**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| IN THE MATTER OF THE REHABILITATION OF INDEMNITY INSURANCE CORPORATION, RRG | ) ) ) | C.A. No. 8601-VCL |

**MEMORANDUM OPINION**

Date Submitted: February 20, 2014
Date Decided: March 21, 2014

W. Harding Drane, Jr., Jessica M. Willey, DELAWARE DEPARTMENT OF JUSTICE, Wilmington, Delaware; *Attorneys for Petitioner State of Delaware*.

Michael W. Teichman, Michael W. Arrington, James D. Nutter, Elio Battista, Jr., PARKOWSKI, GUERKE & SWAYZE, P.A., Wilmington, Delaware; *Attorneys for Respondent Indemnity Insurance Corporation, RRG.*

Theodore A. Kittila, GREENHILL LAW GROUP, LLC, Wilmington, Delaware; *Attorney for Proposed Intervenor RB Entertainment Ventures, LLC.*

**LASTER, Vice Chancellor.**

This case is a delinquency proceeding involving Indemnity Insurance Corporation, RRG ("Indemnity" or the "Company"). A delinquency proceeding is "any proceeding commenced against an insurer pursuant to this chapter for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer." 18 *Del. C.* § 5901(3). The Insurance Commissioner of the State of Delaware (the "Commissioner") initiated this proceeding by seeking and obtaining a seizure order that authorized the Commissioner to conduct a targeted investigation into Indemnity's business. Based on the results of that investigation, the Commissioner sought and obtained authority to place Indemnity into liquidation. After assessing Indemnity's situation further, the Commissioner believed it might be possible to rehabilitate Indemnity through a capital infusion or a sale of assets, and the Commissioner sought and obtained a rehabilitation order. When the effort at rehabilitation proved unsuccessful, the Commissioner petitioned to return Indemnity to liquidation. Non-party RB Entertainment Ventures, LLC ("RB Entertainment") has moved pursuant to Rule 24 to intervene for the purpose of opposing the liquidation petition. The motion is denied.

## I. FACTUAL BACKGROUND

A state-court delinquency proceeding is analogous to a federal bankruptcy court proceeding, but it is heard in state court because Congress has reserved for the states the power to regulate insurance companies. *See* 15 U.S.C. §§ 1011-15 (McCarran-Ferguson Act); *Checker Motors Corp. v. Exec. Life Ins. Co.*, 1992 WL 29806, at *2 (Del. Ch. Feb. 13), *aff'd*, 615 A.2d 530 (Del. 1992) (TABLE). Many states, including Delaware, "have adopted the [Uniform Insurers Liquidation Act ('UILA')] to establish a uniform

method for processing claims against, and distributing assets of, distressed insurance companies." *Checker Motors*, 1992 WL 29806, at *2. The Delaware Uniform Insurers Liquidation Act appears in Chapter 59 of the Insurance Code, which is titled "Rehabilitation and Liquidation." *See* 18 *Del. C.* §§ 5901-5933; 5941-5944.

**A. Indemnity Insurance Corporation, RRG**

Indemnity is a Delaware corporation. Non-party Jeffrey B. Cohen founded Indemnity and served as its CEO and Chairman of the Board until August 5, 2013, when he resigned as Chairman and was removed from his other positions.

RB Entertainment is a Delaware limited liability company. RB Entertainment has grounded its motion to intervene on two factual premises: its purported ownership of 99% of Indemnity's equity and its purported ability to exercise 100% of Indemnity's voting power. The Commissioner has raised serious questions about the factual accuracy of both premises. This decision assumes without deciding that RB Entertainment is a stockholder of Indemnity.

**B. The Seizure Petition**

On May 30, 2013, the Commissioner initiated a summary proceeding against Indemnity by filing a Verified Petition for Entry of Confidential Seizure and Injunction Order. Dkt. 1 (the "Seizure Petition"). The Insurance Code grants the Commissioner the power to file such a petition if the Commissioner believes (i) there exists "[a]ny ground that would justify a court order for a formal delinquency proceeding against an insurer" and (ii) "that the interests of policyholders, creditors or the public will be endangered by delay." 18 *Del. C.* § 5943(a). Grounds that "would justify a court order for a formal

delinquency proceeding against an insurer," such as an order requiring rehabilitation, include if (i) the insurer "is impaired or insolvent or is in unsound condition" or (ii) the insurer is "using such methods and practices in the conduct of its business as to render its further transaction of insurance presently or prospectively hazardous to its policyholders." *Id.* § 5905(1). The Insurance Code authorizes the Court of Chancery to issue a seizure order "forthwith, ex parte and without a hearing." *Id.* § 5943(a).

