IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In Re: Penn Treaty Network America Insurance Company in Rehabilitation	:	1 PEN 2009
In Re: American Network Insurance Company in Rehabilitation	:	1 ANI 2009

INTERVENORS' BRIEF IN OPPOSITION TO THE POLICYHOLDERS COMMITTEE'S APPLICATION TO COMPEL

I. INTRODUCTION

Eugene J. Woznicki ("Woznicki") and Penn Treaty American Corporation ("PTAC") (together, the "Intervenors") offer this brief in opposition to the application to compel filed by a very small and non-representative committee of policyholders (the "Committee"). Although the Committee was formed solely to facilitate negotiations regarding the April 2013 Plans, the Committee's role has mushroomed, at great expense to the Companies, and they now appear to be the Commissioner's litigation henchman in attacking the Intervenors. The Commissioner has not filed a motion to compel responses to the Intervenors' discovery responses, as she appears to be content with the nature of those responses. It makes no sense to require the Intervenors to respond, also at great expense to the Companies, to discovery requests of a third party with regard to the Intervenors' objections to the Commissioner's plan.

The discovery that this Committee has improperly propounded upon the Intervenors includes multiple sets of interrogatories and requests for production of documents demanding information on a range of topics running the gamut from "the current value of PTAC's shares in PTNA" (Interrogatory 3 and Request 3), the circumstances under which "PTAC anticipates PTNA will be able to pay dividends to its shareholders" (Interrogatories 4-5 and Requests 4-5), whether states are likely to approve actuarially justified premium rate increases and identification of all premium rate increases and benefit reductions required to

rehabilitate the Companies including to the point where they can pay all policyholder claims and resume insurance sales (Interrogatories 6-7, 10, 18, 21, and 23-24, and Request 7), and whether and why PTNA should be rehabilitated rather than liquidated (Interrogatories 11, 15, and 16). For the reasons explained below in greater detail, the Court should deny the application because:

a) the Committee's sole aim is to terminate the rehabilitation process, rendering the Committee's further participation unproductive and contrary to this Court's directives;

b) the Committee seeks to reopen matters already resolved by this Court's decision after a lengthy hearing, and the expense to the Companies of the Committee propounding and the Intervenors answering the discovery sought to be compelled outweighs any possible utility that the information sought could possibly have;

c) alternatively, the Committee seeks to compel discovery answers that are not relevant to its formal comments;

d) alternatively, the Committee has or may obtain any documents and information it needs with regard to its role in this hearing from the Commissioner; and

e) alternatively, the Committee purports to compel answers to discovery requests that it propounded only days before it filed the application and which are not contained in the actual discovery requests that the Committee served upon the Intervenors, and the few unmodified requests addressed by the application are improper.

II. ARGUMENT

A. The application should be denied because the Committee's sole aim is to terminate the rehabilitation process, rendering the Committee's further participation unproductive and contrary to this Court's directives.

The Court should limit improper discovery to deny the Committee's application to compel. As explained below, the Committee has forfeited its right to participate with regard to the plan hearing, or at least discovery relating thereto, by taking the position that the entire

rehabilitation process should be abandoned. This Committee has nothing constructive to offer and its discovery requests in this context are abusive and improper. The Committee is not propounding discovery upon the Intervenors in order to support the Committee's own comments, but rather is a third party seeking discovery in order to attack the Intervenors' efforts to enforce the Judgment of this Court awarded to the Intervenors.

The Committee's and NOLHGA's opposition to the April 2013 Plans served as the "cover" that former Commissioner Consedine desired to justify delaying the implementation of and then flip-flopping on his own proposed plans. After opposing the April 2013 Plans, the Committee filed formal comments which were generally supportive of the Second Amended Plan, but it now opposes even the current plan and urges liquidation. There are many other policyholders, however, who do not share the same view regarding liquidation. The few members of the Committee are not a fair cross section of the entire policyholder base.[1]

