IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

REPLY MEMORANDUM OF THE HEALTH INSURERS IN FURTHER SUPPORT OF OBJECTION TO THE APPLICATION FOR SETTLEMENT APPROVAL

INTRODUCTION

Aetna Life Insurance Company, Anthem, Inc., Cigna Corporation, HM Life Insurance Company, Horizon Healthcare Services, Inc. d/b/a Horizon Blue Cross Blue Shield of New Jersey, QCC Insurance Company, United Concordia Life and Health Insurance Company, United Concordia Insurance Company and UnitedHealthcare Insurance Company (collectively, the "Health Insurers") through their undersigned counsel hereby submit this reply brief in order to respond to the (i) Omnibus Response of the Rehabilitator to Objections to Application for Settlement Approval ("Rehabilitator's Response") and (ii) Joint Memorandum of Law Submitted by Broadbill and PTAC in Further Support of the Application for Settlement Approval ("PTAC's Response") in the receivership proceeding of Penn Treaty America Insurance Company ("Penn Treaty") and American Network Insurance Company ("ANIC" and, together with Penn Treaty, the "Companies") .

ARGUMENT

A. The Relevant Standard of Review Does Not Give the Rehabilitator Unfettered Discretion to Make Payments to Equity.

In her opening papers, the Rehabilitator cited *In re Jevic Holding Corp.*, 787 F.3d 173 (3d Cir. 2015) ("*Jevic*"), as authority for the standard under which a court supervising in a reorganization proceeding must approve a settlement. Verified Joint Application for Approval of Settlement Agreement (the "Application") at para. 14. Although *Jevic* was a bankruptcy proceeding, the Rehabilitator noted that

it remains persuasive authority, stating that "although bankruptcy courts do not have jurisdiction over insurer receiverships or their estate assets, state courts may look to bankruptcy law for guidance." *Id*. at n.3 (citing *Koken v. Fidelity Mut. Life Ins. Co.*, 803 A.2d 807, 817 (Pa. Commw. Ct. 2002)).

In retreating from the *Jevic* standard, the Rehabilitator now cites the holding of the Pennsylvania Supreme Court in *In re Penn Treaty Network American Ins. Co.*, 119 A.3d 313 (Pa. 2015). In her Response, the Rehabilitator selectively quotes the Pennsylvania Supreme Court's decision for the proposition that the Court "broadly held that 'judicial review…should proceed subject to a more deferential overlay to the …Commissioner.'" Rehabilitator's Response at 4. The Rehabilitator then claims "[t]hat holding applies to the entire receivership, not simply to conversion petitions." *Id.* When the statement is viewed in context, however, it becomes clear that the Supreme Court was referring only to review *of the plan of rehabilitation* in the case. The Court stated that "we decline to impede the court's review *of the rehabilitation plan* which it directed should be filed, and which has now been submitted. The judicial review, however, should proceed subject to a more deferential overlay relative to the new acting Commissioner." *In re Penn Treaty*, 119 A.3d at 323 (emphasis added). The Supreme Court did not establish a blanket deferential standard of review for every action taken by the Rehabilitator. Rather, it was providing the standard under which the

Commonwealth Court should review a specific plan: the Second Amended Plan of Rehabilitation, which had already been submitted when the decision was written.

The Rehabilitator's citation of *Foster v. Mut. Fire, Marine & Inland Ins. Co.* is similarly misplaced. Again, in that case the Court was reviewing *a plan of rehabilitation* under the abuse of discretion standard. *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086, 1093 (Pa. 1992) ("Accordingly, for the reasons that follow, we believe the Plan of Rehabilitation, as modified by the Commonwealth Court, is a legitimate and proper exercise of the Rehabilitator's statutory powers, and properly effectuates the intentions of the rehabilitation statutes.").

Both the Rehabilitator and the PTAC Intervenors argue that the settlement payment – either $10 million or $15 million, the specific amount remains a mystery – constitutes an administrative expense of the estate and not a payment to equity, therefore does not violate the statutory priority scheme under Section 544 (40 P.S. § 221.44). Rehabilitator's Response at 11-16; PTAC's Response at 11.

