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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Penn Treaty Network America Insurance Company in Rehabilitation	DOCKET NO. 1 PEN 2009
In Re: American Network Insurance Company in Rehabilitation	DOCKET NO. 1 ANI 2009

MEMORANDUM OF LAW OF MICHAEL F. CONSEDINE IN SURREPLY TO INTERVENORS' APPLICATION FOR RELIEF AND TO COMPEL

I. INTRODUCTION

As the Court expressed on May 21, the litigation is over. The Court's May 3, 2012 Order denied the Rehabilitator's petitions to place the Companies in liquidation and the Rehabilitator has filed Rehabilitation Plans ("Plans"). By statute, this Court may approve or disapprove the Plans as proposed or modify them and approve them as modified. 40 PA. STAT. ANN. § 221.16(d). The Court will make this decision by evaluating the Plans as filed (and perhaps amended) and any evidence adduced at the hearing regarding the Plans. Not relevant to this

analysis would be any collateral suggestion regarding the Rehabilitator's motivations, because the best evidence of what the Plans seek to accomplish is the Plans themselves.

Intervenors would disrupt the statutory process. The tone of their Reply belies their intent: cry "foul" without one shred of proof of purported "malfeasance" in order to obtain a ruling from the Court on the substance of the Rehabilitator's proposed rehabilitation plans before the Intervenors—and, more importantly, any policyholders—have filed a single comment or objection. At the same time, they would preset the issues that will be taken up in the forthcoming hearing without satisfying prerequisites. Until they filed their Reply, Intervenors had never demanded a privilege log. The Court should not condone their attempts to treat this dispute as if two civil litigants were marching toward another trial through a swamp of unfolding discovery requests. Only after Intervenors and other interested persons file formal comments or objections to the Plans will the Court be in a position to determine what is in issue and whether *any* discovery is warranted (and the Rehabilitator submits respectfully no discovery is warranted).

The reality is that under the circumstances Intervenors are now no more than creditors of last resort, equity holders whose interests fall below those of the policyholders, and who are not entitled to preferential treatment in the provision of information or the presentation of evidence. As such, this Court should not even entertain Intervenors' improper demands.

Were the Court to consider Intervenors' demands and arguments, however, the factual backdrop to the development of the Plans should be noted. Just two months ago, the Intervenors sought to delay the filing of the Plans. Now they actively seek to distract the Court and disrupt the rehabilitation by seeking to pry into communications that, on their face, qualify for numerous privileges under common law and Article V of the Insurance Department Act, and are not

relevant to this Court's consideration of the Plans. They would do so on the basis of a false premise; *i.e.*, that the Plans "don't involve the pursuit of *any* premium rate increases in the near future," which purportedly somehow "proves" that the Rehabilitator has attempted to undermine future rate-increase requests during alleged communications with the NAIC and other state regulators about potential amicus participation in the Appeal. *See* Intervenors' Reply Br. at 6. For these and the other reasons set forth below and in the Rehabilitator's Opposition Brief, the Court should deny the Application.[1]

II.
ARGUMENT

A. The Court should deny the Intervenors' Application for Relief because no authority authorizes their requested discovery, and they did not lay a proper foundation for the information they seek.

1. The discovery requested by Intervenors is not authorized under Article V of the Insurance Department Act or the Pennsylvania Rules of Civil Procedure.

Intervenors claim that they may discover the Rehabilitator's confidential Appeal-related communications and documents under both Article V and the Pennsylvania Rules of Civil Procedure, implying that such communications would somehow be relevant to evaluation of the Plans, but they have failed to show that either of those authorities authorizes their request. Article V grants the Court supervisory authority to oversee rehabilitation proceedings. *See, e.g.*, 40 PA. STAT. ANN. § 221.15(c) (a rehabilitator "administer[s the insurer's assets] under the orders of the court"). However, it contains no provision granting any person the right to take discovery, nor does it set forth any basis for requiring the provision of any information prior to the filing of objections to a proposed rehabilitation plan. The Intervenors cite Rule 3781(e)(4) of

[1] The Intervenors further claimed in their Application for Relief that the requested discovery was necessary because the Rehabilitator's attorneys are not "unbiased and free from conflict." *See* Application for Relief ¶ 13. Although they declared to the Court that they were not making any such claim before they filed their Application, they have now clearly abandoned it, as their Reply is silent on this point.

the Pennsylvania Rules of Appellate Procedure to claim that discovery is authorized in Article V proceedings[2], but that rule contemplates discovery, if at all, in disputed claim proceedings in a liquidation where the Court has appointed a referee. Rule 3781only applies in a rehabilitation proceeding to the extent an approved plan of rehabilitation includes the filing of claims. *See* PA. R. APP. P. 3782. In the instant proceeding, the rehabilitation plans have not even been reviewed by the Court as of yet, let alone approved, nor have any objections or claims been filed. Accordingly, discovery is improper under Article V.