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[1] There are many different policyholders with competing interests: "The Rehabilitator has not made an earnest effort to correct the condition that caused the Companies' financial difficulties: the pricing structure for the OldCo non-tax qualified policies, particularly those policies with "Cadillac" coverages. . . .The financial problem for both Companies is discrete: the OldCo non-tax qualified policies are underpriced and overly generous. That is why policyholders do not receive a tax deduction for their premium payment. In rehabilitation, these policies can be reformed and repriced." May 3, 2012 Opinion at 159-60. Likewise, this Court determined that:

> Some states, such as Virginia and South Dakota, have acted responsibly on the OldCo filings. As a result, policyholders there are paying close to "national rate," *i.e.*, the amount needed to pay claims in any and all states for a particular product. [footnote omitted] Other states, including Pennsylvania, have refused to approve actuarially sound rate filings. (Waite) N.T. 2/1/11 at 104 (describing Pennsylvania as a "difficult state"). Rate inequities are the result. Policyholders in South Dakota, for example, are subsidizing policyholders in Pennsylvania; NewCo policyholders are subsidizing OldCo policyholders.

Id. at 9-10. Accordingly, this Court ordered, *inter alia*, that "[t]he plan of rehabilitation must address and eliminate the inadequate and unfairly discriminatory premium rates for the OldCo business." May 3, 2012 Order at 2. Some policyholders are the beneficiaries of this discrimination, and some are its victims. PTNA policyholders are not aligned with ANIC policyholders. NewCo policyholders are not aligned with OldCo policyholders, and OldCo

During the conference in which this Court entertained the application to form a policyholders' committee, the Court warned that it had already held a lengthy hearing regarding the Rehabilitator's liquidation petitions and that formal commenters would not be allowed to participate merely to argue for the entry of the liquidation orders that this Court had already denied. In response to saber rattling for liquidation by NOLHGA, this Court admonished that:

> We have had a lengthy, lengthy hearing already on that point. So if your position is really just going to be to ask the Court to convert the rehabilitation to a liquidation – and I don't hear you saying anything else – we will have to consider carefully whether or not we are going to accept your data and your participation.

(9/24/2013 Transcript at 44).

The Committee has ignored the Court's clear admonition. Upon its formation, the Committee filed -- at the Companies' expense -- an untimely brief in the Supreme Court of Pennsylvania arguing for liquidation. Most recently, the Committee's counsel argued during the status conference held on October 2, 2015, that the rehabilitation process should be abandoned in favor of liquidation. Notably, the Committee is represented by counsel who previously served as the *Commissioner's* long-time counsel in the Fidelity Mutual receivership. That is the nature of this Committee that has propounded -- at the Companies' expense -- three sets of interrogatories and three sets of requests for production of documents upon the Intervenors demanding information on a range of topics from whether states are likely to approve actuarially justified premium rate increases, to the propriety of benefit reductions for OldCo policies, to the Intervenors' post-rehabilitation business plans for dividends and resumption of insurance sales.

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policyholders are not even aligned with each other in many instances (*e.g.* South Dakota v. Pennsylvania). The policyholders reside in states with different amounts of guaranty fund coverage. *See* Opinion at 145. Some policyholders have multiple policies while others have one. *Id.* at 161. The differences among the policyholders are great, rendering the Committee incapable of representing the interests of or speaking for all policyholders.

None of the Committee's discovery requests is appropriate in this context. Now is the time for finally taking rehabilitative action to save these Companies, not for reopening matters decided by the Court or for spending time and resources analyzing what might occur many years down the road if a rehabilitation plan is correctly executed.

Notably, the Committee's discovery requests upon the Intervenors constitute the only discovery sought by one set of intervenors against another in this proceeding. During the first phase of the hearing, this Court was understandably quite surprised to learn that the Committee propounded discovery upon the Intervenors. Hesitant to admit the extent of that discovery, the Committee's counsel incorrectly represented that it had only served interrogatories, as follows:

> **MR. CHRISTIAN:** Well, with due respect, the only way to do it is to wait until all the responses are in, including with regard to the Discovery Mr. Leonard's client served on my clients, and we'll get into the issue at the appropriate time of the appropriateness of that issue.
>
> **THE COURT:** I didn't understand that. So the policyholders have propounded Discovery?
>
> **MR. CHRISTIAN:** Lots of it.
>
> **MR. LEONARD:** Interrogatories, Your Honor.

