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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF THE REHABILITATION OF INDEMNITY INSURANCE CORPORATION, RRG	)	No. 621, 2013
	)	On Appeal from C.A. No. 8601-VCL in the Court of Chancery of the State of Delaware

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APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This case is Jeffrey B. Cohen's and RB Entertainment Venture, LLC's ("RBE") (non-parties below, and together, "Appellants") appeal from (i) a November 1, 2013, Order Imposing Additional Sanctions issued by the Court of Chancery of the State of Delaware (the "Trial Court") (the "Nov. 1 Sanctions Order") (attached hereto as Exhibit A); and (ii) a November 7, 2013, Rehabilitation and Injunction Order issued by the Trial Court (the "Rehabilitation Order") (attached hereto as Exhibit B).[1] This appeal is part of an ongoing proceeding in the Trial Court and follows on the heels of a related appeal, Case No. 545, 2013. Appellants will be filing a motion to consolidate these appeals.

Mr. Cohen and RBE appealed the above-referenced decisions of the Trial Court on November 8, 2013. *See* Supr. Ct. Dkt. 1 (Notice of Appeal). On November 18, 2013, appellee Delaware Insurance Commissioner (the "Commissioner) filed a motion to dismiss the appeal in part. *See id.* at Dkt. 4. Briefing on this motion has been completed. *See id.* at Dkt. 9 and 10. As of the date of this Opening Brief, the Court has not ruled.

This is Mr. Cohen's and RBE's Opening Brief in support of their appeal.

[1] The proceeding pending before the Trial Court was initially filed under seal. In a November 1 and a December 2, 2013, order, the Trial Court lifted the seal on this matter and ordered the parties to work together to unseal the docket. In light of a current debate between the parties about what past filings can be made public, out of an abundance of caution, this Opening Brief and accompanying appendix are being filed under seal.

SUMMARY OF ARGUMENT

1. The Trial Court erred as a matter of law and in violation of the protections of due process under the Federal Constitution and the Constitution of the State of Delaware, where it did not allow for an opportunity to present any argument before entry of the Rehabilitation Order, appointing the Commissioner as receiver of IIC and vesting her with all right and title to all of the assets of Indemnity Insurance Corporation, RRG (A1854).

2. The Trial Court erred as a matter of law and fact and in violation of due process protections under the Federal Constitution and the Constitution of the State of Delaware, when it (i) sanctioned Mr. Cohen for, among other things, filing certain lawsuits in Maryland, for refusing to return vehicles to IIC, and for communicating with IIC employees and (ii) refused to consider evidence to the contrary (A1424-34).

STATEMENT OF FACTS[2]

A. The Commissioner Obtains a Confidential, *Ex Parte* Seizure Order Prior to An Evidentiary Hearing.

Mr. Cohen, through a wholly-owned Delaware limited liability company, RBE, is the 99 percent owner of IIC, a Delaware domiciled captive insurance company operating as a risk retention group (A100). On May 30, 2013, following an *ex parte* petition filed by the Commissioner in which the Commissioner alleged concerns that IIC was insolvent,[3] the Trial Court issued a Confidential Seizure and Injunction Order (the "Seizure Order") pursuant to 18 *Del. C.* §§ 5943 and 5944, granting the Commissioner broad authority to seize control of IIC (A53). By stipulation of the Commissioner and IIC, and order of the Trial Court, the Seizure Order dated August 9, 2013, was extended for at least an additional 90 days (A6).

Pursuant to the Seizure Order, on June 18, 2013, the Commissioner took exclusive possession and control of all the property of IIC, including all of IIC's assets, contracts, rights of action, books, records, bank accounts, certificates of deposit, collateral and rights to collateral, securities, and all real or personal property of any nature of IIC (A56). The Commissioner was able to extend this

[2] As noted above, this appeal follows on the heels of the currently pending appeal in Case No. 545, 2013. A motion for consolidation of these two appeals will be filed. However, in the event such motion is not granted, pertinent facts outlined in the fact section from Case No. 545, 2013 are being provided in this Opening Brief.

[3] *See, e.g.,* A54 (stating that the Commissioner had "uncovered several areas of high concern regarding [IIC]'s financial ability"). To date, the Commissioner has not shown that IIC is insolvent.

control, which included the seizure of property belonging to separately owned businesses of Mr. Cohen, after "domesticating" a much broader Maryland order in an *ex parte* proceeding (A384-5).

The purpose of the Seizure Order was to allow the Commissioner to examine IIC (A57). The Commissioner, however, has had exclusive possession and control for approximately **6 months** (A1-52).

B. The Commissioner Seeks to Push Out Mr. Cohen.

Shortly after the Commissioner took control over the assets and the office of IIC (the "Office"), the Commissioner began to push for Mr. Cohen's removal from control (A229). Mr. Cohen raised his concerns that, without his direct involvement in the ongoing operations of the company, IIC would be unable to operate in the ordinary course and the business that he started more than a decade ago would suffer irreparable harm (A386).[4]

Mr. Cohen's concerns regarding the stability of daily operations, in part, prompted a telephonic hearing with the Trial Court on July 10, 2013 (A64). Ironically, counsel for the Commissioner acknowledged to the Trial Court that Mr. Cohen was critical to IIC "because we have a company that is really dominated by one person and, at least as far as the department has been able to determine so far,

[4] Since the ouster of Mr. Cohen and under the control of the Commissioner, IIC has lost its highly coveted A-rating by A.M. Best, Inc. and has suffered from a mass exodus of clients. Obviously these losses have seriously and negatively affected the company's profitability.

doesn't really exist apart from Mr. Cohen" (A73 [10:5-8]). The Commissioner's counsel also admitted that the seizure was not going as smoothly as planned because the Department of Insurance had little, if any, experience with handling an actual seizure:

> I will confess, first of all, that I am relatively new in this particular position, and there has been no seizure during my time, in Delaware or elsewhere, that I'm aware of, although it may have happened.
>
> I'm not -- in speaking with people who have been at the department a lot longer than I've been their counsel, this is apparently a very unusual proceeding. And there may be many reasons for that.

