

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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

IN RE: AMERICAN NETWORK :  
 INSURANCE COMPANY IN : NO. 1 ANI 2009  
 REHABILITATION :

**APPLICATION TO BAR INTERVENING PARTIES FROM CALLING  
 COMMISSIONER MILLER, FORMER COMMISSIONER CONSEDINE,  
 AND DEPUTY COMMISSIONER DIMEMMO TO TESTIFY DURING  
 PHASE II OF THE PLAN APPROVAL HEARING**

This Court has repeatedly rejected attempts to compel discovery from Department personnel, as contrasted with the individual tasked with developing the Plan—*i.e.*, the SDR.<sup>1</sup> Nevertheless, the PTAC Intervenors and Broadbill have jointly declared their intent to include Commissioner Miller, former Commissioner Consedine, and Deputy Commissioner DiMemmo in their witness lists for Phase II of the Plan Approval Hearing (the “Phase II Hearing”).<sup>2</sup> (*See* Ex. A, Letter from Benjamin Schmidt to Carl Buchholz (Oct. 1, 2015), at 1.) The Rehabilitator therefore applies for a protective order, barring the PTAC Intervenors from calling those Department heads to testify in Phase II of the Plan Approval Hearing.

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<sup>1</sup> For example, the Court earlier rejected Broadbill’s attempt to depose Commissioner Miller and former Commissioner Consedine.

<sup>2</sup> For brevity’s sake, the PTAC Intervenors and Broadbill are collectively referred to in the remainder of this Application as “the PTAC Intervenors.”

**I. THE SDR'S PRESENCE AND TESTIMONY AT THE PHASE II HEARING MOOTS THE PTAC INTERVENORS' NEED FOR THE AGENCY HEADS' TESTIMONY.**

Pursuant to statute, the Rehabilitator has delegated authority to the SDR to develop and propose a plan of rehabilitation, and the SDR has retained consultants (and instructs employees of the Companies) to further his deliberations by providing analyses and advice to inform development of the Plan. *Cf.* 40 P.S. § 221.16. Because the Plan was proposed by the SDR (in collaboration with his own agents and consultants, and Company employees he directs), and because the SDR will testify at the Plan Approval Hearing, it is both unnecessary and improper for the PTAC Intervenors to include Commissioner Miller, former Commissioner Consedine, and Deputy Commissioner DiMemmo on their witness list for the Phase II Hearing. *See, e.g., Fla. Office of Ins. Regulation v. Fla. Dep't of Fin. Servs.*, 159 So. 3d 945, 949, 950-53 (Fla. Dist. Ct. App. 2015). Accordingly, "Department heads and similarly high-ranking officials should not ordinarily be compelled to testify unless it has been established that the testimony to be elicited is necessary and relevant and unavailable from a lesser ranking officer." *Halderman v. Pennhurst State Sch. & Hosp.*, 559 F. Supp. 153, 157 (E.D. Pa. 1982); *see also Comer v. Sch. Dist. of Phila.*, No. 87-3206, 1988 WL 79810, at \*1 (E.D. Pa. July 29, 1988) (applying rule to preclude testimony from school board superintendent and school board president); *KC Equities v. Dep't of Pub. Welfare*,

95 A.3d 918, 933-34 (Pa. Commw. Ct. 2014) (applying rule to preclude testimony from acting Deputy Secretary of Department of Public Welfare).

Courts protect agency officials from compelled testimony based on the well-recognized “apex doctrine,” an analytical framework used to determine whether to permit the testimony “of individuals at the ‘apex’ of corporations and other entities.” *United States ex rel. Galmines v. Novartis Pharm. Corp.*, No. 06-3213, 2015 WL 4973626, at \*1 (E.D. Pa. Aug. 20, 2015).<sup>3</sup> It recognizes that such testimony “severely burdens those officers and the entities they represent, and that adversaries might use this severe burden to their unfair advantage.” *Id.*; *see also Fla. Office of Ins. Regulation*, 159 So.3d at 952-53 (internal quotation marks and citations omitted) (“The time spent preparing and testifying in this case will take away from the Insurance Commissioner’s duties and responsibilities as an agency head for the state of Florida, and the precedent served by compelling him to testify will create a significant deterrent to qualified candidates seeking public service positions.”).

Here, the PTAC Intervenors have not demonstrated, because they cannot, that the testimony that they might elicit from the Department heads at issue is “necessary and relevant and unavailable from a lesser ranking officer.”

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<sup>3</sup> Although the apex doctrine is most often applied to deposition testimony, it applies with equal force to the trial testimony of the Department heads at issue. *See, e.g., Fla. Office of Ins. Regulation*, 159 So.2d at 950.

*Halderman*, 559 F. Supp. at 157. The SDR, who was specifically appointed pursuant to the General Assembly’s adoption of the executive or administrative form of receivership, has already begun to testify, and he may be cross-examined on topics related to the merits of the Plan. Moreover, because the SDR was tasked with developing the Plan—or put another way, because Commissioner Miller, former Commissioner Consedine, and Deputy Commissioner DiMemmo **did not** shoulder that task—it “would be irrelevant, and would constitute an annoyance and harassment, and would be unduly burdensome” to compel their trial testimony. *Cantor v. Equitable Life Assurance Soc’y of U.S.*, No. 97-5711, 1998 WL 544962, at \*2 (E.D. Pa. Aug. 27, 1998). That is so even though one or more of those individuals may have served as the “final decision-maker” on receivership matters during the relevant time period, including the decision to propose the Plan to the Court. *See Fla. Office of Ins. Regulation*, 159 So.3d at 951.

**II. EVEN IF THE PTAC INTERVENORS COULD COMPEL THE DEPARTMENT HEADS AT ISSUE TO TESTIFY AT TRIAL, THEIR DELIBERATIONS ON THE PLAN WOULD REMAIN PRIVILEGED.**

The Rehabilitator earlier detailed the scope of the deliberative process and executive privileges, and her earlier briefing is incorporated here by reference. (*See* Rehabilitator’s Omnibus Opp’n to the Appls. to Compel Filed By the Health Insurers, the PTAC Intervenors, and Broadbill, at 6-18 (Oct. 26, 2015).) Each of

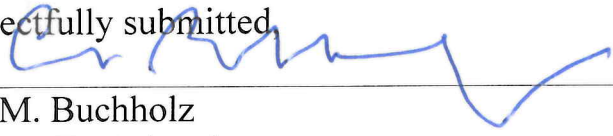
those privileges would apply to any testimony that the PTAC Intervenors might try to compel from Commissioner Miller, former Commissioner Consedine, and/or Deputy Commissioner DiMemmo. “The reason that subpoenas to high-ranking officials are denied is precisely to ensure that [the] executive or deliberative process is protected.” *KC Equities*, 95 A.3d at 934 (citing *Commonwealth v. Vartan*, 733 A.2d 1258 (Pa. 1999)).

### **III. CONCLUSION**

For the reasons set forth above, the Rehabilitator’s application for a protective order should be granted, and the PTAC Intervenors should be barred from calling Commissioner Miller, former Commissioner Consedine, and Deputy Commissioner DiMemmo to testify at Phase II of the Plan Approval Hearing.

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Respectfully submitted



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