(July 14, 2015 Transcript at 257).

The Committee argues that no order specifically prohibits one group of intervenors from taking discovery from other intervenors. However, the Intervenors object to the propriety of the Committee propounding any discovery upon them and the Court has the inherent power to limit the Committee's improper discovery requests. If the Committee has not yet already forfeited its right to participate in the plan hearing by ignoring this Court's admonition and instead urging liquidation, then the Committee's single-minded pursuit of liquidation at a

minimum supports the Intervenors' objection to answering the Committee's requests. The Intervenors have already won a hard fought judgment declaring that a rehabilitation plan based upon rate increases or benefit reductions or preferably both in concert must be filed and pursued. It is not the role of these few policyholders comprising the Committee, especially at the Companies' expense, to contest points the Intervenors have made about the plan, to help the Commissioner make her case, or to urge liquidation in violation of this Court's rehabilitation orders.

B. The application should be denied because the Committee seeks to reopen matters already resolved by this Court's decision after a lengthy hearing, and the expense to the Companies of the Committee propounding and the Intervenors answering the discovery sought to be compelled outweighs any possible utility that the information sought could possibly have.

The Intervenors do not need to continually reprove the propriety of quickly implementing an action plan for obtaining needed and actuarially justified premium rate increases and benefit reductions to rehabilitate these Companies after having won a hard fought judgment from this Court ordering precisely that. In serving discovery requests intimating that premium rate increases and benefit reductions should not be implemented and that the Companies (or at least PTNA) should not be rehabilitated, the Committee has ignored the many clear rulings of this Court regarding the rehabilitation process. If accepted, the Committee's argument that basically everything decided in the hearing on the prior liquidation petitions should be tried again merely because the Commissioner has delayed implementing a rehabilitation plan since the May 3, 2012 decision (in part as a result of the Committee's own interference with the April 30, 2013 Plans) would reward the Commissioner and the Committee for their obstruction of this Court's rehabilitation orders, and waste additional time and estate resources.

The tremendous expense to the Companies of the Committee propounding and the Intervenors answering the discovery sought to be compelled outweighs any possible utility that the information sought could possibly have even if the Committee were seeking any relevant information (and the information sought is not relevant as the Committee does not seek the information to support their own limited comments to the plan, but rather to attack the Intervenors' objections to the Commissioner's plan). This is particularly case where the Court has already ruled that the Commissioner should rehabilitate PTNA and ANIC, and where the Commissioner is not seeking to compel the production of any discovery materials from the Intervenors for the plan hearing. It makes no sense to require the Intervenors to respond, at great expense to the Companies, to discovery requests of a third party with regard to the Intervenors' efforts to modify the Commissioner's proposed plan so that it better conforms to this Court's Judgment awarded to the Intervenors.

C. Alternatively, the application should be denied because the Committee seeks to compel discovery answers that are not relevant to its formal comments.

The Court should alternatively deny the Committee's application because the discovery answers sought to be compelled are not relevant to the Committee's formal comments to the plan. "The Committee's comments largely concern issues of implementation and communication with policyholders concerning policyholder elections." Formal Comments of the Policyholders Committee on the Second Amended Plan of Rehabilitation filed February 13, 2015 at p. 1. None of the Committee's discovery requests propounded upon the Intervenors are relevant to the Committee's small number of comments concerning communications with policyholders and the policyholder election package. Accordingly, even if the Committee had not already staked out the position that the entire rehabilitation process should be aborted rendering its further participation in the plan approval process unnecessary, the Committee

cannot demonstrate that it needs the discovery it has sought from the Intervenors in order to support its formal comments.

D. Alternatively, the application should be denied because the Committee has or may obtain any documents and information it needs with regard to its role in this hearing from the Commissioner.