The Rehabilitator erroneously asserts that the settlement does not violate Section 544's priority scheme because (1) that section is inapplicable until liquidation is ordered or a plan is approved by the Court and (2) the settlement payment does not involve a determination of the value of an equity holder's interest. Rehabilitator's Response at 11-12. The first argument constitutes a

radical reading of Section 544 for which the Rehabilitator provides no support, and that is irreconcilable with core insolvency principles. If Section 544 were only applicable to Court-approved rehabilitation plans, the Rehabilitator would be free to distribute estate assets as she saw fit during the often very long period prior to formal approval of a plan. In this case, for example, assets could have been distributed during the last seven years without regarding to the absolute priority rule, which has long been a core principle of insolvency proceedings. *See e.g.*, *United Stated v. Key*, 397 U.S. 322, 327 (1970) ("In short…no plan can be 'fair and equitable' which compromises the rights of senior creditors in order to protect junior creditors.") (citing *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 115-16 (1939); and *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510, 527-29 (1941)). This reading of Section 544 would allow a rehabilitator to end-run the priority scheme by making distributions during a case without regard to the ultimate priorities that would be imposed in a plan or liquidation, thereby defeating the priority scheme. The legislature could not possibly have intended this result.

The Rehabilitator's second argument – that the settlement payment does not constitute a determination of the value of an equity holder's interest – misses the point of *Jevic.* The standard adopted in *Jevic* was adopted on the basis of who received payment, not why. In *Jevic,* the standard was imposed because a payment was being made to unsecured creditors rather than more senior creditors, thereby

violating the priority scheme. The reason for paying the unsecured creditors was not that the asset values reached down to their class, but because they had initiated a fraudulent transfer suit. *Jevic* at 176-77. The argument advanced by PTAC and the Rehabilitator that the payment is an administrative expense misses the point. It is only an administrative expense if the Court approves the settlement and orders amounts to be paid. In reviewing the settlement, the Court must apply a standard that recognizes that this is a settlement that makes a payment to equity and the Court must apply the level of scrutiny prescribed by *Jevic*.

B. The Rehabilitator and the PTAC Intervenors Have Failed to Establish a Record On Which the Court Can Rule.

Under any standard of review, the record must provide enough detail to permit the reviewing court to evaluate the merits of the issues being settled and the consideration paid therefor. This principle is well established and recognized in at least one case cited by the Rehabilitator. *See, e.g.*, *In re Executive Life Ins. Co.*, 32 Cal. App. 4th 344, as modified on denial of reh'g (Mar. 15, 1995) (analyzing statutes, policy language and legislative history in approving one settlement and disapproving another); *see also Protective Committee for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 88 S. Ct. 1157, 1171-72) (reversing and remanding approval of a settlement and stating that "[t]he record before us leaves us completely uninformed as to whether the trial court ever evaluated the merits of the causes of action held by the debtor, the prospects and problems of litigating

those claims, or the fairness of the terms of compromise.”).

Neither the Application and Memorandum of Understanding (the “MOU”) nor the supporting and responding papers filed by the Rehabilitator and the PTAC Intervenors provide a sufficient basis on which the Court can approve the Application. The tax issues being settled under the MOU have never been briefed. Special Deputy Rehabilitator Patrick Cantilo testified at a high level on the tax issues in connection with the proposed Second Amended Plan of Rehabilitation – which has now been withdrawn – but made very clear the limits of that testimony: “There’s a general rule -- **and I’m not a tax expert, so I hasten to add that** -- but my understanding is that there’s a general rule in federal income taxation that if you have a debt and that debt is forgiven, the forgiven amount of that debt becomes taxable income.” Transcript of Proceedings dated July 14, 2015, Testimony of Patrick Cantilo at 9 (emphasis added). Mr. Cantilo was not subject to cross-examination as part of that hearing, which, as the Rehabilitator and the PTAC Intervenors are aware, was only Phase I of the hearings on the now withdrawn Plan. High level testimony by a self-proclaimed non-tax expert, not subject to cross-examination, hardly forms a robust record on the tax issues being settled.