The General Assembly's failure to provide for discovery in Article V and the absence of any applicable court rule for discovery prior to plan confirmation serves an important purpose: a claimant must file an objection outlining its position so that the Court may evaluate the need for any requested discovery for purposes of a hearing. Put differently, the objections to a plan will potentially define any need for discovery, but no discovery requests can be evaluated in the first instance without articulated objections. Intervenors' refusal to tie their discovery requests to a particular objection has deprived the Court and the Rehabilitator of the opportunity to consider any requests and the Court should not permit an invasive inquiry into the Rehabilitator's confidential legal communications concerning the Appeal based on an unadorned claim that those materials are somehow relevant to the proposed Plans. Moreover, even if they were relevant in some indirect way, that would not make them discoverable. It is the Plans themselves that the Court will evaluate and approve, disapprove or modify.

Intervenors also claim that the requested discovery is permissible because the Pennsylvania Rules of Civil Procedure govern proceedings filed under this Court's original jurisdiction "so far as [those Rules] may be applied," PA. R. APP. P. 106, and because, according

[2] The Intervenors also claim that Rule 3774(c)(3) authorizes the requested discovery; however, that rule merely authorizes the Court to enter a case management order after entry of orders of rehabilitation or liquidation.

to Intervenors, their discovery would be permitted under the Civil Rules. *See* Intervenors' Reply Br. at 32. However, the Civil Rules provide for discovery only of issues that are "relevant to the subject matter involved in the pending litigation." Pa. R. Civ. P. 4003.1(a). As this Court has recognized, "[d]iscovery requests must ... be *reasonable*" and may be barred when the requests "have been stated too broadly or without proper specification, and would amount to a 'fishing expedition.'" *Koken v. One Beacon Ins. Co.*, 911 A.2d 1021, 1025 (Pa. Commw. Ct. 2006) (quoting 6 STANDARD PA. PRACTICE § 34.28). Requests "are permitted for non-privileged information only." *Id.* (citing 6 STANDARD PA. PRACTICE § 34:35). Here, Intervenors' Application must be denied because it demands production exclusively of privileged material. But even were that not the case, the Application would still be improper because, on its face it seeks documents and communications concerning amicus participation in the Appeal, a matter that has no effect on the only issue presently before the Court, namely whether to approve the Rehabilitator's proposed Plans. The Application is therefore outside the scope of discovery authorized by the Civil Rules.

Pennsylvania's highest court has made clear that a party may not obtain discovery by merely shouting an allegation of malfeasance into the wind and claiming that the averment must be investigated. *See, e.g.*, *Bata v. Central-Penn Nat'l Bank of Phila.*, 224 A.2d 174, 179, 182 (Pa. 1966) (affirming a trial court's refusal to permit discovery regarding unsupported allegations of fraud because such "[a]verments ... are meaningless epithets unless sufficient facts are set forth which will permit an inference that the claim is not without foundation...."). It is instead incumbent upon the party claiming bad faith to provide evidence showing, at a minimum, that a reasonable inference of misconduct can be drawn from the facts at issue. The Intervenors have made no such showing here, and indeed, logically could not.