The Court should alternatively deny the application because the Committee has or may obtain any documents and information it needs with regard to its role in this hearing from the Commissioner. The Commissioner has been in the sole possession, custody, or control of the Companies and their employees, agents, and files since January 6, 2009. The Committee has failed to explain (particularly given the very limited scope of its formal comments) why it cannot obtain any data or information it needs directly from the Commissioner.

Moreover, unlike the Intervenors who have been precluded by the Commissioner from hiring an actuary at the Companies' expense unless the Court orders it *sua sponte*, the Committee has retained its own actuary at significant expense to the Companies. The Committee should not be heard to argue that the Intervenors must provide additional discovery to its very small number of policyholders who have been corralled by the Commissioner's former counsel into disrupting the rehabilitation process and pursuing liquidation of the Companies contrary to this Court's orders. If the Rehabilitator wishes to pursue arguments for pursuing liquidation in defiance of this Court's many rehabilitation orders, she should pursue those arguments herself. She should not be using the Committee's counsel as a proxy, as she appears to be doing, in order to pursue discovery from the Intervenors.

E. Alternatively, the application should be denied because the Committee purports to compel answers to discovery requests that it propounded only days before it filed the application and which are not contained in the actual discovery requests that the Committee served upon the Intervenors, and the few unmodified requests addressed by the application are improper.

The Committee through its October 9, 2015 letter[2] and Exhibit C to its October 15, 2015 application belatedly and improperly purports to "modify" (e.g., propound different discovery than the Committee had actually served upon the Intervenors on April 30, 2015 and June 30, 2015), and then to compel answers to those new requests just days later. The Committee fails to cite a single authority supporting this prejudicially novel approach to discovery motion practice. By way of example:

- the Committee's Interrogatory 3 inquired: "3. State the current value of PTAC's shares in PTNA and identify the methodology by which such value was determined."
    - By contrast, the application "modified" Interrogatory 3 in Exhibit C to state: "3. Please describe in general terms the 'value of PTAC's ownership in the subsidiaries' that will be destroyed if PTNA is liquidated, as stated at page 10 of your Formal Comments on the Second Amended Plan, including the sources of that value and the conditions under which that value may exist."
- the Committee's Interrogatory 4 inquired: "4. State when and under what circumstances PTAC anticipates PTNA will be able to pay dividends to its shareholders, on the assumption that PTNA is rehabilitated instead of ANIC as suggested as page 10 of the Intervenors' Comments."
    - By contrast, the application "modified" Interrogatory 4 in Exhibit C to state: "4. Assuming the Court grants PTAC's request to make to make [*sic*] PTNA the surviving company under the Second Amended Plan, as stated at pages 9-13 of your Formal Comments on the Second Amended Plan, does PTNA have to be profitable for PTAC's ownership in PTNA to have value after rehabilitation? If no, please explain."
- the Committee's Interrogatory 5 inquired: "5. With respect to your answer to interrogatory no. 4, state the assumptions on which your answer is based."
    - By contrast, the application "modified" Interrogatory 5 in Exhibit C to state: "5. Assuming the Court grants PTAC's request to make to make [*sic*] PTNA the

[2] Exhibit B to the application.

surviving company under the Second Amended Plan, as stated at pages 9-13 of your Formal Comments on the Second Amended Plan, what business plans does PTAC have for PTNA after rehabilitation?"

- the Committee's Interrogatory 17 demanded to know: "17. Were any of PTAC's current officers or directors also officers or directors of PTNA or ANIC before rehabilitation? If so, please identify them."
    - By contrast, the application "modified" Interrogatory 17 in Exhibit C to state: "17. Who has knowledge concerning 'the value of PTAC's ownership in the subsidiaries' that will be destroyed if PTNA is liquidated, as stated at page 10 of your Formal Comments on the Second Amended Plan, including the sources of that value and the conditions under which that value may exist."