A deposition of Lori Jones (the Rehabilitator’s tax expert) was taken and a deposition of Gregory Fairbanks (the PTAC Intervenors’ tax expert) was started

but never concluded. These depositions were not before the Court in connection with the Seconded Amended Plan, and are not otherwise before the Court now.[1] The PTAC Intervenors assert that "[f]or the last two years, litigation in this Court has focused almost exclusively on tax issues." PTAC's Response at 17. The Health Insurers disagree with that characterization. But more to the point, other than the limited testimony from Mr. Cantilo in Phase I of the hearings on the now withdrawn Second Amended Plan, there is no record of the "litigation…on tax issues." Until the PTAC Intervenors filed their Response, the tax issues being settled had not been discussed in detail in any pleading filed with the Court other than the now abandoned and withdrawn Second Amended Plan and First Supplemental Disclosure Statement thereto. Even the proposed MOU is vague – there is no description of what the private letter ruling request would cover outside of the context of the withdrawn Second Amended Plan.

The tax issues have been the subject of mediation sessions at which not all parties were present and the substance of which are privileged. *See* 42 Pa.C.S. § 5949(a) ("Mediation communications and mediation documents shall not be admissible as evidence in any action or proceeding, including, but not limited to, a

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[1] The Health Insurers sought to complete Mr. Fairbanks's deposition but this was opposed by Broadbill. After a telephone conference with the Court, the deposition was discontinued and the Court instructed the parties to conduct a video conference between tax counsel from O'Melveny & Myers and Morgan, Lewis & Bockius. As a result of the incomplete deposition testimony, at the request of the Health Insurers the Court agreed to return the deposition transcript of Ms. Jones, which had been provided to the Court by Broadbill.

judicial, administrative or arbitration action or proceeding."). These sessions cannot be the basis on which the Application is approved. At a minimum, a hearing is necessary for the Rehabilitator to put on her case. Prior to that hearing, the Health Insurers respectfully request that the Court provide for limited discovery, including the depositions of any witnesses to be called at the hearing and the continuation of the deposition of Mr. Fairbanks.

C. The Rehabilitator and the PTAC Intervenors Have Not Demonstrated a Sufficient Benefit to the Estate from the Proposed Settlement.

1. Consent to Petition for Liquidation

The Rehabilitator continues to rest on PTAC's consent to the liquidation petition as a "key benefit" of the proposed settlement. Rehabilitator's Response at 7. Acknowledging that the issue of liquidation here is not materially in doubt, the Rehabilitator nonetheless asserts that the "expediency and cost efficiency with which liquidation can be achieved because the PTAC Intervenors have agreed not to oppose a conversion petition" is a significant benefit to the estate. *Id.* In so doing, the Rehabilitator drastically overestimates the time that even a contested conversion petition would take for approval and ignores the changed factual circumstances from the first conversion petition.

The Rehabilitator's position that a contested conversion petition, even proceeding on an expedited basis, would likely take more than one year for trial and appeal is unsupported and unsupportable. The conditions under Article V for

conversion to liquidation exist today, as evidenced by the Petitions to Convert Rehabilitation to Liquidation filed by the Rehabilitator on July 27, 2016. The Court found the Companies to be insolvent in 2012, and since then their financial condition has deteriorated materially. Even the PTAC Intervenors do not contest the solvency of the Companies. Two rehabilitation plans have now been attempted in good faith and failed. No party can reasonably argue that further attempts at rehabilitation would be anything but futile. Again, even the PTAC Intervenors do not dispute this in their Response. Yet the Rehabilitator points to the 29 days of testimony and six months of formal discovery that took place in connection with the prior conversion petition six years ago. This completely ignores what has taken place over the last four years. The Companies are now even more deeply insolvent and the Rehabilitator has attempted rehabilitation through two separate, fully integrated plans of rehabilitation. If the settlement is not entered, a liquidation order should not take a year to obtain. Moreover, an appeal of such an order would not stay the effect of the liquidation order unless the PTAC Intervenors put up a bond. This seems like a remote possibility at best.