The Seizure Petition was supported by documentary evidence and averred that Indemnity was in a precarious financial position and had engaged (through Cohen) in multiple acts of fraud. Among other things, the Seizure Petition explained that as part of an examination into Indemnity's safety and soundness, the Commissioner asked for more specific information regarding amounts reported as being held at institutions designated on Indemnity's financial statements as "Banks 1 through 4." Through Cohen, Indemnity responded that Indemnity held $5,100,000 in unencumbered cash at Susquehanna Bank, the institution identified as "Bank 4."

To confirm the account balance, the investigators asked to contact Susquehanna Bank. Through Cohen, Indemnity provided the investigators with an email address purportedly belonging to a Susquehanna Bank employee named Nicole Bliss. When the investigators pressed for a physical address, Cohen asked them to use the email address, representing that Susquehanna Bank charged an exorbitant fee for providing confirmations via physical mail. When the investigators insisted on a physical address, Cohen gave them the number for a P.O. Box that purportedly belonged to Susquehanna Bank.

The investigators sent a confirmation form to the P.O. Box, and they received a fax confirming the account balance and its ownership. To follow up on the confirmation, the investigators tried to call Bliss at the phone number listed on the fax. That number connected to a voicemail box for "James Berg of Susquehanna." Confused, the investigators looked up Bliss's phone number on the internet and contacted her at that number. Bliss denied having seen the form that the investigators had sent to the P.O. Box, and she asked them to resend the form by email. The investigators sent the form to the email address that Indemnity (through Cohen) had provided for Bliss.

The investigators did not receive a response to the email sent to Bliss at the address Indemnity had provided. They followed up with Bliss by phone, and she told them that she had not received the email. She provided the investigators with her correct email address, which differed from the address Indemnity had provided. The investigators sent a copy of the form to the correct email address, and Bliss confirmed that she had never seen the form, had not completed it, and had not faxed it to the investigators.

Further investigation revealed the following:

- The P.O. Box that Indemnity claimed belonged to Susquehanna Bank was registered to Cohen.
- The fax number that transmitted the fax to the investigators did not belong to Susquehanna Bank.
- The phone number listed for Bliss on the fax that the investigators received is a VoIP number that does not belong to Susquehanna Bank and whose true owner is unknown.

- The domain name for the email address that Indemnity provided does not belong to Susquehanna Bank. It was registered anonymously by Domains by Proxy, LLC, a company that Cohen is known to have used in the past.

- The email address that Indemnity provided was created within days after the Commissioner's February 28, 2013 request for bank confirmation.

- The signature on the fax was not Bliss's.

- Contrary to what Indemnity (through Cohen) had represented to the investigators, the cash in the Susquehanna Bank account was not unencumbered. It was 100% encumbered.

The Seizure Petition identified other troubling problems with Indemnity's records and representations. After reviewing the Seizure Petition, the court entered an order granting the relief requested and authorizing the Commissioner to take control of the business and assets of Indemnity. *See* Dkt. 4 (the "Seizure Order").

Among other things, the Seizure Order directed the Commissioner to

> immediately take exclusive possession and control of, and is hereby vested with all right, title and interest in, of or to, all of the property of [Indemnity] including, without limitation, all of [Indemnity's] assets, contracts, rights of action, books, records, bank accounts, certificates of deposits [sic], collateral and rights to collateral of [Indemnity], securities or other funds, and all real or personal property of any nature of [Indemnity] including, without limitation, all proceeds of or accessions to any of the foregoing, wherever located, in the possession, custody or control of [Indemnity] or any trustee, bailee, or any agent acting for or on behalf of [Indemnity] (collectively, the "Assets").

