**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| **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 November, 2010, upon consideration of Intervenors' Motion In Limine To Preclude The Proposed Testimony of Barry Rovner, M.D., and the Rehabilitator's response thereto, it is hereby **ORDERED** and **DECREED** that said Motion is **DENIED**.

BY THE COURT:

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MARY HANNAH LEAVITT

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| **AMERICAN NETWORK INSURANCE COMPANY,** | : | |
| **Defendant.** | : | |

**MEMORANDUM OF LAW OF THE REHABILITATOR IN OPPOSITION TO INTERVENORS' MOTION TO EXCLUDE THE PROPOSED REBUTTAL TESTIMONY OF BARRY ROVNER, M.D.**

## INTRODUCTION

Petitioner Robert L. Pratter, Acting Insurance Commissioner of the Commonwealth of Pennsylvania (the "Rehabilitator"), in his capacity as Rehabilitator of Penn Treaty Network America Insurance Company ("PTNA") and American Network Insurance Company ("ANIC") (and collectively the "Companies"), submits this memorandum of law in opposition to the motion filed by Intervenors Penn Treaty American Corporation and Eugene Woznicki

(collectively "Intervenors") titled Motion in Limine to Exclude the Proposed Testimony of Barry Rovner, M.D. ("Intervenors' Motion").

Intervenors' proposed Order seeks the preclusion of Barry Rovner, M.D., including his proposed testimony concerning the opinions proffered in his Rebuttal Report dated October 20, 2010 ("Rovner Rebuttal") on the grounds that (1) his opinions fails to meet the reasonable probability standard in Pennsylvania; (2) he fails to offer his opinions within a reasonable degree of medical certainty; and (3) Dr. Rovner lacks the expertise to proffer the proposed opinions set forth in the Rovner Rebuttal. Each of the aforementioned arguments to preclude Dr. Rovner from testifying at trial are not only unsupported by Pennsylvania law, but are contrary to the sworn testimony of Dr. Rovner and the express language of the Rovner Rebuttal and are designed as nothing more than a specious attempt to cast Dr. Rovner in a bad light before he has had an opportunity to appear before this Court.

As is demonstrated below, this Motion is without basis and should therefore be denied.

**ARGUMENT**

**1. Dr. Rovner Will Proffer Medical Opinions To Rebut The Intervenors' Suggestion That The Court, In Considering The Financial Condition and Projected Financial Results Of The Companies, Accept Morbidity Improvement Assumptions That Are Unsupported By The Current State of Medical Science.**

Intervenors contend that the Companies can survive in rehabilitation if the Court adopts its actuary's proposed revisions to the analysis done by the Rehabilitator. Intervenors' actuary, Karl Volkmar, begins from the projection of a nearly $1 billion in negative surplus for PTNA. (Milliman Rebuttal, Exhibit 9, pg. 10, to Combined Appendix of Exhibits To Rehabilitator's Motion In Limine ("Combined Appendix"), dated November 12, 2010.) Volkmar proposes that this profound deficit, which is nearly 5 times as great as that believed to exist at the time the Companies entered rehabilitation, can be overcome in rehabilitation with the adoption of about a

dozen assumptions which in their totality are aggressive, including the incorporation of a large future morbidity improvement assumption. (Volkmar Report, Exhibit 2, pp. 41 and 306 to Combined Appendix; see Milliman Rebuttal, Combined Appendix, Ex. 9 at 10.) Even if the Court were to adopt the dozen or so more aggressive assumptions recommended by Intervenors, and the Rehabilitator submits that the Court should not, if any one of those assumptions is not reasonable, the Intevenors' proverbial house of cards collapses.

The morbidity improvement assumption embodies the concept that advances in medical science can better the population such that an improvement factor should be included in the claims cost projections. In particular, according to the Companies actual claims paid data, cognitive claims have comprised more than forty percent of the total claims paid by PTNA and ANIC consistently since 2003. (A true and correct copy of the Companies' Claims Paid By Diagnosis Summary, is attached hereto as Exhibit A.) The Intervenors have incorporated an aggressive morbidity improvement factor based upon the opinions of their expert Dr. Holland, that research could reveal a cure for cognitive diseases including but not limited to Alzheimer's disease, in the next 5 years. (*See* Holland Report, Combined Appendix, Exhibit 23 at 39-40.) Intervenors contend that a more aggressive morbidity improvement assumption[1] should be used in analyzing PTNA's and ANIC's conditions than their own expert uses in his actuarial work for other companies.[2] (Volkmar Tr. at 153:4-22.) Dr. Holland's assertions concerning an imminent

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[1] The Rehabilitator's actuary has employed a morbidity improvement assumption of 1 ½% per year for 10 years, and 1% per year thereafter, whereas the Intervenors' actuary contends that this Court should adopt a morbidity improvement factor of 2 ½% per year forever even though he admits that he would not use such an aggressive morbidity improvement assumption with respect to his other clients. (Combined Appendix, Ex. 12, Milliman's Projections Report at 10.)

