IN THE COMMONWEALTH COURT OF PENNSYLVANIA

ROBERT L. PRATTER, ACTING INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
Plaintiff,	:	
v.	:	**DOCKET NO. 5 M.D. 2009**
PENN TREATY NETWORK AMERICA INSURANCE COMPANY,	:	
Defendant.	:	
ROBERT L. PRATTER, ACTING INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
Plaintiff,	:	
v.	:	**DOCKET NO. 4 M.D. 2009**
AMERICAN NETWORK INSURANCE COMPANY,	:	
Defendant.	:	

ORDER

AND NOW, this ___ day of _____, 2010, in consideration of the Motion in Limine of the Rehabilitator to Preclude Portions of the Expert Report and Testimony of Karl G. Volkmar ("Motion") and any response thereto, it is hereby

ORDERED that the Rehabilitator's Motion is GRANTED, and accordingly, the Intervenors are precluded from offering evidence including but not limited to testimony of (1) Volkmar's opinions relating to achievable rate increases; (2) Volkmar's opinions relating to the alleged lack of independence and/or conflict of interest of the actuaries, including but not limited

to the actuaries retained by the Rehabilitator and all third party actuaries who have opined on Penn Treaty Network America Insurance Company and American Network Insurance Company; and (3) Volkmar's opinions concerning the governing statutory language at issue in this matter.

BY THE COURT:

_____

MARY HANNAH LEAVITT

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Plaintiff,	:	
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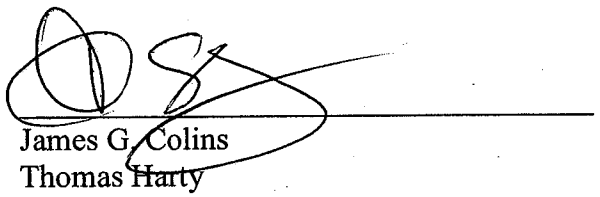
PENN TREATY NETWORK AMERICA INSURANCE COMPANY,	:	
Defendant.	:	
ROBERT L. PRATTER, ACTING INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
Plaintiff,	:	
v.	:	**DOCKET NO. 4 M.D. 2009**
AMERICAN NETWORK INSURANCE COMPANY,	:	
Defendant.	:	

MOTION TO PRECLUDE PORTIONS OF THE EXPERT REPORT AND TESTIMONY OF KARL G. VOLKMAR

Petitioner Robert L. Pratter, Acting Insurance Commissioner of the Commonwealth of Pennsylvania (the "**Rehabilitator**" or "**Commissioner**"), in his capacity as Rehabilitator of Penn Treaty Network America Insurance Company ("**PTNA**") and American Network Insurance Company ("**ANIC**") hereby moves this Court to preclude portions of the expert report and testimony of Karl G. Volkmar. The reasons and grounds for this motion are set forth in the accompanying Memorandum of Law submitted in support thereof and the exhibits set forth in the accompanying Appendix, which are incorporated by reference as if set forth fully herein.

Respectfully submitted,



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Dated: November 12, 2010

CERTIFICATE OF SERVICE

I, Thomas S. Harty, hereby certify that on November 12, 2010, I served the foregoing Rehabilitator's Motion to Preclude Portions of the Expert Report and Testimony of Karl G. Volkmar, supporting Memorandum of Law and Appendices by the following means:

By Hand Delivery:

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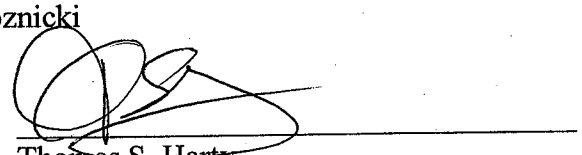

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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Defendant.	:	

MEMORANDUM OF LAW OF THE REHABILITATOR IN SUPPORT OF HIS MOTION IN LIMINE TO PRECLUDE PORTIONS OF THE TESTIMONY OF KARL G. VOLKMAR

I. INTRODUCTION

Petitioner Robert L. Pratter, Acting Insurance Commissioner of the Commonwealth of Pennsylvania (the "**Rehabilitator**" or "**Commissioner**"), in his capacity as Rehabilitator of Penn Treaty Network America Insurance Company ("**PTNA**") and American Network Insurance Company ("**ANIC**" and collectively with PTNA, the "**Companies**"), submits this memorandum of law in support of his motion to preclude the introduction of testimony of Karl Volkmar ("**Volkmar**") with respect to:

(i) speculative rate increases; and

(ii) his claim that the actuarial firm retained by the Commissioner, Milliman, is not "independent" and therefore should either be precluded from testifying or their opinions discounted accordingly; and

(iii) his claim that rehabilitation is not futile.

