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1 SHP 2022

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL HUMPHREYS, Acting Insurance Commissioner of the Commonwealth of Pennsylvania in his capacity as the Statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania,	:	No. 1 SHP 2022
Plaintiff,	:	
v.	:	
BRIAN WEGNER, *et al.*,	:	
Defendants.	:	

ORDER

AND NOW, on this _____ day of _____, 2022, after reviewing Defendant Paul Lorentz's Preliminary Objections to the Amended Complaint and the parties' respective filings regarding the same, and following oral argument, it is hereby ORDERED that Defendant Lorentz's Preliminary Objections are SUSTAINED and Counts I, III, IV, and VI of the Amended Complaint are DISMISSED WITH PREJUDICE as to Defendant Lorentz.

BY THE COURT:

_____

J.

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,	:	No. 1 SHP 2022
Plaintiff,	:	
v.	:	
BRIAN WEGNER, *et al.*,	:	
Defendants.	:	

NOTICE TO PLEAD

To: Acting Commissioner Michael Humphreys

You are hereby notified to file a written response to the enclosed Preliminary Objections within twenty (20) days from the date of service hereof or a judgment may be entered against you.

/s/ Casey Alan Coyle
Casey Alan Coyle, Esquire (PA 307712)
Counsel for Defendant Paul Lorentz

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,	:	No. 1 SHP 2022
Plaintiff,	:	
v.	:	
BRIAN WEGNER, *et al.*,	:	
Defendants.	:	

DEFENDANT PAUL LORENTZ'S PRELIMINARY OBJECTIONS

Pursuant to Pennsylvania Rule of Appellate Procedure 106 and Pennsylvania Rule of Civil Procedure 1028, Defendant Paul Lorentz, by his attorneys, Babst, Calland, Clements, and Zomnir, P.C., submits the following Preliminary Objections to the Amended Complaint filed by the Acting Insurance Commissioner of the Commonwealth of Pennsylvania in his capacity as Statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania.

BACKGROUND

1. Senior Health Insurance Company of Pennsylvania ("SHIP") is a Pennsylvania stock limited life insurance company that administers a closed block of long-term care insurance policies. (Am. Compl. ¶3).

2. SHIP was a subsidiary of CNO until 2008. (Am. Compl. ¶13).

3. CNO and its subsidiaries made approximately $915 million in capital contributions to SHIP. (Am. Compl. ¶15).

4. However, in 2008, CNO recognized that it was enduring significant underwriting losses for SHIP policies and sought to reduce the strain of supporting these persistent losses. (Am. Compl. ¶13).

5. CNO transferred ownership of SHIP to Senior Health Trust, which was then merged into an independent oversight trust, the Senior Health Care Oversight Trust ("SHOT"). (Am. Compl. ¶14).

6. Following its transfer to SHOT and despite CNO's nearly $1 billion in capital contributions, SHIP continued to decline financially. (Am. Compl. ¶16).

7. SHIP began experiencing a "material increase" in financial difficulties in 2015. (Am. Compl. ¶28).

8. Starting in 2017, the Pennsylvania Insurance Department ("PID") began to express concerns regarding SHIP's financial condition. (Am. Compl. ¶137).

9. In February 2017, PID concluded that SHIP "had a capital shortfall." (Am. Compl. ¶137).

10. Over the course of the next nine months, PID "requested that SHIP issue a corrective plan and eventually considered seeking administrative supervision of SHIP." (Am. Compl. ¶137).

11. Between February and November 2017, PID requested that SHIP issue a corrective plan and "eventually considered seeking administrative supervision of SHIP." (Am. Compl. ¶137).

12. By January 2018, PID communicated to SHIP its concern that SHIP's "reverse assumptions were incorrect" and that two transactions—which are referred to in the Amended Complaint as the "Beechwood Re and Roebling Re transactions"—"were problematic." (Am. Compl. ¶138).

