STATE OF MICHIGAN

COURT OF APPEALS

DIRECTOR OF THE DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES,

Petitioner-Appellee,

v

PAVONIA LIFE INSURANCE COMPANY OF MICHIGAN,

Respondent,

and

GBIG HOLDINGS, INC.,

Appellant,

and

ASPIDA HOLDCO, LLC,

Appellee.

UNPUBLISHED
March 25, 2021

No. 354182
Ingham Circuit Court
LC No. 19-000504-CR

Before: BOONSTRA, P.J., and BORRELLO and RICK, JJ.

PER CURIAM.

This interlocutory appeal arises from a rehabilitation proceeding initiated by the Director (director or rehabilitator) of the Michigan Department of Insurance and Financial Services (DIFS) under Chapter 81 of the Insurance Code of 1956, MCL 500.8101, *et seq*. The director initiated, by consent, the underlying court-supervised rehabilitation proceedings over Pavonia Life Insurance Company of Michigan (Pavonia) to separate and disassociate Pavonia from its relationship with four financially-troubled North Carolina insurer affiliates, and the legal and financial issues generated by the actions of its "upstream owner," Greg Lindberg (Lindberg), a

North Carolina resident and now convicted felon[1], and his holding company, GBIG Holdings, Inc (GBIG). The rehabilitation plan explicitly incorporated a stock purchase agreement (SPA), whereby GBIG agreed to sell its stock in Pavonia to Aspida Holdco, LLC (Aspida), a Delaware holding company. GBIG appeals by leave granted[2] a July 10, 2020 order entered by the Ingham Circuit Court, which granted the emergent motions of Aspida for specific performance of the SPA, and moved the closing date for the stock purchase from July 31, 2020, to "on or before July 14, 2020." The trial court advanced the closing date after finding that GBIG had taken actions that were in violation of the Rehabilitation Order and that were inconsistent with the preparations for the closing of the stock sale. GBIG also challenges the trial court's denial of its motion for reconsideration. GBIG argues that the trial court improperly decided issues delegated to the exclusive jurisdiction of New York courts and otherwise overstepped its authority.

For reasons explained below, we reverse the decision of the trial court granting specific performance, vacate the July 10, 2020 and July 14, 2020 orders memorializing the trial court's rulings, lift our stay of the trial court proceedings[3], and remand this matter to the trial court for further proceedings.

I. FACTS

A complete and detailed recitation of the facts and procedural history of this case is necessary for our resolution of the issues pending before us. Lindberg owns GBIG Holding, GBIG Capital, LLC, and Global Bankers Insurance Group, LLC. Global Bankers, also referred to as ServiceCo, is a managing company for and wholly-owned subsidiary of Pavonia, a Michigan-

[1] In April 2019, Lindberg was indicted on federal criminal charges of public corruption and bribery. A federal jury sitting in Charlotte, North Carolina, convicted Lindberg in March of 2020 of conspiracy to commit honest services wire fraud and bribery for orchestrating a bribery scheme involving independent expenditure accounts and improper campaign contributions. The purpose of this scheme was to cause the elected Commissioner of Insurance for the North Carolina Department of Insurance to take official action favorable to Lindberg's business interests. On August 19, 2020, a federal district judge sentenced Lindberg to 87 months in prison and three years of supervised release. United States Department of Justice Website, <justice.gov/opa/pr/founder-and-chairman-multinational-investment-company-and-company-consultant-convicted>, accessed 3/5/21.

Lindberg was also involved in a campaign financing scandal involving multiple Florida elected officials and candidates. United States Department of Justice Website, <justice.gov/opa/pr/federal-jury-convicts-founder-and-chairman-multinational-investment-company-and-company>, accessed 7/21/20.

[2] *Dep't of Ins and Financial Services/Director v Pavonia Life Ins*, unpublished order of the Court of Appeals, entered August 3, 2020 (Docket No. 354182).

[3] *Dep't of Ins and Financial Services/Director v Pavonia Life Ins*, unpublished order of the Court of Appeals, entered July 14, 2020 (Docket No. 354182); *Dep't of Ins and Financial Services/Director v Pavonia Life Ins*, unpublished order of the Court of Appeals, entered August 3, 2020 (Docket No. 354182).

domiciled life insurer, and four North Carolina insurer affiliates of Pavonia. As noted, Lindberg is also the "upstream" owner of Pavonia and the four North Carolina Companies. He is the upstream owner of Pavonia because he controls GBIG, and GBIG owns Pavonia. The Commissioner of Insurance for the North Carolina Department of Insurance placed the four North Carolina insurer affiliates of Pavonia into court-supervised rehabilitation on June 27, 2019. Although Pavonia is "financially stable and ha[d] not engaged" in the activities encumbering its affiliates, the DIFS had concerns about financial risk to Pavonia because of its association with the affiliates and with Lindberg, and it therefore initiated the Michigan rehabilitation proceedings. The July 9, 2019 stipulated order initiating rehabilitation indicates that Pavonia had developed a plan to "protect its assets, policyholders, and creditors." The plan included the SPA.

Under the terms of the SPA, Aspida agreed to purchase Pavonia's issued and outstanding capital stock for $75 million, which served as the "Base Purchase Price" of Pavonia. Aspida also agreed to pay and did pay a $25 million advance to GBIG in the form of a "loan," which was secured by a pledge of the Pavonia stock that GBIG was to deliver to Aspida. The $75 million base price was to be adjusted at closing for this indebtedness of GBIG, certain costs associated with the settlement of intercompany bills, certain expense "overruns," amounts to be held in escrow, and "Banker Fees." GBIG was to provide a closing statement setting forth the adjustments. The proceeds to be paid to GBIG at closing consisted of the base price minus the various allowed adjustments. The parties to the SPA simultaneously agreed that Pavonia would be placed in court-supervised insurance rehabilitation administered by the director and DIFS.

