IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

O R D E R

AND NOW, this ____ day of _____, 2015, upon consideration of the Rehabilitator's Amended Application for Entry of a Protective Order dated June 16, 2015 (Amended Application), the Intervenors Eugene J. Woznicki and Penn Treaty American Corporation's Brief in Opposition thereto, and any other responses, it is hereby **ORDERED** that the Amended Application is **DENIED**.

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MARY HANNAH LEAVITT, Judge

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In Re: American Network Insurance Company in Rehabilitation	:	1 ANI 2009

INTERVENORS EUGENE J. WOZNICKI AND PENN TREATY AMERICAN CORPORATION'S BRIEF IN OPPOSITION TO THE REHABILITATOR'S AMENDED APPLICATION FOR ENTRY OF A PROTECTIVE ORDER

Intervenors Eugene J. Woznicki and Penn Treaty American Corporation submit this Brief in opposition to the Rehabilitator's Amended Application for Entry of a Protective Order.

I. INTRODUCTION

Notwithstanding the expansive and convoluted nature of the Rehabilitator's current plan and her *volte-face* from the April 2013 Plans that offered the "best chance" for success, the Rehabilitator improperly seeks to shut down discovery and shroud under a veil of secrecy the Rehabilitator's continued frustration of these rehabilitations and violations of the Court's Orders. As was the case during the proceedings on the Rehabilitator's application for liquidation orders that led to this Court's May 2012 Order and Opinion, thorough discovery responses are necessary to any determination of the propriety of the Rehabilitator's actions and her proposed 2014 Liquidation Petition and Second Amended Plan. Indeed, there is no justification for the stingy approach to discovery urged by the Rehabilitator, especially given the self-laudatory statements by the Rehabilitator's counsel in open court that "the world is watching" and that this rehabilitation serves as a shining example for future rehabilitations. Given the continuing sordid history of the Rehabilitator's approach to this rehabilitation—including an unrebutted finding by the Court that the Rehabilitator has actually acted to frustrate the rehabilitation—she has no business demanding a severely limited approach to discovery. The evidence of that frustration was not volunteered by the Rehabilitator; the Intervenors had to obtain the support for that position in the same type of thorough discovery they seek and are entitled to here.

At the start of the hearing on July 13 and 14, either the Rehabilitator's counsel or Special Deputy Rehabilitator Cantilo argued or testified about these and many other topics

addressed in the Intervenors' discovery requests including in contravention of the Rehabilitator's current request to severely limit discovery:

- The personal involvement of current and former Insurance Commissioners Miller and Consedine in making assessments and determinations in this matter;
- The alleged reasonable and appropriate actions of the Rehabilitator;
- The Rehabilitator's alleged efforts to follow and comply with this Court's rehabilitation Orders and the specific directives and requirements of the Court's May 3, 2012 Opinion and Order;
- The decision to hire Cantilo for the ostensible purpose of preparing a rehabilitation plan in compliance with the Court's May 3, 2012 decision;
- The rehabilitative methods, approaches and alternatives that the Rehabilitator considered;
- The preparation and development of the Rehabilitator's April 2013 Plans;
- The Rehabilitator's withdrawal of support for his own April 2013 Plans;
- The Companies' investment yields and income;
- The involvement of PricewaterhouseCoopers ("PwC") in this matter and PwC's actuarial work and participation in the preparation of the various rehabilitation or liquidation petitions and plans;
- The Rehabilitator's attempt to strip the Intervenors of their ownership of the Companies and other property rights including valuable deferred tax attributes;
- Conversations and communications with other state insurance departments and guaranty associations;
- The alleged inability to obtain premium rate increases for the Companies during rehabilitation;[1] and
- The industry-wide premium rate increases enjoyed by every long-term care insurer in the United States except for the Companies.

[1] In defiance of this Court's rulings that future premium rate increases will not be sought on a "business as usual" basis (Opinion at 10, 111) and that "[t]he Rehabilitator has not established that a rehabilitation, even one focused solely on rate increases, will not work." *id.* at 135.

Given the obvious relevancy of these matters to the claims or defenses of either the Rehabilitator or the Intervenors, and having chosen to raise these topics at the start of the hearing, there is no basis for the Rehabilitator to refuse discovery on these matters to the Intervenors.

Under *any* standard applicable to the 2014 Liquidation Petition and Second Amended Plan, including the "abuse of discretion" standard urged by the Rehabilitator that may be proven by, *inter alia*, the existence of bad faith, fraud, capricious action, abuse of power, arbitrary or unreasonable plan provisions, irrationality, conflicts of interest or self-dealing, bias, ill-will, misapplication of law and other abusive conduct, the Rehabilitator's misconduct and non-compliance with the Court's Orders are relevant to the Intervenors' defenses. The Rehabilitator cannot possibly demonstrate that information relating thereto is not discoverable. At the start of the hearing, the Rehabilitator placed at issue their acting reasonably and appropriately.

Furthermore, the Rehabilitator's current request to shut down discovery is a sea change from the prior approach to discovery in this same matter. Previously, the Rehabilitator produced in a relatively straightforward manner the records that the Intervenors requested for the hearing on the prior contested liquidation petitions.[2] The Intervenors used these records at the hearing and the Court cited them as highly probative evidence in its Opinion. The Rehabilitator is now desperate to avoid producing similar records because they will show that the Rehabilitator and the so-called "rehabilitation team" have remained fixated on liquidation and done their best yet again to try and torpedo these rehabilitations rather than to actually rehabilitate the Companies as the Court Ordered, all while many if not all other long-term care insurers have

[2] Except that several witnesses for the Rehabilitator admitted that they had discarded documents, and certain files from Milliman were inappropriately withheld from production until mid-trial.

enjoyed substantial premium rate increase since the Companies entered into rehabilitation in 2009.