Intervenors' implicit but hollow argument is that the Rehabilitator is not *truly* seeking to rehabilitate the companies. The test of that proposition, of course, is the Plans filed by the Rehabilitator themselves. No amount of collateral evidence of good intent would be accepted by the Intervenors as salvation for what they might perceive as plans not truly intended to rehabilitate the Companies; neither would the converse be more persuasive. That is, no amount of collateral evidence of unsatisfactory intent could reduce the merit of plans *truly* designed to rehabilitate the companies. The evidence of record reflects that the Court ordered the Rehabilitator to rehabilitate the companies; the Rehabilitator retained a Special Deputy and a new actuary who made an independent assessment; collaborated extensively with Intervenors (unlike any other creditor) through numerous Rehabilitation Advisory Committee and Actuarial Advisory Committee meetings; filed two Rehabilitation Plans; and now is ready to pursue the development and implementation of those Plans upon approval from this Court. The Intervenors have never described why any of that conduct occurred in bad faith. Intervenors' Application is little more than an attempt to disrupt that process, and is precisely the sort of discovery that lacks "proper specification" to support the request. *One Beacon*, 911 A.2d at 1025. The Court should therefore deny their Application.

2. The requested discovery is irrelevant to whether the Plans should be approved, disapproved, or approved as modified on their merits.

The Intervenors' lone basis for seeking discovery is the unsubstantiated claim that, when communicating with the NAIC and other state regulators, the Rehabilitator *may have suggested* either expressly or impliedly that other regulators "can and should disregard their responsibilities to grant appropriate and actuarially justified premium rate increases" because the outcome of the Appeal would obviate the need. *See* Intervenors' Reply Br. at 24. Intervenors' argument has no

basis in fact or logic. Assuming *arguendo* that any communications were had,[3] that would not provide a basis for discovery into communications with the NAIC, which exercises no authority over rate increases in any state.

The Court should recognize this dispute for what it is: an improper attempt to disrupt rehabilitation efforts and inquire into the Rehabilitator's strategic appellate communications with the NAIC and other state regulators. That request should be denied.

3. Intervenors have failed to comply with the appropriate procedure for making a discovery request.

Even if the Intervenors' requested discovery were permissible under the Pennsylvania Rules of Civil Procedure (and it is not), they attempt to use this Court to circumvent those very rules and the discovery requirements thereof. Rule 4009.11(b) requires a litigant seeking production of documents to serve a request "set[ting] forth in numbered paragraphs the items to be produced ... and describe each item or category with reasonable particularity." While the Rehabilitator believes that any such discovery is inapplicable in this case, such a request would have permitted the Rehabilitator to present the issue of discovery properly to the Court. Intervenors have never served a single written document request, and have instead made various demands either orally or through email, generally claiming that they are "entitled" to the Rehabilitator's communications with the NAIC and other state regulators about amicus support for the Appeal. Such informal demand for documents does not satisfy the requirements for a production request under Rule 4009.11, (the very rule Intervenors rely upon) much less permit an opposing party to formulate a meaningful response. And, because a properly served production

[3] As in his Response and Opposition Brief, the Rehabilitator assumes strictly *arguendo* for purposes of this surreply that there have been communications with the NAIC about participating in the Appeal as amicus. The Rehabilitator has neither admitted or denied such allegations because such allegations relate to the substance of the purported communications and any admission or denial could be perceived as a waiver.

request is an essential prerequisite to a motion to compel, Intervenors' present Application is wholly improper under the Civil Rules.

Intervenors belatedly fault the Rehabilitator for failing to provide a privilege log and for failing to "enlighten[] the Intervenors and the Court about exactly whom and what requires protecting." *See* Intervenors' Reply Br. at 25. However, a litigant incurs no obligation to provide a privilege log or to respond to a discovery request until the requestor has complied with Rule 4009.11. *See* PA. R. CIV. P. 4009.12(b). In addition, from a practical perspective, the Rehabilitator is limited by the content of the Intervenors' request. Intervenors have asked generally for documents and communications "concerning the Rehabilitator's appeal of the denial of the petitions to convert the rehabilitations of PTNA and ANIC into liquidations, including efforts to enlist *amicus curiae* brief support." *See* Intervenors' Proposed Order. The Rehabilitator has responded that, if those conversations occurred, all of them would have taken place in the presence of counsel for the purpose of preparing legal strategy. Intervenors also pose their request as a Catch-22: the underlined portion of the request seeks substantive disclosure. The Rehabilitator cannot respond without committing a potential waiver.

Accordingly, as the Intervenors have failed to comply with the Pennsylvania Rules of Civil Procedure when formulating their request, the Court should deny their Application for Relief.

B. Even if the Intervenors had laid a proper foundation, they have failed to show that any of the requests fall outside the scope of the privileges at issue.