(A72 [9:12-20]).

At this hearing, IIC's counsel advised the Trial Court that the company was "contemplating having the Court consider the merits of an interim management team…" (A87 [24:15-16]). The Trial Court responded that, "[c]hanging management is completely inconsistent with the status quo. The point of one of these orders is to maintain the status quo by freezing these people in the ordinary course of business" (A91 [28:10-13]). The Commissioner's counsel reassured the Trial Court that "the day-to-day procedures, including Mr. Cohen's decision on settling claims and on writing checks, you know, would go forward subject to somebody, in effect, looking over his shoulder. And that the Commissioner's intent was that the company operate in the ordinary course" (A93 [30:18-23]).

C. The Commissioner Files a Liquidation Petition.

On July 26, 2013, the Commissioner filed a Verified Petition for Liquidation

and Injunction Order (the "Liquidation Petition") seeking to have the Trial Court liquidate IIC and appoint the Commissioner as receiver (A3).[5] The Liquidation Petition, filed approximately two months after the Commissioner took control of IIC's operations and assets did not contain a single allegation that Mr. Cohen had interfered with the Commissioner's efforts since those efforts began (A388).

On or about August 21, 2013, IIC filed its "Opposition Statement" to the Liquidation Petition (A10). IIC's Opposition Statement was supported by the Expert Report of Key Coleman of Grant Thornton (the "Expert Report") (A420). The Expert Report refuted many of the key issues raised by the Commissioner, and additionally explained that the company had been and remained profitable (A422). In particular, the Expert Report noted, "[i]n the years 2011 and 2012, the Company's net income was $3.4 million and $2.9 million respectively. The Company has continued its profitability showing $1.8 million in net income for the first half of 2013" (A423); unfortunately the profitability has been destroyed by the Commissioner and her delegated receiver.

[5] The Commissioner delegated its duties as the receiver and control over IIC to an out-of-state for-profit contractor, INS Services, Inc.

D. Mr. Cohen, Though the Principal Owner of IIC, Agrees to Resign from the Board and as an Officer of IIC, But to Remain an Employee of the Company He Built.

In early August 2013, at the demand of IIC's counsel, Parkowski, Guerke & Swayze, P.A.,[6] Mr. Cohen agreed to relinquish his roles as an officer of the company and as a member of the Board of Directors in order to deflect some of the Commissioner's attacks and potentially stave off liquidation (A390). Mr. Cohen understood that in doing so, he would remain an employee (and remain subject to an existing Employment Agreement) and would be able to continue his input into the day-to-day operations of IIC (A390). The IIC Board met on August 2, 2013, and passed a resolution stating, among other things, that "it being understood that during the period in which Mr. Cohen is relieved of his title as President and Chief Executive Officer he shall remain employed without change to his compensation by the Corporation and shall provide such services to the Corporation as may be requested by the officers of the Corporation or their designees" (A574).

However, much to his surprise, following his resignation from the Board in August, Mr. Cohen was abruptly informed by IIC's counsel that he was being barred from the premises and no longer permitted to work at the Office (A391). Problem immediately arose. Several other businesses—businesses not subject to the Commissioner's regulatory authority and owned by Mr. Cohen—were being

[6] Parkowski Guerke & Swayze is the subject of a motion for disqualification filed by RBE and Mr. Cohen pursuant to Delaware Lawyer's Rules of Professional Conduct 1.9.

operated out of the Office (A1532-4)—a fact that was widely known both by the Commissioner and IIC management (A391). These companies included, among others, IDG Companies, LLC, a Delaware limited liability company ("IDG"), separately operated by Mr. Cohen that performs insurance-related services (A812-3), NI Agency, a retail broker operated by Mr. Cohen, and approximately 16 other businesses (the "Cohen Entities") (A1532-4).

Specifically, counsel for IDG began reaching out to the Commissioner's counsel, to work out means to ensure the continuity of IDG's business operations (A583). On August 21, 2013, IDG's counsel wrote to the Commissioner's counsel seeking clarification on who at the Office would perform important accounting functions on behalf of multiple entities operating from the Office (*id.*). Since Mr. Cohen was no longer permitted to appear at the Office, these functions needed to be performed by someone, or the entities' operations would be jeopardized (*id.*).

The Commissioner's counsel responded on August 26, 2013 that Mr. Cohen would not be permitted to enter the Office to manage the other entities operating from the Office (A587-8). The Commissioner's counsel's explanation for barring him—an explanation that had little if any basis in reality—was that Mr. Cohen "has resigned all of his responsibilities with respect to the operations of [IIC] and the Vice Chancellor has made it clear that Mr. Cohen has no operational role and, thus, as far as the Vice Chancellor is concerned, has no right to be on the premises

for any purpose, including operating the Cohen [E]ntities" (A587)—a position that is not found in any transcript in this matter.

E. RBE, as the 99 Percent Equity Holder of IIC, Seeks to Intervene in the Proceeding.

As relations between Mr. Cohen and IIC management soured more and more, Mr. Cohen caused RBE to file a Motion to Intervene in the ongoing proceeding (A99). Specifically, RBE argued that it had a right to intervene as the 99 percent equity owner of IIC "because it has an interest in the property and transactions which are the subject of [the Commissioner's] action" (A100). In light of the fact that the Commissioner was seeking liquidation of IIC, RBE stated, "The disposition of this action will necessarily impair or impede [RBE]'s ability to protect that interest as respondent [IIC] is presently unable or unwilling to adequately represent that interest" (*id.*).

Both IIC and the Commissioner filed oppositions to RBE's Motion to Intervene, arguing among other things that RBE did not have standing as a shareholder to intervene and that IIC was adequately representing the interests of the company (A108 & 216). The Trial Court, following a hearing denied RBE's motion on August 22, 2013 without prejudice (A10). Specifically, the Court noted:

> Now, what I am denying this without prejudiced to is this issue of the extent to which fraud would be proven against Mr. Cohen and that proof and a judicial finding by this Court would have res judicata effect on him and potentially, because of some remedy, the specific stockholder rights that are the -- I'm sorry -- RB Entertainment might

> have. So what you see in these receivership cases is a distinction between claims that are derivative on behalf of the entity and, therefore, affect all stockholders proportionately, and claims that interfere with specific stockholder rights, like the right to vote.