The Health Insurers also share the public policy concerns raised by the Intervening Agents. *See* Opposition of Intervenor Agents to the Application for Settlement Approval at 7. The Rehabilitator is setting a dangerous precedent with her proposed settlement. The PTAC Intervenors' position in this proceeding cuts

against the grain of fundamental policy written into Article V. Section 506 requires the owners of an insolvent insurance company to cooperate with the receiver, not seek to extract value based on leveraging the corporate structure of the enterprise. The receiver in *Triad Guaranty, Inc.* successfully resisted exactly the type of extortionate play undertaken by the PTAC Intervenors, and the Rehabilitator should do likewise. *In re Triad Guaranty, Inc.*, Bankr. Case No. 13-11452 at 14 (D. Del. June 27, 2016) ("*Triad*"). In this very recent decision, the receiver of an insolvent Illinois insurance company successfully resisted a bankrupt parent company's attempt to extract ransom for the use of the net operating losses the insurance company had generated. The Delaware bankruptcy court, and later the Delaware District Court, rejected the parent company's contention that it had the unfettered right to take a worthless stock deduction that would interfere with the receiver's use of the net operating losses that the company in receivership had generated. The parent asserted that it had the sole right to take a worthless stock deduction regardless of the impact on the group's consolidated net operating losses ("CNOLs"). Relying on *In re Prudential Lines, Inc.*, 928 F.2d 565 (2nd Cir. 1991), the District Court found that the subsidiary had and retained a property interest in the CNOLs that it generated. *Triad* at 21. The District Court held that even if the parent demonstrated a right to take a worthless stock deduction, such action would violate the receivership order's prohibition on

wasting the receivership estate's assets. *Triad* at 22. The Rehabilitator should enforce the provisions of Article V and reach the same result.

2. The Companies Already Have the Right to Use the CNOLs; the Tax Sharing Agreement Does Not Create Any Additional Rights for PTAC

The PTAC Intervenors assert that "the settlement captures the cost associated with using an asset that another entity owns in order to continue operations" and that, absent settlement, the Rehabilitator would be precluded from "commandeering PTAC's property without compensation." PTAC's Response at 11-12. Both of these statements are based on the false premise that PTAC somehow "owns" the Companies' shares of the CNOLs. To the contrary, the Companies' portions of the CNOLs are property of the estate. *See Triad* at 19-22 (finding that the subsidiary insurance company had a property interest in CNOLs it generated). While they are members of the PTAC consolidated group, those CNOLs are available to reduce the federal income tax obligations of the entire group, including the Companies. Treasury Regulations § 1.1502-21(a). Even if they leave the group, the Companies have the right to take with them the CNOLs attributable to their own operations. Treasury Regulations § 1.1502-21(b)(2)(iv). This issue was recently examined in *Triad*. The Court expressly determined that the insurance company subsidiary had a property interest in the CNOLs and that the parent holding company could not take any action which might waste or

interfere with that interest. *Triad* at 19-22. The Court cited the *Prudential Lines* case in which the Second Circuit concluded that a subsidiary had a property interest in CNOLs attributable to its operations. *Triad* at 21.

The Second Circuit's discussion of this issue in *Prudential Lines* is instructive. The Court stated that "[t]he common parent acts as an agent on behalf of all the members of the consolidated group for the convenience and protection of the IRS only. The corporations retain their separate identities and the property interests of the subsidiaries are not absorbed by the common parent. It follows that a corporation does not lose any interest it had in the right to use its NOL to offset income because of its status in a group of affiliated corporations that file a consolidated tax return." *In Re Prudential Lines*, 928 F.2d at 571.

Thus, despite PTAC's unsupported declarations of its "ownership" in the CNOLs by virtue of its status as head of the tax group, the relevant tax law and case law from the Second Circuit and the Delaware District Court is directly to the contrary. It is the Companies that have the property interest in CNOLs they generate, and it is PTAC that is prohibited from "commandeering" the Companies' property by virtue of Section 505 of Article V, as the *Triad* case makes clear.