13. In February 2018, SHIP entered into a letter agreement with PID "similar in some respects to administrative supervision." (Am. Compl. ¶139).

14. In April 2018, SHIP stated in regulatory filings that it was terminating its reinsurance agreement with Roebling Re; SHIP exited this arrangement "at the urging" of PID. (Am. Compl. ¶100).

15. On March 1, 2019, SHIP reported a deficit of more than $466 million to PID—a drop of $478 million in just one year—"apparently rendering the Company statutorily insolvent." (Am. Compl. ¶¶102, 103).

16. On or about January 23, 2020, the Insurance Commissioner of the Commonwealth of Pennsylvania filed a petition, pursuant to 40 P.S. §§ 221.1 *et*

seq., requesting that SHIP be placed in rehabilitation and the Commissioner be appointed as statutory rehabilitator.

17. On January 29, 2020, this Court approved the Commissioner's petition, placed SHIP into rehabilitation, and appointed the Commissioner as rehabilitator. (Am. Compl. ¶106).

18. One day shy of two years later, on January 28, 2022, the Commissioner, in her capacity as the statutory rehabilitator of SHIP, filed this Complaint against Defendants on behalf of SHIP, pursuant to 40 P.S. §221.16(c).

19. Thereafter, the Acting Commissioner of the Commonwealth of Pennsylvania was substituted as the named plaintiff. (Docket).[1]

20. Mr. Lorentz and the other Defendants each filed Preliminary Objections to the Complaint. (Docket).

21. The Commissioner declined to stand pat on the allegations in its 64-page, 245-paragraph Complaint.

22. Instead, the Commissioner filed an Amended Complaint in the face of the Preliminary Objections. (Docket).

[1] Although the petition for rehabilitation and other matters related to SHIP were undertaken by the prior Insurance Commissioner, for the sake of brevity, both the prior Insurance Commissioner and the current Acting Commissioner are referred to as the "Commissioner" hereinafter.

23. While continuing to acknowledge that "[t]here is no single cause of SHIP's financial problems," the Commissioner has attributed SHIP's deteriorated financial position to the wrongdoing of Mr. Lorentz and the other named Defendants, at least for purposes of the instant action. (Am. Compl. ¶¶29, 30).[2]

24. Mr. Lorentz served as SHIP's Chief Financial Officer and Board member from 2008 to February 2017, during which time he also served as the treasurer of SHIP's sister company, Fuzion Analytics. (Am. Compl. ¶5).

25. Of the six counts in the Amended Complaint, four target Mr. Lorentz: (1) Count I (breach of fiduciary duty); (2) Count III (civil conspiracy); (3) Count IV (negligence); and (4) Count VI (negligent misrepresentation). (Am. Compl. ¶¶191-204, 209-32, 237-46).

[2] On the same date that the Commissioner instituted this action, the Commissioner—again acting in her capacity as the statutory rehabilitator of SHIP—instituted a second action on behalf of SHIP against various third-party consultants referenced throughout the Complaint, docketed at 2 SHIP 2022. Both actions arise out of and are related to the placement of SHIP into rehabilitation at the request of the Commissioner on January 29, 2020. Although the defendants in the two actions are different, the facts, the alleged wrongdoing, and the purported harm to SHIP are ***virtually identical***: the Commissioner avers that the defendants in each action inappropriately, inaccurately, and/or fraudulently advised SHIP on critical financial matters, which led to SHIP making poor financial decisions in the management of its business and eventually to SHIP's reserves becoming too deficient to pay for the benefits expected to be owed to its remaining policyholders under its policies. Indeed, the related Complaints contained over 65 virtually identical paragraphs of factual averments, as well as identical whereas clauses, requests for relief, and demands for jury trial. Despite the existence of a common plaintiff alleging wrongdoing related to the same underlying events and the significant overlap between both related Complaints, the Commissioner curiously elected to file two separate actions.