On July 9, 2019, the director and DIFS commenced court-supervised rehabilitation proceedings in the Ingham Circuit Court. As required by MCL 500.8113(1), the trial court entered the Rehabilitation Order that appointed the director of DIFS as the rehabilitator of Pavonia. The order directed the rehabilitator to take immediate possession of all Pavonia's assets and to administer those assets under the court's supervision. MCL 500.8113(1). It vested legal title to all assets, accounts, and moneys of Pavonia in the rehabilitator. MCL 500.8113(1). In addition, the order authorized the rehabilitator to:

> take such action as he or she considers necessary or appropriate to reform and revitalize the insurer including, but not limited to, the powers in section 8121(1)(f), (l), (m), (r), and (u). The rehabilitator has all the powers of the directors, officers, and managers, whose authority shall be suspended, except as they are redelegated by the rehabilitator. The rehabilitator has full power to direct and manage, to hire and discharge employees subject to any contract rights they may have, and to deal with the property and business of the insurer. [MCL 500.500.8114(2).]

Under MCL 500.8114(4) and the terms of the Rehabilitation Order, the rehabilitator was given the authority to effect changes to the plan upon determination that "reorganization, consolidation, conversion, reinsurance, merger, or other transformation of the insurer is appropriate[]" and to implement the plan upon court approval. Further, the rehabilitator was vested with "such additional powers as the Court shall grant from time to time upon petition of the rehabilitator." Finally, the order authorized the rehabilitator to "conduct receivership proceedings in accordance with the powers granted to her under Chapter 81."

The parties filed their rehabilitation plan with the trial court on August 8, 2019. That same day, the trial court gave preliminary approval to the plan at the request of the rehabilitator. The SPA is part of and fully integrated into the plan.

Objections to the preliminarily-approved rehabilitation plan were to be filed in the supervising court by October 4, 2019. Neither Lindberg nor GBIG filed an objection. In fact, when Independent Insurance Group, LLC (Independent Insurance), filed an objection and requested an opportunity to "submit a proposal for the acquisition of Pavonia," GBIG replied:

> Consistent with its voluntary stipulation to these [rehabilitation] proceedings, GBIG desires a swift and efficient return of Pavonia to its normal operations (albeit under a new ultimate controlling person). Among other reasons for this desire is that delay in the confirmation of the proposed Rehabilitation Plan increases the risks to Pavonia's successful operations and to its policyholders. As previously discussed in GBIG's submissions to this [c]ourt, delay would increase the costs of estate administration (which are to be paid by Pavonia), increase the likelihood that key employees will depart for other opportunities if they believe their position to be in jeopardy, and increase execution risk on the purchase deal that has already been negotiated over many months of good faith efforts by GBIG, Aspida . . . and DIFS.

GBIG also acknowledged the fairness of the purchase price negotiated.

At a January 2020 hearing, counsel for GBIG acknowledged that "the parties are represented by sophisticated counsel, negotiated the terms of the stock purchase agreement at arm's length and then presented it to the rehabilitator." On February 24, 2020, GBIG once again argued, in response to actions by Independent Insurance, that the court should "overrule Independent's objection and immediately approve the plan of rehabilitation." The trial court denied the objection of Independent Insurance by order entered on March 9, 2020. The court stated, in part, that "there's no meaningful evidence . . . that the sale process was not fair and equitable" and "no basis on which this [c]ourt can reasonably conclude that the SPA between GBIG . . . and Aspida . . . is not fair and equitable to all parties." The trial court then directed that the matter proceed to an approval hearing on the rehabilitation plan.

On March 12, 2020, the rehabilitator issued a Form A Order Approving Acquisition of Pavonia by Aspida. On May 18, 2020, the rehabilitator moved for entry of a Final Approval Order and accompanied that motion with a proposed Final Approval Order.

The trial court scheduled the final approval hearing of the plan for May 26, 2020. Shortly before the scheduled hearing, Lindberg and GBIG objected to the "Estimated Closing Statements," which had been prepared by Pavonia's chief financial officer. GBIG averred that the ultimate amount to be received at closing by GBIG was now only $7.5 million, despite the base price of $75 million, because of "an enormous [amount] in expense overruns" and because the $25 million in loan money had been paid to "Colorado Bankers Life Insurance Co. rather than GBIG." Lindberg and GBIG threatened to invoke their contractual right to terminate the SPA unless the rehabilitator and Aspida agreed to adjourn the hearing to allow GBIG time to review the documentation supporting the figures used in the Estimated Closing Statements and to consider

whether potential amendments to the SPA were warranted. The parties agreed to an adjournment, which the trial court approved, and the hearing was rescheduled to June 16, 2020.

Following the adjournment of the May 26th final approval hearing, GBIG proposed that the SPA be amended such that, among other significant modifications: the Base Purchase Price be increased from $75 million to $120 million; the balance of Aspida's $25 million loan to GBIG be forgiven before closing; the required escrow be reduced by fifty percent; and payment of fifty percent of the Acquired Companies' management long-term incentive plan, which was payable by GBIG, be delayed. Essentially, GBIG sought to wholly rewrite the SPA at the eleventh hour. GBIG also complained that the initial sale price was unfair to its sole shareholder, Lindberg, and that it was entitled to be paid "adjusted" capital and surplus, which it defined as including the values of Pavonia's interest maintenance reserve and its asset valuation reserve.

