SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Liquidation of HEALTH REPUBLIC INSURANCE OF NEW YORK, CORP.	:	Index No. 450500/2016
	:	I.A.S. Part 35
	:	Hon. Carol Edmead

MEMORANDUM OF LAW IN OPPOSITION TO
JAMES VEACH'S MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Maria T. Vullo, the Superintendent of Financial Services of the State of New York, as liquidator (the "Liquidator") of Health Republic Insurance of New York, Corp. ("Health Republic"), respectfully submits this memorandum of law in opposition of James Veach's Motion for Leave to Appear as *Amicus Curiae* in Health Republic's liquidation proceeding (the "Motion" or "Mot.").

PRELIMINARY STATEMENT

Mr. Veach's request for leave to appear as *amicus curiae* is flawed as a matter of law and should be rejected. The Motion fails to meet the most basic requirements for obtaining *amicus* status, asks the Court to set dangerous and unnecessary precedent for liquidation proceedings generally, and seeks to change the well-established procedures governing the liquidation of insolvent insurance companies.

The liquidation of Health Republic is an ongoing special proceeding under Article 74 (the "Liquidation Proceeding"). New York's legislature created Article 74 special proceedings to furnish a complete process for resolving all claims on behalf of and against the estate of insolvent insurers. Under Article 74, the court-appointed liquidator is empowered to act for the benefit of all policyholders, creditors, and other persons with an interest in the insolvent insurer's estate. Indeed, the primacy of the liquidator's role in an Article 74 proceeding is reflected in the fact that Article 74 does not permit intervention. *In re Fin. Guar. Ins. Co.*, 2013 WL 3940289, at *1 (N.Y. Sup. Ct. 2013).

Despite the well-established parameters of Article 74 proceedings, Mr. Veach has sought to improperly interject himself into Health Republic's Liquidation Proceeding. Prior to this Motion, he improperly filed a nine-page, single-spaced letter consisting of commentary and questions about the estate and opinions about how the estate should be handled. ECF No. 31. Mr.

Veach also filed with this letter his resume and several opinion articles he authored on Health Republic. *See id.* The Court promptly notified Mr. Veach that any attempt to participate should be done through a procedurally proper method, such as a motion to intervene or for leave to file an *amicus* brief. *See* Email from Justice Edmead dated Oct. 3, 2016. Mr. Veach opted to file an *ex parte* order to show cause seeking unprecedented relief: a kind of free-floating *amicus* status in this proceeding. *See* ECF No. 39.

Mr. Veach's Motion lacks any basis in the law and should be denied for several reasons. First, Mr. Veach's request for leave to appear as *amicus curiae* is not made in connection with any motion pending in this proceeding. Assisting the court with the disposition of a live issue raised by the parties in a motion before the court is the *sine qua non* of an *amicus* brief. But Mr. Veach seeks to raise *new* factual and legal issues with the Court on an ongoing, ad hoc basis, and to provide general, undefined oversight during the remainder of the Liquidation Proceeding. However, it is axiomatic under New York law that *amicus curiae* may not introduce new issues. What is more, there is no authority (and the Motion cites none) supporting a non-party's request to obtain unbounded *amicus* status to a case as a whole (as opposed to a discrete issue on a motion or appeal already pending before the court). While New York law permits *intervenors* to participate in a broader capacity as parties in certain special proceedings, Article 74 is not one of them, and, in any event, the same rights and privileges do not extend to *amici*.

Second, Mr. Veach seeks a role far in excess of the proper scope of *amicus curiae* and thus attempts to sidestep Article 74's intervention prohibition. Although Mr. Veach claims that he is not seeking to intervene in Health Republic's Liquidation Proceeding (Veach Aff. ¶ 5), he asks this Court for permission to engage in actions that are exclusively within the domain of parties and intervenors and go far beyond the permissible role of *amici*. Indeed, his motion

admits that he seeks to "raise issues that might not otherwise be raised or explored by counsel acting for the Liquidator." Mot. at 10. This is precisely what is permitted by an intervenor, but not a person seeking *amicus* status.

Mr. Veach also does not meet other criteria for obtaining *amicus* status in this proceeding. To begin, his Motion is not timely because, as discussed *supra*, Mr. Veach moves in the absence of a pending motion. Further, Mr. Veach has no actual interest in Health Republic's Liquidation Proceeding. Although a movant seeking *amicus* status is required to indicate his or her interest in the proceeding and the issues to be briefed, Mr. Veach fails to do so. He merely asserts that the motivation for his Motion is "concern[] about the pace of Health Republic's liquidation and the expenses that have been and are being charged to the estate." Mot. at 1, ¶ 2. But the interference of a non-party asserting no client interest in the Liquidation Proceeding has and will continue to harm Health Republic's estate by requiring the Liquidator to expend estate resources responding to his "concerns." This conduct ultimately diminishes assets available to actual creditors for recovery.