The Rehabilitator asserts that discovery is unduly burdensome to the Companies. What is unduly burdensome to the Companies is a Rehabilitator who refuses to take any meaningful rehabilitative action in over six years. If this proceeding is expensive, it is expensive because of the Rehabilitator's intransigence. Unlike the Rehabilitator, the Intervenors are motivated to avoid imposing unnecessary costs on *their* Companies, which is why they have handled this matter for the most part with two or three lawyers. Particularly given the Rehabilitator's profligate spending on a growing army of lawyers (nineteen at last count), consultants, and actuaries ($11.2 million spent on PwC alone in 2013 and 2014), her feigned concern at the cost of discovery is a mere pretext to avoid producing records that are relevant to the Intervenors' defenses and objections. The Intervenors do not seek these records to embarrass, harass, or annoy, but because as the Chairman of the Boards of Directors and sole shareholder of the Companies they are obligated and statutorily authorized to defend against the Rehabilitator's continued improper liquidation efforts and other improper actions. The Intervenors should not have to jump through hoops to prepare their case and try this matter.

The Amended Application should be denied for these reasons and because as further explained below: (a) the Rehabilitator has the burden of establishing the non-discoverability of information; (b) former Commissioner Consedine and Commissioner Miller must be made available for deposition given their personal involvement in the matter; (c) the vague relief sought of limiting discovery to the Plan's "four corners" and suggestion that creating a "share file" populated with documents of the Rehabilitator's sole choosing somehow absolves her of complying with her discovery responsibilities is unsupported by any authority and would

violate Pa.R.C.P. 4003.1(a) and prejudice the Intervenors; (d) the Rehabilitator alleges facts not of record without verification and fails to establish any requisite undue burden that could possibly outweigh the Intervenors' need for discovery under the circumstances; and (e) the Rehabilitator's demand for fee-shifting against the Intervenors contravenes the general presumption that the producing party bears the cost of production and would turn the Court's award in favor of the Intervenors on its head.

II. ARGUMENT

A. The Rehabilitator has the burden of establishing non-discoverability.

Pursuant to Pa.R.C.P. 4003.1(a) made applicable to this proceeding by Pa.R.A.P. 106, the Intervenors "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." Pa.R.C.P. 4003.1(a).[3] "In discovery matters, a court should interpret the

[3] The Rules of Appellate Procedure provide for discovery in Commonwealth Court's original jurisdiction matters by incorporating the "general rules applicable to practice and procedure in the courts of common pleas," as follows: "[u]nless otherwise prescribed by these rules the practice and procedure in matters brought before an appellate court within its original jurisdiction shall be in accordance with the appropriate general rules applicable to practice and procedure in the courts of common pleas, so far as they may be applied." Pa.R.A.P. 106. The Pennsylvania Rules of Civil Procedure in turn provide regarding the scope of discovery, including document requests, that "[t]he rules of this chapter apply to any civil action or proceeding brought in or appealed to any court which is subject to these rules...." Pa.R.C.P. 4001(a). Because this is a civil action or proceeding brought in an appellate court within its original jurisdiction, the discovery procedures provided by the Pennsylvania Rules of Civil Procedure apply. It is the practice and procedure in the courts of common pleas to liberally permit discovery for many different uses including for use at a hearing such as will be held on the pending liquidation petition and plan. *See* Pa.R.C.P. 4001(c) (providing that "any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery, or for preparation of pleadings, or for

requirement of relevancy liberally." 6 Stnd. Pa. Prac. 2d §34:24 (2015). Whether information is relevant depends upon the nature and the facts of the case, and any "doubts are to be resolved in favor of relevancy." *Id.* "If there is any conceivable basis of relevancy, the discovery should be permitted." *Id.* Moreover, "[t]he party seeking discovery does not need to justify complete relevance in advance." *Id.* §34:25.

"It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence." Pa.R.C.P. 4003.1(b). It is well established that "the rules of discovery involve a standard that is necessarily broader than the standard used at trial for the admission of evidence; the purpose of allowing a broader standard is to ensure that a party has in its possession all relevant and admissible evidence before the start of trial." *Commonwealth v. TAP Pharmaceutical Prods.*, 904 A.2d 986 (Pa. Cmwlth. 2006) (granting the Commonwealth's motion to compel production of documents). Finally, "[i]f during discovery, a party objects to discovery requests on the ground of relevancy, the objecting party has the burden of establishing the right to refuse the discovery." 6 Stnd. Pa. Prac. 2d §34:25 (2015). Accordingly, the Rehabilitator as the objecting party has the burden of demonstrating non-discoverability.

B. Former Commissioner Consedine and Commissioner Miller must be made available for deposition given their personal involvement in the matter.

The Intervenors intend to call former Commissioner Consedine and Commissioner Miller as witnesses at the hearing. They should not be forced to jump through hoops to depose them and prepare their case. There is no need to speculate whether Consedine and Miller were personally involved in this matter. He served as the Insurance Commissioner

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preparation or trial of a case, or for use at a hearing upon petition, motion or rule, or for any combination of the foregoing purposes"); Pa.R.C.P. 4001(d) (providing that "any party may obtain discovery by one or more of the following methods….").

and Rehabilitator before and after the Court's decision of May 3, 2012. Consedine hired Cantilo, and was personally involved in the preparation and approval of the April 2013 Plans but then failed to support his own plans and instead filed the 2014 Liquidation Petition and the Second Amended Plan. In December of 2013 (eight months after the April 2013 Plans had been filed), when it suited the Rehabilitator's objectives to impress upon the Court that Consedine was personally involved, the Rehabilitator's counsel represented to the Court that: "**Commissioner Consedine, you know, has been extremely engaged personally**, and has also appointed a special deputy rehabilitator, who has been doing, I dare say, nothing but being focused on this case." Pretrial Conference Tr. 12/17/2013 at 36 (emphasis added). At the start of this hearing, the Rehabilitator's counsel again represented to the Court that Consedine as well as Miller were personally involved in this matter:

> No fewer than five insurance commissioners have grappled with this problem, Your Honor, now, including Commissioner Miller. **They've assessed the situation. They've made determinations.**
>
> Most recently **Commissioner Consedine, and now Commissioner Miller, have followed this Court's Order and prescribed a way ahead to rehabilitate these companies.**

Notes of Testimony ("N.T.") 7/13/2015 at 15 (emphasis added).