Volkmar is the actuarial expert retained by Intervenors Penn Treaty American Corporation ("**PTAC**") and Eugene Woznicki (collectively, the "**Intervenors**"). As discussed below, Volkmar's projected rate increases, by which he hypothesizes that, when combined with numerous other overly aggressive assumptions, PTNA and ANIC could cure an enormous negative surplus and timely pay all of their obligations, are unprecedented, inconsistent with the Companies' relevant history and would result in policy holders in some states effectively carrying the burden for those policyholders in states that will not grant the required rate increases. In fact, PTNA's former President, who serves as a consultant to PTAC, testified that the Companies have never been able to procure rate increases of that level. Thus, Volkmar's purely speculative rate increase testimony must be precluded as a matter of law.

Moreover, Volkmar's recent claim that Milliman should be precluded from testifying due to a purported conflict of interest is baseless and made in bad faith. As detailed *infra,* Intervenors are not now and have never been a client of Milliman. Prior to the Rehabilitator's retention of Milliman, PTAC management not only knew that Milliman might be the Rehabilitator's actuary in rehabilitation, but also specifically supported Milliman's continued involvement. (Ex. 1, Waite Aff. Dated Nov. 11, 2010, ¶¶ 2-3). Moreover, PTAC's counsel, Mound Cotton, by letter dated December 8, 2008, advised the Rehabilitator of the importance of maintaining the actuarial assumptions, which request was consistent with its and the Companies' support of the Rehabilitator's retention of Milliman. The Intervenors likewise knew of Milliman's continued

involvement as the Rehabilitator's actuary. Since that time Milliman (i) authored their April 9, 2009 report filed with the Court in support of the Preliminary Plan of Rehabilitation; (ii) conferred with the Intervenors on more than one occasion, together with their counsel; (iii) filed their report with the Court in October of 2009 by way of the Petition for Liquidation; (iv) conferred with Volkmar and his staff to provide them detailed information, including their proprietary software programs, in order to permit them to run projections in a more cost effective manner; (v) ran projections for Volkmar and the Intervenors; and (vi) had numerous conversations and email exchanges with Volkmar and his staff to facilitate their efforts. In his report Volkmar even relies on Milliman information.

Not once, not during a phone conversation, an in person conference, a presentation or a court appearance did Volkmar or the Intervenors raise this alleged concern—even though Volkmar claimed he told his clients about this as late as last April, 2010. Volkmar did not raise this concern despite his *professional obligation* to do so directly with Milliman. If his "opinion" and testimony are to be accepted on their face his conduct violates the *Code of Professional Conduct,* adopted by the American Actuary Association and the Society of Actuaries (the "**Code**"). His misconduct should not be countenanced by this Court, particularly when it was withheld for a transparent and tactical benefit.

Moreover, the Intervenors never disclosed that Volkmar would act as an expert on this issue disclosed during this past summer for evident tactical reasons. Not until September of 2010 was this issue raised as a defense for the very first time, belying the Intervenors' goal of trying to gain an improper tactical advantage.

Finally, Volkmar should be barred from testifying as to whether the Rehabilitator has met its burden in support of its Petition for Liquidation under the relevant statutory language because

experts in Pennsylvania are not permitted to testify to legal conclusions, which in this case, the Court is most capable of making.

II. FACTUAL BACKGROUND

A. The Consent Order and the Condition of the Company.

On January 6, 2009 this Court entered by consent Orders providing for the Rehabilitation of PTNA and ANIC. In pertinent part the Orders provided as follows:

> *The Rehabilitator shall take such actions as are necessary to correct the condition of the Company that prompted the Board of Directors request for and consent to the rehabilitation of the Penn Treaty.*

(PTNA Rehabilitation Order ¶ 5; ANIC Rehabilitation Order ¶ 5). The Rehabilitation Orders did not require the Rehabilitator to take steps to correct a hopeless and futile condition. Prior to the initiation of this proceeding the condition of the companyies was described as problematic, as set forth in the correspondence to the Commissioner by counsel for the Intervenors. (Ex. 5, Veach Letter Dated December 5, 2008). At first, the negative surplus was described as totaling $100 million, a sum viewed as potentially rehabilitatable by the Commissioner. (Ex. 6, DiMemmo Dep. at 75:2-12). By April the negative surplus based on the then-currently available information and analysis had ballooned to $227 million dollars. Even with the more than doubled negative surplus, the Rehabilitator viewed the Companies, in the event of certain adjustments in operations, potentially rehabilitatable. (Ex. 6, DiMemmo Dep. at 75:2-12).

