IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ERIE INSURANCE EXCHANGE, *et al*.,	*	
Plaintiffs,	*	
v.	*	Case No. 1:23-cv-01553-JRR
MARYLAND INSURANCE ADMINISTRATION, *et al*,	*	
Defendants.	*	

* * * * * * * * * * * * *

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO LIFT STAY

The Maryland Insurance Administration (the "Administration") and Kathleen A. Birrane, the Maryland Insurance Commissioner (the "Commissioner") (collectively, "Defendants"), by and through their undersigned counsel, and pursuant to Federal Rule of Civil Procedure 7(b) and Local Rule 105, submit this Response to Plaintiffs' Motion to Lift Stay and Memorandum of Law in Support of Motion to Lift Stay for the following reasons:

INTRODUCTION

Defendants do not object to lifting the stay. Defendants do object to the Memorandum in Support of the Motion to Lift Stay because it is a misrepresentation of the agreement that was discussed in court. It also misrepresents the good faith efforts of Defendants to enter into a Consent Order with Plaintiffs. It is for these reasons that Defendants feel compelled to respond to Plaintiffs' motion.

This lawsuit involves Plaintiffs' attempt to collaterally attack a state administrative investigation and related proceeding. Plaintiffs seek an order that would enjoin the Administration from the use of documents obtained from Plaintiffs in a market conduct

examination and dissemination of Determination Letters that have already been issued and discussed in news reports.

In essence, Plaintiffs seek to circumvent State law and procedure. They would have this Court decide a matter where adequate state review is available, which would be contrary to the abstention doctrines held by the U.S. Supreme Court in *Burford v. Sun Oil Co*., 319 U.S. 315 (1943) and *Younger v. Harris*, 401 U.S. 37 (1971); and subsequently held by this Court in *Kaplan v. Carefirst*, 614 F. Supp. 2d 587 (D. Md. 2009); *Fuller v. Bartlett*, 894 F. Supp. 874 (D. Md. 1995); *Larsen v. Cigna Healthcare Mid-Atlantic*, Inc. 224 F. Supp. 2d, 998 (D. Md. 2002); and *Jews v. Tyler*, No. 08-2075 (D. Md. Jan. 19, 2009)(order granting motion to dismiss).

From the limited back and forth that has occurred with regard to the proposed administrative consent order, it appears that Plaintiffs have decided to reopen this case to get this Court, rather than the administrative hearing officer, to determine what documents may be admitted into evidence in the administrative proceedings.

STATEMENT OF FACTS

A. Procedural History

On June 8, 2023, Plaintiffs filed a Motion for a Temporary Restraining Order, or in the alternative, Preliminary Injunction and Request for Hearing. On June 12, 2023, Defendants filed their Opposition to Plaintiffs' Motion for Temporary Restraining Order. Also on June 12, 2023, the parties came before this Court for oral argument on Plaintiffs' Motion for Temporary Restraining Order. At the June 12, 2023 hearing, upon request of the parties, this Court entered an Order of Administrative Stay, which stated:

> This matter came before the court this 12th day of June 2023 for oral argument on Plaintiffs' Motion for Temporary Restraining Order (ECF No. 2). As set forth on the record in open court, the parties are working to resolve their disputes pending in this court and administrative tribunal, and have reached a

> principal framework of the terms to that effect. Per the parties' mutual request, and the consent of this court, this action shall be, and is hereby, administratively STAYED in order to allow the parties the opportunity to resolve, fully and finally, their disputes.
>
> The PARTIES SHALL FILE A JOINT STATUS REPORT upon settlement of their disputes or every 60 days, whichever is earlier. Stay of this action is without prejudice to any party's right or entitlement to make or raise any argument, request, objection or defense.

(ECF No. 14). The parties subsequently exchanged three drafts of a potential Consent Order and reached an impasse. Rather than cooperate with Defendants and "jointly ask this Court to schedule a preliminary injunction hearing promptly," as provided in the record (Plaintiffs' Exhibit A, Court Transcript 4:12-14), Plaintiffs filed their own Motion to Lift Stay, including a Memorandum.

B. The Court Record

The record in open court reflects the Court's recognition in its Order that the parties "reached a principal framework of the terms." Counsel for Plaintiffs stated on the record that the language to be put on the record will require "wordsmithing," and the terms "are intended to be concepts" in the following exchange with the Court:

> MR. BROWN: So what we have done is, Mr. Dorsey and I have agreed on some language that will be a settlement that we wanted to put on the record of the issues pending before you today. Mr. Dorsey will tell you this will need to be wordsmithing. These are intended to be concepts. We are trying to move efficiently and get these things on the record.
> THE COURT: And before you do begin, just to clarify, that the terms or the sort of the silhouette of terms that you're about to describe on the record here, these are not terms that will be enforceable by this Court.
> MR. BROWN: That's correct. They will be part of a consent order in the underlying administrative cases.