[2] Notably, some actuarial schools of thought incorporate **no** morbidity improvement into their analysis because claims experience does not support measurable improvement. NOLHGA's actuary, DaVinci Consultants, are among those LTC actuaries who disagree with the inclusion of morbidity improvement assumptions and accordingly do not include it in their analysis. (Combined Appendix, Ex. 8, DaVinci Rebuttal at 17.) Thus, the morbidity improvement

future discovery of a cure to Alzheimer's are unsupported by medical research, and the Rehabilitator intends to offer the testimony of Dr. Rovner to rebut Dr. Holland's unsupported assertions. For the reasons discussed more thoroughly below, Dr. Rovner will testify that despite continuing research efforts "it is [his] opinion, to which [he] hold[s] with a reasonable degree of medical certainty, that no preventative, clinically meaningful therapeutic, or disease-modifying treatments for [Alzherimer's disease] will be available at least within the next five years." (Intervenors' Motion, Exhibit D at 9.)

**2. Dr. Rovner, A National Leader In Alzheimer's Research, Is Imminently Qualified To Offer His Opinions At Trial.**

Intervenors begin the "FACT" section of their motion proffering misleading and factually inaccurate information about Dr. Rovner, all in a transparent attempt to discredit Dr. Rovner and call into question his credibility. This effort can be described as nothing short of a baseless and improper smear campaign. No other conclusion can be reasonably drawn, except that Intervenors have fabricated arguments which are not only unsupported by the law, but are ***contrary*** to the law, simply for an opportunity to taint the Court's view of Dr. Rovner before he has appeared in Court. Intervenors' abuse of the Motion in Limine and the resources of this Court and the Companies, is nothing short of an outrage.

Pennsylvania Courts will not grant motions in limine that go to the credibility and weight of the evidence – such motions comprise the misuse of a motion in limine. (*See, e.g.*, *Grugnale v. Tymosky*, 14 Pa. D & C.5th 48, 60 (Lacka. Cty. 2010) (citing *Kuna v. Lake Sheridan Cottagers Association*, 2 Pa. D & C.5th 290 (Lacka. Cty. 2007)). A determination of credibility of an expert witness and the weight given to his testimony, is within the power of the factfinder. *See Summers v. Certainteed Corp.*, ___ Pa. ___, 997 A.2d 1152, 1161 (2010) (refusing to decide

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assumption incorporated by the Rehabilitator's actuary falls between the views of Intervenors and NOLHGA's actuary.

issues of credibility in the context of a summary judgment motion); *In re Hunter's Estate*, 416 Pa. 127, 136, 205 A.2d 97, 102 (Pa. 1964) ("It is axiomatic that the credibility of witnesses, professional or lay, and the weight to be given their testimony is strictly within the proper province of the trier of fact."); *see also Reading Radio, Inc. v. Fink*, 833 A.2d 199, 208 (Pa. Super. 2003).

Dr. Rovner is a Professor of Psychiatry and Neurology and the Director of the Division of Geriatric Psychiatry at Jefferson Medical College in Philadelphia, Pennsylvania. (*See* Exhibit D, pg. 1 to Intervenors' Motion.) Dr. Rovner treats patients with Alzheimer's disease, he trains medical students and residents and is considered nationally, a leading expert in the research of Alzheimer's disease. (Id.) Intervenors suggest that Dr. Rovner has improperly represented his positions and appointments, contending that his most recent appointment at Jefferson Medical School of Philadelphia is untrue because the website did not reflect the appointment at the time of his deposition. (Intervenors' Motion at 2.) However, based on Intervenors' inquiry, the Rehabilitator produced Dr. Rovner's written appointment letter from the Jefferson University, which the Rehabilitator submits ends any further questions relating to Rovner's appointments. (Intervenors' Motion, Ex. B.)