Undeniably, matters were determined to be far worse by the fall of 2009. By then the negative surplus had exploded to more than $1 billion dollars. (Ex. 6, DiMemmo Tr. at 76:3-4; Ex. 17, Robinson Dep. at 55:6-9). Milliman issued its updated analyses, including the Surplus Projections and Continuance Curve analyses , dated July 7, 2010 ("Milliman's Updated Analyses"). Milliman's Updated Analyses showed that PTNA and ANIC were in far worse

financial condition than believed at the time the Rehabilitator petitioned the Court for rehabilitation.

Among other things, Milliman reported that as of December 31, 2009, PTNA had a negative surplus of approximately $2.1 billion and ANIC had a negative surplus of nearly $137 million. (Exhibit 12). The Rehabilitator retained Ernst & Young to confirm Milliman's Updated Analyses, and Ernst & Young reported no material differences in and/or objections to Milliman's work or the Rehabilitator's decision in favor of liquidation. (Ex. 28, Ernst & Young's Report.)

B. Volkmar's Retention, Projections and Speculative Rate Increase Assumptions

The Intervenors retained Volkmar as an actuarial consultant to review Milliman's Updated Analyses, in support of their opposition to the Petition for Liquidation. With the Rehabilitator's knowledge and consent, Milliman worked with Volkmar in 2010, and provided underlying data, support and access to its proprietary model, so that Intervenors could evaluate Milliman's Updated Analyses. Volkmar issued his actuarial analysis on September 17, 2010 ("Volkmar Report", Ex. 2).

Volkmar's own actuarial analysis is predicated on a negative surplus of nearly $900 million for PTNA – a negative surplus that is more than four times greater than that believed by the Rehabilitator at the time it filed its Preliminary Report and Plan for Rehabilitation in April 2009, and which represents 411% of PTNA's annualized premium. (Ex. 9, Milliman's Rebuttal Report, dated November 8, 2010 ("Rebuttal") at 10.) Volkmar calculates a negative surplus for ANIC of $30 million, which represents 142% of its annualized premium. (Ex. 9, Rebuttal at 10.) Working from that baseline, Volkmar opines that PTNA and ANIC can be rehabilitated if Milliman revises its assumptions including those for interest, morbidity, future morbidity improvement, and claim adjudication improvements, which modifications Milliman views as "aggressive in their totality" given the Companies' actual experience. (Ex. 9, Rebuttal at 10.)

Even with more aggressive assumptions, Volkmar's proverbial house of cards collapses unless PTNA and ANIC succeed in obtaining certain premium rate increases which accumulate to ranges of 314 to 1,276% over 25 years and 314% to 2,026% over 50 years. (Ex. 9, Rebuttal at 10; Ex. 2, Volkmar Report, Attachment 6.) Volkmar speculates that PTNA and ANIC will be able to secure these premium rate increases even though he concedes that he is not aware of any other similarly-situated, long term care ("LTC") insurance company that has sought and been granted such dramatic rate increases. (Ex. 19, Volkmar Dep. at 36:13-24, 157:21-158:4.) Volkmar concludes that the rehabilitation of PTNA and ANIC is not futile if the Rehabilitator adopts his aggressive actuarial assumptions and presumes that the companies will obtain dramatic premium rate increases. (Ex. 19, Volkmar Dep. at 119:22-120:3, 123:24-125:1.) Because Volkmar has no basis to conclude that PTNA and ANIC can achieve the dramatic rate increases this predicate to his opinion is nothing but speculation when considered in the proper factual context.

Specifically, PTNA and ANIC were unable to achieve rate increases of just 60-70% in 2006, *prior to* entering rehabilitation. William Hunt, the former Chief Executive Officer of PTNA and ANIC, conceded that in 2006 the companies were not obtaining the premium rate increases for which they applied:

> Q. Were there amounts, percentages beyond which, on the whole, on average, not isolated states, that you believed that PTNA and ANIC would be unlikely to achieve rate increases?
>
> A. I believe that the rate increases that the company was -- the companies were filing for were reasonable and should have been granted.
>
> Q. Did you conclude that there were amounts beyond which the states, in fact, would not grant them?

