

**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  
RESPONSE IN  
OPPOSITION TO  
PLAINTIFF’S  
PRELIMINARY  
OBJECTION TO  
PROTIVITI’S  
PRELIMINARY  
OBJECTION 1**

Counsel of Record for  
Defendant Protiviti, Inc.:

Perry A. Napolitano  
PA I.D. No. 56789  
Justin J. Kontul  
PA I.D. No. 26026

REED SMITH LLP  
Firm No. 234  
225 Fifth Avenue, Suite  
1200  
Pittsburgh, PA 15222  
T: (412) 288-3131  
F: (412) 288-3063  
pnapolitano@reedsmith.com  
jkontul@reedsmith.com

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No. 1 SHP 2022

**DEFENDANT PROTIVITI, INC.’S RESPONSE IN OPPOSITION TO  
PLAINTIFF’S PRELIMINARY OBJECTION TO PROTIVITI’S  
PRELIMINARY OBJECTION 1**

Defendant Protiviti, Inc. (“Protiviti”) submits this Response in Opposition to Plaintiff’s Preliminary Objection to Protiviti’s Preliminary Objection 1 regarding statutes of limitations. Protiviti hereby incorporates by reference its Brief in Support of its Preliminary Objections (“Brief”), which is being filed contemporaneously herewith. For the following reasons, the Court should deny Plaintiff’s Preliminary Objection to Protiviti’s Preliminary Objection 1.

1. Admitted.

2. Paragraph 2 contains a legal conclusion to which no response is required. To the extent a response is required, Protiviti lacks sufficient information upon which to form a belief as to the truth of the allegations in Paragraph 2, and therefore denies the allegations in Paragraph 2.

3. The allegations in the first sentence of Paragraph 3 are denied, except Protiviti admits that it is a consulting firm that provides various consulting services to its clients. The allegations in the second sentence of Paragraph 3 contain legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations, except Protiviti admits that its corporate headquarters is located in Menlo Park, California. The allegations in the third sentence of Paragraph 3 purport to describe the contents of a written document. Protiviti denies the allegations in the third sentence of Paragraph 3 to the extent they are inconsistent with said document. By way of further response, Protiviti admits that it served as SHIP's internal auditor from 2013 to 2016; however, Protiviti denies that the allegations in the complaint relate to Protiviti's provision of internal audit services to SHIP. To the contrary, the allegations in the complaint relate to discrete consulting projects as to which Protiviti was retained by SHIP pursuant to the Master Services Agreement ("MSA") and separate Statements of Work ("SOWs") attached to Plaintiff's Amended Complaint.

4. Paragraph 4 contains a legal conclusion to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 4.

### **RELEVANT BACKGROUND**

5. Denied, except Protiviti admits that the Rehabilitator's purported claims arise solely out of discrete consulting services provided by Protiviti to SHIP pursuant to the MSA and SOWs attached to Plaintiff's Amended Complaint.

6. Admitted.

7. Admitted.

8. Admitted.

9. Paragraph 9 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 9, except Protiviti admits that its first preliminary objection to the Amended Complaint is based on Plaintiff's claims being barred by the applicable statutes of limitation.

10. Paragraph 10 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 10. By way of further response, Protiviti's Preliminary Objection 1 properly raises a statute of limitations defense because the claims in Plaintiff's

Amended Complaint against Protiviti are time-barred on the face of the Amended Complaint.

### **RESPONSE TO REHABILITATOR'S PRELIMINARY OBJECTION**

11. Paragraph 11 is an incorporation paragraph to which no response is required. By way of further response, Protiviti incorporates the foregoing responses as if fully restated herein.

12. Paragraph 12 contains a legal conclusion to which no response is required. By way of further response, the allegations in Paragraph 12 purport to describe the contents of a Pennsylvania Rule of Civil Procedure. Protiviti denies the allegations to the extent they are inconsistent with said Rule.

13. Paragraph 13 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 13. By way of further response, Protiviti's Preliminary Objection 1 properly raises a statute of limitations defense because the claims in Plaintiff's Amended Complaint against Protiviti are time-barred on the face of the Amended Complaint.

14. Paragraph 14 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 14. By way of further response, Protiviti's Preliminary Objection 1 properly raises a statute of limitations defense because the claims in Plaintiff's

Amended Complaint against Protiviti are time-barred on the face of the Amended Complaint. *See* Brief at Section IV.a. Pennsylvania courts have held that a statute of limitations defense may be raised in 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, 2020 Pa. Commw. Unpub. LEXIS 433 at \*10 n.16 (Pa. Commw. Ct. 2020) (per curiam) (unpublished); *see also* *Rufo v. Bastian-Blessing Co.*, 207 A.2d 823, 825 (Pa. 1965) (“The complaint was properly dismissed because it is apparent on its face that it was originally filed beyond the period permitted by the applicable statute of limitations.”); *Davis v. Commonwealth*, 660 A.2d 157, 159 n.2 (Pa. Commw. Ct. 1995) (“Preliminary objections were a proper method of raising the affirmative defense of the statute of limitations because the defense appears on the face of the pleadings under attack.”).