Nothing in the procedural rules permits this confusing, inefficient, and improper approach to discovery of making wholesale "modifications" to discovery requests after the deadline for serving discovery and then seeking to compel answers to the new discovery requests. Accordingly, the Committee's application should alternatively be denied with regard to all such improper requests: Interrogatory Nos. 3-7, 11, and 17-18, 21, and 23 and Requests for Production Nos. 3-4. The few discovery requests that are the subject of the application that remain unmodified should alternatively be denied for the reasons explained below.

Set forth below is a table for each set of interrogatories and document requests addressed in the application. The first row after each table's heading identifies by number and sets forth verbatim the interrogatories and requests that the Committee seeks to compel answers to that are the same in both the original discovery requests that were actually served upon the Intervenors and in Exhibit C to the application.

The second row identifies by number the interrogatories and requests that are different because the Committee improperly purports to modify them in the application to compel itself, which is a prejudicial and defective discovery procedure. These items are not set forth verbatim in the tables below because the Committee has waived any right to compel

answers to them by failing to include them in the discovery requests that it actually served upon the Intervenors.

The third row identifies by number the interrogatories and requests that the Committee is not moving on for various reasons including because the request has been withdrawn. These items are not set forth verbatim in the tables below because the Committee does not seek to compel any answers to them.

After the tables for the first and second sets of discovery is a brief explanation for why answers to the items in the first rows of the tables should not be compelled. (Additional reasons regarding why the application should be denied outright are separately explained above in argument sections "A" through "D" of this brief).

First Interrogatories dated April 30, 2015	
Same requests	**No. 10**: "What investigation have you performed to determine whether individual states are likely to grant premium rate increases to insolvent insurance companies, such as PTNA and ANIC. Identify the results of such investigation." **No. 15**: "State why you contend at page 45 of the Intervenors' Comments that '[p]olicyholders having self-sustaining policies should not have the option to transfer their policies to the company being liquidated." **No. 16**: "State the reasons why Intervenors' suggestions for alternative plans would be better for policyholders than the Second Amended Plan?"
Different requests (waived)	**Nos. 3-7, 11, 17**
Withdrawn or not addressed by application	**Nos. 1-2, 8-9, 12-14**

First RFPs dated April 30, 2015	
Same requests	**No. 1**: "Produce all documents you intend to introduce into evidence at the hearing in this

	matter." **No. 2**: "Produce all expert reports, statements, and other non-privileged documents relating to any expert testimony that you intend to introduce into evidence at the hearing in this matter." **No. 5**: "Produce all documents showing the premium rate increases you believe are necessary to rehabilitate PTNA so that PTNA is able to pay policyholder claims as they come due, including any breakdown of such rate increases by product and by state." **No. 7**: Produce documents relating to any investigation or analysis you have performed to determine whether individual state regulators are likely to grant premium rate increases to insolvent insurance companies such as PTNA and ANIC."
Different requests (waived)	**Nos. 3-4**
Withdrawn or not addressed by application	**Nos. 6, 8-10**

The Committee's Request No. 1 along with every other document request propounded upon the Intervenors is improper because the Committee's sole role in this proceeding should be to offer its own comments regarding the proposed rehabilitation plan. It is not the role of the Committee to help the Commissioner make points about the Intervenors' comments or objections or to serve as an additional estate-funded litigant against the Intervenors. Moreover, this request is improper because the Commissioner is in the possession of the Companies' documents, and the Intervenors have not yet completed discovery and determined what documents they will use as evidence at trial. With regard to Request No. 2, the Intervenors will serve a copy of their expert reports upon all counsel of record including the Policyholders Committee at the appropriate time.

The Committee's Interrogatories Nos. 10, 15, and 16 and Requests No. 5 and 7 regarding the likelihood of obtaining rate increases, liquidating the Companies' appropriately priced business, and modifying the proposed plan to rehabilitate rather than liquidate PTNA are improper because it is not the role of the Committee to propound discovery upon matters that have long been resolved, such as the Court's basic ruling that PTNA should be rehabilitated rather than liquidated and that rate increases (and benefit reductions) are an appropriate means of doing so.[3] The Court in its May 3, 2012 Opinion has already clearly ruled that rate increases should be sought, unfairly discriminatory premium rates should be addressed, and PTNA should be liquidated. This Court ruled that "rate increases are not futile because PTNA and ANIC can impose rate increases at policy renewal...rate increases are expressly authorized where the rates on a particular product are inadequate" (*id.* at 140); held that regulators including the Commissioner have "statutory obligations to approve actuarially justified rate increases" (*id.* at 141); ordered the Rehabilitator to prepare an "action plan" for obtaining critical rate increases for the OldCo policies (*id.* at 164); and supported such future rate increases for the Companies and