1. Intervenors have failed to establish the lack of a common interest among the Rehabilitator, the NAIC, and its state regulator members with regard to the Appeal.

a. The common-interest doctrine requires identity of legal interests only as to the subject matter at issue.

Intervenors claim that no Pennsylvania court "has upheld a joint defense privilege assertion ... without demonstrating the existence of identical legal interests regarding a litigation," and that, because the interests of other state regulators may diverge from those of the Rehabilitator with regard to rate-increase filings, the attorney-client privilege cannot apply by virtue of that doctrine to communications related to the Appeal. *See* Intervenors' Reply Br. at 10, 15-16. Both of those assertions are incorrect. While many cases applying the common-interest doctrine involve co-litigants (the most common example is criminal co-defendants), neither Pennsylvania courts nor federal courts applying Pennsylvania law have ever restricted its application to such circumstances.[4] As this Court has recognized, the salient question for applying the doctrine is whether the parties are "working collectively" to "participate in a common group defense" or advance a common legal position. *In re Condem. by City of Phila. of 16.2626 Acres*, 981 A.2d 391, 397 (Pa. Commw. Ct. 2009).

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[4] Intervenors rely upon *Young v. Presbyterian Homes, Inc.*, 50 Pa. D. & C. 4th 190 (Lehigh Ct. Com. Pl. 2001), and *Executive Risk Indemnity, Inc. v. Cigna Corp.*, 81 Pa. D. & C. 4th 410 (Phila. Ct. Com. Pl. 2006), for the proposition that no Pennsylvania court "has upheld a joint defense privilege ... without an express joint defense agreement" and "the existence of identical legal interests." *See* Intervenors' Reply Br. at 10. However, *Executive Risk* expressly recognized that "the exact parameters of the joint defense privilege [do] not have to be spelled out in a written agreement." 81 Pa. D. & C. 4th at 423. Moreover, while *Executive Risk* arose in the context of "identical claims" against multiple defendants it also recognized that the sole requirement for application of the doctrine is "a common interest in legal strategy," *id.* at 424, and *Young* applied the doctrine to co-defendants even though they "have a potential conflict," in that the conduct of one defendant might have resulted in liability for the other, 50 Pa. D. & C. 4th at 198-99. Thus, neither of those decisions suggest, as Intervenors claim, that parties must share a complete unity of legal interests to invoke the doctrine. They must merely share a common interest in the communications at issue for that doctrine to apply.

The United States Court of Appeals for the Third Circuit, applying both federal and Pennsylvania privilege law, has further explained that the parties need not share a complete unity of interests, so long as they share a mutual interest in the particular subject matter at issue. Thus, in *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985), the court upheld application of the doctrine to communications between an agent of one defendant and an attorney of another defendant, even though testimony by the one party could have been used to impose liability against the other, because the communication was made for the purpose of coordinating a joint litigation strategy. *Id.* at 787-88 (distinguishing such a scenario from a case in which "the parties' interests are completely adverse"). Thus, the court held that "[c]ommunications to an attorney to establish a common defense strategy are privileged, *even though the attorney represents another client with some adverse interests.*" *Id.* at 787 (emphasis added).

The Restatement (Third) of the Law Governing Lawyers further explains the required commonality of interest as follows:

> The communication must relate to the common interest, which may be either legal, factual, or strategic in character. The interests of the separately represented clients need not be entirely congruent.
>
> * * *
>
> *The fact that clients with common interests also have interests that conflict, perhaps sharply, does not mean that communications on matters of common interest are nonprivileged.*

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 cmt. e & Reporter's Note to cmt. e (2000) (emphasis added). As such, courts have found shared legal interests sufficient to support application of the doctrine with regard to co-defendants against whom a plaintiff has asserted different theories of liability, as well as parties "in purely transactional contexts." *In re Teleglobe Comm'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007).

