriate standard of review, Lorentz's objection to the timeliness of the claims against him fails for three reasons: (1) SHIP's claims are timely under fundamental application

of the discovery rule; (2) SHIP's claims are timely under the adverse domination doctrine, as the Defendants were the senior managers of SHIP until the time it entered rehabilitation; and (3) 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 in the control of the Rehabilitator, rather than culpable management.

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, and not one for the Court to resolve at preliminary objections. *Id.*

Here, SHIP has alleged it was prevented from discovering its claims against the Defendants – principally due to the Defendants' own misrepresentations and concealment– until after the rehabilitator was appointed on January 29, 2020. The Amended Complaint avers in detail that each of the Defendants, and Lorentz in particular, made numerous misrepresentations and concealed key facts relating to Beechwood, Roebling Re, and the actual value of SHIP's reserves.

For example, the Amended Complaint avers that Lorentz, along with his co-conspirators, "were aware of the underpricing of SHIP's policy premiums" given its true actuarial position and future liabilities, but continually misrepresented those circumstances to the Trustees and the PID in financial statements and failed to correct facts they knew to be materially false. (Am. Compl., ¶ 31-35). These misrepresentations continued until at least March 2019.

The Amended Complaint further alleges that Wegner, in conspiracy with Lorentz and Staldine, misrepresented the Beechwood Re transactions as "senior secure loans that were rated NAIC 1 and 2." (Am. Compl., ¶ 49-50). He also perpetuated the false representation that Beechwood was "investing SHIP's money conservatively and that the investments were more than sufficiently collateralized." (*Id.*, ¶ 48). SHIP has alleged that Wegner knew these facts were false and yet perpetuated them, causing SHIP to invest $320 million in investments that lacked any oversight and risked substantial losses that eventually materialized. The

Amended Complaint alleges similar material misrepresentations regarding the Roebling Re transactions and the related BIT note. (Am. Compl., ¶ 151-171).

Moreover, the Amended Complaint alleges that Lorentz engaged in schemes to misrepresent the Beechwood and Roebling Re transactions, and SHIP's true actuarial and financial position, together with Wegner and Staldine. Pursuant to the conspiracy Lorentz joined, when Wegner was replaced as Chief Executive Officer by Lorentz, and then by Staldine in 2016, they continued Wegner's malfeasance and misrepresentations.

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, including Wegner, 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.

Against this clear application of the discovery rule, Lorentz asks the Court to preclude this matter from proceeding to discovery because during 2018, or before, (a) SHIP had *some* indication of concerns regarding Beechwood and Roebling Re; (b) at least one person in senior management raised concerns about Lorentz's performance; and (c) Mr. Lorentz ultimately left his position as CEO of SHIP. (P.O. ¶ 39-43). This is essentially an argument 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 questions of reasonable diligence at any stage and instead advised courts to leave the issue 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").

Moreover, none of the cherry-picked facts identified by Lorentz would have notified SHIP that it had suffered significant financial losses because of the Defendants' misconduct. Even if the Court were to focus only on these allegations and ignore the averments regarding Defendants' concealment, none of these facts notified the Trustees or PID that Defendants had any role in causing financial losses at SHIP. Nor do any of these facts indicate that the Trustees or PID either knew or could have discovered through reasonable diligence that the Defendants were misrepresenting these transactions from 2016 to 2020.

None of these averments are sufficient to show inquiry notice or a lack of reasonable diligence by SHIP as a matter of law, particularly at the pleading stage. *Gleason v. Borough of Moosic*, 15 A.3d 479, 485 (Pa. 2011). They do not indicate, let alone prove as a matter of law, that SHIP knew the full extent of its financial

deterioration or the malfeasance that occurred related to the Beechwood and Roebling Re transactions. Nor do they indicate, let alone prove as a matter of law, that SHIP was aware that its losses were the result of Defendants' malfeasance and that Defendants had been misrepresenting the Beechwood and Roebling Re transactions and SHIP's actuarial and financial position while knowing the true circumstances.

Accordingly, the discovery rule renders SHIP's claims timely and Lorentz's arguments to the contrary, while they might be revived at trial, are no basis for dismissal at the preliminary objection stage.

B. SHIP's claims are timely under the adverse domination doctrine.

Second, SHIP's claims are timely under the adverse domination doctrine because the Defendants exerted control over the organization until it entered rehabilitation on January 29, 2020. The adverse domination doctrine delays the running of the statute of limitations where a corporate entity seeks to bring claims against directors' or officers' wrongful actions adverse to the entity. *See Marine Chestnut Partners, L.P. v. Lenfest*, 152 A.3d 265, 280 (Pa. Super. Ct. 2016) ("a statute of limitations is tolled against director/officer misconduct so long as a majority of the board is controlled by the alleged wrongdoers"). Courts applying the doctrine in Pennsylvania rely on the fact that "no non-culpable party could have brought suit before the receiver…was appointed because of the control the

defendants exerted over the organization and others' lack of sufficient knowledge of the wrongdoing." *See id. at* 281.

The adverse domination doctrine tolls the statute of limitations for claims against bad-actor directors, officers, accountants, auditors, actuaries, and attorneys. *See, e.g., Resolution Trust Corp. v. Farmer*, 865 F.Supp.1143 (E.D. Pa. 1994) (applying doctrine to board's attorneys); *see also In re O.E.M.*, 405 B.R. 779, 786 (Bankr. W.D. Pa. 2009) (finding that the court could not decide the adverse domination issue on a motion to dismiss because the doctrine raised "various questions of material fact"). Pennsylvania courts assess (i) the degree of influence by the dominating/controlling directors or officers on the company, and (ii) the degree of culpability of the dominating/controlling directors or officers. Under the doctrine of adverse domination, the statute of limitations is tolled for as long as a corporate plaintiff is controlled by the alleged wrongdoers. *Id*. at 1151.