*Id.* ¶ 2. The Insurance Code specifically authorizes this relief. *See* 18 *Del. C.* § 5943(a) (authorizing Court of Chancery to direct the Commissioner "to take possession and control of all or a part of the property, books, accounts, documents and other records of an insurer and of the premises occupied by it for the transaction of its business"). The Seizure Order also prohibited "[a]ll persons or entities that have notice of these

proceedings or of this Seizure and Injunction Order . . . from interfering with the Commissioner and her authorized agents either in their possession and control of the Assets or in the discharge of their duties hereunder." Seizure Order ¶ 9. Here too, the Insurance Code specifically authorizes this relief. *See* 18 *Del. C.* § 5943(a) (authorizing Court of Chancery to "enjoin the insurer and its officers, managers, agents and employees from disposition of its property and from transaction of its business except with the written consent of the Commissioner").

The Insurance Code provides that an insurer subject to an ex parte order "may petition the Court at any time after the issuance of such order for a hearing and review of the order, and the Court shall grant such a hearing and review within 10 days of the filing of such petition." 18 *Del. C.* § 5943(d). On July 5, 2013, Indemnity petitioned for review of the Seizure Order. The court scheduled a hearing on the petition for July 15, within the time period contemplated by the statute. The court held a telephonic status conference with the parties on July 10. After the status conference, the parties reached an agreement to defer the July 15 hearing.

**C. The Initial Liquidation Petition**

Using the authority conferred by the Seizure Order, the Commissioner took possession of Indemnity's books, records, and other assets and conducted a preliminary examination of Indemnity. On July 26, 2013, the Commissioner filed a Verified Petition for Entry of Liquidation and Injunction Order. Dkt. 20 (the "Initial Liquidation Petition"). Under the Insurance Code, the grounds on which the Commissioner may apply to liquidate an insurer include the grounds for seeking rehabilitation. 18 *Del. C.*

§ 5906. Those grounds include (i) if the insurer "is impaired or insolvent or is in unsound condition" or (ii) the insurer is "using such methods and practices in the conduct of its business as to render its further transaction of insurance presently or prospectively hazardous to its policyholders." *Id.* § 5905(1). The Initial Liquidation Petition expanded on the allegations in the Seizure Petition and sought authority to liquidate Indemnity in light of (i) Indemnity's unsound financial condition and (ii) Indemnity's hazardous business practices, consisting predominantly of acts of fraud by Cohen.

**1. More On The Susquehanna Bank Fraud**

The Initial Liquidation Petition provided greater detail and additional supporting documentation regarding the Susquehanna Bank fraud. The Initial Liquidation Petition recounted that when the Commissioner initially asked Indemnity about the Susquehanna Bank fraud, Indemnity informed the Commissioner that "management had discovered a scheme to defraud the company" and that an "external threat," such as an ex-employee, had breached Indemnity's network through a "man in the middle attack." The Initial Liquidation Petition explained that by using the supervisory authority granted by the Seizure Order, the Commissioner had confirmed that there was no "man in the middle attack" and that Indemnity, through Cohen, had created the false communications from Susquehanna Bank.

**2. The RBC Fraud**

The Initial Liquidation Petition explained that using the authority granted by the Seizure Order, the Commissioner had investigated Indemnity's internal financial documents, communications, and bank confirmations. That investigation uncovered a

similar fraudulent confirmation scheme that involved an Indemnity account allegedly held at Royal Bank of Canada – Barbados ("RBC"). This scheme also utilized fraudulent bank confirmations, fraudulent email addresses, and the creation of a domain name through Domains by Proxy. In this case, the purported email address for the bank employee was laurel.springer@rbci.com, which was not an RBC email address.

Through the RBC scheme, Indemnity provided its auditors with a false bank confirmation that the auditors relied on during their audit of Indemnity's 2011 financial statements. The same scheme was used in 2012. The Initial Liquidation Petition attached the purported bank confirmations and alleged that Indemnity had been unable to provide any bank statements for the account or documentation showing the transfer of funds into the account.