As Dr. Rovner further explained in his deposition, he received his appointment only one month prior to appearing for his deposition in this case, and the medical college had apparently not yet had an opportunity to update the website. (Intervenors' Motion, Ex. A, Rovner Tr. at 30:7-16.) In fact, as Dr. Rovner explained, there are physicians listed on the website that are no longer with Jefferson University. (Intervenors' Motion, Ex. A Rover Tr. at 35:14-19.) To have nonetheless filed this pleading hurling factually inaccurate information at the Rehabilitator, is beyond the pale – it is deliberately and intentionally misleading.

As is typical, the Intervenors representations are far short of accurate or truthful. Any attack on Dr. Rovner's credibility is an improper basis for Intervenors' Motion and should summarily be disregarded and the Court is requested to take notice of the consistent pattern engaged in by the Intervenors to deliberately and intentionally misstate facts and fail to present the Court with truthful representations.

### 3. Dr. Rovner Is A Rebuttal Witness And His Testimony Need Not Meet The Standards of Pa.R.E. 702 As Intervenors Incorrectly Suggest.

Intervenors contend that Dr. Rovner's report fails to meet even the more relaxed standard of "reasonable probability" that applies to expert opinions that deal with future consequences. But, Intervenors have simply mis-stated the rule that applies to ***rebuttal*** experts in Pennsylvania. The Pennsylvania Supreme Court has clearly directed that the party who bears the burden of proving his expert's opinion – in this case Intervenors bear the burden of proving Dr. Holland's opinion that a cure and/or treatment developments for Alzheimer's are so imminent that it should bear on the morbidity improvement assumptions used by the Rehabilitator's actuary – has the burden to offer an opinion within a reasonable degree of medical certainty, or in the case of future consequences, within a reasonable degree of probability. *Neal v. Lu*, 365 Pa. Super. 464, 476, 530 A.2d 103, 109 (1987) (citing *McMahon v. Young*, 442 Pa. 484, 276 A.2d 534 (1971)); *and see* Pa.R.E. 702; Leonard Packel and Anne Poulin: Pennsylvania Evidence Section 702-6 at 773 n.11.[3] (Thomson/West 3d ed. 2007). Where a party seeks to introduce expert opinion evidence that discredits or rebuts the other side, however, the rebuttal evidence is not considered

[3] Notably Intervenors ask this Court to rely upon the holdings in *McMahon v. Young*, 442 Pa. 484, 276 A.2d 534 (1971), for the expert admissibility standards that the Court should apply in this case, but inexplicably Intervenors fail to alert to the Court to the expert admissibility standard that should be applied to a rebuttal expert such as Dr. Rovner, as set forth by the Supreme Court in that same decision. (Intervenors' Motion at 5.)

"proof" if it "simply vitiates the effect of opposing evidence." *Neal*, 365 Pa. Super. at 476, 530 A.2d at 110. "Expert opinion evidence ... certainly affords an effective means of rebutting contrary expert opinion evidence, even if the expert rebuttal would not qualify as proof" and is not, therefore, held to the standards of the general rule. *Id.* Dr. Rovner's opinions have, at all times, been described as and intended to rebut and discredit Dr. Holland's opinions which lack factual basis in medical research.

It is undisputed by Intervenors that the Rehabilitator intends to call Dr. Rovner as a rebuttal witness to Dr. Holland's testimony and opinions and in fact their Motion in Limine expressly seeks to bar the "Rebuttal Report of Barry Rovner, M.D". (Intervenors' Motion, Proposed Order.) As a general matter, the Court has broad discretion in deciding to accept or reject rebuttal evidence. "In general, 'the admission or rejection of rebuttal evidence is within the sound discretion of the trial judge.'" *Neal*, 365 Pa.Super. at 476, 530 A.2d at 110 (citing *Mapp v. Dube,* 330 Pa. Super. 284, 294, 479 A.2d 553, 557 (1984)); *see also Erkens v. Tredennick*, 353 Pa. Super. 236, 509 A.2d 424 (1986) (holding that the trial court had acted within its discretion in permitting the defendant physician's medical expert to testify on the issue of causation with less than reasonable medical certainty). Here, the Rehabilitator will demonstrate the thorough bases and extensive education and experience upon which Dr. Rovner relies in reaching his opinion that based upon currently pending studies, a cure for Alzheimer's is not yet imminent. The Court should, therefore, permit Dr. Rovner's rebuttal testimony.