During the second day of the hearing, the Rehabilitator's counsel again represented to the Court that the Rehabilitator was personally involved in this matter:

> …**the Rehabilitator and** the Special Deputy Rehabilitator **have acted reasonably and appropriately** within their discretion under the circumstances.

N.T. 7/14/2015 at 64 (emphasis added).

In response to questioning by the Rehabilitator's counsel, Cantilo testified about Consedine's involvement in "dealing with consumers" by directing that the "bad bank" be renamed to entice policyholders to choose liquidation. *Id.* at 102-103. ("Commissioner

Consedine, when we first came up with this, said, Cantilo, no one will ever want to go to a company called 'bad bank.' You go to do something else."). Cantilo also testified that he was "engaged by then Commissioner Mike Consedine in July 2012 after this court's Order a couple of months earlier. I was tasked by Commissioner Consedine with the development of a plan of rehabilitation for the two insurers that address the requirements set forth in The Court's May 2012 Order[.]" *Id.* at 18. Cantilo further testified that "the commissioner was bound and determined to take a completely fresh look at these companies following this court's May 2012 Opinion and Order[.]" *Id.* at 26. Deposing Consedine and Miller in this context in which they were personally involved in this matter and were already the subject of argument and testimony by the Rehabilitator is as basic as discovery gets.

Notably, the Intervenors deposed and cross-examined former Commissioner Joel Ario ("Ario"), to defend against the liquidation petitions that he had filed, and Ario's testimony was cited in the Court's Opinion as important evidence notwithstanding the fact that a new commissioner had been appointed. The Rehabilitator called Ario as a witness and freely permitted his deposition. As Ario testified, the buck stops with the Insurance Commissioner. Ario N.T. 2/11/11 at 51 ("**Q.** You were the statutory rehabilitator when the decision was made to seek liquidation orders for both ANIC and Penn Treaty, correct? **A.** The buck stops with me. That was your decision, and it is – you're here to explain how you reached that decision; is that your understanding? **A.** Correct. The buck stops with me."). The buck also stopped with Consedine when he served as the Rehabilitator who pulled the trigger on the decisions to file aborted April 2013 Plans and subsequent 2014 Liquidation Petition and Second Amended Plan. The buck stopped with Miller when she made the decision to support the terribly flawed Plan and liquidation petition after she took over as Rehabilitator. Consedine and Miller's deposition and

hearing testimony will be important for purposes of discovery, case preparation, and evidence at the next stages of the hearing just as Ario's testimony was relevant.

The Intervenors are also entitled to discover relevant information by deposing more than a single witness, especially in a case of this importance. Ario was assisted by Deputy Commissioner Joseph DiMemmo ("DiMemmo") and Chief Rehabilitation Officer Robert Robinson ("Robinson"). The deposition and hearing testimony of all three witnesses served an independent and non-cumulative role in developing the factual record supporting the Court's May 3, 2012 decision. Cantilo's deposition, while also necessary, is no substitute for Consedine and Miller's depositions. In fact, taking their depositions will be vital in preparing to cross-examine Cantilo at the hearing for impeachment and other purposes.

The Rehabilitator's Amended Application seeks to stifle the Intervenors' ability to prepare their case for trial by requesting to quash Consedine's deposition notice. The Rehabilitator argues that Consedine's deposition notice should be quashed for three reasons: (1) Cantilo was retained as Special Deputy Rehabilitator and the relevant decisions were reached through a collaborative process with the department's staff rather than by the Commissioner personally; (2) the Intervenors have noticed the deposition of Cantilo; and (3) the Rehabilitator does not plan to call Consedine as a witness. Rehabilitator's Brief at 16-18 (quoting *Fla. Office of Ins. Regulation v. Fla. Dep't of Fin. Servs.*, 159 So. 3d 945, 951 (Fla. Dist. Ct. App. 2015). Each of these reasons fails to support the relief the Rehabilitator seeks.

The only case cited by the Rehabilitator as support for quashing Consedine's deposition notice is a Florida case that is not binding on this Court and in any event is distinguishable and better supports the Intervenors' position. The Court of Appeal of Florida quashed an order compelling the deposition of a commissioner where the requesting party, an

accounting firm, intended to elicit testimony on "hypothetical questions" regarding how he would have acted in "hypothetical situations" rather than to elicit testimony on factual questions regarding his personal involvement or knowledge of actual events or actions. *See id.*, 159 So. 3d at 947 & 951-52. By contrast, Consedine and Miller were personally involved in this matter.

Furthermore, it is simply irrelevant that the Rehabilitator does not currently plan to call Consedine in the Rehabilitator's case-in-chief because the Intervenors intend to call him as a witness in their defense against the Rehabilitator's latest liquidation petition.

Moreover, the Intervenors are not limited to deposing a witness only for use at trial. They may take the depositions of Consedine and Miller "for the purpose of discovery, or for preparation of pleadings, or for preparation or trial of a case, or for use at a hearing upon petition, motion or rule, or for any combination of the foregoing purposes." Pa.R.C.P. 4001(c) (authorizing any party to take the testimony of any persons including a party by oral deposition). As explained above, they may depose Consedine and Miller for discovery and case preparation purposes even if no party calls them at trial, although the Intervenors at least, fully expect to do so. Accordingly, the Court should deny the Amended Application's request to quash Consedine's deposition notice and both Consedine and Miller should be made available for deposition.