Intervenors also claim that the Rehabilitator cannot share a common interest with the NAIC or other state regulators due to the disparity in the Companies' rates in various states, and that any interest they possess is "at best political" rather than legal in nature. *See* Intervenors' Reply Br. at 15-16. Both *Eisenberg* and the Restatement preclude that conclusion. Even if the Rehabilitator's interests do not exactly align with those of the potential amicus parties as to rate-related issues, any such disparity does not preclude them from sharing identical interests with regard to the Appeal. Intervenors ignore—as they did in their Application—that the Appeal pertains to the legal standards governing a conversion petition and the administrative deference that the Rehabilitator receives in such a proceeding. Nor do they dispute that significant commonalities exist in receivership proceedings across the country, or that the Pennsylvania Supreme Court's decision in the Appeal will likely be cited as persuasive precedent in other states' rehabilitation proceedings. It is for precisely that reason that the Rehabilitator shares "similar legal interests" with the members of the NAIC in the legal standards under which courts evaluate conversion petitions. *Teleglobe*, 493 F.3d at 364. Intervenors have failed to explain why the latters' interests are any less legal in character than those of the Rehabilitator, whose authority under Article V will be directly affected by the outcome of the Appeal. Indeed, these are precisely the type of legal issues about which appellate parties frequently enlist amicus supporters. Those shared interests support application of the common-interest doctrine because they reflect a collaborative effort to present a coordinated legal position, and the Court should reject Intervenors' claims to the contrary.[5]

[5] The Intervenors argue the Rehabilitator may not claim privilege by virtue of his status as Treasurer-Secretary of the NAIC because "there is no showing that ... the withheld communications sought were provided" in that capacity. *See* Intervenors' Reply Br. at 16. However, Intervenors ignore that *any* request for NAIC participation in a case as amicus must be presented to the organization's staff attorneys, who relay it to the Executive Committee, on which the Rehabilitator serves in his capacity as Treasurer-Secretary. *See* Guidelines for

b. Application of the common-interest doctrine does not depend upon a written joint-defense agreement.

The Intervenors assert that the common-interest doctrine cannot apply because no written common-interest agreement allegedly exists between the Rehabilitator, his counterparts in other states, and the NAIC. *See* Intervenors' Reply Br. at 12. Yet they cite no legal authority for that position, and no Pennsylvania state or federal court has ever held that a written joint-defense agreement is essential to the common-interest doctrine. In fact, the United States District Court for the Eastern District of Pennsylvania has recognized that "the common interest doctrine protects privileged and work-product materials even if there is no 'final' agreement or if the parties do not ultimately unite in a common enterprise." *Katz v. AT&T Corp.*, 191 F.R.D. 433, 437 (E.D. Pa. 2000) (applying federal law). While parties may execute an agreement outlining the scope of their shared interests and agree to maintain the confidentiality of information exchanged, application of the doctrine depends, not on the existence of such an agreement, but on whether the parties share legal interests in the dispute at issue. *Id.* As discussed above and in the Rehabilitator's Opposition Brief, a shared interest exists here, and that is alone sufficient to apply the common-interest doctrine.

Nonetheless, even if a written agreement were necessary, the Information Sharing and Confidentiality Agreement satisfies that requirement. Joint-defense agreements typically stipulate that a common interest exists among their signatories, and require all parties to maintain the confidentiality of information exchanged between them. The Information Sharing Agreement among the Rehabilitator, the NAIC, and other state regulators serves those ends. It

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Requests for Friend of the Court (Amicus Curiae) Briefs from NAIC ("Guidelines"), ¶ 1, http://www.naic.org /documents/legal_amicus_guidelines.doc. Thus, the communications that Intervenors seek, if they exist, would necessarily have occurred between a member-officer of the NAIC and its counsel about strategic legal matters. . The Rehabilitator would receive the benefit of attorney-client privilege for such communications and they are therefore protected from Intervenors' requested discovery.

recognizes that the Rehabilitator "may from time to time need to obtain Confidential Information relevant to [his] regulatory" authority over the insurance industry, *see* Information Sharing Agreement, at 1, attached to Rehabilitator's Amended Response as Ex. 7; states that the purpose of the Agreement is "[t]o facilitate the sharing of Confidential Information" in furtherance of that role, *id.* ¶ 1, and stipulates that the Rehabilitator will "protect from disclosure any Confidential Information" received under the Agreement's terms, *id.* ¶ 4(a). Each of those provisions applies to information exchanged with potential amicus parties in furtherance of the Appeal, and the Intervenors have failed to explain how, if at all, a joint-defense agreement limited to the present litigation would differ from the requirements of the Information Sharing Agreement. Accordingly, to the extent that the common-interest doctrine requires execution of a written agreement, the Information Sharing Agreement satisfies that condition.

c. The presence of clients or their representatives during privileged discussions does not preclude the common-interest doctrine from protecting the communications.