**3. The Unencumbered Cash Fraud**

The Initial Liquidation Petition explained that on May 20, 2013, Susquehanna Bank had identified three accounts that Indemnity held at the institution, including one account that showed a balance of $5,007,621.04. Through Cohen, Indemnity represented that these funds were unencumbered. Subsequent investigation revealed that the money came from Susquehanna Bank itself, which loaned it to RB Entertainment. As conditions of that loan, RB Entertainment had to provide the funds to Indemnity, and Indemnity had to deposit the money back in Susquehanna Bank as security for the loan to RB Entertainment. RB Entertainment and Indemnity thus paid loan origination fees and interest so that Indemnity could show an account balance of approximately $5 million, even though Indemnity could not use the cash and had to keep it at Susquehanna Bank as

security. The Initial Liquidation Petition attached copies of the transaction documents for the loan.

**4. The IDG Receivable**

In its filings with the Commissioner, Indemnity claimed as assets over $21 million in receivables from IDG, another entity controlled by Cohen. Indemnity booked the receivables in lieu of actual payment of over $23 million in premiums that IDG failed to remit to Indemnity. Delaware law requires unremitted premiums to be held in a fiduciary account, but IDG did not have a fiduciary account for the premiums. In fact, the Commissioner's investigation revealed that IDG did not appear to have the premiums at all. At the time of the investigation, IDG had only $3.3 million in assets and had $24.4 million in liabilities, including the $21 million owed to Indemnity.

Given IDG's financial position, Indemnity had no reasonable expectation that the receivables would be fully repaid. Indeed, even without the money owed to Indemnity, IDG's net assets were effectively zero. Yet Indemnity was carrying the receivables from IDG at full face value on its financial statements.

**5. Other Solvency Issues**

The Commissioner's investigation revealed other material misstatements on Indemnity's financial statements, including overstated account balances and unsubstantiated reinsurance claims. Adjusted for these items, Indemnity's total policyholder surplus was negative $9 million, an amount that contrasted sharply with the $24.5 million that Indemnity had claimed on its financial statements.

Delaware law requires a captive risk retention group to hold a minimum of $1 million in policyholder surplus. 18 *Del. C.* § 6905(a)(5). Because of the volume of Indemnity's business, the Commissioner would have required Indemnity to maintain a substantially greater surplus. *See id.* § 6905(b) (giving Commissioner the authority to require additional surplus); Initial Liquidation Petition ¶ 126 (statement by Commissioner that Indemnity's volume was sufficient to require a surplus "greatly in excess of $1,000,000"). Indemnity's fraudulent and misleading books masked a shortfall in policyholder surplus of at least $10 million.

**D. The Court's Order To Show Cause On The Initial Liquidation Petition**

Based on the averments in the Initial Liquidation Petition and supporting documentary evidence, the court granted an order directing Indemnity to show cause why it (i) was not insolvent or in unsound condition and (ii) should not be liquidated. The parties agreed to a schedule leading up to a hearing on the order to show cause, and they agreed to extend the Seizure Order for another ninety days pending the outcome of the hearing.

On August 5, 2013, Cohen resigned from his position as Chairman of the Board, and Indemnity's board of directors (the "Board") removed him from all officer positions with Indemnity. After August 5, Cohen's only connection to Indemnity was through his control of RB Entertainment.

**E. RB Entertainment's First Motion To Intervene**

On August 14, 2013, Cohen caused RB Entertainment to move to intervene in these proceedings and request an expedited hearing. In RB Entertainment's proposed

opposition to the Initial Liquidation Petition, RB Entertainment did not contest the fraud allegations in the Initial Liquidation Petition. RB Entertainment instead argued that the court should ignore those allegations because they were the work of "two individuals" who were no longer with the company:

> Indemnity's former President, Mr. Cohen, has resigned as an officer and director of Indemnity, as has Indemnity's former Controller, Mrs. Piotrowski. The alleged wrongdoing of these two former employees should be addressed separately, because neither is in a position to cause any further harm.