(A309-310 [37:18-38:6]).

F. IIC Terminates Mr. Cohen's Employment.

Relations between IIC and Mr. Cohen continued to sour, and in late-August/early-September, Mr. Cohen was purportedly terminated from his employment at IIC (A568).[7] On August 28, 2013, IIC's IT employees informed Mr. Cohen that they had been instructed to take whatever steps were necessary to prevent Mr. Cohen from accessing what were actually IDG's servers (and indirectly owned by Mr. Cohen) (A570). In a letter from IDG to IIC dated August 28, 2013, IDG's counsel raised IDG's concern that Mr. Cohen needed access to IDG's servers to run the various other businesses (A594).

On August 29, 2013, IIC responded to IDG's counsel's letter of August 28, 2013 and specifically the representations regarding IDG's ownership of the computer servers and related devices (A600). Mr. Teichman, counsel for IIC, claimed that IDG had "transferred ownership and custody of such servers and information to [IIC] as of April 1, 2012," but provided no support for his statement

[7] Mr. Cohen had an employment agreement that was in effect for over two years at the time of his termination (A1469-76). The employment agreement included among other clauses, a penalty for the early termination of Mr. Cohen (A1470-71). He moved to enforce his rights under Maryland law believing that various state statutes requiring the filing in Maryland, yet the Trial Court sanctioned him for filing this suit (A983).

(*id.*).[8] IIC also claimed that the servers were subject to the Seizure Order because the Trial Court granted the Commissioner "exclusive possession and control of ... all right, title and interest in, of or to, all of the property of [IIC] including, without limitation, all of [IIC]'s … books and records" (*id.*). The Seizure Order empowered the Commissioner to marshal assets, even assets the ownership of which may be disputed. *See id.* at ¶ 8.

On August 29, 2013, IDG's counsel responded to IIC's letter (A603-6). IDG's counsel provided a specific breakdown of when each server and related peripheral devices were purchased by IDG and how much IDG paid for such servers (A603). IDG's letter also pointed out that these assets have been listed on IDG's balance sheet and personal property returns since the date of purchase (*id.*).

G. IIC Begins Its Campaign of Filing Motions for Sanctions.

IDG's challenges to IIC's and the Commissioner's position with respect to IDG's assets continued into September (A15). Thereafter, IIC's counsel, at the direction of the Commissioner, began a campaign of filing motions for sanctions against Mr. Cohen (A15-26). The initial results of this campaign led to the entry of the two of three orders which are the subject of the appeal in Case No. 545, 2013 pending before this Court: specifically, (i) the September 10, 2013, Order

[8] Other evidence discovered to date shows that the IIC's general counsel had taken an alternative position with respect to whether transfers of assets had occurred. At this point, a 30(b)(6) deposition of IIC has been noticed to further investigate this issue.

Amending Seizure and Injunction Order and to Show Cause (the "Amended Seizure Order") (A360); and (ii) the September 25, 2013, Order Imposing Sanctions and Directing Discovery (the "Sanctions Order") (A983).

In short, the Trial Court entered the Amended Seizure Order which greatly expanded the scope of the original Seizure Order, and thereafter, the Amended Seizure Order played a part in a September 24, 2013, sanctions hearing leading to the entry of the Sanctions Order (A983). The Court is addressing those issues in the related appeal, together with an October 7, 2013, Order denying Mr. Cohen and IDG's motion to modify or for relief from the Trial Court's order imposing sanctions (the "Rehearing Denial") (A1196). Unless the Court so requires, Appellants will not re-address those issues here.

H. The Continuation of the Sanctions Campaign.

On October 21, 2013, counsel for Mr. Cohen wrote to the Court requesting assistance with obtaining access to certain personal documents located at the Office (A1203-4). Later that same day, counsel for IIC filed a motion for sanctions against Mr. Cohen arguing that Mr. Cohen's filing of certain out-of-state lawsuits against IIC and its officers and directors violated the Seizure Order and the Amended Seizure Order, including the filing of certain actions *pro se* (A1211-1219). Incredulously, IIC management claimed that Mr. Cohen was interfering with the affairs of the Commissioner by simply being present seated in a vehicle

while the process server served the individual defendants (A1218). [9]

Mr. Cohen responded with his argument that he had a due process right to file litigation and to place IIC employees and officers who were violating his rights on notice, and that IIC was reading the Trial Court's orders in a way that would lead to a deprivation of those rights (A1426-7). Furthermore, Mr. Cohen argued that there was additional evidence that was discovered and became available after the September 24 hearing that he believed needed to be presented to the Trial Court to demonstrate that the motions for sanctions were only being used to keep Mr. Cohen "at bay" (A1428-33).

Following briefing by Mr. Cohen, the Trial Court held a hearing on November 1, 2013 (A1605). During the course of that hearing, the Trial Court specifically ruled that Mr. Cohen could not present evidence showing that the Amended Seizure Order was overbroad or that the Sanctions Order was based on improper evidence (A1719).[10] When Mr. Cohen's counsel attempted to introduce such evidence during the examination of Mr. Cohen, the Trial Court cut off the questioning, ruling:

---

[9] Mr. Cohen's accompanying of the process server became the central issue in the Nov. 1 hearing (A1626). Evidence, however, was introduced at the hearing that IIC refused other efforts at service of the complaints (A1661-2 [57:15-58:12]).

[10] Evidence was discovered that certain members of the IIC management team had actually attempted to induce a vendor to lie under oath that certain computer problems occurring at IIC were being caused by Mr. Cohen himself. *See* A1598 (J. Anton Affidavit).

> And this is a ruling in terms of the scope of what we're going to hear today. We are not having a do-over of the last hearing. This type of evidence, if you wanted to make it, last hearing was the time to do it. You chose not to show up. You could have shown up. You could have come in here, you could have put on evidence, and you could have tried to explain to me why you were not, in fact, interfering. You didn't make that showing.