Finally, the relief sought by the Motion will not be helpful to the Liquidation Proceeding. The Liquidator, with approval from the Court, is fully capable of presenting and addressing the matters necessary for a successful liquidation, including those that Mr. Veach mentions in his supporting brief. As is contemplated by Article 74, the Liquidator is already addressing these matters—including claims administration and adjudication, a financial audit, a strategic review of the estate's position in the federal "3R" (Risk Corridor, Risk Adjustment and Reinsurance) programs, potential claims against third-parties, data management, policyholder assistance, long-term planning, and other areas of ongoing activity. The Liquidator will continue to bring these matters before the Court as appropriate in the normal course of administering Health Republic's

estate. At each juncture, the Court will have an opportunity to oversee the matters presented by the Liquidator. Mr. Veach's unprecedented and unusual motion does not assist this process and would simply do more harm than good.

For these reasons, as elaborated below, Mr. Veach's motion for leave to file as *amicus curiae* should be denied.

ARGUMENT

Amicus status "is a privilege and not a right." *Kemp v. Rubin*, 187 Misc. 707, 709 (N.Y. Sup. Ct. 1946). The law is well-settled that the function of *amicus* is "to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration[.]" *Id.* Importantly, this requires that there be "a matter then before the Court" such as a pending motion or other application. *See id.* ("[N]o phase of this litigation is now pending before me for judicial determination[] except[] the instant motion. . . . When the petitioners here ask for an order granting them the right 'to participate in the trial thereof, and all motions or other proceedings taken therein . . .,' they ask what is virtually tantamount to full intervention as parties. There is no authority for this relief, and accordingly, the motion is denied[.]"). This is because an *amicus* is "not a party[] and cannot assume the functions of a party; he must accept the case before the court with issues made by the parties, and may not control the litigation." *N.Y. State Senator Kruger v. Bloomberg*, 1 Misc. 3d 192, 197 (N.Y. Sup. Ct. 2003) (quoting *Kemp*, 187 Misc. at 708); *see also Price v. New York City Bd. of Educ.*, 16 Misc. 3d 543, 554 (N.Y. Sup. Ct. 2007) ("[A]n amicus that merely alerts the court to its 'position' . . . constitutes an improper attempt to influence the court to make its decision on other than the facts and the law. If the law and facts support a particular result, the court must reach such result rather than conform its decision to political or popular pressure. Such material should not even be submitted.").

Once it is established that the request for *amicus curiae* status relates to a particular pending motion, New York courts consider a number of criteria before granting leave to appear as *amicus curiae*, including "(1) whether the application[] [is] timely; (2) whether [it] states the movant's interest in the matter and includes the proposed brief; (3) whether the parties are capable of a full and adequate presentation of the relevant issues and, if not, whether the proposed *amici* could remedy this deficiency; (4) whether the proposed brief[] identif[ies] law or arguments that might otherwise escape the court's consideration or would otherwise be of assistance to the court; (5) whether consideration of the proposed amicus brief[] would substantially prejudice the parties; and (6) whether the case involves questions of important public interest." *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc. 3d 450, 454 (N.Y. Sup. Ct. 2012) (citing *Kruger*, 1 Misc. 3d at 198).

I. MR. VEACH'S REQUEST IS NOT MADE IN CONNECTION WITH ANY MOTION CURRENTLY PENDING BEFORE THE COURT

Mr. Veach seeks leave to appear as *amicus curiae* although no motion currently is pending before the Court. His Motion should be denied for this reason alone. *See Kemp*, 187 Misc. at 709. Indeed, of the 20 cases cited in Mr. Veach's Motion, not a single one presents a situation where a non-party was granted *amicus* status without an existing motion or appeal pending before the court. That is because a court must deny an application for *amicus* status that is untethered to any underlying justiciable pending motion. *See id.* ("[N]o phase of this litigation is now pending before me for judicial determination[] except[] the instant motion. . . . When the petitioners here ask for an order granting them the right 'to participate in the trial thereof, and all motions or other proceedings taken therein . . .,' they ask what is virtually tantamount to full intervention as parties. There is no authority for this relief, and accordingly, the motion is denied[.]").