C. The vague relief sought of limiting discovery to the Plan's "four corners" and the suggestion that a "Share File" populated with documents of the Rehabilitator's sole choosing somehow absolves her of complying with her discovery responsibilities are unsupported by any authority, and would violate Pa.R.C.P. 4003.1(a) and prejudice the Intervenors.

The Rehabilitator requests to limit "discovery to objections made within the four corners of the Plan." Rehabilitator's Brief at 12; Rehabilitator's Proposed Order ¶ 1. She further requests that electronic discovery be confined "to the content of the electronic ShareFile" which

is populated with documents of the Rehabilitator's sole choosing. Rehabilitator's Proposed Order ¶ 2; Amended Application at 4.

The Court should deny these requests pursuant to Pa.R.C.P. 4003.1(a), which authorizes "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]" The proposed "four corners" approach is improper because the subject matter involved in this rehabilitation action is broader than the Plan, and parties are entitled to discovery not only on the Rehabilitator's claims relating to her Plan, but also with regard to the claims or defenses of any other party.

The subject matter involved in this rehabilitation action is not limited to the Second Amended Plan. The subject matter is the rehabilitation of the Companies and the correction of the conditions that prompted the Companies' Boards of Directors to consent to the rehabilitation petitions and Orders of January 6, 2009. Additionally, the Intervenors have obtained a Judgment of this Court that they are requesting the Rehabilitator to comply with, and the Rehabilitator has filed the April 2013 Plans and the 2014 Liquidation Petition. To suggest that the subject matter involved in this rehabilitation action does not include compliance with the Court's Order and Opinion of May 3, 2012 entered as a Judgment in favor of the Intervenors is indicative of the Rehabilitator's abusive approach and utter disregard for the Court's Orders in this action. Moreover, discovery cannot be confined to only those matters described in the "plain language" of the Second Amended Plan. As a document drafted by the Rehabilitator, the Plan's "plain language" would not be expected to predict and describe the potential claims, defenses, or objections of other parties.

The Rehabilitator through the argument and testimony during the first two days of the hearing has also placed at issue the Rehabilitator and Special Deputy Rehabilitator acting reasonably and appropriately and in compliance with this Court's Orders. Furthermore, under any standard applicable to the 2014 Liquidation Petition and Second Amended Plan, the Rehabilitator's misconduct and non-compliance with the Court's Orders are relevant to the Intervenors' defenses to liquidation. The Rehabilitator urges that an "abuse of discretion" standard be applied. The Intervenors dispute that such a standard is applicable given the request to convert these rehabilitations to a liquidation. But under that standard, an "abuse of discretion" may be proved by, *inter alia*, the existence of bad faith, fraud, capricious action, abuse of power, arbitrary or unreasonable plan provisions, irrationality, conflicts of interest or self-dealing, bias, ill-will, misapplication of law and other forms abusive conduct including excessive delay, waste of estate assets, and violation of Court Orders. One of the Intervenors' extremely important defenses is that the Rehabilitator has violated the Orders and Opinion of May 3, 2012 and failed to comply with the Court's directives by abusive conduct and actively frustrating these rehabilitations notwithstanding the filing of the April 2013 Plans and now the Second Amended Plan, which is nothing more than window dressing. Of course the Rehabilitator would prefer to shut down discovery on the Intervenors' defenses, but that is not appropriate under the circumstances. Information regarding the Rehabilitator's misconduct and frustration of the rehabilitation was discoverable for the prior hearing and cited by the Court as probative evidence that the Rehabilitator had not yet attempted an earnest rehabilitation of the Companies. Similar information is discoverable now under any standard that may be applied.

The "share file" referred to by the Rehabilitator contains confidential documents regarding the privileged (by Court Order) MPRG negotiations, and the Intervenors have not had

access to it without agreeing to onerous terms. In addition, the "share file" only contains documents that the Rehabilitator chooses to place in it, and does not contain the e-mail records of the key players such as the Rehabilitator, Deputy Commissioner DiMemmo, Special Deputy Rehabilitator Cantilo, Chief Rehabilitation Officer Robinson, or any other custodian.

The Rehabilitator fails to cite a single case supporting the relief sought in the Amended Application, including the "share file" approach that would shut down discovery by giving the Rehabilitator carte blanche to decide what documents to produce. That is not how discovery is supposed to work. It is not how discovery worked in this case before. The Rehabilitator's proposed "four corners" and "share file" approach to discovery are vague, unworkable and would result in withholding precisely the type of relevant and documents that the Intervenors previously used in this matter and that the Court cited as highly probative evidence in its Opinion. There is no support for such an approach.

1. The cases with which the Rehabilitator leads are inapposite.

After quoting Pa.R.C.P. 4003.1(a) but omitting the language "whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party" in an apparent effort to minimize the broad scope of discovery, *see* Rehabilitator's Brief at 5, the Rehabilitator leads with two cases that do not support the vague relief sought of limiting discovery to the "four corners" of a plan or to a "share file" populated with documents of the Rehabilitator's sole choosing.[4]

[4] The Rehabilitator also truncated a quotation from page 36 of the February 20, 2015 Transcript to alter its meaning. *See* Rehabilitator's Brief at 2 (stating that "In a conference with all parties on February 20, 2015, the Court advised that depositions and other discovery 'should be ***targeted [and] narrow***.'") (emphasis supplied by the Rehabilitator's Brief). In fact, the Court's comment did not extend to "other discovery" and was directed at depositions. The Court said that "[t]he depositions should be targeted, narrow, and if there's any dispute I'm assuming I'm going to hear." February 20, 2015 Transcript. Just a few pages later, the Court indicated that the Rehabilitator should consider agreeing to an expedited response to document requests,

The Rehabilitator cites *MarkWest Liberty Midstream & Res., LLC v. Clean Air Council*, 71 A.3d 337 (Pa. Cmwlth. 2013) for the proposition that discovery must be relevant. Rehabilitator's Brief at 6. That case, however, did not involve a determination of whether documents are relevant and did not contain any holdings regarding what relevancy means. In *MarkWest*, this Court vacated and remanded in part the Environmental Hearing Board's order compelling the production of a class of 60 documents with instructions to identify any documents comprising trade secrets. The Court simply held that a party seeking a protective order under Rule 4012(a)(9) must initially establish that the information it seeks to protect is a trade secret or confidential business information based upon six factors. The Amended Application does not raise the protection of trade secrets and the cited authority is irrelevant to the relief requested in this Amended Application. The case does, however, support the proposition that as the party seeking a protective order, the Rehabilitator bears the burden on the Amended Application.