[3] The Court was understandably critical of the 2009 abandonment of pursuit of premium rate increases, and it was specifically concerned about the Commissioner advising "state regulators to follow his example and *not* approve pending rate filings on OldCo business." *Id.* at 10 (emphasis by the Court). The Court specifically: (1) rejected a "business as usual" approach to seeking future rate increases, *id.* at 111; (2) required a "unified attack on OldCo's rate structure," *id.* at 112; (3) expected "[e]nergy in implementing the plan," *id.* at 112; (4) required a "legitimate effort to devise a rehabilitation plan, noting that "[a]ggressive efforts to pursue actuarially justified rate increases and contract modification options, for policyholders and agents, all hold potential," *id.* at 139; and (5) required that neither the Rehabilitator's "phlegmatic effort" nor his abandonment of the effort is an appropriate response to the companies' "inadequate rate structure." *Id.* at 160. The Court concluded its Opinion by instructing that: "*[t]he Court also agrees with Intervenors that rate increases for OldCo are critical and, accordingly, the Rehabilitator must prepare an action plan for obtaining such relief. An appropriate order follows.*" *Id.* at 164 (emphasis added). Accordingly, the Court ordered that the "plan of rehabilitation must address and eliminate the inadequate and unfairly discriminatory premium rates for the OldCo business." Order at 2.

recognized that they will not be sought on a "business as usual" basis (*see id.* at 10, 111, 112, 114, 162).

Second Interrogatories dated June 30, 2015	
Same requests	**None**
Different requests (waived)	**Nos. 18, 21, 23**
Withdrawn or not addressed by application	**Nos. 19-20, 22, 24** (No. 24 was deleted in the Committee's October 9, 2015 letter)

Second RFPs dated June 30, 2015	
Same request	**No. 1**: "Kindly produce for inspection and copying any documents identified in your responses to the foregoing interrogatories."
Different requests (waived)	N/A
Withdrawn or not addressed by application	N/A

The Court should deny the Committee's request to compel the Intervenors to answer its second set of interrogatories because the application does not seek to compel any answers to interrogatories that have actually been timely served upon the Intervenors. Instead, it improperly seeks to compel answers to new interrogatories ##18, 21, 23, and 24 defectively propounded as part of the Committee's application to compel itself. Notably, interrogatory #24 was withdrawn as "deleted" in the Committee's October 9, 2015 letter (Exhibit B to the application), and does not seek information regarding a particular subject, but rather requests the identification of all documents embodied in answer interrogatory answers. Likewise, the Committee's request to compel the Intervenors to answer its second set of document requests should be denied because it refers to documents identified in connection with its second set of interrogatories, and the application does not seek to compel any answers to interrogatories that have actually been timely served upon the Intervenors.

III. CONCLUSION

Accordingly, the Committee's application should be denied.

Respectfully submitted,

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Dated: October 26, 2015

Attorneys for Intervenors Eugene J. Woznicki and Penn Treaty American Corporation

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2015, I caused a true and correct copy of the foregoing Intervenors' Brief in Opposition to the Policyholders Committee's Application to Compel Answers to Interrogatories and Requests for Production to be electronically served, upon:

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ORDER

AND NOW, this ____ day of _____, 2015, upon consideration of the Policyholders' Committee's Application to Compel PTAC and Woznicki to Provides Answers to Interrogatories and Requests for Production (Application), the Brief in Opposition thereto, and any oral argument thereon, it is hereby **ORDERED** that the Application is **DENIED**.

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MARY HANNAH LEAVITT, Judge