Unlike traditional *amicus curiae*, Mr. Veach does not seek to assist the Court with the disposition of any actual, imminent issue raised by the parties in the underlying proceeding. Rather, Mr. Veach concedes that he intends to "raise issues that might not otherwise be raised or explored by counsel acting for the Liquidator" and to "provide an objective view of the liquidation proceedings." Mot. at 1, ¶ 2. New York law is clear, however, that *amicus curiae* may not "introduce any issues" and that "only the issues raised by the parties may be considered." *See Colgate-Palmolive Co. v. Erie Cty.*, 331 N.Y.S.2d 95, 96 (4th Dep't 1972); *see also Anschutz Exploration Corp.*, 35 Misc. 3d at 454-55 (granting motion for leave to file an *amicus curiae* brief only to the extent that the movants "present arguments related to the issues in controversy" and refusing to consider arguments deemed unrelated to the matters raised by the parties pursuant to a motion or appeal before the court).

Not only does Mr. Veach seek to raise *new* factual and legal issues with the Court, but he intends to do so on a continuing, ad hoc basis. In essence, Mr. Veach wishes to provide open-ended oversight during the remainder of the Liquidation Proceeding. The Liquidator is not aware of any authority (and the Motion cites none) supporting a non-party's request to serve as *amicus curiae* to a case as a whole. Indeed, the litany of factual questions raised by Mr. Veach in his application simply highlights the impropriety of his application and demonstrates why *amici* are prohibited from raising outside issues.[1] These reasons include the time and expense in responding to questions that are not supported by an actual party-in-interest. Many of Mr. Veach's questions are voluminous, repetitive, and made without regard to whether the

[1] Mr. Veach's submissions to the Court have largely included his version of—and opinion on—the events that have occurred thus far in the Liquidation Proceeding, which itself is an improper use of *amicus* briefing. *See Price*, 16 Misc. 3d at 553 ("[A]s the proper function of an amicus is to advise the court of the law and the implication on other matters of a decision of the court on the matter before it, the inclusion of factual material is almost always improper.").

information sought may be protected by privilege, concern litigation strategy, or relate to other sensitive information that may only be appropriate for the Court's *in camera* review. In short, Mr. Veach's application is wholly unprecedented and should be rejected.

II. MR. VEACH'S REQUEST TO BECOME *AMICUS CURIAE* TO THE PROCEEDING IS AN IMPROPER ATTEMPT TO CIRCUMVENT ARTICLE 74'S PROHIBITION OF INTERVENTION

The role that Mr. Veach seeks to occupy in Health Republic's Liquidation Proceeding exceeds *amicus curiae* status and contravenes Article 74's prohibition of intervention. Though disguised as an application for *amicus* status, Mr. Veach is seeking to "raise *issues* that might not otherwise be raised or explored by counsel acting for the Liquidator." Mot. 1, ¶ 2 (emphasis added). But such actions go beyond the purview of an *amicus*, who "is not a party," "cannot assume the functions of a party[,]" "must accept the case before the court with issues made by the parties," and "may not control the litigation." *Kruger*, 1 Misc. 3d at 196. The law is clear that raising new issues in a proceeding is the domain of the parties or intervenors, who "[o]nce let in[,] . . . become[] part[ies] for all purposes." *Id.* "The ability of an individual to intervene in a proceeding, whether by right or by permission, is governed by statute," *Estate of Mayer*, 110 Misc. 2d 346, 348 (Surr. Ct., N.Y. Cnty. 1981). In proceedings where intervention is permitted by statute (e.g., Article 78 proceedings), a party moving to intervene must show that he or she is an "interested" party who has a "legally cognizable claim to intervene" and not merely "a general interest in the result [of the proceeding]." *Kruger*, 1 Misc. 3d at 195. Mr. Veach concedes that he neither has such an interest in the Liquidation Proceeding himself nor represents a client who does.

For example, in *In re Fin. Guar. Ins. Co.*, 2013 WL 3940289, during the Article 74 rehabilitation proceeding for Financial Guaranty Insurance Company ("FGIC"), FGIC sought the court's approval of a tentative settlement agreement. When certain investors objected, moved to

intervene in the special proceeding, and sought limited discovery, the New York Supreme Court denied the motion to intervene, holding:

> ***[N]owhere in NYIL Article 74, which governs this special proceeding, does [Article 74] permit intervention.*** This is in contrast to Article 78 (which is also a special proceeding governed by CPLR Article 4), which does specifically provide for intervention . . . . The absence of such corresponding language in the NYIL Article 74 rehabilitation statute indicates that the Legislature did not intend for intervention in such rehabilitation proceedings. Similarly, CPLR Article 52, a special proceeding, also specifically permits intervention . . ., unlike a rehabilitation proceeding.