(*Id. at* [115:2-10]).

After the ruling, the Court asked that questioning be focused on the filing of lawsuits by Mr. Cohen and his accompanying of the process server to the Office when the papers were served (A1727). When Mr. Cohen articulated one argument, the Court reprimanded Mr. Cohen, stating to counsel that he had issues with Mr. Cohen's credibility in part in light of fraud allegations that Mr. Cohen had not had an opportunity to disprove. *See* A1723 [119:4-13].

With the Trial Court's rulings limiting what could be heard, counsel for Mr. Cohen was forced to cut short his presentation of evidence (A1732). The Trial Court ruled immediately after the close of testimony (A1751). Among other things, the Trial Court ordered (1) the forfeiture of $100,000 that Mr. Cohen had placed in escrow with the Register in Chancery; (2) the return to IIC of three vehicles (whose ownership Mr. Cohen challenged) by the next business day, Monday, November 4, 2013; (3) the dismissal of certain lawsuits brought by Mr. Cohen and certain of the Cohen Entities (referred to as the "Maryland Suits"); and (4) the deposit of a further $500,000 in escrow with the Register in Chancery on or

before Friday, November 8, 2013 (A1760-68). An order was issued thereafter (the "Nov. 1 Sanctions Order") (Ex. A).[11]

I. The Rehabilitation Order.

On November 6, 2013, the Commissioner filed a Petition for Entry of Rehabilitation and Injunction Order by Consent (the "Rehabilitation Petition") and a Motion for Expedited Consideration (A1782). The Rehabilitation Petition sought to shift the focus of the IIC proceedings from liquidation to rehabilitation, but it acknowledged that if the cause of the "impairment or insolvency cannot be removed, then it would be in the best interest of the policy holders to convert the rehabilitation proceedings into liquidation proceedings" (A1794) That same day, counsel for IIC filed a letter consenting to the entry of the Commissioner's proposed order stating "[f]rom Respondent's [IIC's] perspective, the matter is ready for adjudication" (A1853).

Within three hours of the filing of IIC's letter of consent, counsel for RBE, filed a letter seeking to intervene to protect RBE's rights as a stockholder with respect to the Rehabilitation Order (A1854). That same day, counsel for the Commissioner filed a letter opposing RBE's position (A1860). Without offering RBE an opportunity to be heard, the Trial Court granted the Rehabilitation Order

[11] Mr. Cohen has caused all three of the vehicles to be returned to IIC and has filed papers dismissing his Maryland Suits without prejudice. However, Mr. Cohen has not deposited the $500,000 escrow amount with the Register in Chancery, because as he testified under oath, he does not have the ability to deposit $500,000.

the next day, on November 7, 2013 (Ex. B).

The Rehabilitation Order appointed the Commissioner as "Receiver" (again, which duties she delegated to a for-profit contractor) permitting her to continue her exclusive possession and control of the property of IIC and all of the other Cohen Entities. *See* Ex. B. This property, which the Commissioner is permitted to take title to (which the Rehabilitation Order defines at ¶ 6 as "Assets"), includes a broad list of assets ("all real and personal property of any nature of [IIC] ….") and includes an even broader "catchall" providing that "Assets" includes any of the foregoing property "in the possession, custody, or control of [IIC] …" (*id*.) and even "**possible** Assets" (*id.* at ¶ 11) (emphasis added).

The sweeping effect of the Rehabilitation Order was to "immediately take or continue exclusive possession and control of" and to vest the Commissioner with "all right, title and interest in, of or to, all of the property of IIC" (Ex. B at ¶ 6). Additionally, the Rehabilitation Order provided a broad injunction prohibiting any person from "in any way interfering with the Receiver, the Deputy Receiver(s), or the Designees either in their possession and control of the Assets or in the discharge of their duties hereunder" (*id.* at ¶ 14). Included in the order were exceedingly broad indemnification provisions, effectively cloaking the for-profit contractor with immunity (*id.* at ¶¶ 16 & 22).

This appeal was filed the next day on November 8, 2013.

ARGUMENT

I. The Trial Court Erred as a Matter of Law When It Entered the Rehabilitation Order Appointing the Commissioner as Receiver Over the Assets of IIC Without Allowing RBE Any Opportunity to Intervene.

Question Presented

Whether the Trial Court erred as a matter of law and in violation of the protections of due process under the Federal Constitution and the Constitution of the State of Delaware, where it did not allow for an opportunity to present any argument before entry of the Rehabilitation Order, appointing the Commissioner as receiver of IIC and vesting her with all right and title to all of the assets of IIC (A1854).

Standard and Scope of Review

The standard and scope of review is *de novo* where this Court is asked to review an alleged constitutional violation. *See Cooke v. State*, 977 A.2d 803, 840 (Del. 2009).

Merits of the Argument

A. The Trial Court Entered the Rehabilitation Order Without Affording RBE Any Opportunity to Intervene.

The broad grant of power to the Commissioner and her agents under the Rehabilitation Order had a direct and significant impact on the property interests and rights of RBE which owns 99 percent of the equity in IIC. Despite RBE's interest, the Trial Court entered the Rehabilitation Order one day after the filing of

the Rehabilitation Petition without affording RBE any opportunity to move to intervene and despite RBE's request to intervene. Had RBE been permitted to intervene, RBE would have had an opportunity to challenge many of the allegations in the Rehabilitation Petition including, among others, the Commissioner's basis for asserting control over IIC, the seizure of assets not belonging to IIC, and the illegal process in which the Commissioner engaged a for-profit contractor.

Even though RBE had no opportunity to make its argument for intervention, the Trial Court stated in granting the Rehabilitation Order:

> The request by [RBE] for leave to intervene and oppose the application is denied. To the extent [RBE] has a claim against the [IIC] estate, [RBE] 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.

(Ex. B at ¶ 28). This single paragraph was the Trial Court's sole explanation for the denial of the request for leave to file a motion for intervention.