On June 11, 2020, GBIG requested another adjournment of the final approval hearing, asserting that entry of a final approval order would be premature "at this time." GBIG explained:

> While preparing for the initially scheduled hearing date on this motion, GBIG identified several material issues related to the changing economics of the sale and the logistics of closing on this transaction that have given GBIG pause and required the parties to the proposed sale to work through in negotiation. Those discussions are ongoing. But because they have not been resolved, GBIG does not believe the time is right for this [c]ourt to enter a final order . . . . Notably, GBIG does not suggest any blame in the Rehabilitator's filing. Nonetheless, it does not make sense to ask this [c]ourt to approve the transaction that may be materially different at the conclusion of the parties' discussions.

Also on June 15, 2020, Aspida sent a breach notice and "request for cure" to GBIG, alleging that GBIG had "variously demanded additional consideration and purchase price not provided for in the SPA." Aspida averred that GBIG had breached § 7.03 of the SPA by failing to employ reasonable best efforts to consummate the closing. GBIG's attorney replied that "'reasonable best efforts' does not require Seller to waive concerns over ballooning and unexplained Expense Overruns many millions of dollars above the parties' pre-signing expectations without further investigation."

The trial court adjourned the final approval hearing to June 25, 2020.

GBIG engaged in almost no preparation for closing between May 26, 2020 and June 25, 2020, to the dismay of Aspida. Instead, GBIG sought to secure an alternative buyer for Pavonia or refinancing using stock exclusively held by the rehabilitator in violation of the rehabilitation order and the SPA's "no-shop" provisions.[4] As a consequence, on June 22, 2020, Aspida filed its objection to adjournment, or in the alternative, motion for specific performance. The motion was never noticed for hearing, however.

[4] Section 7.01 of the SPA precludes GBIG from selling or encumbering Pavonia's capital stock. Section 8.09 precludes GBIG from pursuing an alternative buyer for Pavonia.

The trial court held the June 25, 2020 final approval hearing as scheduled. Following comprehensive argument and spirited commentary by all interested parties, the trial court rejected GBIG's objections, finding there was no need for further delay. It entered an order "Approv[ing] . . . Plan of Rehabilitation and Related Closing of Stock Purchase Agreement" and "Approv[ing] All Actions Taken or Not Taken by the Director as Rehabilitator." It also ordered that upon closing of the SPA, the rehabilitator would be discharged and the rehabilitation would be terminated.

On June 26, 2020, counsel for the rehabilitator issued the following cautionary notice on the rehabilitator's behalf:

> Notice to Seller, Buyer, and Pavonia Entities:
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> This notifies the parties that based on the Court's ruling yesterday granting final approval to the Plan of Rehabilitation ("Plan"), the Rehabilitator fully expects the parties to close on the transaction pursuant to the Plan-incorporated Stock Purchase Agreement by June 30, 2020. Any failure to close by this deadline without good cause or mutual agreement of the parties approved by the Rehabilitator will be deemed by the Rehabilitator to constitute obstruction and/or interference with the Court-approved Plan and the conduct of this rehabilitation proceeding, in violation of MCL 500.8105(1)(c), MCL 500.8106(2), and paragraphs 18 and 19 of the Rehabilitation Order. The Rehabilitator will seek all available remedies against any party engaging in such obstruction and/or interference, including but not limited to the following remedies under MCL 500.8106(4) and paragraph 19 of the Rehabilitation Order:
>
> (a) A sentence requiring the payment of a fine not exceeding $10,000.00, or imprisonment for a term of not more than one year, or both; and
>
> (b) After a hearing, the imposition by the DIFS Director of a civil penalty not to exceed $10,000.00, or the revocation or suspension of any insurance licenses issued by the Director, or both.
>
> The Rehabilitator appreciates the parties' anticipated cooperation in consummating a timely closing of the transaction. Thank you.

After receiving this notice, GBIG "request[ed] access to all books and records of Pavonia, including those documents provided in the Ares data room as part of the deal." The requested documentation was not provided to GBIG.

On June 29, 2020, the trial court sua sponte entered an order that amended the June 25, 2020 order giving final approval to the rehabilitation plan. The amended order provided in pertinent part:

> **IT IS ORDERED** that this Courts [sic] June 25, 2020 Order is amended to extend only the deadline for Closing of Stock Purchase Agreement until July 31, 2020. All other deadlines related to the closing are likewise adjusted consistent with the July 31, 2020 closing date.

On July 1, 2020, Aspida filed an emergency motion for specific performance. It argued that "[t]here is now good cause to believe that Seller is seeking financing using the stock of Pavonia as collateral, in violation of the SPA, in order to conduct another long, contentious, difficult sales process during which value will deteriorate and staff will leave, or to contest the Rehabilitation and seek to retake control of Pavonia." It asserted that GBIG was not facilitating the closing and that "specific performance is the proper remedy for Seller's breach of the SPA." The rehabilitator joined in the motion.

GBIG responded that the SPA explicitly provided that disputes about the SPA were to be resolved in New York courts and that Michigan courts only had jurisdiction over the rehabilitation and the assets of Pavonia. It also noted that a contract dispute such as that raised by Aspida could not be summarily resolved when no complaint or motion for summary disposition had even been filed. GBIG argued that the court "should reject Aspida's attempt to transform a voluntary sale into a forced sale." It also noted that even if a breach of the SPA did occur by GBIG, the SPA, by its terms, allowed for a cure.