Dkt. 65 at 3. RB Entertainment only sought to litigate the question of Indemnity's solvency, arguing that "Indemnity has over $19 million in admitted surplus that includes over $35 million in cash and liquid assets available to play claims." *Id.*

The parties briefed the motion to intervene, and the court heard argument on August 22, 2013. RB Entertainment's counsel opened the hearing by recognizing that "shareholders are not typically granted intervention in cases of this nature." Dkt. 73 at 3. RB Entertainment's counsel then confirmed what its proposed opposition suggested, namely that RB Entertainment and Cohen did not plan to dispute the allegations of fraud for purposes of the Initial Liquidation Petition. *Id.* at 4 ("Mr. Cohen takes the allegations of misconduct seriously, understands how serious the charges are. We're not here to litigate those issues right now . . . ."). Indemnity's counsel was even more direct: "[A]s you'll determine when you look at our – our pleadings and if we go to a hearing on this matter, the company is absolutely unable to refute the allegations respecting Mr. Cohen's fraud." *Id.* at 10; *accord id.* at 15-16 (explaining Indemnity's strategy of disputing insolvency and arguing an alternative remedy other than liquidation but stating, "We are

not going to get into whether or not Mr. Cohen did or did not commit frauds. We just – we just have no – no – at this point we have no information to refute what's in the papers.").

Based on the evidence in the record, the arguments made at the hearing, and the pertinent authorities, the court denied the motion to intervene. The court held that as a stockholder of Indemnity, RB Entertainment did not have standing to intervene as of right in the delinquency proceeding. Both under the Insurance Code and as a matter of business entity law, the Board was the duly authorized party that would direct and oversee Indemnity for purposes of the delinquency proceeding.

The court also ruled that permissive intervention was unwarranted at that time. The court held that RB Entertainment had failed to show that the Board could not adequately represent the interests of all corporate claimants, including Indemnity's stockholders. The court noted, however, that Indemnity had suggested potential alternative remedies that might include placing RB Entertainment's equity in a voting trust or otherwise depriving Cohen of control. The court ruled that RB Entertainment could renew its petition to intervene if the Commissioner sought a remedy involving Indemnity that would inflict on RB Entertainment a specific and unique injury that was not derivative of its status as an equity holder. The court therefore denied the motion for permissive intervention without prejudice.

**F. The Rehabilitation Order**

On November 6, 2013, the Commissioner filed a Verified Petition for Entry of Rehabilitation and Injunction Order by Consent. Dkt. 228 (the "Rehabilitation Petition").

The Rehabilitation Petition averred that Indemnity was impaired and insolvent and cited Cohen's fraudulent schemes and other improper business practices. The Rehabilitation Petition also explained why the Commissioner sought to proceed via rehabilitation in lieu of liquidation:

> 9. On August 21, 2013, [Indemnity] filed an Answer to the Liquidation Petition and an Opposition Statement in which the Company did not contest the allegations of fraud and other improprieties of Cohen but did contest the Commissioner's allegations that the Company was insolvent and the relief requested by the Commissioner.
>
> 10. Rather, it was [Indemnity's] position at that time that although the Company was not technically insolvent [Indemnity] would have to write off certain assets and [that] other assets, while arguably appropriate for balance sheet consideration, could not be used to pay claims. In this regard, an influx of additional capital would be needed or the Company would have to sell [itself] or its assets in order for the Company to avoid delinquency proceedings.
>
> . . .
>
> 11. . . . [I]n the weeks after [Indemnity] filed is Answer and Opposition Statement . . . , the Company's management and directors determined that the financial condition and viability of the Company have deteriorated for several reasons, including the past and ongoing conduct of Cohen, and the Company has been unable to attract potential investors or asset purchasers to make the Company viable outside of receivership.
>
> 12. In this regard, [Indemnity's] management now acknowledges that in the absence of a third party investor or purchaser, [Indemnity] is impaired and is, or will be, insolvent.
>
> * * *
>
> 22. [Indemnity's] management has negotiated a potential transaction for the acquisition of certain assets of [Indemnity] and believes that if certain financial analytics can be confirmed, an approved Plan of Rehabilitation based upon this potential transaction would provide a substantial likelihood that the Company's tail liabilities can be run off completely with existing assets.

*Id.* In light of these facts, Indemnity management, its Board, and the Commissioner all agreed that it was in the best interests of Indemnity and its policyholders to place Indemnity into rehabilitation with the goal of submitting a plan of rehabilitation within sixty days. *Id.* ¶ 24. The Rehabilitation Petition cautioned that "in the event a Plan of Rehabilitation is not submitted and approved, and the cause or causes of the impairment and insolvency cannot be removed, then it would be in the best interest of the policyholders to convert the rehabilitation proceedings into liquidation proceedings." *Id.* ¶ 25.