Id. at *1 (emphasis added). Thus, although some special proceedings permit intervenors to participate as parties, Article 74 does not.

While Mr. Veach claims that he "does not seek leave to intervene in Health Republic's liquidation proceeding" (Veach Aff. ¶ 5), in substance, Mr. Veach requests permission to engage in actions that are solely within the domain of parties and intervenors: namely, raising new issues that the parties themselves have not raised. Because intervention is not permitted in Article 74 proceedings—either directly or indirectly through the unprecedented use of *amicus* status to circumvent this prohibition—the Court should deny the Motion.

III. MR. VEACH OTHERWISE FAILS TO SATISFY THE CRITERIA FOR *AMICUS* STATUS

Finally, Mr. Veach's Motion should be denied because he otherwise fails to meet the criteria for obtaining *amicus* status in this proceeding.

A. Mr. Veach's Motion for Leave to File as *Amicus Curiae* is Not Timely

One of the factors that courts consider before granting leave to appear as *amicus curiae* is whether the application is timely. *See Anschutz Exploration Corp.*, 35 Misc. 3d at 454. The requirement that applications for *amicus* status must be "timely," however, contemplates that applications must be filed within the window set forth by applicable rules, statutes, or court orders. If a party could move for leave to file as *amicus curiae* at any time during a case—even

without a pending motion or appeal in the underlying case, as Mr. Veach seems to suggest—then the timeliness requirement would be superfluous.

B. Mr. Veach Lacks Any Legitimate Interest in the Liquidation Proceeding

Mr. Veach claims that his motivation for seeking *amicus* status is "concern[] about the pace of Health Republic's liquidation and the expenses that have been and are being charged to the estate." Mot. at 1. But he lacks a client or actual interest in any of these issues, and his efforts will be counterproductive.

C. Mr. Veach's Appearance as *Amicus Curiae* Would Not Be Helpful

The Court should also deny the Motion because it would not be helpful to the Liquidation Proceeding. It is important to emphasize the context in which the Motion is made. The liquidation of Health Republic is an ongoing special proceeding under Article 74—a comprehensive statute that furnishes a complete process for resolving all claims on behalf of and against the estate of the insolvent insurer. Pursuant to Article 74, and as provided in the liquidation order entered in this proceeding (ECF No. 12), the Liquidator is empowered to act for the benefit of all policyholders, creditors, and other persons with an interest in the insolvent insurer's estate. Indeed, New York's legislature has determined that the Liquidator is best qualified to act on behalf of policyholders in such proceedings because the Liquidator has no special interest in the outcome of the proceeding except to administer the estate for the maximum benefit of all claimants. *See Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d 225, 232 (1990) ("[The Liquidator] holds office . . . solely to protect the interests of policyholders, stockholders and the public[.]"); *see also Dinallo v. DiNapoli*, 9 N.Y.3d 94, 97 (2007) ("[T]he Legislature, by statutory enactment, bestowed upon the Superintendent broad fiduciary powers to manage the affairs of distressed domestic insurers and to marshal and disburse their assets.").

The interests of Health Republic's policyholders and creditors are well represented by the Liquidator, with oversight from this Court. To be clear, the Liquidator is not opposed to addressing questions raised during the Liquidation Proceeding in an open manner. However, the framework of Article 74 must be followed. Objections may be raised during the proceeding, where appropriate, in connection with a motion or pending appeal. Once a motion is submitted or a decision is appealed, stakeholders may come forward and ask to be heard. At the time of a pending motion or appeal, the Court can properly consider a motion to act as *amicus curiae*, but only with respect to the issues raised pursuant to the motion or on appeal. However, there is no role, under any circumstances, for interference by self-appointed "watchdogs" who have no justiciable interest or client in the matter and are motivated only by curiosity and self-interest.

CONCLUSION

For these reasons, the Liquidator respectfully request that the Court deny Mr. Veach's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2016, I served a copy of the Liquidator's Opposition to James Veach's Motion for Leave to Appear as *Amicus Curiae* in Health Republic's Liquidation Proceeding, on the following counsel via e-mail and U.S. mail:

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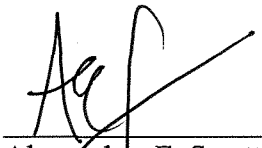

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