On July 7, 2020, GBIG filed an action for declaratory judgment in a New York court, seeking a declaration of its rights under the SPA and the loan agreement. GBIG requested "declarations that the agreements require Aspida to accept payoff of the loan, accept the termination fee [for the SPA], and release its possession and interest in GBIG[']s] . . . assets, including the stock in [Pavonia]."

Also on July 7, 2020, GBIG filed another response in the Michigan court to Aspida's motion, reiterating that the courts of New York had jurisdiction over contractual disputes and alleging that its request to review the books of Pavonia before closing was reasonable, contrary to assertions made by Aspida and the rehabilitator. GBIG stated, "GBIG has no intention of violating this [c]ourt's orders. GBIG will either close upon negotiated terms by July 31 or terminate under the SPA, as expressly allowed by Paragraph L of this [c]ourt's June 25, 2020 order, and present an alternative plan for Rehabilitation. Until then, this [c]ourt need not act." GBIG alleged a violation of due process because it did not have adequate time to address the alleged breaches of contract and it also raised the issue of a constitutional prohibition on state actions impairing contracts. Aspida filed a response, arguing, in part, that "Seller does not have the right to close on economic terms acceptable to it, but rather must close on the economic terms agreed by it in the SPA." It argued that the Michigan court had sole jurisdiction over the matter by virtue of the rehabilitation proceedings in which GBIG had acquiesced.

The hearing on Aspida's emergent motion for specific performance took place on July 9, 2020. The trial court granted Aspida's motion from the bench, in part. The trial court effectuated its bench ruling by order entered on July 10, 2020. The text of the order provides in part as follows:

> 1. The circumstances described in the Motion present an emergency requiring judicial relief pursuant to MCL 500.8105 and Sec. 14.14 of the Stock Purchase Agreement ("SPA") that forms an integral part of the Rehabilitation Plan, which the Court approved on June 25, 2020;
>
> 2. The Court has jurisdiction of the parties, including Mr. Greg Lindberg, and the subject matter;

3. Seller GBIG Holdings, Inc., by or through its ultimate controlling person Mr. Lindberg (collectively "Seller"), has taken actions they (sic) are contrary to pursuing closing as described in the SPA, including Sections 7.01(a) and (ee), 7.03(a), and 8.09(a);

4. During the hearing, the Seller described other acts or omissions that are in violation of the Rehabilitation Order entered on July 9, 2019, including paras. 18, 19 and 21, Michigan law, including MCL 500.8105 and 8106, and the Rehabilitator is entitled to relief pursuant to par. 22.

5. The Court is satisfied that the Buyer is prepared to close as outlined in the SPA, and the Rehabilitator is prepared to proceed with full implementation of the Rehabilitation Plan.

6. To avoid any unnecessary delay or jeopardize the protection of Pavonia and its subsidiary GBIG, LLC (collectively, the "Pavonia Entities"), along with their policyholders and staff, this court orders closing to take place on or before July 14, 2020.

7. Good cause exists for the court to clarify any covenants and obligations under the Stock Purchase Agreement, and to specifically enforce such covenants and obligations; and

8. Notwithstanding cost overruns documentation that may have been disclosed, the Court finds no reason to further delay closing of the transactions in the Stock Purchase Agreement.

9. Any efforts by any party to delay the sale are in violation of the Rehabilitation Order, the Plan of Rehabilitation and Michigan law as aforesaid; and

10. The Rehabilitator has plenary authority over the Pavonia Entities under Chapter 81 of the Michigan Insurance Code, the Rehabilitation Order that the Court entered on July 9, 2019, and the Order Approving the Plan of Rehabilitation that the Court entered on July 25, 2020.

IT IS ORDERED THAT Buyers' Specific Performance Motions are **GRANTED-IN PART**, and the Court orders as follows:

1. Closing under the terms of the Stock Purchase Agreement approved by this Court on June 25 and 29, shall take place on or before July 14, 2020.

2. The Seller is compelled to specifically perform its SPA obligations in accordance with SPA Articles II and III, and Sec's 7.01(a) and (ee), 7.03(a), and 8.09(a), without posting of a bond or other security, and to close the transaction by 5:00 p.m. EDT on Tuesday, July 14, 2020 in accordance with Articles II and III, and to deliver to Buyer before such time the Estimated Closing Statement and such other closing deliverables as are required to be delivered by Seller under the SPA in connection with the Closing; and

3. Mr. Lindberg, Seller, and their affiliates, associates, agents, and representatives, shall otherwise comply with Sections 7.01 and 8.09 of the SPA without breach or violation; and

4. Mr. Lindberg, Seller, and their affiliates, associates, agents and representatives, pursuant to SPA Sec. 809, shall produce to the Michigan Department of Insurance and Financial Services and Buyer any offer that either or any of them has provided, solicited, made, received, or receives, including, without limitation, offers with respect to or that would or may involve Pavonia's stock, including, but not limited to, any pledge, transfer, sale, or recapitalization, and any similar transaction to anyone other than Buyer on or before 5:00 pm, EDT, Monday, July 13, 2020.

5. The Seller is entitled to documents explaining current cost overruns. Buyer shall immediately provide to Seller all such records not previously provided since June 19, 2020. Seller may petition this Court with a list of specific cost overrun documents outstanding no later than 5:00 pm on July 10th, 2020, if such records are not received for review.