SHIP has alleged in its Amended Complaint that the Defendants controlled its management from the inception of the misconduct at issue through SHIP's placement into rehabilitation on January 29, 2020. Indeed, Defendants were the senior officers of SHIP during that entire period, ending only when Defendant Staldine stepped down as CEO and was replaced by the Rehabilitator. *See Farmer*, 865 F. Supp. at 1158-59 (noting that "the fact that a regulatory body—even the eventual plaintiff—acquired knowledge of the wrong and possessed certain power

over the institution…does not negate the adverse domination doctrine or constitute, standing alone, the necessary cessation of domination so that it could or should have brought a lawsuit"). These allegations appropriately invoke the adverse domination doctrine and SHIP is entitled to discovery on the issues identified in *Farmer*, namely the degree to which Defendants influenced SHIP during this period and their degree of culpability.

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

Finally, SHIP's claims are 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 Staldine 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 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. The fact that control of the

company rested with these Defendants is undisputed. Multiple Pennsylvania legal doctrines are designed specifically to avoid such an unjust result, particularly at the pleading stage.

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

IV. RESPONSE TO PRELIMINARY OBJECTION 2: SHIP'S AMENDED COMPLAINT DOES NOT IMPERMISSIBLY PLEAD INCONSISTENT FACTS.

Defendant Lorentz claims that SHIP has impermissibly pled inconsistent facts but fails to identify any material or impermissible inconsistencies. Indeed, this preliminary objection appears to arise from the false proposition that that an event or injury cannot have multiple causes. That is, of course, absurd. This preliminary objection must be overruled.

Lorentz first posits that he and his co-defendants cannot be responsible for SHIP's financial losses because non-party consultants also engaged in apparent misconduct. (P.O. 64-66). But that is not improper – it is a fact of our reality that has given rise to a vast body of law on joint liability.

The only other alleged inconsistency identified by Lorentz is that SHIP avers he knew, or should have known, that facts provided to SHIP's Trustees and the PID regarding the matters in the Amended Complaint were false, but SHIP also alleges that Lorentz was incompetent. (P.O. 67). These averments are not inconsistent either – even the most incompetent individuals can violate their fiduciary duties.

Defendant Lorentz's second preliminary objection is without any factual or legal basis at all. It must be overruled.

V. RESPONSE TO PRELIMINARY OBJECTION 3: SHIP HAS ADEQUATELY PLED ITS CLAIM FOR CIVIL CONSPIRACY.

Defendant Lorentz's preliminary objection to SHIP's Civil Conspiracy claim once again ignores the averments in the Amended Complaint. SHIP has averred a civil conspiracy among the Defendants to misrepresent and conceal the true nature of the unjustifiable financial transactions set forth in the Amended Complaint. SHIP has alleged that each of the Defendants, including Lorentz, knew the true facts surrounding these transactions but agreed to conceal them through intentional misrepresentations in order to continue managing SHIP, avoid personal liability, and avoid regulatory action by the PID.

Lorentz began conspiring with Wegner and Staldine while working on the Beechwood transactions. Despite knowing the true, and unwise and unjustifiable, nature of the investments and absence of oversight, the three co-conspirators actively concealed those facts and instead promoted Beechwood as a safe investment for $320 million in funds. Staldine, Wegner, and Lorentz further agreed to misrepresent the Roebling Re transactions and SHIP's actuarial and financial position. Accordingly, the Amended Complaint adequately alleges an agreement by the Defendants to commit intentional misrepresentation against SHIP, its Trustees, and

the PID. Defendants carried out this conspiracy over the course of years. Those allegations squarely meet the elements of civil conspiracy in Pennsylvania.

Finally, Defendant argues that Pennsylvania law precludes a civil conspiracy claim by a corporation against its officers. This is simply not correct. While, generally, Pennsylvania law holds that a corporation cannot conspire *with itself or its agents*, *Doe v. Nest Graf, P.C.*, 862 F. Supp. 1310, 1328 (E.D. Pa. 1994); there is no legal rule precluding a corporate entity from claiming that its officers conspired *against* it. Indeed, even the Pennsylvania rule Defendant misstates has an exception that would squarely apply to SHIP's claims:

> [A] corporation can conspire with its agents or employees if the agents or employees are acting not for the corporation, but for personal reasons and one of the parties to the conspiracy is not an agent or employee of the corporation. This rule has been liberally construed, however, so as to allow a civil conspiracy claim to proceed where agents or employees act outside of their corporate roles even in the absence of a co-conspirator from outside the corporation.

Tyler v. O'Neill, 994 F. Supp. 603, 613 (E.D. Pa. 1998) (internal citations omitted); *see also Denenberg v. American Family Corp.*, 566 F. Supp. 1242, 1253 (E.D.Pa. 1983) and *O'Neill v. ARA Services, Inc.*, 457 F. Supp. 182, 188 (E.D. Pa. 1978).

Accordingly, Defendant's preliminary objection to SHIP's claim for civil conspiracy is without merit and must be overruled.

VI. CONCLUSION

For the foregoing reasons, SHIP respectfully requests that the Court overrule Defendant Lorentz's Preliminary Objections and order him to file an Answer to SHIP's Amended Complaint within twenty (20) days.

Dated: October 17, 2022

Respectfully submitted,

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