15. Paragraph 15 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 15. By way of further response, Pennsylvania courts have repeatedly held that statutes of limitations may be raised in preliminary objections. *See supra* ¶ 14.

16. Paragraph 16 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in

Paragraph 16. Protiviti properly raises a statute of limitations defense in its preliminary objections because Plaintiff's claims against Protiviti are time-barred on the face of the Amended Complaint. *See supra* ¶ 14.

17. Protiviti denies the allegations in Paragraph 17. By way of further response, in its Preliminary Objections to the Amended Complaint, Protiviti provides support for its position that a statute of limitations defense may be raised in preliminary objections where “the application of the relevant statute of limitations is apparent on the face of the Amended Complaint[.]” *See* Preliminary Objections ¶ 18 n.3 (quoting *Baney*, 2020 Pa. Commw. Unpub. LEXIS 433 at \*10); *see also supra* ¶ 14.

18. Protiviti denies the allegations in Paragraph 18. By way of further response, *Baney* is directly applicable here. Like in *Baney*, the application of the statute of limitations to Plaintiff's claims against Protiviti is clear from the face of the Amended Complaint. Indeed, Plaintiff's Amended Complaint makes clear that Plaintiff's claims against Protiviti accrued, at the latest, in November 2016. *See* Brief at Section IV.b; Am. Compl. ¶ 60.

19. Paragraph 19 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 19. To the contrary, and as explained further in Protiviti's Brief, the cases cited in *Baney* reinforce that Protiviti has properly raised a statute of

limitations defense via preliminary objections, and that Plaintiff's claims against Protiviti are barred by the statute of limitations. See Brief at Section IV.a and n.6.

20. Paragraph 20 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 20. The cases cited in *Baney* support Protiviti's position. First, *Feldman v. Hoffman* applied *Rufo*, where the Supreme Court affirmed dismissal of a complaint because "on its face, it was clear that [plaintiff's] action was barred by the *statute of limitations*." 107 A.3d 821, 830 (Pa. Commw. 2014) (emphasis added). Like in *Rufo*, "there [is] no prejudice involved in . . . sustaining the preliminary objection" because Plaintiff here has effectively "answered and denied" the defense by choosing to brief a substantive response, which, in turn, fails to establish "any issues of fact that might have to be tried." *Id.* (quoting *Rufo*, 207 A.2d at 826). The remaining *Baney*-cited cases further reinforce that Protiviti's defense is properly—indeed, best—resolved now. See *Greenberg v. Aetna Ins. Co.*, 235 A.2d 576, 579 (Pa. 1967) (explaining that "where plaintiff's complaint or pleading shows on its face that his claim is devoid of merit, preliminary objections are an appropriate" and "wise" "remedy," "because if the law or the rule were otherwise, it would mean long and unnecessary delays in the law -- delays which Courts are strenuously trying to eliminate or reduce -- and it could not aid plaintiff at the trial or affect the result"); *Iudicello v. PENNDOT*, 383



A.2d 1294, 1297 (Pa. Commw. 1978) (affirming dismissal at preliminary objection stage, which “expedite[s] the disposition of the case,” whereas delay provides “no possible benefit to anyone”); *Pelagatti v. Cohen*, 536 A.2d 1337 (Pa. Super. 1987) (affirming, in part, dismissal based on “an affirmative defense . . . raised by way of preliminary objections where it is established on the face of the complaint”).

21. Paragraph 21 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 21. To the contrary, *Cooper v. Downingtown Sch. Dist.*, 357 A.2d 619 (Pa. Super. 1975) upheld dismissal at the preliminary objection stage, because disposition there served “the interests of judicial economy” and a full opportunity for briefing was provided. *Id.* at 627; *see also* Brief at Section IV.a and n.6.

22. Paragraph 22 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 22. By way of further response, like *Baney*, it is clear that Plaintiff’s claims against Protiviti are time-barred on the face of the complaint. Similarly, like *Baney*, Plaintiff’s attempt to argue for tolling of the statute of limitations is disproved by the allegations in the Amended Complaint, which make clear that Plaintiff’s claims against Protiviti accrued, at the latest, in November 2016. Am. Compl. ¶ 60; *see also* Brief at IV.b.

23. Paragraph 23 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 23. For the reasons detailed in the preceding paragraphs, *Baney* and the well-established rule it invokes applies here, and the Court should consider Protiviti's statute of limitations defense. *See also* Brief at IV.a.