6. In the event that the parties to the SPA do no[t] close on the transaction by the deadline ordered by the Court, the Court affirms the Rehabilitator's authority to execute all necessary documentation and take all necessary actions on behalf of the Seller to consummate the closing on the transaction as soon thereafter as possible.

On July 11, 2020, the rehabilitator provided copies of all cost overrun material to GBIG for a second time.

On July 12, 2020, GBIG moved for reconsideration of the July 10, 2020 order. The next day, Aspida presented GBIG with all closing deliverables. That same day, GBIG served Aspida and DIFS with two notices of termination of the SPA. The first notice, signed by Lindberg, provides in pertinent part:

> On behalf of GBIG Holdings, Inc. ("Seller") and in accordance with the Article XII ("Termination and Waiver"), Section 12.01(h) we are providing this Notice of Termination of the Stock Purchase Agreement ("SPA") dated July 9, 2010 to Buyer with respect to the sale of Pavonia Life Insurance Company of Michigan ("PLICMI") and indirectly, PLICMI's Subsidiary, Global Bankers Insurance Group, LLC.
>
> We maintain that the Michigan Court erred in ordering the Parties to close by July 14 under the threat of contempt, and potential implication that the Rehabilitator can proceed to close over the rights of the Seller, gives us no reasonable choice than to issue this Notice.
>
> We will withdraw this termination notice and agree to reinstate the SPA, if the Michigan Court grants the relief requested in our Emergency Motion for Reconsideration filed on Sunday, July 12. In the alternative, we agree to withdraw

> this termination notice and reinstate the SPA, if Aspida agrees to proceed in accordance with the terms of the SPA.

The second notice of termination acknowledged the prior notice of termination issued by GBIG and reflects the intent to supplant that notice. The second notice provides in part:

> As previously noted, we maintain that the Michigan Court erred in ordering the Parties to close by July 14 under the threat of contempt, and potential implication that the Rehabilitator can proceed to close over the rights of Seller, gives us no reasonable choice than to issue this Notice.
>
> To avoid any doubt, Seller is terminating the SPA in accordance with Section 12.01(h) without condition and without prejudice to the Seller's rights and remedies, all of which are hereby expressly reserved.

The trial court denied GBIG reconsideration motion by order entered on July 14, 2020.

GBIG filed a claim of appeal with this Court from the July 10, 2020 order, accompanied by an emergency motion to stay lower court proceedings pending appeal and a motion for immediate consideration. This Court administratively dismissed the claim of appeal and motions for lack of jurisdiction by order entered on July 14, 2020.[5]

GBIG then filed the underlying application, accompanied by motions to stay lower court proceedings and for immediate consideration. This Court, by order entered on July 14, 2020, temporarily stayed proceedings in the trial court in order to allow the Court time to meaningfully consider the merits of the issues raised by GBIG in its application.[6] Thereafter, we granted the leave to allow plenary consideration of the issues advanced by GBIG. We also directed that the stay provision in this Court's July 14, 2020 order remain in effect until further order of this Court.

GBIG ascribes error to the trial court in multiple regards. GBIG argues that it has a contractual right under § 12.01(h) of the SPA to terminate the SPA "for any reason or for no reason," including for the reason that the closing purchase price does not accurately reflect the value of Pavonia. The July 10, 2020 order granting specific performance essentially rewrites the SPA by eliminating the right of termination granted under the agreement. As such, the order deprives GBIG of this contractual right in violation of MCL 500.8106(3), which specifically bars the supervising court from crafting an order that abridges GBIG's "otherwise existing legal right." GBIG further argues that the trial court lacked jurisdiction to summarily resolve contractual disputes between the parties because § 14.11(a) of the SPA clearly requires that "any action arising out of or relating to this Agreement, the Transactions, the formation, breach, termination, or validity of this Agreement . . . [falls within] the exclusive jurisdiction of the courts of the State of New York . . . [or] the federal courts for the Southern District of New York." Next, GBIG argues

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[5] *Dep't of Ins and Financial Services/Director v Pavonia Life Ins*, unpublished order of the Court of Appeals, entered July 14, 2020 (Docket No. 354176).

[6] *Dep't of Ins and Financial Services/Director v Pavonia Life Ins*, unpublished order of the Court of Appeals, entered July 14, 2020 (Docket No. 354182).

that the trial court erred when it granted the rehabilitator the authority to surrender the stock of Pavonia and act on GBIG's behalf by closing on the SPA. Neither the Insurance Code nor the SPA authorizes the grant of such power. Finally, GBIG argues that the July 9, 2020 order violates and impairs GBIG's contractual rights in violation of the United States Constitution.

Both the rehabilitator and Aspida respond that GBIG's claims lack both legal and factual support, and seek affirmance of the trial court's grant of specific performance.

II. ANALYSIS

A. STANDARD OF REVIEW

The trial court engaged in contractual and statutory interpretation when deciding whether to grant Aspida's motion for specific performance. We review de novo, as a question of law, the proper interpretation of a contract. *Andrusz v Andrusz*, 320 Mich App 445, 452; 904 NW2d 636 (2017). Likewise, issues concerning the application and interpretation of a statute are reviewed de novo, as questions of law. *In re Petition of Berrien County Treasurer for Foreclosure (On Remand)*, 323 Mich App 600, 607; 919 NW2d 288 (2018).

B. RIGHT OF TERMINATION, BREACH OF CONTRACT, JURISDICTION

MCL 500.8106(1) imposes a statutory obligation to "cooperate with the commissioner in a proceeding" brought under Chapter 81 of the Insurance Code. This obligation is not without its limits, however. Section 8106 of the Insurance Code "shall not be construed to abridge otherwise existing legal rights, including the right to resist a petition of liquidation or other delinquency proceedings or orders." MCL 500.8106(3).