By letter dated November 5, 2013, Indemnity confirmed that it did not contest the allegations in the Rehabilitation Petition, consented to the entry of the relief sought, and waived the filing of any opposition or responsive pleading. Dkt. 232. The unanimous written consent of the directors of Indemnity through which the Board agreed to the relief sought in the Rehabilitation Petition also consented to a liquidation proceeding if rehabilitation proved unsuccessful:

> RESOLVED, that the Company consents to the appointment of the Commissioner of Insurance of the State of Delaware as receiver for the purposes of placing the Company into rehabilitation and executing a rehabilitation plan consistent with the AmTrust Proposal if this is possible, *or into liquidation if a rehabilitation cannot be accomplished . . . .*

Rehabilitation Petition Ex. A to Ex. 2 at 4 (emphasis added).

As noted, statutory grounds for rehabilitation include (i) if the insurer "is impaired or insolvent or is in unsound condition" or (ii) the insurer is "using such methods and practices in the conduct of its business as to render its further transaction of insurance presently or prospectively hazardous to its policyholders." 18 *Del. C.* § 5905(1). A

rehabilitation order also may be entered if the insurer "[h]as consented to such an order through a majority of [its] directors, stockholders, members or subscribers." *Id.* § 5905(9).

Later in the day on November 6, 2013, RB Entertainment requested an opportunity to file a motion to intervene to oppose the Rehabilitation Petition. Dkt. 235. RB Entertainment noted that this court previously had ruled that if the Commissioner or Indemnity sought some form of remedy that would affect directly RB Entertainment's rights as a stockholder, then the court would consider permitting RB Entertainment to intervene. RB Entertainment asserted, without explanation, that the Rehabilitation Petition would inflict some form of direct injury on RB Entertainment. In response, the Commissioner pointed out that RB Entertainment had not identified any direct injury that it would suffer as a stockholder. The relief the Commissioner sought instead would affect all corporate claimants, including the stockholders, in the order of their priority in the capital structure and proportionately by class. The Commissioner argued that the court should approve the Rehabilitation Petition on multiple grounds, including RB Entertainment's lack of standing to oppose it, Cohen's unclean hands, and the Board's consent to the relief sought.

On November 7, 2013, the court entered an order placing Indemnity into rehabilitation. Dkt. 237 (the "Rehabilitation Order"). The court denied RB Entertainment's request for leave to intervene and confirmed that "[t]o the extent RB [Entertainment] has a claim against the [Indemnity] estate, RB [Entertainment] may give

notice of its claim and file an objection to any proposed report and recommendation in the manner contemplated by this Rehabilitation and Injunction Order." *Id.* ¶ 28.

At some point after the entry of the Rehabilitation Order, given that the Commissioner had been appointed as the Receiver and placed in charge of Indemnity, the two remaining members of the Board resigned.

**G. The Renewed Liquidation Petition**

The Commissioner's attempts to rehabilitate Indemnity did not meet with success, and on January 16, 2014, the Commissioner filed a verified petition to convert the rehabilitation into a liquidation. Dkt. 341 (the "Renewed Liquidation Petition"). Like the Seizure Petition and the Initial Liquidation Petition, the Renewed Liquidation Petition contained detailed allegations regarding the fraudulent business practices that Cohen caused Indemnity to conduct and supported its allegations with documentary evidence.

In addition to the fraudulent business practices recited in the earlier petitions, the Renewed Liquidation Petition described additional instances of fraud. For example, line 16.1 of Indemnity's 2012 Annual Financial Statement identified the amounts recoverable from reinsurers as of December 31, 2012, to be $739,443, and line 16.3 represented that other amounts receivable under reinsurance contracts was $618,961. Indemnity's first quarter financial statements for 2013 contained the same representations. As part of its examination, the Commissioner reviewed a February 27, 2013 confirmation that Indemnity's auditors had received, purportedly from USRe, to confirm the reinsurance amounts. Like the false documents from Susquehanna Bank and RBC, the USRe confirmation was sent from a fictitious email address associated with a domain name

registered through Domains by Proxy. The Commissioner's investigation confirmed that USRe did not receive the confirmation, did not return it to Indemnity's auditor, and that the USRe employee involved did not sign it. In fact, the employee whose name was used retired from USRe approximately ten months before the confirmation was received by Indemnity's auditor.