**4. Even Though The Admissibility Of Dr. Rovner's Rebuttal Testimony Need Not Meet The Standards Of Pa.R.E. 702, They Do And He Will Offer Opinions Within A Reasonable Degree Of Medical Certainty As a Medical Doctor And National Leader In Alzheimer's Disease Research.**

Dr. Rovner's report clearly states that he was asked "to comment on the current status and future prospects of treatments for Alzheimer's disease." (Intervenors' Motion, Ex. D,

Rovner Rebuttal at 1.) In his report, Dr. Rovner establishes his extensive and relevant experience and knowledge relating to Alzheimer's research, which is the basis for his opinions on the current status and future prospects of Alzheimer's treatments. (*Id.*) He has directed clinical Alzheimer's research and has received grants to study patients with cognitive impairment and dementia, and most recently, this fall was awarded a $2.6 million grant to study cognitive decline. (*Id.*) Dr. Rovner also serves as the director and principal investigator at Jefferson Medical College, in charge of multi-center investigational drug trials for Alzheimer's. (*Id.* At 2.) Dr. Rovner further details the many recent Alzheimer's research trials and studies, and unfortunately, reports that no encouraging break-through has been discovered yet. (*Id.* at 4-6.) Given the current status of the research, and based upon his explanation of that process, Dr. Rovner opines that, unfortunately, a cure or effective treatment for this terrible cognitive disease will not be discovered within the next 5 years. (*Id.* at 7, 9.) In fact, according to Dr. Rovner, medical researchers do not yet fully understand the causes of Alzheimer's. (*Id.*) Dr. Rovner goes on to state that

> ***no effective interventions will be available within the next 5 or even 10 years***. This troubling reality is substantiated by the negative result of recent clinical trials of drug treatments for [Alzheimer's]. Developing more effective treatments will require identifying new targets for drug action. This will depend on researchers first having a better understanding of what causes [Alzheimer's] than they do today ... Based on the foregoing, ***it is my opinion, to which I hold with a reasonable degree of medical certainty,*** that no preventative, clinically meaningful therapeutic, or disease-modifying treatments for [Alzheimer's] will be available at least within the next five years.

(*Id.* at 9) (emphasis added). This is the opinion that the Rehabilitator intends to introduce through Dr. Rovner.

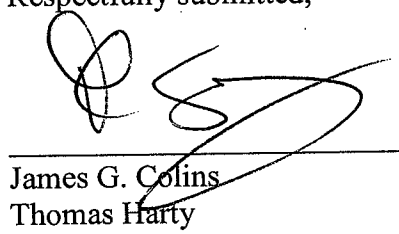
Intervenors' lengthy attempts to try to establish all of the things about which Dr. Rovner does not intend to offer expert testimony are beside the point. (Intervenors' Motion at 6-9.) An

expert witness is not required to have complete knowledge of every aspect of te field in question. *Miller v. Brass Rail Tavern, Inc.,* 541 Pa. 474, 481, 664 A.2d 525, 528 (1995). Dr. Rovner's unfamiliarity with the laundry list of topics and issues raised by Intervenors at his deposition is of no consequence to the assistance Dr. Rovner's proffered opinion will provide the Court in determining how much, if any, morbidity improvement should reasonably be factored in the Companies' claims projections, for the purpose of determining whether the Companies can survive in rehabilitation or must be liquidated. Accordingly, Intervenors' Motion should be denied and Dr. Rovner should be permitted to testify at trial.

**CONCLUSION**

For the reasons set forth above, the Rehabilitator respectfully requests that Intervenors' Motion titled Motion in Limine to Exclude Rebuttal Expert Report of Barry Rovner, M.D. be denied.

Respectfully submitted,



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COMPANY and AMERICAN NETWORK INSURANCE COMPANY

## CERTIFICATE OF SERVICE

I, Virginia Lynn Hogben, hereby certify that on November 16, 2010, I served the foregoing Response to Intervenors' Motion in Limine on the following person by the following means:

**Via Hand Delivery:**

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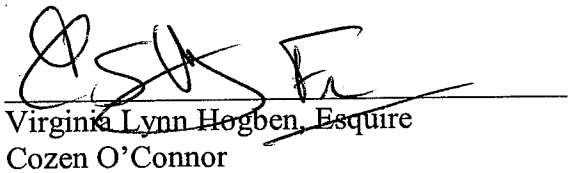

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