Without question, the SPA "is part of and fully integrated" in the rehabilitation plan, "with all of its recitals, terms, conditions, representations, warranties, covenants, indemnities, and exhibits[.]" Additionally, the June 25, 2020 Order Approving Plan of Rehabilitation provides in part: "Nothing in this Order will affect, relinquish, modify, or waive any Closing condition, termination right, or other right or obligation due under or set forth in the SPA and any related agreements."

Section 12.01(h) of the SPA confers upon GBIG the contractual right to terminate the SPA before closing "for any reason or for no reason[.]" A contractual right to terminate the contract is a legal right. See e.g., *Reed v Kurdziel*, 352 Mich 287, 297; 89 NW2d 479 (1958). As previously noted, the statutory obligation to cooperate with the rehabilitator cannot "be construed to abridge otherwise existing legal rights," MCL 500.8106(3), which would necessarily include the legal right to terminate the SPA under the terms of the contract. Additionally, ¶ L of the June 25, 2020 Order Approving Plan of Rehabilitation expressly recognized the continuing vitality of the termination right contained in the SPA after the SPA was integrated into the rehabilitation plan. On the basis of the plain and unambiguous language of MCL 500.8106(3) and the trial court's order, we must conclude that both MCL 500.8106(3) and the order secured GBIG's right to terminate the SPA at any time before the closing of the stock sale or until such time as the exercise of another provision within the SPA rendered termination provision inoperable.

In the present matter, the trial court found that GBIG had breached certain provisions of the SPA, such as the provision prohibiting the seeking of a buyer other than Aspida, and that an order of specific performance was, therefore, appropriate. The parties dispute whether GBIG breached the SPA. In addition, the record reflects that GBIG has notified Aspida and the trial court of its invocation of the right to terminate the SPA. Aspida is disputing, however, whether a notice of termination can be effective once specific performance has already been ordered. Although these arguments and counterarguments raise dispositive questions of law regarding the proper interpretation and application of various provisions within the SPA, we decline to reach the merits of these dispositive questions. The questions are prematurely presented to this Court for resolution as a consequence of error on the part of the trial court.

Section 14.11 of the SPA provides:

> Seller and Buyer irrevocably and unconditionally submits for itself and its property in any Action arising out of this or relating to this Agreement, the Transactions, the formation, breach, termination or validity of this Agreement or the recognition and enforcement of any judgment in respect to this Agreement, to the exclusive jurisdiction of the courts of the State of New York sitting in the County of New York, the federal courts for the Southern District of New York, and appellate courts having jurisdiction of appeals from any of the foregoing, and all claims in respect of any such Action shall be heard and determined in such New York courts or, to the extent permitted by law, in such federal court.

GBIG contends that it contracted, by way of § 14.11 of the SPA, to have certain issues—such as the effectiveness of its notice of termination of the SPA and questions regarding breach of the SPA—addressed by the courts of New York and that the trial court usurped the jurisdiction of these courts. It further contends that the trial court exceeded the scope of the rehabilitation court's jurisdiction when it summarily resolved claims of breach of contract asserted by the parties as part of the court's ruling granting specific performance.

Our Legislature has vested the Ingham Circuit Court with exclusive subject-matter jurisdiction over the supervision and rehabilitation of insurers. MCL 500.8104(3). The Legislature also vested the Ingham Circuit Court with the following authority:

> If the court on motion of any party finds that any action should as a matter of substantial justice be tried in a forum outside this state, the court may enter an appropriate order to stay further proceedings on the action in this state. [MCL 500.8104(3).]

This latter provision clearly reflects the Legislature's acknowledgment that courts outside of Michigan may have subject-matter jurisdiction over matters affecting the implementation of the rehabilitation plan such that a stay of the Michigan rehabilitation proceedings may be appropriate until the pending foreign litigation is resolved. It also reflects the Legislature's intent that the supervising Michigan court proceed with the rehabilitation proceedings unless "substantial justice" is served by the underlying matter being tried in an out-of-state forum. Finally, MCL 500.8115(1) confers the authority on a rehabilitator to petition out-of-state courts "having jurisdiction over . . . litigation for stays necessary to protect the insurer's estate."

Given that the rehabilitation plan specifically incorporated the SPA, which was signed first; given that the language of the SPA unambiguously assigns jurisdiction over the matters at issue to the courts of New York; and given that the order approving the rehabilitation plan specifically indicates that rights under the SPA remain in effect, there are several indications that the disputes surrounding termination and breach should be tried in New York, to give the GBIG the benefit of its bargain with regard to the forum-choice clause in the SPA. Aspida and the rehabilitator make certain arguments, however, against the jurisdiction of New York courts. The plain language of MCL 500.8104(4) leaves it to the trial court to make the determination in the first instance regarding whether substantial justice requires another court to decide a matter in the midst of rehabilitation proceedings. The trial court did not make this "substantial justice" determination.[7] Accordingly, we reverse the trial court's grant of specific performance and direct it to resolve the jurisdictional issue in light of the explicit wording of MCL 500.8104(4). If the trial court finds that the Ingham Circuit Court is the proper venue to resolve questions concerning the effectiveness of GBIG's notice of termination[8] and whether GBIG breached the terms of the SPA such that specific performance is an appropriate remedy, the trial court shall revisit and resolve those questions and state on the record its factual findings and conclusions of the law.