The Rehabilitator asserts the uncontroversial proposition that the "trial court has discretion to limit discovery 'to insure adequate and prompt discovering of matters allowed by the Rules of Civil Procedure[.]'" Rehabilitator's Brief at 6 (quoting *PECO Energy Co. v. Ins. Co. of N. Am.*, 852 A.2d 1230, 2004 PA Super 221 (2004)). That case affirmed in part and reversed in part a trial court's order granting a motion to compel production of documents. The Superior Court found no error in the trial court's decision to permit discovery of reinsurance information but reversed as to the discovery of potentially privileged insurance reserves information. That case also does not in any way support the Rehabilitator's proposed "four corners" or "share file" approach to discovery.

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interrogatories, and written discovery. That would certainly have helped to facilitate getting the depositions underway. Instead, the Rehabilitator filed repeated applications to stay all discovery.

The remaining cases cited by the Rehabilitator regarding discovery of electronically stored information are federal court decisions in which the producing party was required to produce the information requested. *See* Rehabilitator's Brief at 15-16; *Thompson v. United States Dep't of Housing & Urban Dev.*, 219 F.R.D. 93, 99 (D. Md. 2003) (granting motion to compel discovery of electronic records *against* the Government); *Covad Communications Company v. Revonet, Inc.*, 258 F.R.D. 5, 16 (D.D.C. 2009) (ruling that the plaintiff was permitted to conduct a forensic search of the defendant's computers and servers and that the defendant was required to produce the electronic information sought); *FDIC v. Brudnicki*, 291 F.R.D. 669, 676 (N.D. Fla. 2013) (noting that after defendant directors served discovery requests upon the FDIC as receiver for bank, the FDIC produced the requested documents). Consequently, the Rehabilitator is asking this Court to eliminate the broad scope of discovery required by Pa.R.C.P. 4003.1(a) without any supporting authority for doing so. The Court should decline the Rehabilitator's invitation to eviscerate Pa.R.C.P. 4003.1(a).

2. The Rehabilitator's remaining discovery scope arguments fail.

The Intervenors' March 20, 2015 Document Requests has 18 requests. The Amended Application asserts that the first eight of those requesting the files of key custodians relating to the rehabilitation and attempted liquidation of the Companies are not sufficiently "targeted." The parties exchanged the files of the key custodians in discovery for the prior liquidation hearing in this same case through the use of similar discovery procedures which were not disputed by the Rehabilitator then. Nonetheless, in an effort to resolve the dispute, the Intervenors subsequently served the April 23, 2015 Document Requests containing 64 targeted requests. All are "relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.] Pa.R.C.P. 4003.1(a).

The Rehabilitator contends that 23 of those requests seek non-discoverable information: April 23, 2015 Document Request Nos. 1 (regarding rehabilitation methods and alternatives considered for the Companies since May 3, 2012 including by using premium rate increases or benefit reductions), 5-13 (regarding the development or preparation of, and support for, the April 2013 Plans), 13-19 (regarding frustration of the April 2013 Plans), 20 & 26, 29-32 (regarding other frustration of the rehabilitations since May 3, 2012 including information reflected in communications with other state insurance departments and guaranty associations), and 34 (regarding charging time of Pennsylvania Insurance Department personnel to the Companies from January 6, 2009 to present). In addition, the Rehabilitator has objected to responding to interrogatories of the Intervenors on similar topics, but has not established that it would be unduly burdensome to answer the interrogatories. The Rehabilitator's assertions that these requests seek non-discoverable information are incorrect.

The Rehabilitator cheekily argues that facts regarding non-compliance with this Court's May 3, 2012 Opinion and Order are not discoverable because "[t]he Rehabilitator's filing of the Plan itself is overwhelming proof of the Rehabilitator's good-faith compliance." Rehabilitator's Brief at 10. The Court should reject the contention that the mere filing of the Second Amended Plan (and 2014 Liquidation Petition) proves compliance with the Court's decision. If that were the standard, the Rehabilitator would have free reign to convert any rehabilitation of a company into a liquidation in defiance of this Court's rehabilitation Orders. To the contrary, information and records relating to the Rehabilitator's refusal to comply with the Court's Orders, the continued frustration of these rehabilitations, the rehabilitation alternatives such as rate increases and benefit reductions considered (including in the April 2013 Plans of Rehabilitation that the Rehabilitator filed but failed to support) go to the very heart of

this dispute. The Rehabilitator has also placed compliance with the Court's Orders at issue in the first day of the hearing.