Intervenors claim that the common-interest doctrine cannot apply because some of the communications included representatives of the NAIC or other states' regulators rather than being conducted exclusively through their attorneys. *See* Intervenors' Reply Br. at 19. Intervenors rely on the Third Circuit's decision in *In re Teleglobe Communications* for the proposition that the common-interest doctrine extends only to "*attorneys* to coordinate their clients' ... strategies," and cannot apply when the clients themselves participate in the discussions. *See* Intervenors' Reply Br. at 19 (quoting *Teleglobe*, 493 F.3d at 364-65). That argument is misleading, however, because the requirement discussed in *Teleglobe* arose from the particular Delaware Rule of Evidence at issue in that dispute. The decision, in fact, notes that "[n]either the Restatement nor [Professor Paul Rice, author of a leading treatise on the attorney-client privilege,] emphasize this requirement." *Teleglobe*, 493 F.3d at 364 n.21.

Pennsylvania's version of the common-interest doctrine does not contain that limitation. This Court has recognized that, "where a number of defendants and their attorneys participate in a common group defense," the common-interest doctrine covers "the sharing of confidential communications *to those additional defendants and attorneys* for the benefit of the group." *In re Condemnation of 16.2626 Acres*, 981 A.2d at 397 (emphasis added). The Eastern District of Pennsylvania has likewise held that inclusion of clients does not destroy the attorney-client privilege provided they share a common litigation strategy:

> "[T]he joint defense privilege was adopted as an exception to [the general] waiver rule, under which communications between a client and his own lawyer remained protected by the attorney-client privilege *when disclosed to co-defendants or their counsel for purposes of a common defense*."

United States v. LeCroy, 348 F. Supp. 2d 275, 385 (E.D. Pa. 2004) (emphasis added) (quoting *United States v. Stepney*, 246 F. Rupp. 2d 1069, 1075 (N.D. Cal. 2003)). Thus, the communications at issue do not transgress the boundaries of the common-interest doctrine merely because the NAIC, or their representatives participated in the discussion in addition to the counsel representing them. Accordingly, the Intervenors' application for relief should be denied because the common-interest doctrine makes the attorney-client privilege applicable to the requested communications.

2. The work product doctrine remains applicable to documents and communications that further the Appeal.

Intervenors argue that communications "involving support to defeat this Court's Opinion and Order" are not subject to work-product production. *See* Intervenors' Reply Br. at 20. Were that true, the appellant in every appeal proceeding would lack the benefit of work product protection because the appellant always seeks the reversal (*i.e.*, "defeat") of an adverse order of the trial court. That cannot be the case. The Rehabilitator possesses a statutory right to seek

appellate review of a judicial decision. He has chosen to invoke that right, and communications with regard to that appeal with any parties, including potential amicus parties in furtherance thereof constitute protected work product under Rule 4003.3 of the Civil Rules. The common-interest doctrine also extends that protection to the Rehabilitator's Appeal-related communications, which remain protected for reasons identical to those discussed above. *Russo v. Cabot Corp.*, No. 01-2613, 2001 WL 34371702, at *2 (E.D. Pa. Oct. 26, 2001). The work-product doctrine therefore protects communications and documents relating to the Appeal.

Intervenors further claim that work-product protection does not apply to the "Update on Penn Treaty" given by Commissioner Consedine during a November 2012 presentation to the NAIC. However, the Rehabilitator has never claimed that work-product protects that presentation, which was made on the public record, which (based on publicly available information and belief) is currently in the custody of the NAIC, and which may be obtained directly from the NAIC in accordance with its open-records policy. The public nature of that document has no effect on the work-product protection applicable to the Rehabilitator's confidential communications about the Appeal.