24. Paragraph 24 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 24. *See* Brief at IV.

25. Paragraph 25 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 25. *See* Brief at IV.

26. Paragraph 26 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 26. As demonstrated above, *Baney* invokes and applies a well-established rule, and the allegations in Plaintiff's Amended Complaint, including its own admission that the Beechwood's issues came to light in fall of 2016, make clear that its claims are barred by the statute of limitations. *See supra* ¶¶ 18, 24; Brief at IV.a.

27. Paragraph 27 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in

Paragraph 27. By way of further response, Protiviti rightfully invokes controlling Pennsylvania law allowing adjudication of its statute of limitations defense at the preliminary objection stage and the issue, having been briefed by both sides, is ripe for resolution. *See* Brief at IV.a.

28. Paragraph 28 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 28. By way of further response, Protiviti's statute of limitations defense is apparent on the face of the Amended Complaint. *See* Protiviti's Preliminary Objections ¶ 24; Brief at IV.a. The discovery rule, moreover, does not apply to Plaintiff's claims against Protiviti. Even if it did, on the face of the Amended Complaint, the rule would toll the statutes of limitations to, at the very latest, only November 2016 – when Plaintiff had reason to exercise due diligence regarding the Beechwood Re transaction. *See supra* ¶ 27; Brief at IV.b. Therefore, contrary to Plaintiff's assertions, the Court can decide the statute of limitations from the face of the Amended Complaint.

29. Paragraph 29 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 29. By way of further response, tellingly, Paragraph 29 of Plaintiff's PO does not identify any specific allegations to apply the discovery rule as Plaintiff cursorily claims. *See supra* ¶ 28.

30. Paragraph 30 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 30. By way of further response, Protiviti denies that it owed a fiduciary duty to SHIP. Protiviti further denies that it concealed any of its findings from SHIP, its committees, or its Board. Plaintiff has not alleged – either in the Amended Complaint or its Preliminary Objection – any specific acts of concealment by Protiviti. These vague and conclusory allegations cannot resurrect Plaintiff’s untimely claims against Protiviti. *See* Brief at VIII. By way of further response, Plaintiff’s allegations show no concealment and that SHIP was well aware of the facts giving rise to its claims. *See id.* at IV.b.

31. Paragraph 31 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 31. By way of further response, Plaintiff argues that the question of reasonable diligence in discovering its claim is a question for the jury, but concedes that “reasonable awareness of injury and cause of injury are to be decided by [the] jury unless ‘facts are so clear that reasonable minds cannot differ.’” Plaintiff’s Preliminary Objection ¶ 31 (quoting *Gleason v. Borough of Moosic*, 15 A.3d 479, 484-88 (Pa. 2011)). Here, the facts alleged in the Amended Complaint make clear that Plaintiff’s claims against Protiviti are time-barred. Accordingly,

this is not a case where reasonable minds can differ regarding whether Plaintiff exercised reasonable diligence. *See* Brief at IV.b.

32. Paragraph 32, including footnote 3, contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 32, including footnote 3. By way of further response Plaintiff concedes that Protiviti's report was delivered to "appropriate committees or individuals at SHIP" in November 2016. Am. Compl. ¶ 60. Plaintiff further alleges that "Beechwood's issues *came to light* in fall of 2016." *Id.* ¶ 127. Based on these and other allegations, there can be no doubt that SHIP had a duty to exercise reasonable diligence to investigate the Beechwood Re investments by no later than November 2016. SHIP is not asking the Court to construe allegations in its favor; rather, SHIP is asking the Court to ignore its own allegations to allow its untimely claims to survive Protiviti's Preliminary Objections. Public policy considerations do not excuse Plaintiff's untimeliness under controlling Pennsylvania authorities. *See* Brief at IV.c.

33. Paragraph 33 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 33. By way of further response, as discussed further in Protiviti's Brief in Support of its Preliminary Objections and in Opposition to Plaintiff's Preliminary Objection, SHIP cannot resurrect its untimely claims by ignoring the

statutes of limitations in favor of public policy considerations. In Pennsylvania, statutes of limitations apply to claims brought by a rehabilitator just as they would in any other context, subject to select statutory exceptions that do not apply here. *See* Brief at IV.c (citing *Pratter v. Penn Treaty Am. Corp.*, 11 A.3d 550, 557 (Pa. Commw. 2010) (recognizing that insurers in rehabilitation are subject to limitations periods)).

34. Paragraph 34 contains legal conclusion to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 34. By way of further response, the case upon which Plaintiff relies, *Foster v. Alexander & Alexander Servs.*, Civil Action No. 91-1197, 1995 U.S. Dist. LEXIS 711 (E.D. Pa. Jan. 20, 1995), is a non-binding, unpublished federal district court decision. As explained more fully in Protiviti's Brief, the reasoning in *Foster* is fundamentally flawed under controlling law. *See* Brief at IV.c. Nonetheless, *Foster* correctly acknowledges that "[a] rehabilitator is not exempt from the statute of limitations." *Foster*, 1995 U.S. Dist. LEXIS 711, at \*17.