The Rehabilitation Petition explained that Indemnity's efforts to secure an investment of capital or sell certain Indemnity assets sufficient to make the Company viable were unsuccessful for a combination of reasons. Potential investors and purchasers approached Indemnity with skepticism and distrust due to the known frauds perpetrated by Cohen and the risk of further, as yet unknown frauds. Potential investors and purchasers also were concerned about Cohen's litigiousness. The public disclosure of the seizure proceeding and Indemnity's downgrade by A.M. Best further damaged the Company in the marketplace. *See id.* ¶¶ 62-64. The Rehabilitation Petition recited that as of September 30, 2013, Indemnity's liabilities exceeded its assets by $16,984,222, and that an actuarial report updated as of September 30, 2013, reflected that Indemnity was under-reserved by nearly $14 million. *See id.* ¶¶ 65-67. In light of Indemnity's condition and the frauds in which Cohen caused Indemnity to engage, the Commissioner sought to convert what were then rehabilitation proceedings into a liquidation proceeding.

On February 4, 2014, RB Entertainment filed its current motion to intervene. The Commissioner has opposed the motion. The court heard argument on February 20. During the hearing, the court permitted RB Entertainment to supplement the record with live testimony, even though testimony had not been contemplated.

## II. LEGAL ANALYSIS

Court of Chancery Rule 24 governs motions to intervene. Rule 24(a) addresses situations when a party can intervene as of right. Rule 24(b) covers permissive intervention. Rule 24(c) establishes procedural requirements for both scenarios. It states:

> A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

Ct. Ch. R. 24(c).

RB Entertainment originally sought to move to intervene without filing the responsive pleading required by Rule 24(c). RB Entertainment subsequently filed a motion that attached its proposed answer to the Renewed Liquidation Petition. The content of its answer, or more aptly the lack thereof, has dispositive implications for the motion. In this case, to allow RB Entertainment to intervene would be futile, because RB Entertainment does not contest certain of the statutory grounds for placing Indemnity in liquidation. *See New Castle Cty. v. Pike Creek Recreational Servs., LLC*, 82 A.3d 731, 755 (Del. Ch. 2013) (denying intervention where permitting claim would be futile); *see also Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 4782314, at *8 (Del. Ch. Oct. 19, 2006) (evaluating whether a motion to intervene would be futile); *Flynn v. Bachow*, 1998 WL 671273, at *7 (Del. Ch. Sept. 18, 1998) (same). For similar reasons, the court previously denied Cohen and RB Entertainment's motion to stay the Rehabilitation Order pending appeal. *See In re Rehabilitation of Indemnity Ins. Corp., RRG*, 2014 WL 185017, at *12 (Del. Ch. Jan. 16, 2014) (ruling that the stay application

failed to present "a serious legal question for appeal because Cohen has not challenged the other bases for the Rehabilitation Order, which are independently sufficient to justify its entry").

Under the Insurance Code, the Commissioner can seek an order appointing the Commissioner as receiver and directing the Commissioner to liquidate the business of an insurer "upon any of the grounds specified in § 5905 of this title." 18 *Del. C.* § 5906. Section 5905 identifies ten possible grounds, including if the insurer:

> (1) Is impaired or insolvent or is in unsound condition or in such condition or using such methods and practices in the conduct of its business as to render its further transaction of insurance presently or prospectively hazardous to its policyholders;
>
> * * *
>
> (3) Has concealed or removed records or assets;
>
> * * *
>
> (6) Has wilfully violated . . . any law of this State; [or]
>
> * * *
>
> (9) Has consented to such an order through a majority of the directors, stockholders, members or subscribers . . . .

*Id.* § 5905. The Insurance Code contemplates that the Commissioner may proceed as it has here by first attempting to rehabilitate an insurer and then switching to liquidation. *See id.* § 5910(b) ("If at any time the Commissioner deems that further efforts to rehabilitate the insurer would be useless, the Commissioner may apply to the court for an order of liquidation.").