The Tax Sharing Agreement does nothing to alter this result. In fact, it resolves any potential doubt that the CNOLs are property of the estate. The third paragraph of the Tax Sharing Agreement (attached as Exhibit 1 to PTAC's

Response) expressly provides that in determining the subsidiaries' payment obligations to PTAC under the Tax Sharing Agreement, they determine their tax as if they were not members of the controlled group. Thus, if a subsidiary generated operations losses carryovers (the insurance company equivalent of a net operating loss) from its operations, and if those loss carryovers would be available if it were not a member of the tax group, it is entitled to use those loss carryovers in determining its tax obligations under the Tax Sharing Agreement. As explained in *Prudential Lines*, PTAC acts only as an agent for the tax group, it does not acquire the interests of the members of the tax group or otherwise become the "owner" of any CNOLs generated by those members.

3. The PTAC Intervenors' Threatened Actions Would Not Harm the Estate

The PTAC Intervenors assert that the Companies are getting good value for the consideration they would pay under the proposed settlement: in return for $10 million or more, PTAC would refrain from taking one of two actions that, they assert, would harm the Companies. PTAC's Response at 10. Following the *Triad* decision, these threats should not be countenanced in any way since they are a blatant attempt to interfere with property of the estate. *Triad* at 19-22. But even if *Triad* were ignored, the PTAC Intervenors would still need to cite some tax

authority for the proposition that these actions would harm the Companies. The only support offered is an out-of-context citation to the deposition of Ms. Jones.[2]

The first action the PTAC Intervenors propose to take is a worthless stock deduction. There are two problems with this threat. First, PTAC does not currently meet the requirements needed to take the worthless stock deduction as a matter of tax law. Second, even if it did meet the requirements for a worthless stock deduction, there would be no impact until the first day of the first tax year after the Companies cease to be members of the group. By that time the worthless stock deduction would not have any negative consequences on the Companies.

Before PTAC can take a worthless stock deduction, it must meet the prerequisites under Section 165 of the Internal Revenue Code (the "Code") and Treasury Regulations 1.1502-80(c). Section 165 of the Code requires the taxpayer to demonstrate that the stock is worthless in the year the deduction is taken (and not in any earlier or later year). PTAC has failed to do this. A finding of insolvency is not conclusive evidence of worthlessness under Code Section 165. *Triad* at 15. The Treasury Regulations that interpret this section, Treasury Regulations § 1.1502-80(c), further provide that in the context of an affiliated

[2] The pages they cite consist substantially of (i) legal conclusions asserted by Broadbill's counsel, (ii) responses by Ms. Jones explaining that counsel's conclusions are incomplete because they do not consider exceptions that could eliminate the problems counsel was trying to get Ms. Jones to agree existed (Ms. Jones also referred to those limitations earlier in her deposition, *see* Jones Tr. at 120 and 173, as well as the pages cited by the PTAC Intervenors, Tr. at 179), and (iii) instructions to Ms. Jones to ignore those exceptions in answering the questions.

group of corporations filing a consolidated tax return a subsidiary's stock is not treated as worthless until the earlier of when (i) all the subsidiary's assets are disposed of, abandoned, or destroyed, or (ii) the subsidiary ceases to be a member of the tax group. *Id.* (citing Treasury Regulation §§ 1.1502-80(c) and 1.1502-19(c)(1)(iii)). None of these events has occurred.

Second, even if PTAC could take a valid worthless stock deduction (which it cannot for the reasons described above), it would not even have a theoretical impact on the Companies' tax attributes until the first day of the first tax year after the Companies cease to be a members of the PTAC consolidated group. *See* Code Section 382(g)(4)(D) and Treasury Regulations Sections 1.1502-19(c)(1)(iii), 1.1502-80(c). This would have no negative consequences on the Companies. Once deconsolidation has occurred, the Companies can either use the CNOLs before year-end or, if the contemplated private letter ruling is granted, they will no longer need them.