The information and records sought are highly relevant and important to the Rehabilitator's compliance with the Court's Orders and the Intervenors' defenses against and objections to the 2014 Liquidation Petition and the Second Amended Plan. In fact, at the start of this hearing, the Rehabilitator's counsel and Cantilo argued or testified about the supposed compliance with the Court's May 3, 2012 decision, rate increases, benefit reductions, the April 2013 Plans, and several other topics addressed in the Intervenors' discovery requests including, *inter alia*:

- The personal involvement of current and former Insurance Commissioners Miller and Consedine in making assessments and determinations in this matter (**N.T. 7/13/2015** at 15, 102:16-103:1; **N.T. 7/14/2015** at 64:19-24);
- The alleged reasonable and appropriate actions of the Rehabilitator and the Special Deputy Rehabilitator (**N.T. 7/14/2015** at 64:19-24);
- The Rehabilitator's alleged efforts to follow or comply with this Court's rehabilitation Orders and the specific directives and requirements of the Court's May 3, 2012 Opinion and Order (**N.T. 7/13/2015** at 15:1-11, 18:9-13, 19:21-20:5, 20:17-19, 26:1-5, 26:22-27:1, 34:17-35:2, 36:7-40:3, 97:14-98:5; **N.T. 7/14/2015** at 64);
- The decision to hire Cantilo for the ostensible purpose of preparing a rehabilitation plan in compliance with the Court's May 3, 2012 decision (**N.T. 7/13/2015** at 34:17-35:2);
- The rehabilitative methods, approaches and alternatives that the Rehabilitator considered (**N.T. 7/14/2015** at 43-52);[5]

[5] Moreover, page 6 of the Rehabilitator's March 27, 2015 Brief filed in support of the Rehabilitator's original Application provided that "the alternatives the SDR considered" were relevant and fair game for discovery. The April 2013 Plans, which were mentioned literally dozens of times throughout the first two days of the hearing, were an alternative that the SDR not only considered by swore offered the best possibility for success. Information surrounding the alternatives considered and the April 2013 Plans remain relevant notwithstanding the removal of this language from the Rehabilitator's Amended Application and Brief.

- The preparation and development of the Rehabilitator's April 2013 Plans (**N.T. 7/13/2015** at 34:17-35:2, 37, 39, 45, 49, 68, 104:20-105:10, 148-149, 228-230, 233; **N.T. 7/13/2014** at 45, 49-50);

- The Rehabilitator's withdrawal of support for his own April 2013 Plans (**N.T. 7/13/2014** at 36:7-40:3, 91, 204-205, 212, 229-230);

- The Companies' investment yields and income (**N.T. 7/13/2015** at 30:10-14; 30:19-20; 31:7-9);

- The involvement of PwC in this matter and PwC's actuarial work and participation in the preparation of the various rehabilitation or liquidation petitions and plans (**N.T. 7/13/2015** at 26, 28, 68-69, 230, 233-240; **N.T. 7/14/2015** at 80);

- The Rehabilitator's attempt to strip the Intervenors of their ownership of the Companies and other property rights including valuable deferred tax attributes (**N.T. 7/13/2015** at 23-24, 98-101; **N.T. 7/14/2015** at 8-19, 30-31, 36-38);

- Conversations and communications with other state insurance departments and guaranty associations (**N.T. 7/13/2015** at 165, 171; **N.T. 7/14/2015** at 47);

- The alleged inability to obtain premium rate increases for the Companies during rehabilitation (**N.T. 7/14/2015** at 44-49); and

- The industry-wide premium rate increases enjoyed by every other long-term care insurer in the United States except for the Companies (**N.T. 7/14/2015** at 44, 48).

Given the obvious relevancy of these matters to the claims or defenses of either the Rehabilitator or the Intervenors (or other parties involved such as Broadbill Partners, LP and the Health Insurers), and having chosen to raise these topics at the start of the hearing, there is no basis for the Rehabilitator to refuse discovery on these matters to the Intervenors.

Moreover, in this proceeding, the Rehabilitator has argued that actuarially justified premium rate increases cannot be obtained. In support of this argument, he has sought to introduce testimony regarding communications with regulators of other states. The Intervenors were able to challenge this argument through his series of March 2010 letters effectively telling his fellow commissioners that they did not have to approve the pending rate increases. *See* Opinion at 36; Ex. R-58. The Rehabilitator has now submitted the proposed 2014

Liquidation Petition and Second Amended Plan that do not contemplate the pursuit of needed rate increases as ordered by the Court. Likewise, the current actuarial assumptions on which the proposed rehabilitation plans are based are even worse than before, as they assume no premium rate increases. These plans and actuarial assumptions demonstrate utter disregard for the Court's May 3, 2012 Opinion and Order. At the upcoming hearing, the Intervenors will object and propose modifications including premium rate increases as a component. The Rehabilitator's and the rehabilitation team's communications to the NAIC and other insurance regulators promoting liquidation of the Companies are relevant in rebutting the Rehabilitator's arguments that premium rate increases cannot or should not be obtained.

Over the objections of the Intervenors, the Rehabilitator has authorized his outside law firm, DLA Piper LLP, to concurrently lead the efforts to rehabilitate the Companies while prosecuting an appeal seeking to liquidate the Companies. Any communications with other regulators in an effort to bolster the appeal (in which the Rehabilitator argues, in essence, that any rehabilitation is impossible), including campaigning for amicus curiae brief support, interfere with the ordered rehabilitations. The content of such communications made by the rehabilitation team promoting liquidation of the Companies to other regulators is relevant to whether the Rehabilitator is undertaking earnest, meaningful, and legitimate rehabilitation efforts as ordered by this Court. Any efforts by the rehabilitation team to promote liquidation of the Companies to other regulators or make deals regarding liquidation of the Companies frustrates the Ordered rehabilitation and is detrimental to persuading other regulators to do the right thing and assist in rehabilitating the Companies by approving actuarially justified and needed rate increases for the OldCo policies.

Furthermore, communications with regulators and guaranty associations are relevant to the licensing, guaranty association agreements, and other objections to the Second Amended Plan raised in the Intervenors' April 30, 2015 Reply in Further Support of Application to Reject Plan, and about which the Court recently heard testimony from Cantilo. None of these communications with outside entities are privileged. If the Rehabilitator does assert any privilege he should be required to provide a privilege log listing the communications so that the assertions of privilege or other basis for non-production may be fairly tested. *See* Pa.R.C.P. 4009.12(b)(2).