B. The Requirements of Due Process and the *Eldridge* Factors.

This Court held in *Formosa Plastics Corp. v. Wilson*, 504 A.2d 1083, 1089-1090 (Del. 1986):

> Before a party can be deprived of life, liberty, or property, it has the right to notice and a hearing in a meaningful time and a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556 (1972). The due process requirements of the Fifth and

> Fourteenth Amendments[12] of the United States Constitution dictate that result as do Art. I, sections 7-9 of the Delaware Constitution.

See also Slawik v. State, 480 A.2d 636, 645 (Del. 1984) ("A rudiment of procedural due process is the right to receive notice and to be heard 'at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965), prior to the deprivation of a protected interest."); *In re Buckson*, 610 A.2d 203, 218 (Del. 1992) (citing *Slawik*).

In weighing whether a challenged procedure satisfies the requirements of "procedural due process," this Court has looked to, among other precedent, the U.S. Supreme Court's decision in *Matthew v. Eldridge*, 424 U.S. 319 (1976), a case in which the U.S. Supreme Court outlined a three factor analysis whether a procedure satisfied the requirements of the Constitution's Due Process Clause. This Court (albeit in another context) has outlined the so-called "*Eldridge* factors" stating that the Court will examine the following:

> (1) the private interest that will be affected by the official action; (2) the risk that there will be an erroneous deprivation of the interest through the procedures used and the probable value of additional or substitute procedural safeguards; and (3) the government interest involved, including the added fiscal and administrative burdens that addition or substitute procedure would require.

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12 The Due Process Clause in Section 1 of the 14th Amendment to the Federal Constitution provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Furthermore, "Delaware constitutional due process is coextensive with federal due process." *Sheehan v. Oblates of St. Francis de Sales*, 15 A.2d 1247, 1259 (Del. 2011).

Moore v. Hall, 62 A.3d 1203, 1209 (Del. 2013). *See also Xcomp, Inc. v. Ropp*, 2002 Del. Ch. LEXIS 170, at *8-13 (Del. Ch. July 17, 2002) (applying *Eldridge* factors). Here, an application of the *Eldridge* factors leads to the conclusion that the Trial Court's issuing of the Rehabilitation Order without an opportunity to be heard does not satisfy due process requirements.

1. The Rehabilitation Order Significantly Impacts RBE and Others (*Eldridge* Factor 1).

With respect to the first *Eldridge* factor, the entry of the Rehabilitation Order directly and significantly impacted RBE's property rights: specifically, RBE is the owner of 99 percent of the equity of IIC. Despite this ownership interest, the Commissioner as Receiver of IIC has been vested with complete control over all "Assets" of IIC. The term "Assets" is broadly defined in ¶ 6 and includes:

> the property of [IIC], including, without limitation, all of [IIC]'s assets, contracts, rights of action, books, records, bank accounts, certificates of deposits, collateral securing obligations to, or for the benefit of, [IIC] or any trustee, bailee, or any agent acting for, or on behalf of [IIC] (collectively, the "Trustees" and each a "Trustee"), securities or other funds, and all real or personal property of any nature of [IIC] including, without limitation, furniture, equipment, fixtures, and office supplies, wherever located, and including such property of [IIC] or collateral securing obligations to, or for the benefit of [IIC] or any Trustee thereof that may be discovered hereafter, and all proceeds of or accessions to any of the forgoing, wherever located, in the possession, custody, or control of [IIC] or any Trustee therefore.

Ex. B at ¶ 6.

By controlling the "Assets" of IIC and subsequently mismanaging them, the

Commissioner, has significantly and irreparably harmed the value of the company. RBE's interest in IIC (the property interest at stake here) has been deeply affected and will continue to be as long as the Commissioner maintains control over, and mismanages, IIC and its "Assets."

2. The Trial Court Erred By Not Allowing RBE to Present Any Argument Whether a Shareholder Has a Right to Intervene (*Eldridge* Factor 2).

With respect to the second *Eldridge* factor, "the risk that there will be an erroneous deprivation of the interest through the procedures used and the probable value of additional or substitute procedural safeguards," *Moore*, 62 A.3d at 1209, the risk here is substantial. Here, the Trial Court appointed the Commissioner receiver of IIC without hearing any opposition. Where there is absolutely no opportunity to even raise arguments, the risk of error is substantial.

RBE had a basis under the law for intervention. Pursuant to Court of Chancery Rule 24(a):

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In an assessment of the intervenor's interest, the bar is relatively low. Critically, "the Court should not prejudge the merits of Intervenor's claims, but should only

consider whether those claims appear to be of sufficient substance so as not be considered legally frivolous." *Shipley v. Shipley*, 1991 WL 189000 (Del. Ch. 1991) (citing *Schiff v. RKO Pictures Corporation*, 136 A.2d 193, 195 (Del. Ch. 1954) and *Pennamco, Inc. v. Nardo Mgmt. Co., Inc.*, 435 A.2d 726, 728 (Del. Super. 1981)). Moreover, "[o]n a motion to intervene, a party need only claim, rather than prove, an interest in the subject of the litigation; the validity of that claimed interest is assessed by reference to the allegations accompanying the motion to intervene, and such allegations are accepted as true." *Harris v. RHH Partners, LP*, 2009 WL 891810 (Del. Ch. 2009) (citing *Bonczek v. Helena Place, Inc.*, 1989 WL 110547 (Del. Ch. 1989)).

a. Equity Holders are Recognized Parties Under Delaware's Version of the Uniform Insurers Liquidation Act.