(Plaintiffs' Exhibit A, Court Transcript 3:11-23). Therefore, the Court explicitly clarified that the terms were going to be a "silhouette of terms," which would not be enforceable by the Court.

Counsel for Plaintiffs continued reading the "framework," the "concepts," the "silhouette of terms" requiring "wordsmithing" for the record:

> The next term is that the Maryland Insurance Administration will not produce any documents obtained through the market conduct examination, the ongoing market conduct examination of the Erie entities to anyone until the administrative cases -- the four administrative cases are concluded -- without providing the Erie Plaintiffs in this federal suit notice and an opportunity to object to that production.
>
> The next term is that the Maryland Insurance Administration will not further disseminate the so-called determination letters referenced in the briefing to anyone, including but not limited to the hearing officer or through a Public Information Act request, without notice to the Erie Plaintiffs in this federal lawsuit and a reasonable opportunity to object to that production.
>
> The administration has agreed that the Erie entities will be given -- bear with me a second -- that the administration will give the Erie entities a hearing on the four underlying determination letters. And these would be four separate hearings on the four different cases as soon as reasonably practicable. Of course after discovery and that sort of thing.
>
> Finally -- no, second to last, the stay of this case does not waive or otherwise compromise any arguments or defenses of any party, including as to jurisdiction, abstention, or otherwise.
>
> THE COURT: Correct.
>
> MR. BROWN: And, finally, the parties will refer press inquiries to the consent order as opposed to publicly commenting on this agreement. Thank you, Your Honor.
>
> THE COURT: Thank you.

(Plaintiffs' Exhibit A, Court Transcript 4:15-25–5:1-15). After counsel for Plaintiffs read the concepts or framework of terms into the record, counsel for Defendants stated "Yes, that, in broad brush, I think is what we will agree to. It definitely will be in the details of the administrative consent order." (Plaintiffs' Exhibit A, Court Transcript 5:22-24).

Plaintiffs have characterized the draft consent orders submitted to them by Defendants as materially changing or altering the "agreed-upon terms." (Pls' Memo in Supp of Mtn to Lift Stay at pp. 5-6). As the following analysis with demonstrate, however, Defendants' draft Consent Orders were within the spirit of the parties' concepts, framework, broad brush or

silhouette of terms as stated in the record. Unfortunately, the parties' reached an impasse on the details.

ANALYSIS

Plaintiffs essentially seek notice and confidentiality with respect to certain documents that may need to be admitted into evidence in the administrative hearings that Plaintiffs have requested. Defendants' proposed draft Consent Order provides for a process under Maryland law to afford Plaintiffs such notice and confidentiality and an opportunity for the admissibility of the documents to be considered before they are made part of the administrative record. That process requires the administrative hearing officer to render decisions. However, Plaintiffs do not want the hearing officer to ever view the documents at issue or to render a decision. Plaintiffs' refusal to respect the authority of the hearing officer to be an impartial arbiter of the law in such administrative matters has created the impasse in this matter.

Defendants pointed out in their Opposition to Plaintiffs' Motion for Temporary Restraining Order that Plaintiffs will be afforded all the rights of a party to a hearing to present evidence and argument and to object to the introduction of any evidence or even the discovery of documents. Md. Code Ann. Ins. §2-213; Md. Code Ann. State Gov't Art. §10-213; COMAR 31.02.01.05-1 (D)("A party may object to the production of a file, memorandum, correspondence, document, object, or tangible thing by filing a motion to quash discovery or for other relief").

Defendants' draft Consent Orders sought to work out a procedure to address Plaintiffs' concerns within Maryland's statutory and regulatory framework required for all such matters. Plaintiffs' Memorandum in Support of their Motion to Lift Stay references paragraph C of Defendants' first draft Consent Order to argue that the Market Conduct Materials and

Determination Letters at issue would be immediately transferred to a hearing officer. But that paragraph simply states what is allowed under Maryland law:

> C. Any party may seek rulings from the hearing officer on the use, admissibility, and confidentiality of the Shared Documents in the Administrative Cases, including requests for protective orders, on any grounds and at any time during the pendency of the Administrative Cases.