Information regarding the Rehabilitator's shifting of the Companies' investments into lower yielding investments or cash to prepare for the liquidation that the Rehabilitator desires at the expensive of the Companies' future investment income is relevant to the Intervenors' defenses, and the Court has already heard testimony from Cantilo regarding the Companies' anticipated future investment income.

Finally, discovery relating to the improper billing of Pennsylvania Insurance Department personnel time to the Companies is relevant for the reasons set forth at length in Section M of the Intervenors' Formal Comments to the Second Amended Plan. The $3.2 million amount paid to the Department do not constitute funds expended to conduct the rehabilitation because the time of salaried Commonwealth employees who are already paid to do their jobs does not constitute a cost or expense. Rather, it is a fee that the Department had no statutory entitlement to receive.[6] The return of $3.2 million to the Companies would have a positive

[6] None of the Rehabilitator's cited authorities involved Article V of the Insurance Department Act. In *R. Bauer & Son v. Wilkes-Barre Light Co.*, 117 A. 920, 274 Pa. 165 (1922), the issue was the priority order of a receiver's compensation compared to state taxes. In *In re Harmar Coal Company*, 378 Pa. Super. 327, 336 (1988), the issue was whether monies spent by a corporation's receiver to comply with environmental laws and stop the immediate discharge of

impact on their rehabilitations and is relevant. Nor would it be burdensome to produce these billing and related records.

Accordingly, the Intervenors respectfully submit that discovery thereon, whether in form of document requests or interrogatories, is relevant and needed to ensure compliance with the Court's rehabilitation Orders and to defend against the 2014 Liquidation Petition.

D. The Rehabilitator alleges facts not of record without verification and fails to establish any requisite undue burden that could possibly outweigh the Intervenors' need for discovery under the circumstances.

The Rehabilitator's inflated estimates regarding production costs are unverified. They also lack credibility for the same reasons that her actuaries' overly conservative and punitive projections lack credibility. Both are calculated using flawed assumptions that serve the Rehabilitator's litigation objectives rather than to present a fair portrayal of the facts to the Court.

As support for the Rehabilitator's argument that protection is needed against an alleged undue burden, she fancifully alleges that the Intervenors seek the records of some "50 custodians who have participated in this receivership" that will cost "approximately $2 to 2.4 million." Amended Application at 3. This is nothing more than scaremongering. The Rehabilitator's bald allegations of undue burden must be rejected especially where, as here, they are unaccompanied by a signed verification. *See* Pa.R.A.P. 123(c) (requiring alleged facts not of record being newly asserted by way of application to be verified). Moreover, the Rehabilitator's own cited authority better supports the Intervenors' position that the Rehabilitator has failed to meet her burden on the Amended Application because "[a] properly particularized showing of

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acid mine pollutants into a river located just upstream from water authority supply intakes constituted an administrative expense. Here, the dispute is not with the many millions paid to Cantilo, consultants, or actuaries, but to state employees at the Insurance Department who are already compensated by the Commonwealth and should not be billing the Companies for doing their state jobs.

burden must be established by affidavit that identifies evidentiary facts to support the claims of unfair burden or expense." *Thompson v. United States Dep't of Housing & Urban Dev.*, 219 F.R.D. 93, 99 (D. Md. 2003) (granting motion to compel discovery of electronic records and subsequent motion for sanctions *against* the Government and explaining that the Government's failure "to provide affidavits, deposition excerpts or similarly detailed information in opposition to the Plaintiffs' motions to obtain discovery of electronic records . . . prevented the court from having available the information needed to analyze the Rule 26(b)(2) cost-benefit factors, and, predictably, resulted in rulings that the Plaintiffs' motions were meritorious.").

The Rehabilitator's Brief at page 13 goes on to state that the 50 unidentified custodians "possess more than 4 terabytes of data, including, *e.g.*, but not limited to 1.5 million emails and document pages within the Companies and another 1 million emails within the SDR's files." Rehabilitator's Brief at 13. By contrast, the Rehabilitator originally claimed that there were "potentially hundreds of thousands of documents." Rehabilitator's March 27, 2015 Brief in Support of the original Application for Protective Order at 11. Either way, stating that 50 custodians possess a lot of data in an unverified brief is not a particularized showing regarding the actual number of documents being sought. These types of general, unverified assertions of undue burden fails to persuade because the substantially shorter list of custodians whose records the Intervenors actually seek (about 10) is a far cry from the 50 custodians that the Rehabilitator hangs her undue burden argument on. A more realistic number of estimated custodians together with the application of electronic search terms to identify responsive documents, time periods for the search[7], and de-duplication of email across custodians will minimize the amount of material

[7] For example, the Intervenors' April 23, 2015 Document Requests, Instruction No. 9, provides a general discovery cut-off date of May 3, 2012 except where otherwise specified.

produced. Thus, in addition to be being unverified and overly generalized, the Rehabilitator's assertions of undue burden are jacked up by flawed assumptions.

Finally, the Rehabilitator cannot substantiate any undue burden claim that could possibly outweigh the Intervenors' need for the discovery given the gravity of this matter involving the fates of the Companies, the Rehabilitator's proven track record of frustrating their rehabilitations, the Intervenors' entitlement to compliance with the Judgment that they obtained as the prevailing parties on the prior liquidation petitions, and the unavailability of the information from any other source. Accordingly, the Amended Application should be denied.

E. Imposition of fee-shifting against the Intervenors should be denied.

The Rehabilitator argues that the Court should shift "all related fees and costs (including, but not limited to attorneys' and vendor fees) associated with collection, review, and production of responsive ESI" to the Intervenors as the requesting party. Rehabilitator's Brief at 16. In light of the Rehabilitator's proven frustration of this rehabilitation, the Judgment that the Intervenors obtained in their favor, and the fact that the expenses involved are only necessitated by the Rehabilitator's intransigence in refusing to comply with this Court's orders, fee-shifting against the Intervenors is not appropriate.