3. Intervenors have failed to demonstrate that the deliberative process privilege is inapplicable.

Intervenors suggest that the deliberative process privilege does not apply because the Pennsylvania Supreme Court has never adopted it, as if to suggest that the Supreme Court's silence calls the viability of the privilege into question. *See* Intervenors' Reply Br. at 21-22. However, that the Supreme Court has never had occasion to rule on the privilege does not mean that it is unavailable under Pennsylvania law, especially when this Court has acknowledged its existence and applied it in prior cases. *See, e.g.*, *Van Hine v. Dep't of State*, 856 A.2d 204, 211-12 (Pa. Commw. Ct. 2004) (applying deliberative process privilege). Basic rules of *stare decisis*

provide that the privilege is available under those decisions until the Supreme Court rules otherwise. *See State Farm Mut. Auto. Ins. Co. v. Dep't of Ins.*, 720 A.2d 1071, 1073 (Pa. Commw. Ct. 1998) ("Stare decisis binds us to follow decisions of our own court until they are either overruled or compelling reasons persuade us otherwise.").

To circumvent the privilege, Intervenors attempt to cast their request as seeking "information that is purely factual," such as the dates of communications and the individuals involved, which they claim falls outside the scope of the deliberative process privilege. *See* Intervenors' Reply Br. at 26. Yet, in fact, on its face, their Application demands the content of any communications. Indeed, their proposed order, if entered, would compel production of "a copy of all communications and documents exchanged between the Rehabilitator, [the NAIC, and other state regulators] concerning [amicus support for] the Rehabilitator's appeal." *See* Proposed Order. That is not a mere request for the dates and times of communications; it is an attempt to discover strategic legal discussions undertaken for the purpose of appellate litigation. Such communications are protected by the deliberative process privilege. *See, e.g., Wolfson v. United States*, 672 F. Supp. 2d 20, 30 (D.D.C. 2009) (holding that memoranda reflecting legal strategy qualified for the deliberative process privilege). Accordingly, the Court should reject Intervenors' attempt to discover these privileged materials.

4. Section 202-A of the Insurance Department Act, 65 PA. STAT. ANN. § 65.2-A, applies to the communications at issue.

Intervenors' argument that Section 202-A is inapplicable to the requested materials is based on a facially erroneous interpretation of the statute. They claim that, because Section 202-A authorizes information-sharing only with individuals or entities who agree to "provide to [the information] the same confidential treatment *as required by this article*," 40 PA. STAT. ANN. § 65.2-A(b), Article II-A of the Insurance Department Act must itself create the confidentiality

or privilege for the statute to apply. *See* Intervenors' Reply Br. at 29. They then argue that Section 202-A cannot protect the communications and documents at issue because Article II-A does not establish any privilege applicable to those materials. *Id.*

That interpretation ignores that Article II-A does not create any confidentiality or privilege whatsoever; it merely provides for the exchange of information that is otherwise confidential without destroying that protection. Since Article II-A does not itself create any confidentiality or privilege, the Intervenors' interpretation requiring such protection to originate within the Article itself must be rejected because it would preclude Section 202-A from applying to any information at all, thereby rendering the statute a nullity. *Se. Pa. Transp. Auth. v. Simpkins*, 648 A.2d 591, 594 (Pa. Commw. Ct. 1994) ("[W]e may not presume that the Legislature intended any of its statutory language to be mere surplusage.").

The far more logical interpretation of Section 202-A is that advanced by the Rehabilitator: Section 202-A allows the Rehabilitator to exchange information that is otherwise privileged or confidential if the recipient agrees to maintain that protection. The phrase "confidential treatment as required by this article" refers not to protection conferred by Article II-A, but to the confidential treatment that the recipient must afford as a prerequisite to the exchange of information. Read in this light, Section 202-A applies to the communications and documents at issue because they are confidential (by virtue of the attorney-client privilege, work-product doctrine, the deliberative process privilege or statutory protection), and the NAIC representatives and state regulators receiving that information have agreed to preserve its confidentiality. Accordingly, the Court should deny the Intervenors' Application for Relief because Section 202-A applies to the materials at issue.

5. The Intervenors have not shown any waiver of privilege.

In their Application, the Intervenors claim that testimony and emails from Joel Ario, Camerion Waite, and Joseph DiMemmo dating from late 2010 and early 2011 constitute a waiver of privilege. In their Reply, they abandon those claims of waiver and instead allege that waiver actually resulted from a March 3, 2010 letter, in which former Commissioner Ario advised his counterparts in other states that, in light of the then-pending liquidation petitions, he "d[id] not anticipate approval of any new premium rate increase filings for PTNA and ANIC ... in Pennsylvania." *See* Letter dated Mar. 3, 2010 from Joel Ario to Sean Dilweg, attached as Exhibit 8. Not only does Intervenor's position ignore the subsequent change in Rehabilitator and actuary, as well as ignore the finality of the liquidation hearing and this Court's ruling; but that letter fails to establish waiver for the same reasons that the testimony and emails previously relied upon by Intervenors could not do so: it discloses no privileged information, and it is unrelated in both time, context, and subject matter to the communications that Intervenors now seek. *See Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1268 (Pa. Super Ct. 2007) (explaining that waiver of the attorney-client privilege requires disclosure of other privileged information pertaining to the same subject matter as the communication at issue).