A. The experience was such that certain states were not granting all the rate increases.

(Ex. 11, Hunt Dep. at 51:7-51:21.) Hunt unequivocally testified that by 2006, he felt it was *impossible* to achieve rate increases of 60% and 70% throughout the country, and in fact, some states were denying all of the Companies' applications for rate increases. (Ex. 11, Hunt Dep. at 54:17-55:8.) Because the evidence in this case unequivocally reflects the inability of the Companies to achieve lesser rate increases before it entered rehabilitation, Volkmar's opinion that the Companies could achieve dramatically greater increases while in rehabilitation is not only speculative, but doubtful. (*See* Ex. 2, Volkmar Report, Attachment 6.)

C. Volkmar's Allegations Against Milliman

Volkmar also suggests that Milliman's Updated Analyses are unreliable and/or tainted because of a purported lack of independence under the Code. (Ex. 19, Volkmar Dep. at 95:2-6). This proves a stunning comment since he relies on their underlying data and certain portions thereof in order to prepare his own report.

Contrary to Volkmar's suggestion, Milliman is independent because it has no financial interest in the companies, it is not owned by an entity that can influence its work, its ability to act fairly is unimpaired and at all times both PTNA and ANIC management, and the Intervenors and the Rehabilitator were aware of Milliman's continued role as the actuary in rehabilitation. (Ex. 9, Milliman's Rebuttal at 1-2.) Milliman does not lack independence and furthermore has not violated the Code. By contrast, Volkmar admits that he violated the Code by failing to raise this alleged conflict to Milliman and the appropriate actuarial disciplinary board in accordance with the reporting requirements of the Code. (Ex. 19, Volkmar Dep. at 80:2-6, 82:8-84:7). The Intervenors' belated independence assertions are belied by the fact that Volkmar did not take action consistent with the Code and are made in bad faith in the eleventh hour before the hearing in this matter.

D. Volkmar's Futility Assertion

Finally, Volkmar intends to offer his opinion – a legal conclusion – that rehabilitation of PTNA and ANIC is not futile. In Pennsylvania, an expert's testimony as to a legal conclusion is inadmissible and accordingly, Volkmar should not be permitted to testify to futility at trial. Even if an expert was permitted to testify to legal conclusions, which he is not, Volkmar misinterprets the statutory language governing the Rehabilitator's discretion to petition the Court for liquidation of the Companies. As this issue has been briefed at length in the Rehabilitator's Motion in Limine to Preclude William Hager's Testimony, the arguments are hereby incorporated as if set forth fully, and will not be revisited at length in this motion.

III. LEGAL ARGUMENT

A. The Court Should Bar Volkmar's Report And Testimony Because They Are Entirely Speculative

The Court should bar Volkmar's opinions and testimony at trial because the support for the central premise of his opinion – that PTNA and ANIC can obtain premium rate increases that would allow these companies to survive in rehabilitation – is entirely speculative and contrary to the record.

It is axiomatic that an expert's opinion not be based on conjecture or guesswork. *Commonwealth v. Galvin*, 985 A.2d 783, 801 (Pa. 2009). An opinion may be found conjectural because it does not have an adequate basis in fact. *Hussey v. May Dep't Stores*, 357 A.2d 635, 637 (Pa. Super. 1976); *see also First Methodist Episcopal Church v. Banger Gas Co.*, 130 A.2d 517, 525 (1957) (stating that "where there is no reasonable basis for an [expert] opinion, it is valueless and hence inadmissible"); *Betz v. Erie Ins. Exch.*, 957 A.2d 1244, 1258 (Pa. Super. 2008) (requiring that expert testimony be stated with "reasonable certainty . . . to avoid speculation under the rubric of 'expert opinion'"). An "opinion may be found conjectural because it does not have an adequate basis in fact." *Hussey v. May Dep't Stores, Inc.*, 357 A.2d

635, 637 (Pa. Super. 1976). An expert's testimony "is incompetent if it lacks an adequate basis in fact" and in that case is inadmissible. *Helpin v. Trus. of the Univ. of Pa.*, 969 A.2d 601, 617 (Pa. Super. 2009). Although "an expert's opinion need not be based on absolute certainty, an opinion based on mere possibilities is not competent evidence." Pennsylvania Rule of Evidence Rule 703 "requires a greater foundation for the opinion and conclusions of an expert witness than a party's 'dreams' or aspirations for the future profitability of a business or professional practice." *Id.*

In Volkmar's analysis, proposed rate increases are the predicate for PTNA's and ANIC's ability to meet their obligations, but he cannot testify with reasonable certainty, or any certainty whatsoever, as to the ability of PTNA and ANIC to achieve the rate increases. (*Id.*; *see also* Ex. 19, Volkmar Dep. at 152:12-16.). Volkmar summarily concludes that he believes that PTNA and ANIC can obtain his proposed, dramatic premium rate increases, but his conclusion is entirely speculative and lacks any basis in fact. Volkmar concedes that he cannot identify even one similarly-situated company that has sought and obtained the dramatic rate increases which he contends are required for survival of the companies:

> Q. And your report does not indicate that, it is your best estimate that these rate increase applications are achievable, so I'm asking you, are you telling us that it's your best estimate that those rate increases can be obtained?
>
> A. Yes, I believe they can be obtained.
>
> Q. Okay. And can you tell me what similar circumstances you've evaluated to reach your conclusions? In other words, can you tell me another company in rehabilitation, similarly situated to this company, that's achieved those rate increase applications levels? (lawyer colloquy omitted) ... Can you point me to another enterprise?

A. I'm not aware of another enterprise that's in this situation.

(*See* Ex. 19, Volkmar Dep. at 36:7-23.) Volkmar further admits that he knows of no other LTC company that has secured the rate increases he contends are required for PTNA and ANIC to succeed in rehabilitation. (Ex. 19, Volkmar Dep. at 157:21-158:4.) Without evidence that the companies can obtain these rate increases, Volkmar's expert opinion that the companies can be rehabilitated is pure speculation and fails applicable standards of admissibility in the Commonwealth.

Contrary to what Volkmar "believes," the record in this case suggests that PTNA and ANIC would not likely achieve even lesser premium rate increases, once in rehabilitation. Even the Intervenors' primary consultant and a member of PTAC's Board, conceded as much. Here the evidence proves that PTNA and ANIC were unable to achieve rate increases of just 60-70% in 2006, *prior to* entering rehabilitation—far less then what Volkmar projects is required. William Hunt, the former Chief Executive Officer of PTNA and ANIC, conceded that in 2006 the Companies were not obtaining the premium rate increases for which they applied:

Q. Were there amounts, percentages beyond which, on the whole, on average, not isolated states, that you believed that PTNA and ANIC would be unlikely to achieve rate increases?

A. I believe that the rate increases that the company was -- the companies were filing for were reasonable and should have been granted.

Q. Did you conclude that there were amounts beyond which the states, in fact, would not grant them?

A. The experience was such that certain states were not granting all the rate increases.

(Ex. 11, Hunt Dep. at 51:7-51:21.) Hunt unequivocally testified that by 2006, he felt it was *impossible* to achieve rate increases of 60% and 70% throughout the country, and in fact, some states were denying all of the companies applications for rate increases. (Ex. 11, Hunt at 54:17-55:8.)

Thus, the only evidence in this case reflects that the companies could ***not*** achieve rate increases that were considerably lower than those required to succeed in rehabilitation, according to Volkmar. (*See* Ex. 2, Volkmar Report, Attachment 6.) Volkmar should not be permitted to offer purely speculative testimony on his belief that PTNA and ANIC can achieve the dramatically high rate increases to which he cites, particularly since the evidence in the record indicates that even smaller rate increases are not be achievable. Testimony of "dreams" and "aspirations" of achieving such rate increases are inadmissible in Pennsylvania. *Helpin*, 969 A.2d at 617. Moreover, dreams, guesses and aspirations cannot support a conclusion that a company can be rehabilitated. "[S]omething more than blind hope is needed to continue a rehabilitation and avoid a liquidation." Koken v. Legion Insurance Co., 831 A.2d 1196, 1230, (Pa. Cmwlth. 2003), aff'd sub nom. Koken v. Villanova Insurance Co., 583 Pa. 400, 878 A.2d 51 (2005).

B. The Court Should Preclude Volkmar's Testimony Regarding Milliman's Alleged Conflict of Interest In Serving As The Rehabilitation Actuary

Just two months before trial and for the very first time since the Rehabilitator retained Milliman as the rehabilitation actuary in January 2009, the Intervenors call into question the credibility of Milliman's Updated Actuarial Analyses alleging that Milliman lacks independence. Milliman served as the company actuary to PTNA and ANIC prior to the entry of the Rehabilitation order, and was retained by the Rehabilitator as the actuary for rehabilitation since January 2009. (Ex. 9, Milliman Rebuttal at 1-2.) The Rehabilitator did so having informed the

Rehabilitator, management of the Companies, and, with the knowledge and approval of Intervenors. (See Ex. 9, Milliman Rebuttal 1-2; Ex. 1, Waite Aff. Dated Nov. 11, 2010, ¶¶ 2-3).