26. The Amended Complaint alleges that Mr. Lorentz conspired with the other Defendants to lead SHIP's Board to make allegedly "ill-advised," "risky," and "ultimately disastrous" investments. (Am. Compl. ¶30; *see*, *e.g.*, *id.* ¶¶31-34).[3]

27. However, the Amended Complaint inconsistently alleges that SHIP's financial decline was attributable to the misconduct of non-party consultants, namely, Milliman USA, Eide Bailly LLP, Lewis & Ellis, Inc., and Axene Health Partners LLC. (Am. Compl. ¶17; *see id.* ¶¶18-21, 147-150).

28. Specifically, the Amended Complaint alleges, *inter alia*, that:

a. Throughout its decline, SHIP was advised by a series of non-party consultants that "continuously provided overly optimistic, inappropriate or inaccurate estimates, assumptions and calculations related to SHIP's financial health." (Am. Compl. ¶17).

b. For instance, despite its numerous criticisms of its methodologies in evaluating SHIP's financial health, "Milliman consistently defended its aggressive (and unrealistic) calculations and assumptions—even where SHIP's actual experience did not match those assumptions." (Am. Compl. ¶18).

c. These non-party consultants "additionally failed to notify SHIP or Pennsylvania insurance officials of red flags that they knew or should have known existed." (Am. Compl. ¶17).

d. By way of example, despite "significant red flags," Eide Bailly "provided an erroneous opinion letter stating that SHIP's ultimately ill-advised Roebling Re transaction satisfied requirements for reinsurance and risk transfer standards set forth by the National

[3] Mr. Lorentz denies the allegations in the Amended Complaint related to him and will formally deny them at the appropriate procedural time, following the disposition of these Preliminary Objections.

Association of Insurance Commissioners ('NAIC') and applicable Pennsylvania law." (Am. Compl. ¶19).

e. SHIP relied on the expertise and advice of these non-party consultants "to help make critical financial decisions in the management of SHIP's business." (Am. Compl. ¶17).

f. "This reliance ultimately insured to SHIP's tremendous detriment." (Am. Compl. ¶17).

29. The Amended Complaint also inconsistently alleges that, notwithstanding the non-party consultants' failure to disclose "red flags" to SHIP and a belief that Mr. Lorentz "was not sufficiently competent" to serve as SHIP's CFO because "investments were not within [his] expertise," Mr. Lorentz "knew or should have known of SHIP's precarious financial condition." (Am. Compl. ¶¶133, 134, 142).

PRELIMINARY OBJECTIONS

A. This Court Should Dismiss The Amended Complaint, With Prejudice, As To Mr. Lorentz Pursuant To Rule 1028(a)(4), Because The Allegations Conclusively Demonstrate That Counts I, III, IV, And VI Are Time-Barred With Regard To Him

30. In Counts I, III, IV, and VI of the Amended Complaint, the Commissioner purports to assert claims for breach of fiduciary duty, civil conspiracy, negligence, and negligent misrepresentation against Mr. Lorentz and other Defendants. (Am. Compl. ¶¶191-204, 209-32, 237-46).

31. However, as pled by the Commissioner, all four of those Counts are time-barred at least as to Mr. Lorentz.

32. Courts must accept all well-pleaded facts in the operative complaint for purposes of preliminary objections. *See*, *e.g.*, *Raynor v. D'Annunzio*, 243 A.3d 41, 52 (Pa. 2020).

33. Moreover, while the statute of limitations is an affirmative defense and such defenses normally are pled in an answer as new matter, it is appropriate for a court to overlook the technical requirements and dispose of the new matter on preliminary objections where the application of the relevant statute of limitations is apparent on the face of the complaint. *Baney v. Fisher*, No. 752 MD 2018, 2020 WL 5033421, at *4 n.16 (Pa. Commw. Ct. Aug. 26, 2020) (*per curiam*), *aff'd* 263 A.3d 551 (Pa. 2021) (*per curiam*).