C. POWER OF THE REHABILITATOR TO ACT ON HER OWN

Aspida and the rehabilitator imply that the issue of jurisdiction is irrelevant because the rehabilitator had full authority to stand in the shoes of GBIG and sell Pavonia stock over any objections of GBIG. We disagree.

The court ruled in the July 10, 2020 order, "In the event that the parties to the SPA do not close on the transaction by the deadline ordered by the Court, the Court affirms the Rehabilitator's authority to execute all necessary documentation and take all necessary actions on behalf of the Seller to consummate the closing on the transaction as soon thereafter as possible." GBIG argues that the court erroneously conferred authority upon the rehabilitator that it did not possess under

[7] GBIG did not file a separate motion solely on the basis of jurisdiction but clearly, repeatedly, and unambiguously argued before the court, both in writing and orally, that jurisdiction lay with the courts of New York. We conclude that GBIG's submissions were sufficient to trigger the lower court's obligation to determine whether substantial justice required that New York courts be given jurisdiction.

[8] There may be viable challenges to be asserted against GBIG's invocation of its termination rights. For example, Michigan has long recognized that "[t]he power to terminate a contract must be exercised in good faith[.]" *Isbell v Anderson Carriage Co*, 170 Mich 304, 314; 136 NW 457 (1912) (internal punctuation and citation omitted). Here, the statements made by GBIG's counsel at the July 9, 2020 motion hearing make it explicitly clear that GBIG and Lindberg were greatly dissatisfied with the dwindling amount of proceeds they would receive from the sale of the stock, and that they had been using the time they should have been using to prepare for closing to either encumber the stock or to identify a potential new seller. The actions of GBIG and Lindberg may sustain a finding that GBIG invoked § 12.01(h) in bad faith.

Chapter 81 of the Insurance Code, because the rehabilitator had control of *Pavonia*, not GBIG or stock held by GBIG.

In making its ruling, the court relied, in part, on MCL 500.8121(1)(g). MCL 500.8121(1)(g) provides that a liquidator "shall have the power to . . . conduct public and private sales of the insurer's property." This provision is found in § 8121 of the Insurance Code, which is the provision that enumerates the powers of a liquidator. See MCL 500.8121. The director of the DIFS serves as a rehabilitator, not a liquidator, in this matter.[9] Section 8114 of the Insurance Code enumerates the powers of a rehabilitator and confers upon a rehabilitator some of the powers of a liquidator. See MCL 500.8114. MCL 500.8114(2) provides, in part, that "[t]he rehabilitator may take such action as he or she considers necessary or appropriate to reform and revitalize the insurer including, but not limited to, the powers in section 8121(1)(f), (*l*), (m), (r), and (u)." Notably, MCL 500.8114(2) does not refer to § 8121(1)(g). The maxim "expressio unius est exclusio alterius"—the expression of one thing is the exclusion of others—is understood to mean that the express mention of one thing in a statute implies the exclusion of other similar things. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 572 n 8; 592 NW2d 360 (1999); see also *Johnson v Recca*, 492 Mich 169, 176 n 4; 821 NW2d 520 (2012). Because MCL 500.8114(2) specifically refers to the powers of a liquidator detailed § 8121(1)(f), (*l*), (m), (r), and (u)—but not (g)—it can be reasonably inferred that the Legislature did not intend to confer upon a rehabilitator those powers found in § 8121(1)(g).

The rehabilitator and Aspida rely on § 8121(1)(s), and the rehabilitator additionally relies on § 8121(1)(v), in arguing that the rehabilitator could conduct the sale of Pavonia stock. The former subparagraph indicates that a liquidator has the power to "exercise and enforce all the rights, remedies, and powers of a creditor, shareholder, policyholder, or member . . . ." MCL 500.8121(1)(s). The latter indicates that a liquidator has the power to "exercise all powers now held or hereafter conferred upon receivers by the laws of this state not inconsistent with the provisions of this chapter." MCL 500.8121(1)(v). But these liquidation subparagraphs, too, are not referred to in MCL 500.8114(2), and "expressio unius est exclusio alterius" is a properly applicable doctrine. The rehabilitator also relies on MCL 500.8121(4), which states:

> The enumeration in this section of the powers and authority *of the liquidator* shall not be construed as a limitation upon him or her, and it shall not exclude in any manner his or her right to do other acts not specifically enumerated in this section or otherwise provided for if necessary or appropriate for the accomplishment of or in aid of the purpose of liquidation. [Emphasis added.]

But once again, the rehabilitator was simply not appointed as a liquidator in this case.

The plan of rehabilitation refers to liquidation powers under MCL 500.8121 and to the rehabilitator's powers to sell the insurer's property. Aspida contends that by signing the plan, GBIG consented to the rehabilitator's acting as a liquidator. Significantly, however, these powers

[9] Pavonia is a solvent and functioning insurance company, and no party points to any appointment of a liquidator for it. The rehabilitator could have petitioned for liquidation under MCL 500.8116(1).

are in a section of the plan summarizing "applicable law," and the plan directs that the rehabilitator can exercise such powers "when appropriate." Again, the rehabilitator was never appointed as a liquidator.

The rehabilitator and Aspida rely on language from MCL 500.8114(4) stating that "[i]f the rehabilitator determines that reorganization, consolidation, conversion, reinsurance, merger, or other transformation of the insurer is appropriate, he or she shall prepare a plan to effect those changes." But this language does not speak to selling the shares in the company.