Milliman's historical relationship with PTNA and ANIC in no way undermines its work as the Rehabilitator's actuary in this proceeding, and in light of the novel complexities presented by the rehabilitation and/or liquidation of these Companies, Milliman's continued involvement has proven particularly important. For these very reasons, management of the Companies were not only aware of Milliman's continued participation, but they also supported the Rehabilitator's decision to retain Milliman as the actuary in rehabilitation. (Ex. 1, Waite Aff. Dated Nov. 11, 2010, ¶¶ 2-3). These facts do not give rise to questions of independence such that the reliability of Milliman's Updated Actuarial Analyses can be called into question. The Intervenors took no issue with Milliman's continued involvement in the rehabilitation, until nearly a year after Milliman issued its September 2009 actuarial analysis which was filed with the liquidation petitions, and nearly 2 years after it became aware of the Rehabilitator's retention of Milliman as the actuary for rehabilitation. Volkmar should not, therefore, be permitted to testify on the issue of independence and conflicts at trial.

1. The Intervonors Consented to Milliman's Efforts for the Rehabilitator

As Milliman writes in its report, the Intervenors knew and supported the Rehabilitator's decision to retain Milliman as the actuary in rehabilitation:

> The accusations that Milliman lacks independence are unfounded and inaccurate. In the Fall of 2008 the Company had been in discussions with the Pennsylvania Department of Insurance to voluntarily go into Rehabilitation as of January, 2009. At the same time, the senior management of the Company was attempting to sell portions of the business. Both the rehabilitation efforts and the potential sale required the assistance of an actuarial firm. *The senior management of the Company recommended to the*

Department that they continue to retain Milliman to provide these actuarial services effective January 2009.

In December, 2008 we were approached by PTAC through Mark Cloutier, then Chief Financial Officer, to contract with them to continue providing actuarial services for PTAC including support of GAAP financial reporting. Since we were already contracted with the Department, we negotiated specific terms under which we could provide these services to PTAC with the approval and oversight of the Department, specifically Joe DiMemmo. A Consulting Services Agreement was drafted by Milliman but never executed by PTAC.

Milliman provided projections for Preliminary Plan of Rehabilitation which was filed in April 2009; we received no objection from PTAC with respect to our service at this time. On October 16, 2009 Milliman presented the results of the revised projections in a meeting attended by members of PTAC; we did not receive any objections from PTAC regarding our role in providing services, including these projections, to the Department. Finally, we note we have had several discussions with UHAS representative over the last year which they sought and we provided information; not once did they voice any concern as to Milliman's "independence".

(Ex. 9, p. 1-2).

At all relevant times the Intervenors were represented by competent and well versed counsel fully familiar with the issues now before this Court. Moreover, the Company's outside attorneys from Mound Cotton, by letter dated December 8, 2008, advised the Rehabilitator of the importance of maintaining the actuarial assumptions, which request was consistent with the Companies' support of the Rehabilitator's retention of Milliman. (Ex. 5, Veach letter dated December 8, 2008.) Yet not so much as a "peep" was heard as to an alleged conflict, until the very last moment. Clearly this was a tactical decision meant to undermine the Rehabilitator's presentation at trial, and Intervenors should not be permitted to do so.

2. The Intervenors waived and/or are estopped from raising the conflict of interest argument.

The Intervenors have waived and/or are estopped from arguing a conflict of interest because they knew about the alleged conflict since December 2008 if not earlier, yet did not raise the issue until now, on the eve of trial. A conflict of interest may be waived by silence if the silence continues for an unreasonable amount of time. *See, e.g., Int'l Longshoremen's Ass'n, Local Union 1332 v. Int'l Longshoremen's Ass'n*, 909 F. Supp. 287, 292 (E.D. Pa. 1995) (citing *Cmwlth. Ins. Co. v. Graphix Hot Line, Inc.*, 808 F. Supp. 1200, 1208 (E.D. Pa. 1992)). Courts have repeatedly held that a party has waived the right to challenge an alleged conflict of interest when the issue is first raised years after the conflict arose. *Graphix*, 808 F. Supp. at 1208 (citations omitted).

While there are no reported decisions in this jurisdiction concerning the issues of actuarial independence and conflicts, courts have concluded that attorney conflicts can be waived if not timely raised. As the Court is aware, attorneys are governed by onerous professional limitations arising from, *inter alia,* the duty of loyalty they owe to their clients. **Actuaries do not owe a similar duty of loyalty to clients** and their Code is less restrictive in this regard. The Code provides the following Conflicts of Interest precept of guidance for actuaries:

> Precept 7: An actuary shall not knowingly perform Actuarial Services involving an actual or potential conflict of interest unless:
>
> 1. the Actuary's ability to act fairly is unimpaired;
>
> 2. there has been disclosure of the conflict to all present and known prospective Principals whose interests would be affected by the conflict; and
>
> 3. all such Principals have expressly agreed to the performance of the Actuarial Services by the Actuary.