34. Consistent with the foregoing authority, each of the Commissioner's claims against Mr. Lorentz must fail because it is readily apparent from the face of the Amended Complaint that they are barred by the applicable statute of limitations.

35. All of the causes of action asserted against Mr. Lorentz are barred by the two-year statute of limitations. 42 Pa.C.S. §5524(7) (applying a two-year statute of limitations to claims of breach of fiduciary duty claims, negligence claims, and conspiracy to commit fraud); *Toy v. Metropolitan Life Ins. Co.*, 863 A.2d 1, 9 (Pa. Super. Ct. 2004); *Kingston Coal Co. v. 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 which forms the basis for the conspiracy).

36. The two-year statute of limitations expired long before the Commissioner filed the Petition for Rehabilitation in January 2020—let alone filed the Complaint on behalf of SHIP in January of 2022.

37. Despite lacking specificity in many respects, the Amended Complaint is clear that Mr. Lorentz left his position with SHIP in February 2017. (Am. Compl. ¶5).

38. It is also clear from the face of the Amended Complaint that SHIP and the PID were on notice of the alleged conduct underlying this action—and of Mr. Lorentz's alleged role in it—far more than two years prior to the date of filing this Complaint.

39. According to the Amended Complaint, by February 2017 at the latest, SHIP blamed Mr. Lorentz for the poor performance of the Beechwood Re investment. (Am. Compl. ¶136).

40. By January 2018, the PID had identified the Beechwood Re and Roebling Re transactions as problematic. (Am. Compl. ¶138).

41. PID had also determined that SHIP's reserve assumptions were incorrect. (Am. Compl. ¶138).

42. The PID began supervising SHIP in February 2018. (Am. Compl. ¶139).

43. Two months later, in April 2018, SHIP terminated the reinsurance agreement with Roebling Re "at the urging of the Pennsylvania Insurance Department." (Am. Compl. ¶100).

44. On March 1, 2019, SHIP reported a deficit of more than $466 million to PID, "apparently rendering the Company statutorily insolvent." (Am. Compl. ¶¶102, 103).

45. Despite already blaming Mr. Lorentz for the investments' poor performance in 2017 and 2018, and notwithstanding the fact that PID was aware that SHIP was "apparently" insolvent no later than March 1, 2019, SHIP never filed suit against Mr. Lorentz and the Commissioner waited until January 2022 to file the Complaint on behalf of SHIP.

46. The Complaint is devoid of any averment about Mr. Lorentz or his conduct after February 2017.

47. Therefore, the applicable two-year statute of limitations expired in February 2019 at the latest.

48. Nothing in the provisions of Pennsylvania's statutory rehabilitation law or in the case law related to the statute of limitations excuses the

Commissioner's failure to file an action against Mr. Lorentz within the applicable two-year statute of limitations.

49. To the extent that the Commissioner tries to resurrect the stale claims against Mr. Lorentz by citing its inability to file suit on behalf of SHIP prior to the entry of the Order of Rehabilitation (Am. Compl. ¶39), this is misguided because, by statute, only the time between the filing of a petition for rehabilitation and the order of rehabilitation is tolled for purposes of any subsequent action commenced by the Commissioner on behalf of the insurer. 40 P.S. §221.17(b).

50. Presumably, this is because, prior to the order of rehabilitation, the directors and officers of the insurer retain the authority to file suit on its behalf—a fact which the Commissioner concedes in the Amended Complaint. (Am. Compl. ¶39).

51. In any event, the public policy established by the General Assembly dictates that the Commissioner's inability to file suit on behalf of SHIP prior to the entry of the Order of Rehabilitation cannot save the expired claims.

52. Insofar as the Commissioner attempts to avail itself of the discovery rule to prosecute these untimely claims (Am. Compl. ¶41), the Commissioner's efforts are in vain, because Pennsylvania applies an inquiry notice standard, as opposed to the more laxed "legal injury" standard. *Wilson v. El-Daief*, 964 A.2d

354, 363-64 (Pa. 2009); *see Rice v. Diocese of Altoona-Johnstown*, 255 A.3d 237, 251 (Pa. 2021).