The second action the PTAC Intervenors propose to take is deconsolidating the Companies. This likewise would have no adverse impact. The PTAC Intervenors argue that deconsolidation would "effectively use up the CNOLs." PTAC's Response at 10. In point of fact, while deconsolidation would trigger limitations on the use of CNOLs under Section 382 of the Code, it would not "use up" the CNOLs. Even if the CNOLs were limited pursuant to Section 382 of the

Code, they could still be used to offset the "built-in gain" taxable income resulting from the elimination of the Companies' excess reserves. *See* Code Sections 382(h)(1), (6) and Section C.4 below. This would avoid the otherwise significant tax liability the Companies might face when their excess reserves are extinguished. Ms. Jones discussed the application of the Section 382 limitation in her deposition. *See* Jones Tr. at, e.g., 120, 173, 179.

4. The Companies Can Deconsolidate and Retain their CNOLs

The PTAC Intervenors argue that the Health Insurers did not cite any legal authority for the proposition that the deconsolidation would not be harmful to the Companies' tax position, and that the Health Insurers did not "offer an expert" on the issue. PTAC's Response at 15. The PTAC Intervenors argue that deconsolidation would "effectively use up" the CNOLs, but cite no authority for this proposition. PTAC's Response at 15.

To the contrary, there is no authority that would cause the Companies to lose their CNOLs if they were deconsolidated from PTAC. Upon deconsolidation, the Companies would take with them the share of the group's CNOLs attributable to their own operations. That rule is spelled out in the controlling Treasury Regulations, Treas. Reg. § 1.1502-21(b)(2)(iv). In the case of the Companies, that share represents all or substantially all of the group's CNOLs.

In addition, a deconsolidation of the Companies from PTAC, by itself, would not implicate the Code Section 382 ownership change loss limitation rules that Ms. Jones discussed during her deposition, since those rules require a shift of more than 50% ownership, not more than 20% (as the Health Insurers proposed). Moreover, under the exception to Section 382 loss limitations that applies to built-in gains, which Ms. Jones mentioned repeatedly during her deposition (as discussed above at Section C.3), even if PTAC took an additional step following deconsolidation, such as claiming a worthless stock deduction that would trigger loss limitations under Code Section 382, those limitations would not apply to the Companies' built-in gains. These are exactly the types of gains that would be expected should the Companies' existing excess insurance reserves be reversed. *See* Code Sections 382(h)(1), (6). Finally, there is no other body of rules – under the federal consolidated return regulations that govern the Companies' and PTAC's relationship for federal income tax purposes or otherwise – that would, upon deconsolidation, result in a loss of or other limitation on the Companies' ability to use their shares of the CNOLs in circumstances such as the Companies', where the CNOLs are a direct result of their incurring deductible expenses for still-outstanding reserve liabilities. Those principles are more than an "unproven theory" – in addition to being based on the Code and the Treasury Regulations, they are common-sense results that align with the commercial reality that the Companies'

CNOLs are directly associated with insurance reserve deductions that have produced no tax savings. A contrary result would produce a windfall for the taxing authorities, which is unprecedented in a situation such as this.

It is for these reasons that the Health Insurers proposed a structure in which the Rehabilitator would issue the authorized but unissued shares of Penn Treaty to accomplish a transfer that would break consolidation. The Companies could break consolidation, keep their shares of the CNOLs and have the right to file the contemplated private letter ruling without involving PTAC. At that point, PTAC would also be free to take its worthless stock deduction.

The PTAC Intervenors respond by claiming that this structure is prohibited by Penn Treaty's by-laws. The by-law cited for this proposition was purportedly enacted on "April __, 2016" by resolution of the sole shareholder, PTAC. *See* PTAC's Response at Exhibit 18. Not only does this freshly enacted by-law restrict the issuance of shares, it attempts to restrict the ability of the Rehabilitator (who, by statute, exercises the rights of the Penn Treaty board of directors) to do anything about it. This by-law is in clear violation of Section 505 and has no effect. Any authorized and unissued shares of Penn Treaty are property of the estate. PTAC cannot pass a resolution to restrict the Rehabilitator's rights with respect to property of the estate. The by-law enacted on "April __, 2016" and attached to

PTAC's Response as Exhibit 18 is invalid and would not impact the deconsolidation structure proposed by the Health Insurers.

