IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: AMERICAN NETWORK INSURANCE COMPANY IN REHABILITATION	:	DOCKET NO. 1 ANI 2009
IN RE: PENN TREATY NETWORK AMERICA INSURANCE COMPANY IN REHABILITATION	:	DOCKET NO. 1 PEN 2009

INTERVENORS' REPLY TO THE REHABILITATOR'S MEMORANDUM OF LAW IN SURREPLY TO INTERVENORS' APPLICATION FOR RELIEF AND TO COMPEL

The Intervenors respond below to the new arguments raised in the Rehabilitator's June 26, 2013 Surreply with just a few important points:

- Delay. The Rehabilitator argues that discovery would delay or disrupt the rehabilitations, stating "[j]ust two months ago, the Intervenors sought to delay the filing of the Plans. Now they seek to distract the Court and disrupt the rehabilitation. . . ." Surreply at 2. The Intervenors admit to basically begging the Rehabilitator to take the time to get the plans correct once they realized over the last several months that the Rehabilitator's approach was so deficient, and they admit that they asked the Rehabilitator in the Court's presence (and at many, many other times) that he request more time to do the job right. For whatever reason, instead of a request for another 30 days that probably would have been granted, the Rehabilitator filed terribly flawed proposed plans in direct violation of the Court's Orders and Opinion and based on incomplete and wrong actuarial analyses (not only is there still no actuarial report in support of the sketchy actuarial projections that are the focus of the plan, but the Special Deputy Rehabilitator audaciously stated to the Court last week that the incomplete actuarial report does not relate to the proposed plan). When the Rehabilitator wanted his extensions in the aftermath of the Court's May 2012 Order, the Intervenors did not object. When the Intervenors asked the Rehabilitator to take another month to get the job done correctly, he flatly refused. The

suggestion that the Intervenors are attempting to delay a proper rehabilitation that they worked so hard to achieve is meritless.

- Privilege log. The Rehabilitator contends that "[u]ntil they filed their Reply, Intervenors had never demanded a privilege log." Surreply at 2. This contention is incorrect. The Application sought as alternative relief "a list identifying all contacts . . . , including but not limited to the dates of the communication, the substance of the communication, and the participants in the communication." April 29, 2013 Application at 1-2, Proposed Order. Moreover, the Rehabilitator's contention is also irrelevant. He has failed to provide an affidavit and privilege log at his own peril because it is his burden to initially set forth facts showing that all asserted privileges have been properly invoked. *See* Application at 8, n.2 (discussing *Scolforo* affidavit requirement); June 11, 2013 Reply at 10-11, 25 (citing *Fleming*, 924 A.2d at 1266; *Joe*, 782 A.2d at 34).

- Order of distribution. Improperly referring to the order of distribution in a liquidation, the Rehabilitator argues 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." Surreply at 2. The Intervenors submit that as the parties that successfully defended against the liquidation petitions and obtained the May 3, 2012 Order, it is entirely appropriate for them to obtain information to enforce the Order as well as to prepare for the hearing on the proposed Plans. Moreover, Mr. Woznicki is seeking a proper rehabilitation for the Companies (free from undue pessimism, bias, and conflicts of interest that have for years shut down the pursuit of actuarially justified premium rate increases) in his capacity as Chairman of the Boards of the Companies.

- Abandonment. The Rehabilitator argues, without any supporting authority, that Intervenors have somehow "abandoned" arguments made in their Application to the extent that their Reply Brief does not repeat an argument. Surreply at 3, n.1 and 18. This is incorrect. The Intervenors have not and do not intend to "abandon" any arguments made in their Application by not repeating an argument in a subsequently filed reply brief.