Delaware codified the Uniform Insurers Liquidation Act in 18 *Del. C.* §§ 5901-5932, which was created, in part, because insurers are barred from seeking federal bankruptcy protection. *See In re Rehab. of Manhattan Re-Insurance Co.*, 2011 Del. Ch. LEXIS 146, *9 (Del. Ch. Oct. 4, 2011). Specifically with respect to proceeding of this type (referred to under the Delaware Code as "delinquency proceedings"), 18 *Del. C.* § 5903 states:

> The Commissioner shall commence any such proceedings by application to the court for an order directing the insurer to show cause why the Commissioner should not have the relief prayed for. On the return of such order to show cause and after a full hearing, the court shall either deny the application or grant the application,

> together with such other relief as the nature of the case **and the interests of the policyholders, creditors, <u>stockholders</u>, members, subscribers or the public may require.**

Emphasis added. Despite this clear statement by the General Assembly, the Commissioner has repeatedly argued that shareholders (such as RBE) have no right to intervene in a proceeding of this type. *See* Motion to Dismiss Appeal, Dkt. 4 at ¶ 5. However, the Commissioner has likewise been forced to concede that "Delaware has not determined the standing of a shareholder to oppose a delinquency petition…" (A218 at ¶4).

Shareholders are also recognized under the liquidation statute as claimants with respect to distributions in a delinquency proceeding pursuant to 18 *Del. C.* § 5918(e). *See id.* (specifically listing "[t]he claims of shareholders or other owners arising out of such capacity" in the "order of distribution"). The Commissioner has previously attempted to support her argument that shareholders do not have standing by arguing that the statute provides that "[n]o claim by a shareholder, policyholder or other creditor shall be permitted to circumvent the priority classes through the use of equitable remedies." Motion to Dismiss Appeal, Dkt. 4 at ¶ 6. However, the argument is misguided because RBE is not seeking to circumvent the priority of distribution, since the petition for liquidation has been withdrawn. This proceeding is not in a distribution setting, and so priority plays no role. Furthermore, the Commissioner's argument—that stockholders are at the

bottom of the distribution list—cannot support a lack of standing argument. There is a significant difference between being at the bottom of the list versus not being on the list at all.

b. The Commissioner's Out of State Authority Falls Short.

The Commissioner has repeatedly argued throughout the course of the proceeding before the Trial Court that other out-of-state courts interpreting their states' versions of the Uniform Insurers Liquidation Act have found that shareholders have no right to intervene. However, as noted, the Commissioner must concede, this issue presents an issue of first impression for this Court.

The Commissioner cited several cases in her Motion to Dismiss. *See* Supr. Ct. Dkt. 4. None of these cases, however, presents analogous fact scenarios to the case at bar. The court in *Metcalf v. Investors Equity Life Ins. Co.*, 910 P.2d 110 (Hawaii 1996), denied a shareholders' intervention motion. However, the Hawaiian insurance liquidation statute appears to differ from Delaware's in that the Hawaiian statute does not list stockholders as parties whose interests are to be protected. Citing another case (relied upon as well by the Commissioner), *Hartnett v. Southern American Fire Ins. Co.*, 495 So. 2d 902 (Fla. Dist. Ct. App. 1986), the court in *Metcalf* stated:

> Like the Florida statute construed in *Hartnett*, *supra*, the purpose of Article 15 is for "the protection of the interests of *insureds, claimants, creditors,* and the *public* generally with minimum interference with the normal prerogatives of the owners and managers of insurers[.]"

> HRS § 431:15-101(d) (emphases added). "Absent from the purpose of the act is the protection of shareholders of the insolvent insurance company. Section [431:15-101(c)] provides that the act 'shall be liberally construed to effect the purpose stated in subsection ([d]).'" *Hartnett*, 495 So. 2d at 903 (emphasis in original).

Metcalf, 910 P.2d at 111. Given the fact that 18 *Del. C.* § 5903 specifically lists "stockholders," both *Metcalf* and *Hartnett* are not on point.

Furthermore, the *Metcalf* court further supported its determination that the shareholder in question did not have standing since the directors of the company were required to take "such acts as are reasonably necessary to defend against the petition." *Metcalf*, 910 P.2d at 111. Here, however, RBE has repeatedly claimed that the directors were failing in that obligation: the entry of the Rehabilitation Order largely turned on the fact that the Board, for whatever reason, consented to the Rehabilitation Order without challenging any of the Commissioner's allegations.[13] Because RBE has argued that IIC's directors are not taking comprehensive measures to protect the company and RBE's interest, *Metcalf* is unpersuasive.[14]

Similarly, the Commissioner cited in her Motion to Dismiss *State* ex rel.

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[13] Included among these allegations are various fraud claims directed at Mr. Cohen. Mr. Cohen has never had an opportunity to challenge these allegations. Instead, Mr. Cohen has repeatedly faced what is nothing short of a trial by innuendo.

[14] In fact, bankruptcy courts have found that while it is unquestionably true that debtors' officers and directors have a duty to maximize debtors' estates to the benefit of shareholders as well as creditors, the reorganization process does not ensure shareholders are adequately represented by even equity-owning management. *In re Pilgrim's Pride Corp.*, 407 B.R. 211, 2009 Bankr. LEXIS 981 (Bankr. N.D. Tex. 2009).

Holland v. Heritage National Insurance Co., 184 P.3d 1093, 1097 (Okla Civ. App. 2008), which states "[s]hareholders do not have standing to intervene in a receivership proceeding." The *Holland* court—which ultimately gave the shareholder an opportunity to be heard—makes the statement regarding standing without any analysis, and based on *State* ex rel. *Crawford v. American Standard Life and Accident Ins. Co.*, 37 P.3d 971 (Okla. Civ. App. 2001).

In *Crawford*, however, a liquidation order had already been entered before the shareholder sought to intervene for the purpose of pursuing a claim against a third party on the company's behalf. Since the *Crawford* court determined that the shareholder was limited to its claims under the distribution scheme, the court determined that shareholder did not have standing. *Id.* at 973-4. Here, however, IIC is not in liquidation. This is a rehabilitation proceeding and the shareholder here has sought to intervene from the outset of this new stage in the proceeding. Again, neither *Holland* nor *Crawford* is persuasive authority.

c. The Shareholders' Interest Needs Protection.