35. Paragraph 35 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 35. By way of further response, the facts in *Foster* are materially distinguishable from here and its reasoning is contradicted by controlling Pennsylvania authorities. *See supra* ¶ 34; Brief at IV.c.

36. Paragraph 36 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 36. By way of further response, as discussed above, Protiviti did not owe a fiduciary duty to SHIP, and *Foster* does not control. *See supra* ¶¶ 30, 34-35; Brief at IV.c. Moreover, Plaintiff does not identify specific facts suggesting that Protiviti controlled SHIP, and does not allege any acts of concealment by Protiviti. Brief at IV.b.

37. Paragraph 37 contains legal conclusions to which no response is required. To the extent a response is required, Protiviti denies the allegations in Paragraph 37. By way of further response, as explained above and in detail in Protiviti's Brief, the Court should not delay adjudication of a ripe, fully-briefed statute of limitations issue under controlling law. Brief at IV.a.

38. Protiviti denies the allegations in Paragraph 38. The claims against Protiviti in the Amended Complaint are time-barred on their face, and the Court should sustain Protiviti's Preliminary Objection 1.

WHEREFORE, for the foregoing reasons, the Court should deny Plaintiff's Preliminary Objection to Protiviti's Preliminary Objection 1, and should sustain Protiviti's Preliminary Objection without leave to amend because Plaintiff's claims against Protiviti are barred by the statute of limitations.

Dated: December 19, 2022

REED SMITH LLP

/s/ Perry A. Napolitano

Perry A. Napolitano

PA I.D. No. 56789

Justin J. Kontul

PA I.D. No. 26026

225 Fifth Avenue, Suite 1200

Pittsburgh, PA 15222

T: (412) 288-3131

F: (412) 288-3063

pnapolitano@reedsmith.com

jkontul@reedsmith.com

*Counsel for Protiviti Inc.*



**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

Attorney No.: 26026

**PROOF OF SERVICE**

I hereby certify that on this 19th day of December, 2022, I am serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

Via U.S. mail and PACFile (if available):

COZEN O'CONNOR  
Michael J. Broadbent, PA I.D. 309798  
Dexter R. Hamilton, PA I.D. 50225  
Eric D. Freed, PA I.D. 39252  
Matthew J. Siegel, PA I.D. 82406  
1650 Market Street, Suite 2800  
Philadelphia, PA 19103  
(215) 665-4732

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

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

POST & SCHELL, P.C.  
James J. Kutz, PA I.D. No. 21589  
Erin R. Kawa, PA I.D. No. 308302  
17 N. Second Street, 12<sup>th</sup> Floor  
Harrisburg, PA 17101

*Counsel for Defendant Brian Wenger*

ECKERT SEAMANS CHERIN &  
MELLOTT, LLC  
Casey Alan Coyle, PA I.D. No. 307712  
213 Market Street, 8<sup>th</sup> Floor  
Harrisburg, PA 17101

*Counsel for Defendant Paul Lorentz*

BLACK & GERNGROSS, P.C.  
James J. Black, III, PA I.D. No. 41895  
Jeffrey B. Miceli, PA I.D. No. 57475  
Mark W. Drasnin, PA I.D. No. 65328  
Nicola F. Serianni, PA I.D. No. 203803  
1617 John F. Kennedy Boulevard,  
Suite 1575  
Philadelphia, PA 19103

*Counsel for Defendant Barry Staldine*

/s/ Perry A. Napolitano  
Perry A. Napolitano

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Philadelphia, PA 19103  
(215) 665-4732

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

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

POST & SCHELL, P.C.  
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Erin R. Kawa, PA I.D. No. 308302  
17 N. Second Street, 12<sup>th</sup> Floor  
Harrisburg, PA 17101

*Counsel for Defendant Brian Wenger*

ECKERT SEAMANS CHERIN &  
MELLOTT, LLC  
Casey Alan Coyle, PA I.D. No. 307712  
213 Market Street, 8<sup>th</sup> Floor  
Harrisburg, PA 17101

*Counsel for Defendant Paul Lorentz*

BLACK & GERNGROSS, P.C.  
James J. Black, III, PA I.D. No. 41895  
Jeffrey B. Miceli, PA I.D. No. 57475  
Mark W. Drasnin, PA I.D. No. 65328  
Nicola F. Serianni, PA I.D. No. 203803  
1617 John F. Kennedy Boulevard,  
Suite 1575  
Philadelphia, PA 19103

*Counsel for Defendant Barry Staldine*

/s/ Perry A. Napolitano  
Perry A. Napolitano