- Scope and relevance of discovery. The Rehabilitator argues that the Application is "outside the scope of discovery" and "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." Surreply at 5. He similarly argues that the discovery sought is irrelevant. *See id.* at 6-7. These assertions are incorrect. The discovery sought will show that in the time since the May 3, 2012 Order was issued, the Rehabilitator has petitioned other regulators to support his appeal to quash the rehabilitations. These documents are within the scope of permissible discovery because they will be admissible evidence at the hearing to demonstrate that the Rehabilitator has failed to undertake earnest, meaningful, and legitimate rehabilitation efforts as ordered by the Court. The documents sought will be critical evidence to rebut the Rehabilitator's anticipated arguments against modifying the proposed Plans to include premium rate increases and other possible rehabilitation tools that could be implemented with the cooperation of other regulators. In addition, the documents are also within the permissible scope of discovery as they are relevant to the enforcement of the Court's Orders and the issue of whether, once again, the Rehabilitator has acted to frustrate the ordered rehabilitations.[1]

[1] *Bata v. Central-Penn Nat'l Bank of Phila.*, 423 Pa. 373 (1966), cited in the Surreply at 5, is inapt. Unlike the motions to compel filed in *Bata*, the Intervenors' Application was not untimely, and the discovery sought here does not lack a factual foundation. As set forth

- Procedure. Arguing form over substance, the Rehabilitator now opposes discovery on the grounds that the request was not made in "numbered paragraphs" in a document labeled "document requests." Surreply at 7. This argument fails. The Intervenors' counsel repeatedly contacted the Rehabilitator's counsel to request the documents and information. The argument that the request was not made in numbered paragraphs (made for the first time in his Surreply) is trifling, particularly given that the Application's Proposed Order only requests a single category of documents. Had the request been made in a document labeled "document requests," there would only be one numbered paragraph.[2] The Rehabilitator received the request for documents and information and his counsel's response was that nothing would be forthcoming because he contended the documents and information were privileged. Counsel conferred to no avail, and the Intervenors' only recourse was to file the Application. No other discovery procedure was necessary; in fact, other procedures would have been futile. Thus, the Court should reject this latest argument opposing discovery raised only in the Surreply.

- Common-interest and work-product doctrines. The Surreply improperly cites new authorities that the Rehabilitator could have raised in his June 4th Brief, but chose not to, depriving the Intervenors of the opportunity to address them in their June 11th Reply, or given the page limitations, in this brief. Notably, in one such case cited at page 15 of the Surreply, the court held that for the common interest exception to apply, "[t]he nature of the parties' common interest . . .must be identical, not similar, and be legal, not solely commercial." *Russo v. Cabot Corp.*, 2011 WL 34371702, at *2 (E.D. Pa. Oct. 26, 2001) (citation omitted). Moreover, the

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in the verified Application, "[a]t least one member of the rehabilitation team at DLA Piper has admitted in conversation with counsel for the Intervenors that he is personally involved in lining up *amicus curiae* brief support for the appeal." Application at ¶ 17.

[2] Moreover, there is no requirement in Rule 4009.11 that a written request for documents be labeled "document requests" or "request for production of documents."

court had reviewed *in camera* the documents that the defendant had refused to produce in order to determine whether all the asserted privileges and doctrines applied. *See id.* at *3-4. As a result of that review, the court issued an order listing "the documents which are not protected . . . and which accordingly must be produced." *Id.* at *5.

The Rehabilitator should not be permitted to obstruct proper inquiries into proper enforcement of this Court's Orders. The information sought is designed to determine whether, once again, the Rehabilitator has acted to frustrate the ordered rehabilitations. It is folly and arrogance for the Rehabilitator to suggest that the Intervenors no longer have a right to determine whether this proven misconduct is continuing, this time in violation of the Court's Order and Opinion denying liquidation and requiring an aggressive rehabilitation effort. While the Rehabilitator would like to silence the voice of the Intervenors, such a desire cannot compel this Court to ignore the requested information that is expected to show that the Rehabilitator is still avoiding his responsibilities.

For all of these reasons, and those set forth in Intervenors' April 29, 2013 Application and June 11, 2013 Reply, the Intervenors respectfully request that the Application be granted.

Respectfully submitted,

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Dated July 12, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2013, I caused a true and correct copy of the foregoing Intervenors' Reply to the Rehabilitator's Memorandum of Law in Surreply to Intervenors' Application for Relief and To Compel to be served via e-mail and first-class U.S. Mail on the counsel listed below:

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