Other out-of-state authority supports intervention. For example, in *Commonwealth* ex rel. *Chidsey v. Keystone Mutual Casualty Co.*, 76 A.2d 867 (Pa. 1950), the Pennsylvania court permitted the intervention of policyholders in a mutual insurance company who were deemed analogous to shareholders.[15]

[15] *Chidsey* is further analogous because the court's dissolution order was based entirely upon

Moreover, turning to the bankruptcy context, bankruptcy courts regularly approve the appointment of equity committees to represent the interests of equity holders. *See, e.g.*, *Cirka v. Nat'l Union Fire Ins.*, 2004 Del. Ch. LEXIS 118, at *19-20 (Del. Ch. Aug. 6, 2004) (discussing equity committees in bankruptcy context); *Pilgrim's Pride Corp.*, 407 B.R. 211.[16] Here, there is an ongoing dispute between the 99 percent equity holder and the board, which makes intervention particularly appropriate. This is even more so the case where the principal of the equity holder is accused of fraud but not permitted an opportunity to challenge those allegations.

In *Franchise Tax Bd. v. Alcan Aluminum*, 493 U.S. 331, 336 (1990), the Supreme Court stated:

> [T]he rule is a long-standing equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment. There is, however, an exception to this rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated.

493 U.S. at 336 (internal citations omitted). Here, RBE and Mr. Cohen (as the sole member of RBE), have direct personal interests in this cause of action (*See* Section

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consent of the officers and directors of the company, while the policyholder committee (equity holders), as here, asserted that the company was solvent. The court stated "[i]f it were shown that the company was and is solvent and the decree was entered because of fraud, accident or mistake, intervention should not be denied… As this was a consent decree it might be shown that the decree was improvidently made and upon erroneous information." 76 A.2d at 870.

[16] In *Pilgrim's Pride Corp.,* the court noted that appointment of a representative for equity holders is appropriate where the complexities of the case make it difficult for management to protect equity interests as well as those of creditors (or policyholders, in the insurance context).

I.A. *supra*). The Board of IIC failed to exercise good faith business judgment here by failing to object to the Seizure Order and later the Rehabilitation Order. As the Commissioner conceded, there are sufficient assets in the company to cover the tail liabilities, a fact that the board of directors of IIC should have known and relied upon in withstanding the Commissioner's challenges to take over the company.[17]

3. Allowing RBE to Be Heard on a Motion to Intervene Would Have Come at Minimal Cost to the Proceedings (*Eldridge* Factor 3).

Finally, with respect to the third *Eldridge* factor (*i.e.*, the cost-benefit of added safeguards), with minimal cost, any harm to IIC could have been avoided. One of the great values to litigating in Delaware is the ability to have matters expedited and comprehensively addressed. However, where a party continues to file expedited motion after expedited motion in a case that is not an expedited track, there is a significant risk of a due process violation.

Unfortunately, because the Rehabilitation Order was granted without a hearing,[18] there were no procedural "safety valves" built into the order that protected Mr. Cohen's due process right.

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[17] Additionally, while the Rehabilitation Order left open the possibility of an opportunity to be heard later in the process (see ¶ 28), the ruling ignores the irreparable harm that has already been done to IIC. Mr. Cohen and RBE fear that under the Commissioner's management bills have gone unpaid, IT systems have failed, and customers and claims have been ignored.

[18] *See* Rehabilitation Order ¶ 3: "Given the determinations set forth above, a formal hearing on the Commissioner's rehabilitation petition is not necessary."

II. The Trial Court Erred as a Matter of Law and Fact When It Sanctioned Mr. Cohen for filing Certain Lawsuits in Maryland, for Refusing to Return Vehicles Allegedly Belonging to IIC, and for Communicating with IIC Employees.

Question Presented

Whether the Trial Court erred as a matter of law and fact and in violation of due process protections under the Federal Constitution and the Constitution of the State of Delaware, when it (i) sanctioned Mr. Cohen for, among other things, filing certain lawsuits in Maryland, for refusing to return vehicles to IIC, and for communicating with IIC employees and (ii) refused to hear evidence to the contrary (A1424-34).

Standard and Scope of Review

The standard and scope of review is *de novo* where this Court is asked to review an alleged constitutional violation. *See* Cooke, 977 A.2d at 840. Additionally, this Court decides mixed questions of law and fact *de novo*. *See* D.L. Wolfe and M.A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 14.10[c] (Matthew Bender 2013) (quoting *Hunter v. State*, 783 A.2d 558, 561 (Del. 2001) and *Miller v. State*, 4 A.3d 371, 373 (Del. 2010)) ("[T]he Court has stated it will review mixed question of fact and law *de novo*, 'to the extent that we examine the trial judge's legal conclusions,' and for clear error, '[t]o the extent the trial judge's decision is based on factual findings.'").

Merits of the Argument

In the Nov. 1 Sanctions Order, the Trial Court sanctioned Mr. Cohen for three alleged violations of earlier orders of the Trial Court:[19]

- The filing of the three lawsuits (the "Maryland Suits" as defined in the Nov. 1 Order) without leave of the Court (Ex. A at ¶ 1);
- The failure to return three vehicles allegedly belonging to IIC back to IIC (*id.* at ¶ 2); and
- Communicating with IIC employees and accompanying the process server in serving certain IIC managers with process related to the Maryland Suits (*id.* at ¶ 3).

Mr. Cohen brought the Maryland Suits personally and on behalf of IDG. The Nov. 1 Sanctions Order did not find that these lawsuits lacked merit or were otherwise vexatious; instead, the Trial Court found that Mr. Cohen (and IDG) were not allowed to bring these suits (or at least to bring these suits in Maryland) without leave of the Court because the lawsuits were interfering with the actions of the Commissioner and her agents. The Trial Court erred as a matter of law.

> [D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that "wherever one is assailed in his person or his property, there he may defend," *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876).