53. In applying this objective test, it stands to reason that the relevant inquiry is when SHIP—not the Commissioner—knew or should have known that SHIP had been injured and that the injury was caused by another party's conduct, since the Commissioner effectively stands in the shoes of SHIP as the statutory rehabilitator. 40 P.S. §221.16(c).

54. Again, based on the allegations pled in the Amended Complaint, SHIP was put on inquiry notice vis-à-vis Mr. Lorentz's alleged wrongdoing by February 2017 at the latest (Am. Compl. ¶136), meaning that the torts asserted against him all expired by February 2019, if not sooner.

55. Even assuming, *arguendo*, that the Commissioner's knowledge is relevant under the inquiry notice standard, the Commissioner was put on inquiry notice no later than March 1, 2019—when SHIP reported a deficit of more than $466 million to PID, ***a drop of nearly a half of billion dollars in just one year*** (Am. Compl. ¶¶102, 103)—that SHIP had been injured and that the injury was caused by another party's conduct.

56. Indeed, if an insurer "apparently" being render statutorily insolvent is not sufficient to put the Commissioner on inquiry notice, then nothing is, making the "inquiry notice" standard meaningless.

57. Therefore, regardless of whether the inquiry is conducted from the view of SHIP or the Commissioner, the claims against Mr. Lorentz are time-barred per the well-pleaded allegations contained in the Amended Complaint.

58. Accordingly, Mr. Lorentz requests that all claims against him be dismissed pursuant to Rule 1028(a)(4), on the grounds that they are time-barred under the applicable statute of limitations.

59. Such dismissal should be with prejudice because, as demonstrated by the Amended Complaint, further amendment would be futile. *Carlino v. Whitpain Investors*, 453 A.2d 1385, 1388-89 (Pa. 1982).

WHEREFORE, Defendant Paul Lorentz respectfully requests that this Court sustain his Preliminary Objections and dismiss Counts I, III, IV, and VI of the Amended Complaint, with prejudice, with regard to him pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(4).

B. Alternatively, This Court Should Dismiss The Amended Complaint, In Its Entirety, As To Mr. Lorentz Pursuant To Rule 1028(a)(2), Because It Fails To Conform To A Rule Of Law

60. While Rule 1020 permits causes of action to be pled in the alternative, Pa.R.Civ.P. 1020(c), Rule 1024 generally prohibits a plaintiff from pleading inconsistent facts. Pa.R.Civ.P. 1024(b).

61. The only exception is where the plaintiff includes a special verification that states that "the signer has been unable after reasonable investigation to ascertain which of the inconsistent averments, specifying them, are true but that the signer has knowledge or information sufficient to form a belief that one of them is true," Pa.R.Civ.P. 1024(b)—which did not occur here.

62. The proper remedy is to strike the offensive pleading, in its entirety, where Rule 1024(b) is violated. *See*, *e.g.*, *Bowers v. Bon Ton Foods, Inc.*, 58 Pa. D. & C.2d 372, 375 (York Cnty. Ct. Com Pl. 1972); *see U.S. Bank Nat'l Ass'n v. Corteal*, No. 1242 EDA 2014, 2014 WL 10752250, at *2 (Pa. Super. Ct. Dec. 3, 2014) (observing that the proper procedure for objecting to defects in the verification to the complaint is to file preliminary objections).

63. Here, in the event that the Amended Complaint is not dismissed against Mr. Lorentz on the basis of the applicable statute of limitations, then it must be dismissed, in its entirety, because the Amended Complaint fails to conform to Rule 1024(b).