(Plaintiffs' Exhibit B, Def's 1st Draft Consent Order ¶ C). This provision mirrors COMAR 31.02.01.05-1 (D), quoted *supra*. This provision allows Plaintiffs to seek a ruling on any document it anticipates the Maryland Insurance Administration will rely on before the document has been moved into evidence. There is nothing to suggest an immediate transfer to the hearing officer without maintaining the requisite rights and protections for all parties.

Dissatisfied with Defendants' first draft Consent Order, Plaintiffs proposed their own draft Consent Order. (Plaintiffs' Exhibit E, Pl's Draft Consent Order). Defendants gave due consideration to Plaintiffs' proposed draft Consent Order, but Plaintiffs' draft, which in some respects simply reiterated the silhouette, broad brush, concepts and framework of terms recited into the record, in other respects materially changed the agreement of the parties. It also failed to address the details that the Administration needs to satisfy its procedural obligations under the law of the State of Maryland.

For example, the draft consent order submitted by Plaintiffs contains a provision that if the parties "are unable to agree on treatment of the" documents obtained through the market conduct examination, the parties will submit a joint request for a hearing on the preliminary injunction in federal court. (Plaintiffs' Exhibit E, Pl's Draft Consent Order ¶ E). But the purpose of the consent order was to spell out the procedure for the determination of the admissibility of the documents and how objections could be made, not to "agree on the treatment

of the documents." Under Plaintiffs' proposed Consent Order, the parties would necessarily find themselves back in this Court.

Nonetheless, Defendants took Plaintiffs' concerns seriously, and Defendants' second draft of the Consent Order attempted to address concerns raised by Plaintiffs, more clearly allowing for timely advance notice to Plaintiffs of the documents the Administration intends to seek to be admitted into evidence and for documents that are admitted into evidence to be submitted under seal:

> B. The Administration agrees to provide Erie with timely advance notice of the intent of the Administration to introduce any Shared Document and any other documents or materials obtained from the Market Conduct Division through the Market Conduct Examination into evidence in any of the four administrative cases, in order to permit Erie to object to the introduction should it elect to do so.
> C. The Administration further agrees to submit the documents or materials obtained by the Administration through the Market Conduct Examination in the four administrative cases to the Hearing Office under seal, subject to motion by any party to unseal any of those documents or materials.
> D. The documents submitted under seal shall not include the Determination Letters or the Requests for Hearing, but the Administration shall notify Respondents at least two (2) business days in advance of transmitting those documents to the Hearing Officer.

(Plaintiffs' Exhibit G, Def's 2nd Draft Consent Order ¶¶ B-D). Plaintiffs in their memorandum of law ignore paragraph B and refer only to paragraph C above to argue that the second draft provides that the Market Conduct Materials will be transferred directly to a hearing officer without Plaintiffs being given an opportunity to object. That is false. Paragraph B specifically provides for timely advance notice and opportunity to object. Paragraph C provides for such documents to be submitted under seal once admitted.

Defendants were willing to consider further proposals from Plaintiffs and continue negotiations on the details, but Plaintiffs suddenly shut down all discussion. Defendants were willing to join in a Motion to Lift Stay, but could not agree to the representations made in the

Memorandum that Plaintiffs insisted on filing. Counsel for Defendants advised Counsel for Plaintiffs:

> Alex: The agreement of the parties was that a joint motion to lift the stay would be filed if the parties could not come to a resolution. The draft of the memorandum of law you have provided is obviously not part of a joint motion (I have not seen the motion) and mischaracterizes the position of the MIA and the facts. We stand ready to address your concerns about the documents in question in the administrative hearings. You have decided, apparently today, to file the attached memorandum despite having the draft CO for weeks. Under the circumstances, we object to the filing as drafted and do not consent to it. We would consent to a joint motion as we have agreed and while we have no objection to the court reopening the case, preserving our defenses of course, we do not consent to the memorandum as written.
> Please let me know if you wish to discuss further.
> -Van

(Plaintiffs' Exhibit 3 of Exhibit H). Instead of discussing further, Plaintiffs immediately filed their Motion to Lift Stay along with their Memorandum.

CONCLUSION

Defendants have no objection to lifting the stay. Defendants object to the representations made in the Memorandum in Support thereof for all the aforementioned reasons.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of July, 2023, a copy of Defendants' Response to Motion to Lift Stay was filed electronically, emailed and mailed first class mail, postage pre-paid, to counsel for Plaintiffs at the following address:

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