(Ex. 27, Code, Precept 7.) Thus, as long as the actuary can act fairly and his representation is transparent to all presently and potentially known interested parties, the actuary may proceed with the retention to perform actuarial services. (Ex. 9, Milliman Rebuttal at 1-2). Unlike

attorneys, an actuary has no duty of loyalty to one client or to any client, which prevents his retention by another. The absence of such a duty is necessary to ensure the actuary's independence.

Even in the case of the restrictive conflicts rules governing attorneys, courts have held that belated objections based upon an attorney's alleged conflict are waived if not timely raised. In *Graphix*, the court considered a motion to disqualify counsel on the grounds of conflict of interest. *Id.* at 1202. The movant filed the motion more than two years after the lawsuit commenced and just three weeks before trial. *Id.* at 1209. The record demonstrated that the facts upon which the motion was based had been known to the movant for nearly three years. *Id.* at 1208. The *Graphix* court held that the movant had waived its objection to the alleged conflict of interest by its failure to raise the issue of the conflict sooner. *Id.* at 1209. The court opined that the movant had filed the motion on the eve of trial to obtain a "tactical advantage" and that disqualification at that stage would be unfairly prejudicial to the non-movant because its counsel had handled all aspects of the case and had already substantially prepared for trial. *Id.*

Similarly in this case, the Intervenors waived their right to challenge any alleged conflict of interest and/or lack of independence of Milliman, because they have had this information since the time the Rehabilitator retained Milliman for rehabilitation, in January 2009. Like the movant in *Graphix*, the Intervenors have tactically delayed raising the issue for nearly two years, until just two months before trial, in an effort to discredit the actuarial analyses upon which the decision to liquidate will be made. Even after Milliman released its Updated Analyses in September 2009, neither the Intervenors nor Volkmar raised the issues of independence and alleged conflicts for an entire year. (Ex. 2, Volkmar Dep. at 85:20-86:4; Volkmar report at 17-18.) It is precisely a circumstance such as this, where waiver should be invoked to bar the testimony of Volkmar on the issue of independence and conflicts.

Volkmar should also be estopped from opining on these issues because he admits that he directly violated the Code by failing to report the alleged Milliman conflict. If Volkmar truly believed that a conflict of interest existed, the Code required that he confront the offending actuary and then report the offensive conduct to the appropriate actuarial disciplinary body:

> An Actuary with knowledge of an apparent, unresolved, material violation of the Code by another Actuary should consider discussing the situation with the other Actuary and attempt to resolve the apparent violation. If such discussion is not attempted or is not successful, the Actuary shall disclose such violation to the appropriate counseling and discipline body of the profession, except where the disclosure would be contrary to Law or would divulge Confidential Information.

(Ex. 27, The Code, Precept 13). Volkmar testified that he did neither. (*See* Ex. 19, Volkmar at 80:2-6, 82:8-84:7.) It appears that Volkmar considered the alleged conflict serious enough to raise in his report, but not serious enough to report it to a disciplinary body as mandated by the Code governing his profession. The Rehabilitator submits that in fact Volkmar did not report Milliman to the Society of Actuaries because the attacks against Milliman for lack of independence and alleged conflicts are without merit. Accordingly, Volkmar should be precluded from testifying to the issues of independence and alleged conflicts at trial.

3. There is no evidence of any lack of independence.

Even absent waiver or estoppel, the Court should preclude Volkmar's vague testimony about the alleged lack of independence in violation of the Code.[1] As to the alleged violation, Volkmar relies on Precept 7, but he fails to articulate the alleged bases for the conflict and asserts nothing more than conclusory statement that Milliman has violated its professional standards.

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[1] Notably, Volkmar does not believe that Milliman's alleged conflict rises to the point that their projections should be disregarded. Rather, he merely notes that the alleged lack of independence should be "reviewed/analyzed/considered" before a final decision to liquidate is made. The motive is, nonetheless, to cast a shadow of doubt over Milliman's Updated Actuarial Analyses and accordingly Volkmar's testimony on this issue should be precluded. (*See* Ex. 2,Volkmar's Report at 17.)