The only cases cited in support of the Rehabilitator's argument at pages 15-16 of her Brief are not binding because they are federal decisions applying the Federal Rules of Civil Procedure. The 2012 Explanatory Comment preceding Pa.R.C.P. 4009.1 explains beneath subsection heading "*A. No Importation of Federal Law*" that "[t]hough the term 'electronically stored information' is used in these rules, there is no intent to incorporate the federal jurisprudence surrounding the discovery of electronically stored information." Moreover, the cases cited by the Rehabilitator are uniformly distinguishable and better support the Intervenors' position. For example, the court in *Thompson v. United States Department of Housing and*

Urban Development granted a motion to compel discovery of electronic records against the Government and ordered the Government, as the producing party, to bear all costs and expenses of production. 219 F.R.D. 93, 99 (D. Md. 2003). The Rehabilitator cites *Thompson* for the proposition that this Court may shift the cost of "burdensome and expensive Rule 34 discovery to the requesting party" but ignores the decision's actual ruling that the Government's counsel's bald assertions that "discovery of electronic records is overbroad, burdensome or prohibitively expensive" failed to demonstrate that cost-shifting was appropriate. *Ibid.*

The issue in dispute in *Covad Communications Company v. Revonet, Inc.*, also cited by the Rehabilitator, was whether the plaintiff should be permitted to conduct a forensic search of the defendant's computers and servers, how those searches should be conducted, and who should pay for them. 258 F.R.D. 5, 7 (D.D.C. 2009). The court determined that the plaintiff was permitted to conduct a forensic search of the defendant's computers and servers, that the defendant as the producing party should pay for the cost of producing the electronic information sought, and that the plaintiff should pay for the plaintiff's own expert to analyze the evidence produced by the defendant. *Id.* at 16. The court repeated that "[i]t has long been the presumption in this country that the producing party bears the cost of production and '[a]ny principled approach to electronic evidence must respect that presumption.'" *Id.* at 16 (quoting *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003)). Unlike in *Covad Communications*, the Intervenors have not sought to perform their own forensic search of the Rehabilitator's computers and databases, but even if they had, the Rehabilitator would have to pay for that forensic search under the holding of this case. Just like in *Covad Communications*, the Rehabilitator should pay for the cost of producing the electronic information sought pursuant to the presumption that "the producing party bears the cost of production." *Ibid.*

The case of *FDIC v. Brudnicki* involved an action brought by the Federal Deposit Insurance Corporation against eight of a bank's former directors for alleged gross negligence in the approval of eleven transactions. 291 F.R.D. 669, 671 (N.D. Fla. 2013). The defendants served discovery requests upon the FDIC as receiver for the bank, and the FDIC spent $624,000 in costs for collection, processing, and uploading of files and documents into a database. *See id.* at 676. The FDIC's responsibility for bearing these costs was not at all in dispute. At issue was whether the defendants should pay nominal conversion and uploading expenses that the court found they "should be able to bear without impacting their ability to mount a vigorous defense to the claims in this case." *Id.* at 677. As acknowledged by the court, that holding would be controversial in many federal courts that limit consideration of cost sharing to scenarios where the ESI sought is demonstrated to be "inaccessible." *See id.* at 676, n.8.

The *Brudnicki* decision also does not support the relief sought by the Rehabilitator given the circumstances here. There are no allegations of "gross negligence" against the Intervenors. Rather, the economic misfortunes of the Companies were exacerbated by abusive regulators and the Rehabilitator. Moreover, Article V of the Insurance Department Act "specifically authorizes use of insurer (in rehabilitation) funds to contest its liquidation." *Koken v. Legion Insurance Co.*, 831 A.2d 1196, 1228 (Pa. Cmwlth. 2003) (citing 40 P.S. § 221.18(a)). Furthermore, the Intervenors have obtained a Judgment of this Court denying the Rehabilitator's prior petitions to convert the rehabilitations of PTNA and ANIC into liquidations and ordering the Rehabilitator to actually attempt to rehabilitate the Companies. In denying the Rehabilitator's prior liquidation petitions, the Court concluded that "Intervenors have provided a thorough and careful defense to the petitions and are entitled to an award of reasonable attorneys' fees and costs pursuant to Section 518(a) of Article V, 40 P.S. 221.18(a), in an amount

to be determined at a later date." Opinion at 159, Conclusion of Law ¶ 6. Especially given that the Intervenors have obtained a Judgment of this Court in their favor, shifting attorney's fees, costs, and expenses of production against the Intervenors is wholly inappropriate, incompatible with Article V, and would prejudice the Intervenors' defense.

The Rehabilitator also asserts that fee-shifting is necessary to incentive the Intervenors to conduct discovery efficiently. However, the Intervenors as the Chairman of the Boards of Directors and direct or indirect owner of the Companies already have every motivation to avoid imposing unnecessary costs against *their* Companies that *they* own. It is the Pennsylvania Insurance Department that is operating without any skin in the game and which is apparently impervious to litigation expense. Accordingly, the Rehabilitator's demand that the Intervenors pay for the attorney's fees, costs and expenses of the Rehabilitator to comply with her discovery requests must be denied because shifting fees against the Intervenors would turn the provisions of Article V authorizing the directors to defend against liquidation and delinquency proceedings on its head.

III. CONCLUSION

Accordingly, the Amended Application should be denied.

Respectfully submitted,

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Dated: July 20, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2015, I caused a true and correct copy of the foregoing Intervenors Eugene J. Woznicki and Penn Treaty American Corporation's Brief in Opposition to the Rehabilitator's Amended Application for Entry of a Protective Order to be served via e-mail and U.S. Mail upon counsel for the Rehabilitator, and via e-mail upon the following counsel:

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