5. The Other "Disputed Issues" to be Settled are No Longer at Issue

The Rehabilitator cites three "fully briefed but undecided disputes" that will be resolved under the proposed settlement instead of through litigation at a liquidation hearing. Rehabilitator's Response at 9. The first is the PTAC Intervenors' objection to liquidation. The consent of the PTAC Intervenors to liquidation is cited earlier in the Rehabilitator's Response as a "key benefit" of the settlement. *See* discussion above at Section C.1. The Health Insurers disagree that such consent confers a material benefit on the Companies but, in any event, it should not be counted twice in the Rehabilitator's listing of the benefits of the proposed settlement. The second "disputed issue" is the Rehabilitator's application and subsequent filings regarding the standard of review (initially filed on February 2, 2015). This application and related filings, including filings made by the Health Insurers, dealt with the standard of review for the now withdrawn Second Amended Plan of Rehabilitation. They are neither relevant nor in dispute. The third and final "disputed issue" is the Rehabilitator's application to bar intervening parties from calling Commissioner Miller to testify. Again, this application dealt with testimony on the now withdrawn Second Amended Plan of Rehabilitation. It too is no longer relevant or even in dispute.

6. The Settlement Amount Remains Unclear

The settlement amount to be paid under the MOU – either $10 million or $15 million – remains a mystery. The Application fails to mention the arrangement under which an additional $5 million would be paid by ANIC to an insolvent subsidiary controlled by PTAC. The PTAC Intervenors do not address this issue at all in their Response. The Rehabilitator addresses it (again, vaguely) in footnote 3 of her Response. The Rehabilitator states that the payment of the remaining $5 million is "purely contingent on circumstances outside of these proceedings." Does this mean that the Court is not being asked to approve this portion of the MOU? If this payment is part of the consideration of the proposed settlement, which, based on its inclusion in the MOU, it appears to be, the Rehabilitator must provide some basis on which the Court can evaluate and approve it.

D. An Appeal Cannot Be Conditioned on Posting a Bond In This Matter.

In her Response, the Rehabilitator abandons the statutory authority she initially cited as a basis on which to require a bond as a condition to appeal (Pa. R.App.P. 1733(a)). *See* Application at para. 29-32 (citing Pennsylvania Rule of Appellate Procedure 1733(a) as authority for the Court to require the posting of a bond in an appeal in connection with the Application). As the Health Insurers pointed out in their objection to the Application, Chapter 17 only applies to

supersedeas and stays; absent specific statutory authority, a bond cannot be required as condition for appeal. The Rehabilitator concedes the same by her reliance on a case in which the court refused to provide the trial court discretion to require the posting of a bond as a precondition to appeal where no authorization for such a bond existed other than as contained in Section 1701 of Chapter 17. *See* Rehabilitator's Response at 22-23 (citing *PPM Atl. Renewable v. Fayette County Zoning Hearing Bd.*, 81 A.3d 896, 902 (Pa. 2013)).

The Rehabilitator now strikes out in a new direction and contends that Section 505 of Article V (40 P.S. § 221.5) authorizes the Court to require posting of a bond as condition to the taking of an appeal. Rehabilitator's Response at 22-24. That argument also fails. Section 505 provides a detailed list of actions which the Court may enjoin. Taking appeals from the Court's orders is not an enumerated item on that list. The section is designed to regulate the conduct of third parties outside the receivership process, and is not intended to affect parties' procedural rights within that process. The Rehabilitator cites no authority for the proposition that Section 505 can be used in this way. If the drafters of the statute had intended for Section 505 to enable the Court to enjoin a party from appealing orders of the court without posting a bond, it would have done so explicitly and directly as the legislature did in the statutes that have been held to permissibly condition appeal on the posting of a bond. *See e.g.*, 35 P.S. § 691.605 (requiring

persons who wish to appeal assessment of a civil penalty by the Department of Environmental Resources to post bond or deposit a certain amount in escrow); *see also* 53 P.S. § 11003-A (allowing landowner whom appellant seeks to prevent from use or development of certain land, to petition the court to order appellants "to post bond as a condition to proceeding with the appeal"). The specific prohibitions in Section 505 cannot be expanded to limit rights specifically granted to potential appellants.