Volkmar suggests that because Milliman has "a long history with the companies with virtually unlimited access to experience [sic] and financial data/information." (*see* Ex. 2, Volkmar's Report at 6) Milliman has somehow acted improperly. But Volkmar does not explain how his reasoning for this conclusion and the Rehabilitator submits that such an assertion is illogical in this case. Given the unique circumstances presented by the rehabilitation or liquidation of PTNA and ANIC, Milliman's long history with the companies has served to be beneficial and has aided Milliman's performance as the rehabilitation actuary. Moreover, both the Rehabilitator and the management of PTNA and ANIC were aware of Milliman's history with the Companies and that Milliman would remain as the actuary in rehabilitation. (Ex. 1, Waite Aff. Dated Nov. 11, 2010, ¶¶ 2-3; Ex. 9, Milliman Rebuttal at 1-2.) The suggestion by Volkmar that Milliman had to obtain the consent and/or waiver of Intervenors is, in any event, illogical and without basis in the Code. The Intervenors are not now, nor were they ever, a client of Milliman. (Ex. 9, Milliman Rebuttal at 1-2.) When pressed during his deposition to identify the conflict vaguely alluded to in his expert report, Volkmar reluctantly admitted that the only conflict is that Milliman's new projections are adverse to the Intervenors. (*See* Ex. 19, Volkmar Dep. at 96:21-97:16). Disagreement with Milliman's Updated Analyses is not evidence of a lack of independence and Volkmar should be precluded from testifying on this issue at trial simply because it contradicts his client's position.

C. The Court Should Preclude Volkmar's Testimony Regarding The Futility of Rehabilitating PTNA and ANIC

The Court should also preclude Volkmar's opinion that liquidation is unwarranted on the grounds that it would not be "futile" to rehabilitate PTNA and ANIC. Volkmar should not be permitted to offer his opinion in the form of a legal conclusion. Moreover, his interpretation of the applicable statutory language is inaccurate and accordingly should be precluded from trial.

Volkmar should be precluded from testifying to legal conclusions, including his opinion on futility. As a general matter, in Pennsylvania expert opinions on a question of law are not admissible. *See 41 Valley Assocs. v. Bd. of Supervisors of London Grove Twp.*, 882 A.2d 5, 14 n.12 (Pa. Cmwlth. 2005) (stating that "[i]n general, expert opinion on a question of law is inadmissible"); *Corbett v. Weisband*, 551 A.2d 1059, 1075 (Pa. Super. 1988) (holding that an expert could not testify as to the ultimate issue of whether negligence rose to the level of being "highly extraordinary"); *Francis v. Northumberland Cty.*, 636 F. Supp. 2d 368, 387 n.41 (M.D. Pa. 2009) (rejecting a medical expert's testimony that certain conduct constituted "reckless indifference" because this is a legal concept that only a legal expert is competent to address). Volkmar's report and testimony detail his conclusion that it would be not be "futile" to rehabilitate PTNA and ANIC. (*See* Ex. 19, Volkmar Dep. at 130:3-130:13). Volkmar is an actuarial expert, not a legal expert, and accordingly he should be precluded from testifying to the statutory standard at trial.

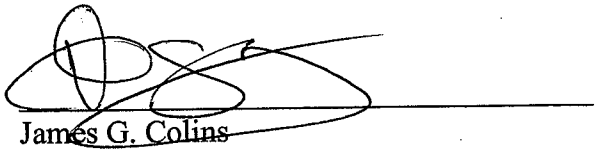
Even if Volkmar's testimony on the statutory language was admissible in Pennsylvania, which it is not, Volkmar's interpretation of the statutory language is inaccurate and misguided. As stated *supra*, the Rehabilitator respectfully refers this Court to the Motion In Limine to Preclude the Testimony of William Hager, for the Rehabilitator's argument on interpretation of the governing statutory language in this proceeding. Volkmar's testimony on the statutory standard will only serve to confuse the issues because he improperly interprets the law and he should therefore be precluded from offering such an opinion.

IV. CONCLUSION

For the foregoing reasons, the Rehabilitator respectfully requests that the Court preclude Volkmar's testimony and opinions concerning the speculative rate increases, the issue of

actuarial independence, and to legal conclusions concerning the statutory language governing this mater.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2010, I served the foregoing Motion In Limine to Preclude Portions of the Testimony of Karl G. Volkmar by the following means:

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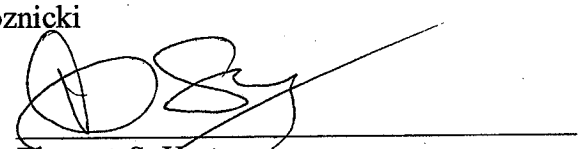

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