64. Again, the Amended Complaint alleges that Mr. Lorentz conspired with the other Defendants to lead SHIP's Board to make allegedly "ill-advised,"

"risky," and "ultimately disastrous" investments. (Am. Compl. ¶30; *see*, *e.g.*, ¶¶31-34).[4]

65. However, the Amended Complaint inconsistently alleges that SHIP's financial decline was attributable to the misconduct of non-party consultants—namely, Milliman, Eide Bailly, Lewis & Ellis, and Axene. (Am. Compl. ¶17; *see id.* ¶¶18-21, 147-150).

66. Specifically, the Amended Complaint alleges, among other things, that:

a. Throughout its decline, SHIP was advised by a series of non-party consultants that "continuously provided overly optimistic, inappropriate or inaccurate estimates, assumptions and calculations related to SHIP's financial health." (Am. Compl. ¶17).

b. For instance, despite its numerous criticisms of its methodologies in evaluating SHIP's financial health, "Milliman consistently defended its aggressive (and unrealistic) calculations and assumptions—even where SHIP's actual experience did not match those assumptions." (Am. Compl. ¶18).

c. These non-party consultants "additionally failed to notify SHIP or Pennsylvania insurance officials of red flags that they knew or should have known existed." (Am. Compl. ¶17).

d. By way of example, despite "significant red flags," Eide Bailly "provided an erroneous opinion letter stating that SHIP's ultimately ill-advised Roebling Re transaction satisfied requirements for reinsurance and risk transfer standards set forth by the National

[4] Mr. Lorentz denies the allegations in the Amended Complaint related to him and will formally deny them at the appropriate procedural time, following the disposition of these Preliminary Objections.

Association of Insurance Commissioners ('NAIC') and applicable Pennsylvania law." (Am. Compl. ¶19; *see id.* ¶¶147-50).

e. SHIP relied on the expertise and advice of these non-party consultants "to help make critical financial decisions in the management of SHIP's business." (Am. Compl. ¶17).

f. "This reliance ultimately insured to SHIP's tremendous detriment." (Am. Compl. ¶17).

67. The Amended Complaint also inconsistently alleges that, notwithstanding the non-party consultants' failure to disclose "red flags" to SHIP and a belief that Mr. Lorentz "was not sufficiently competent" to serve as SHIP's CFO because "investments were not within [his] expertise," Mr. Lorentz "knew or should have known of SHIP's precarious financial condition." (Am. Compl. ¶¶133, 134, 142).

68. Such inconsistent averments appear to be part of PID's strategy to blame everyone ***except itself*** for SHIP's financial deterioration.[5]

[5] Recall that SHIP was a subsidiary of CNO until 2008. (Am. Compl. ¶13). However, in 2008, CNO recognized that it was enduring significant underwriting losses for SHIP policies. (*Id.* Compl. ¶13). Nonetheless, PID allowed CNO to transfer ownership of SHIP to Senior Health Trust, which was then merged into an independent oversight trust, the SHOT. (*Id.* ¶14). SHIP subsequently submitted annual financial statements and other reports to PID. (*See*, *e.g.*, *id.* ¶102). Yet, in the instant action and in the companion case, PID accepts no responsibility for SHIP's financial deterioration whatsoever. This is despite the fact that, before sustaining a nearly half-billion-dollar-drop in 2019, SHIP had already blown through approximately $800 million in capital contributions from CNO in a decade. (Am. Compl. ¶15; *see id.* ¶¶102, 103).

69. Regardless, having pled inconsistent facts, the Commissioner was required to submit the special verification mandated by Rule 1024(b).[6]

70. Accordingly, the Amended Complaint fails to conform with a rule of law, necessitating its dismissal. Pa.R.Civ.P. 1028(a)(2); *see*, *e.g.*, *Bowers*, 58 Pa. D. & C.2d at 375.

WHEREFORE, Defendant Paul Lorentz respectfully requests that this Court sustain his Preliminary Objections and dismiss Counts I, III, IV, and VI of the Amended Complaint with regard to him pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(2).