CONCLUSION

For the foregoing reasons and those stated in their previous submission, the Health Insurers respectfully request that the Court enter an order denying the Application.

Respectfully submitted,

Dated: August 4, 2016

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ Harold Horwich
Harold S. Horwich
Benjamin J. Cordiano
MORGAN, LEWIS & BOCKIUS LLP
One State Street
Hartford, Connecticut 06103-3178
Telephone: 860.240.2700
Facsimile: 860.240.2800

John P. Lavelle, Jr.
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Telephone : 215.963.5000

Attorneys for Aetna Life Insurance Company, Anthem, Inc., Cigna Corporation, HM Life Insurance Company, Horizon Healthcare Services, Inc. d/b/a Horizon Blue Cross Blue Shield of New Jersey, QCC Insurance Company, United Concordia Life and Health Insurance Company, United Concordia Insurance Company and UnitedHealthcare Insurance Company

CERTIFICATE OF SERVICE

I certify that on August 4, 2016, I caused a true and correct copy of the foregoing document to be served on the following persons by email at the email addresses indicated below:

Patrick H. Cantilo
Special Deputy Rehabilitator
Cantilo & Bennett, LLP
11401 Century Oaks Terrace, Suite 300
Austin, TX 78758
phcantilo@cb-firm.corn

Douglas Y. Christian
Ballard Spahr LLP
1735 Market Street
51st Floor
Philadelphia, PA 19103
christiand@ballardspahr.com

Stephen W. Schwab
Jayne A. Risk
Carl H. Poedtke III
Nathan Heller
Adam D. Brown
Justin Kerner
DLA Piper LLP (US)
One Liberty Place
1650 Market Street, Suite 4900
Philadelphia, PA 19103-7300
stephen.schwab@dlapiper.com
jayne.risk@dlapiper.com
carl.poedtke@dlapiper.com
nathan.heller@dlapiper.com
adam.brown@dlapiper.com
justin.kerner@dlapiper.com

Paul M. Hummer
James S. Gkonos
Saul Ewing LLP
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102-2186
phummer@saul.com
jgkonos@saul.com

Charles T. Richardson
Caryn M. Glawe
Faegre Baker Daniels
1050 K Street NW, Suite 400
Washington, DC 20001-4448
charlie.richardson@faegrebd.com
caryn.glawe@faegrebd.com

Andrew Parlen
Gary Svirsky
O'Melveny & Myers, LLP
Times Square Tower
7 Times Square
New York, NY 10036
aparlen@omm.com
gsvirsky@omm.com

James R. Potts
Cozen O'Connor
1650 Market Street, Suite 2800
Philadelphia, PA 19103
jpotts@cozen.com

James J. Rodgers
Dilworth Paxson LLP
1500 Market St., 3500E
Philadelphia, PA 19102
jrodgers@dilworthlaw.com

Thomas A. Leonard, Esq.
Richard Limburg, Esq.
Obermayer, Rebmann, Maxwell &
Hippel LLP
One Penn Center – 19th Floor
1617 John F. Kennedy Blvd.
Philadelphia, PA 19103
thomas.leonard@obermayer.com
richard.limburg@obermayer.com

John B. Consevage
Dilworth Paxson LLP
Penn National Insurance Plaza
2 North 2nd Street
Suite 1101
Harrisburg, PA 17101
jconsevage@dilworthlaw.com

/s/ John P. Lavelle, Jr.
John P. Lavelle, Jr.