Lastly, Intervenors' attempt to link the absence of rate increases from the proposed rehabilitation plans to a privilege waiver is spurious. The content of the proposed Plans cannot function as a privilege waiver when those Plans disclose no privileged material, and when the privileged information that Intervenors demand pertains exclusively to the Appeal. The Court should therefore conclude that the Rehabilitator has not waived privilege as to any alleged Appeal-related communications with potential amicus parties, and should deny the Application for Relief.

III.
CONCLUSION

Accordingly, for the reasons set forth above and discussed at greater length in the Rehabilitator's Opposition Brief, the Rehabilitator respectfully requests that the Court deny the Intervenors' application for relief. The Rehabilitator does not believe that oral argument on these issues is necessary.

Respectfully submitted,

by permission NFH

Dated: June 26, 2013

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Attorneys for Michael F. Consedine, Insurance Commissioner of Pennsylvania, in his capacity as statutory rehabilitator of Penn Treaty Network America Insurance Co. and American Network Insurance Co.

CERTIFICATE OF SERVICE

I, Nathan P. Heller, certify that I will cause the foregoing Memorandum of Law in Surreply to Intervenors' Application for Relief thereto to be placed on the rehabilitation website for the above-referenced matters, and that, on June 26, 2013, served the foregoing Opposition to Application via email and first-class mail, upon Intervenors Penn Treaty American Corporation and Eugene J. Woznicki as follows:

Douglas Y. Christian, Esquire
Ballard Spahr LLP
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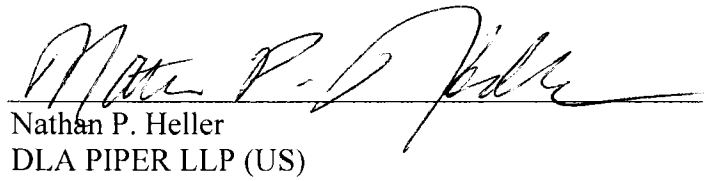
Attorneys for Intervenors Penn Treaty American Corporation and Eugene J. Woznicki



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Attorneys for Rehabilitator

Exhibit

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COMMONWEALTH OF PENNSYLVANIA
INSURANCE DEPARTMENT
HARRISBURG

THE COMMISSIONER

March 3, 2010

Happy to discuss the details here.

Sean Dilweg, Insurance Commissioner
Wisconsin Department of Insurance
PO Box 7873
Madison, Wisconsin 53707-7873

Dear Commissioner ~~Dilweg~~ Sean:

On January 6, 2009, the Commonwealth Court of Pennsylvania approved orders of rehabilitation for two Pennsylvania-domiciled long-term care ("LTC") insurance companies: Penn Treaty Network America Insurance Company ("PTNA") and American Network Insurance Company ("ANIC"). As a result of continued deterioration in the financial condition of these companies, I petitioned the Commonwealth Court in October 2009 to issue Orders of Liquidation for both PTNA and ANIC. A decision by the Court on the petitions for liquidation has not yet been made.

PTNA and ANIC have requested increased premium rates for many of their existing LTC policy forms due to the continued emergence of LTC experience that is worse than previously expected. These requests were made prior to a determination by my staff and me that further efforts to rehabilitate PTNA and ANIC would substantially increase the risk of loss to policyholders and/or would be futile due to the continued deterioration of surplus. In light of these developments, and because there is a currently pending rate increase request with your Department, I write to advise you that I do not anticipate approval of any new premium rate increase filings for PTNA and ANIC LTC policy forms in Pennsylvania. Should you have questions or wish to discuss this matter further, please do not hesitate to contact me.

Sincerely,

Joel Ario
Insurance Commissioner

EXHIBIT
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