C. In The Alternative, This Court Should Dismiss Count III Of The Amended Complaint Pursuant To Rule 1028(a)(4), Because The Complaint Fails To Allege An Essential Element Of A Civil Conspiracy

71. In Count III, the Commissioner purports to assert a claim for civil conspiracy against Defendants. (Am. Compl. ¶209-19).

72. Bare allegations of conspiracy, without more, are insufficient to survive a demurrer. *See*, *e.g.*, *Petula v. Mellody*, 588 A.2d 103, 107 (Pa. Commw. Ct. 1991).

[6] In the event that the Commissioner argues that it did not plead inconsistent facts, but rather pled that, in tandem, the named defendants in the instant action and various non-party consultants contributed to SHIP's financial deterioration, this Court should exercise its discretion under Rule 213(a) and consolidate this case with the companion case docketed at 2 SHP 2022—and any other cases involving the non-party consultants—given that they involve similar issues of proof and questions of fact. *See supra* note 1. Such consolidation should be limited to discovery only.

73. "The mere fact that two or more persons, each with the right to do a thing, happen to do that thing at the same time is not by itself an actionable conspiracy." *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 198, 473 (Pa. 1979) (quotation and citation marks omitted).

74. A cause of action for civil conspiracy requires the plaintiff to allege that: (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. *See*, *e.g.*, *Brown v. Blaine*, 833 A.2d 1166, 1173 n.16 (Pa. Commw. Ct. 2003).

75. The plaintiff must also plead that each defendant entered into an unlawful agreement for the express purpose of committing either a criminal act or an intentional tort. *See*, e.g., *Burnside v. Abbott Labs.*, 505 A.2d 973, 981 (Pa. Super. Ct. 1985).

76. Here, the Commissioner fails to plead that Mr. Lorentz and the other Defendants conspired to commit a criminal act or intentional tort.

77. Rather, the Commissioner alleges that Mr. Lorentz and the other Individual Defendants conspired to oversee and maintain a "management enterprise" that, according to the Amended Complaint, "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." (Am. Compl. ¶35).

78. Such conduct is insufficient, as a matter of law, to form the predicate for a civil conspiracy claim. *See*, *e.g.*, *Goldstein v. Phillip Morris, Inc.*, 854 A.2d 585, 590 (Pa. Super. Ct. 2004) (absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act).

79. Even if such conduct was actionable (even though it is not), "[a] single entity cannot conspire with itself and agents of such an entity cannot conspire among themselves; rather a conspiracy must be between two independent actors." *Grose v. Proctor & Gamble Paper Prods.*, 866 A.2d 437, 440-41 (Pa. Super. Ct. 2005); *accord Lilly v. Boots & Saddle Riding Club*, No. 57 C.D. 2009, 2009 WL 9101459, at *6 (Pa. Commw. Ct. July 17, 2009); *see also* Pa. Commw. Ct. IOP §414(a).

80. To the extent that the Commissioner argues that this rule is inapplicable because Count III is pled against the Individual Defendants and Protiviti, this contention is groundless because the Amended Complaint fails to allege that the Individual Defendants and Protiviti all had a common unlawful purpose. (Am. Compl. ¶¶34-35 (referring only the Individual Defendants)).

81. Thus, Count III fails to state a cognizable claim for civil conspiracy, meriting dismissal. Pa.R.Civ.P. 1028(a)(4).

WHEREFORE, Defendant Paul Lorentz respectfully requests that this Court sustain his Preliminary Objections and dismiss Counts III of the Amended Complaint, with regard to him pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(4).

Respectfully submitted,

By: /s/ Casey Alan Coyle

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Counsel for Defendant Paul Lorentz

Dated: August 26, 2022

CERTIFICATE OF COMPLIANCE

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

/s/ Casey Alan Coyle
Casey A. Coyle, Esquire

Counsel for Defendant Paul Lorentz

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2022, a true and correct copy of the foregoing DEFENDANT PAUL LORENTZ'S PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT was served upon the following persons via this Court's electronic filing system, as follows:

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