The rehabilitator and Aspida additionally rely on MCL 500.8113(1), which provides, in pertinent part, that "[t]he order to rehabilitate the insurer shall by operation of law vest title to all assets of the insurer in the rehabilitator."[10] They contend that under this language, the rehabilitator had the authority to dispose of Pavonia stock. However, stock is considered the property of the stockholder separate and distinct from the property of the issuing corporation. *Detroit v Kresge*, 200 Mich App 668, 673; 167 NW 39 (1918). Here, the stock is held by and, therefore, owned by third party GBIG. In addition, MCL 500.8101(3) directs, in part, that "[t]he purpose of this chapter is the protection of the interests of insureds, claimants, creditors, and the public *with minimum interference with the normal prerogatives of the owners* and managers of insurers[.]" (Emphasis added.) Also, the SPA directs that *GBIG* "shall sell, convey, assign, transfer and deliver to Buyer . . . all of Seller's right, title, and interest in and to the Shares . . . ." It refers to the seller delivering to the buyer "stock certificates evidencing the Shares" and, again, states that the SPA "may be terminated prior to Closing . . . by Seller, for any reason or for no reason." Also, the rehabilitation plan states that the SPA is "fully incorporated into this Plan," and the court's order approving the plan directs, "Nothing in this Order will affect, relinquish, modify, or waive any Closing condition, termination right, or other right or obligation due under or set forth in the SPA and any related agreement."

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[10] Chapter 81 does not specifically define the term "assets," but it defines "general assets" as follows:

> "General assets" means all property, real, personal, or otherwise, not specifically mortgaged, pledged, deposited, or otherwise encumbered, for the security or benefit of specified persons or classes of persons. As to specifically encumbered property, "general assets" includes all property or its proceeds in excess of the amount necessary to discharge the sum or sums secured by the property. Assets held in trust and on deposit for the security or benefit of all policyholders or all policyholders and creditors, in more than a single state, shall be treated as general assets. Amounts due an insolvent insurer as indemnification from the catastrophic claims association created in section 3104 shall not be considered to be assets of the receivership, but shall be paid directly to the property and casualty guaranty association under section 7935. [MCL 500.8103(g).]

In *Comm of Ins v Arcilio*, 221 Mich App 54, 63-64; 561 NW2d 412 (1997), this Court used the definition in MCL 500.8103(g) in discussing "assets."

There is no clear statutory language evidencing the rehabilitator's authority to sell the shares in Pavonia; the SPA was incorporated into the rehabilitation plan; the SPA reveals that GBIG was the entity selling the shares and that GBIG had certain rights under the SPA, including the right to back out of the agreement; and the order approving the plan clearly indicated that rights and obligations under the SPA remained in force. Given all these circumstances, the rehabilitator did not have the authority to sell the Pavonia shares on its own. Indeed, to hold otherwise would, in essence, nullify the SPA, which was entered into by *GBIG* and Aspida, not by the rehabilitator and Aspida.

D. CONSTITUTIONAL ISSUES

GBIG raises constitutional issues, arguing, in part, that the trial court's July 10, 2020 order violated the Contract Clause and principles of due process. We conclude that the constitutional issues are not yet ripe for review. At a minimum, the issue of termination has not yet been addressed by the lower court and is outstanding. Again, the SPA states that it "may be terminated prior to Closing . . . by Seller, for any reason or for no reason," and Aspida admits that on July 13, 2020, GBIG sent it notice of termination. The rehabilitator asserted on June 22, 2020, that "neither party has terminated the SPA, which remains in full effect." On that same date, Aspida represented that GBIG had "threatened to terminate the SPA unless the [hearing to finalize the rehabilitation plan] was adjourned." Aspida also stated that "the SPA remains in force, at least until Seller purports to terminate the SPA." In addition, at the June 25, 2020 motion hearing, counsel for the rehabilitator stated:

> Importantly, Your Honor, neither party to the stock purchase agreement has terminated that agreement. That is still a binding document. It's in full force and effect, and under the agreement the seller agreed to sell and buyer agreed to buy the Pavonia entities. So no one has terminated, and we have an active, ongoing, a binding and in force agreement there, Your Honor.

These representations show that the parties opposing GBIG in this appeal acknowledge the termination power held by GBIG. Accordingly, until the issue of termination or other contractual claims are resolved, the constitutional issues are merely hypothetical. This Court does not address hypothetical issues. See *People v Hart*, 129 Mich App 669, 674; 341 NW2d 864 (1983). In addition, this Court "will not reach constitutional issues that are not necessary to resolve a case." *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001) (quotation marks and citation omitted). The resolution of the appeal at this juncture in the proceedings does not require resolution of the constitutional issues.

III. CONCLUSION

The trial court's grant of specific performance is reversed. The trial court erred as a matter of law when it ruled the rehabilitator could simply stand in the shoes of GBIG and force a sale. It also erred when it failed to determine under MCL 500.8104(4) whether substantial justice required a New York court to decide matters concerning the effectiveness of GBIG's notice of termination and questions regarding breach of the SPA. This matter is remanded to the trial court to resolve

the jurisdictional issue in light of the explicit wording of MCL 500.8104(4). If the trial court finds that the Ingham Circuit Court is the proper venue to resolve questions concerning the effectiveness of GBIG's notice of termination and whether GBIG breached the terms of the SPA such that specific performance is an appropriate remedy, the trial court shall revisit and resolve those questions, and state on the record its factual findings and conclusions of the law. Otherwise, the trial court shall stay proceedings before it until these dispositive issues are decided by a New York court.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Stephen L. Borrello
/s/ Michelle M. Rick