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[19] Specifically the Seizure Order, the Amended Seizure Order (which is on appeal), and the September 25, 2013 Order Imposing Sanctions and Directing Discovery (the "Sept. 25 Sanctions Order") (which is on appeal)

Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

The Maryland Suits were brought after the Trial Court had determined that RBE was not permitted to intervene in the pending receivership. Without any means to protect his property rights, Mr. Cohen, a citizen of the State of Maryland, filed the litigation in the courts in his home state. Although courts have struggled at times in interpreting the Due Process Clause, "there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

The Trial Court issued what amounted to an anti-suit injunction which blocked a non-party's right to pursue relief outside of the State of Delaware. While anti-suit injunctions are not without their controversy (*see Cook v. Delmarva Power & Light Co.*, 505 A.2d 447, 449 (Del. Super. 1985) ("[N]either comity nor the full faith and credit clause of the Federal Constitution requires a court to respect [an anti-suit] injunction") (quoting 21 C.J.S. *Courts*, § 554, at p. 860)), the Trial Court refused to credit Mr. Cohen's position that he was being deprived of his rights to pursue relief from his home state court.

When counsel challenged this issue in the November 1, 2013 hearing, the Trial Court compared itself to a Federal Bankruptcy Court, stating:

> THE COURT: If you want to bring a case in a different court that otherwise would be subject to the jurisdiction of the place where the

bankruptcy is taking place, what do you do first?

MR. KITTILA: Typically, Your Honor, you would seek leave of the court.

THE COURT: Bingo. Leave of which court?

MR. KITTILA: You would actually seek it of the Bankruptcy Court.

THE COURT: Exactly.

(A1668 [64:8-18]). Mr. Cohen's counsel then challenged the Trial Court's analogy, stating, "But there is a difference between you and a Bankruptcy Court. And that is that Congress has passed the provisions related to an automatic stay. It also has exclusivity over issues involving bankruptcy." (A1669 [65:16-19]).

Regardless of what may be determined is the extent to which an out-of-state non-party can be bound by an anti-suit injunction, Mr. Cohen's belief that he could bring these suits (and cause IDG to bring a suit) was deemed by the Trial Court to be wrong. While admittedly, "[i]t is not a defense that the party in contempt did not have the subjective intent to violate the Court's Order" (*Div. of Family Servs. v. A.B.*, 980 A.2d 1045, 1050 (Del. Fam. Ct. 2009)), a court generally does not make a contempt finding for a mere technical violation; rather the violation must be a failure to obey the court in a meaningful way. *M.B. v. E.B.*, 28 A.3d 495, 500 (Del. Fam. Ct. 2011). Had the Court ordered Mr. Cohen to dismiss the Maryland

Suits, Mr. Cohen would have done so, and in fact he did.[20] Here, however, the Trial Court took the additional step of imposing sanctions against Mr. Cohen: (1) $100,000 that was already in escrow was immediately forfeited and (2) a further $500,000 was ordered by the Court to be placed in escrow.[21]

In short, because of IIC's persistent filing of one motion for sanctions after another, Mr. Cohen has been forced to either blindly defer to every demand of the Commissioner or IIC management, or face a motion for sanctions. This argument is equally applicable to the Trial Court's ruling regarding Mr. Cohen's return of certain vehicles to IIC as part of the Commissioner's marshalling of assets. The ownership of these vehicles was disputed, and Mr. Cohen engaged Maryland counsel to defend his ownership. *See* A1478.

Mr. Cohen's counsel argued in a letter sent to IIC that the vehicles were provided to Mr. Cohen under the terms of an Employment Agreement (that is the subject of one of the lawsuits in Maryland). Rather than responding to Maryland counsel's assertions, IIC moved for sanctions, and again, the Trial Court

[20] Mr. Cohen has since dismissed these Maryland lawsuits. The dismissal has not stopped IIC's management from filing yet another motion for sanctions related in part to whether Mr. Cohen filed these dismissals promptly enough where the dismissal papers were mailed to the Maryland court.

[21] In the November 1, 2013, hearing, the Trial Court also found that the Maryland suits were not filed under seal. Mr. Cohen's counsel, Alex Brown, Esq. is facing a sanctions hearing where he maintains that a snafu with a Maryland court clerk led to the filing of litigation without the matter being initially sealed.

sanctioned Mr. Cohen's failure to promptly return the vehicles without any opportunity for Mr. Cohen to defend his claim to the vehicles.

IIC's non-stop stream of sanctions motions against both Mr. Cohen and his counsel is akin to the Sword of Damocles: any challenge to the actions of the Commissioner or her agents (which IIC management maintains includes them) subjects the parties to a motion for sanctions. The justice system is not designed to work in this manner; due process stands in its way. Mr. Cohen should be allowed to assert a valid legal defense. If ultimately, a court disagrees with Mr. Cohen's position, it may so rule, and then issue an order specific to the dispute. If at that point, Mr. Cohen fails to comply, sanctions would be appropriate. [22]

Finally, the Trial Court erred when it refused to hear certain evidence that Mr. Cohen had regarding matters that had been raised at the September 24, 2013 hearing and which served as the basis for both the Sanctions Order and the Nov. 1 Sanctions Order. This evidence included, among other things:

- Evidence regarding the negligent handling of the affairs of IIC and its direct impact on the interests of Mr. Cohen and the Cohen Entities; and
- Evidence that certain persons had sought to elicit perjured testimony from vendors regarding Mr. Cohen.

[22] Similarly, as argued in the appeal with respect to the Amended Seizure Order which barred Mr. Cohen from communicating with any IIC employees, Mr. Cohen has briefed why he maintains that the Amended Seizure Order was overbroad. The Trial Court's decision should be reversed.

Mr. Cohen's arguments were outlined in the response to the motions for sanctions filed prior to the hearing. *See* A1423-1604. Despite these arguments, the Trial Court ruled that it did not want to hear any of Mr. Cohen's evidence (A1719 [115:2-10]). This evidence had a direct impact on the determination that Mr. Cohen had violated the Seizure Order, the Amended Seizure Order, the Sept. 25 Sanctions Order and the Nov. 1 Sanctions Order. The Trial Court erred when it refused to consider this evidence.

CONCLUSION

For all the reasons stated herein, RBE and Mr. Cohen respectfully request that this Honorable Court reverses the Rehabilitation Order and the Nov. 1 Sanctions Order, in accordance with the arguments outlined in this appeal

Respectfully submitted,

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