The verified allegations of the Renewed Liquidation Petition present a powerful case, supported by detailed documentary evidence, that Indemnity (through Cohen) engaged in fraudulent and misleading business practices, concealed records and assets, and willfully violated Delaware law. In response to similar allegations in the Initial Liquidation Petition and the Rehabilitation Petition, Indemnity stated as early as August 22, 2013, that it lacked any basis to contest the allegations. Dkt. 73 at 10, 15-16. Indemnity filed an answer in which it did not contest the allegations, and Indemnity later confirmed that it did not contest the allegations and consented to a liquidation. Dkt. 232. As to Indemnity, therefore, it is established that Indemnity (i) used "such methods and practices in the conduct of its business as to render its further transaction of insurance . . . hazardous to its policyholders," (ii) "concealed or removed records or assets," and (iii) willfully violated the laws of this State.

RB Entertainment's proposed answer does not contest the detailed allegations establishing these bases for liquidation. As to many of the particularized allegations about specific acts of misconduct in which Cohen personally caused Indemnity to engage, RB Entertainment "denies knowledge or information sufficient to form a belief as [to] the truth of the allegations." In offering this response, RB Entertainment appears to be seizing on the incidental phrasing of these allegations as statements about what the Commissioner's investigation has uncovered, rather than direct allegations about what occurred. RB Entertainment seems to be trying to use that phrasing to avoid addressing the substance of the allegations in the Renewed Liquidation Petition. In other words, RB

Entertainment seems to be denying knowledge of the scope of the investigation, rather than the underlying allegations.

Although RB Entertainment may lack knowledge of what the Commissioner's investigation has uncovered, it cannot lack knowledge of the substance of the allegations about Cohen's conduct. Cohen controls RB Entertainment, and his knowledge is imputed to the entity.[1] The allegations of the Renewed Liquidation Petition describe Cohen's personal acts. He may well deny them, but he cannot claim to lack knowledge or information sufficient to form a belief about his own conduct.

In the ordinary case, RB Entertainment's decision to focus on the niceties of the Renewed Liquidation Petition's phrasing of the allegations, instead of the substance of the allegations, might be overlooked. Here, however, RB Entertainment has moved to intervene to dispute allegations that Indemnity, through the Board, already admitted and to contest relief that Indemnity already accepted. At the time Indemnity made its concessions, the Board was Indemnity's duly authorized decision maker. For RB Entertainment to re-open this matter now, RB Entertainment must have grounds to do so.

---

[1] *See Teachers' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 671 n. 23 (Del. Ch. 2006) ("[I]t is the general rule that knowledge of an officer or director of a corporation will be imputed to the corporation."); *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 WL 2130607, at *11 (Del. Ch. Aug. 26, 2005) (imputing knowledge of member-employees to limited liability companies); *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 153–55 (Del. Ch. 2004) (imputing fraud claims to corporation where it designated a manager of a limited liability company and where the manager made fraudulent statements); *see also* 3 William Meade Fletcher et al., *Fletcher Cyclopedia Corporations* § 790 (perm ed., rev. vol. 2011 & Supp. 2013) ("[T]he general rule is well established that a corporation is charged with constructive knowledge . . . of all material facts of which its officer or agent receives notice or acquires knowledge while acting in the course of employment within the scope of his or her authority, even though the officer or agent does not in fact communicate the knowledge to the corporation." (footnote omitted)).

If RB Entertainment is unable or unwilling to raise any litigable dispute, then permitting intervention would be futile.

RB Entertainment's motion to intervene is therefore denied. RB Entertainment shall have ten days in which to renew its motion to intervene with a new proposed answer that fairly responds to the substance of the allegations about Cohen's conduct that appear in the Renewed Liquidation Petition.

## III. CONCLUSION

Assuming *arguendo* that RB Entertainment has standing to intervene either permissively or as of right, the motion is denied. RB Entertainment's proposed answer does not contest the substance of particularized and verified allegations, supported by documentary evidence, that provide adequate and independent bases for entry of a liquidation order. Granting the motion to intervene at this point would be futile. RB Entertainment may, however, renew its motion to intervene in the manner discussed above.