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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

INTERVENORS' REPLY TO THE REHABILITATOR'S "RESPONSE TO APPLICATION FOR RELIEF AND TO COMPEL"

Intervenors Eugene J. Woznicki and Penn Treaty American Corporation submit this reply to the Rehabilitator's "Amended Response to Intervenors' Application for Relief and to Compel" ("Response" or "Response Brief").

I. INTRODUCTION

The Rehabilitator is desperate to avoid having to explain the extent to which he has, once again, acted to frustrate the proper rehabilitations of PTNA and ANIC.[1] The desperation is established by the nature of the arguments he proffers to justify a position that is unjustifiable because it is so fundamentally wrong. Mischaracterization of fact and law is no substitute for proper argument. This is a hugely important matter, as, *inter alia*, it goes to the

[1] The Court clearly and correctly held that the Rehabilitator "has not undertaken a meaningful effort to rehabilitate the Companies and, *to the contrary, has acted to frustrate the rehabilitation*…." May 3, 2102 Opinion at 1 (emphasis added). Regrettably, nothing has changed, and even after almost four years of refusing to seek even one penny of premium rate increases, the proposed rehabilitation plans contemplate the pursuit of not a single cent in premium rate increases in the near future.

heart of this Court's enforcement of its Orders. It requires but has not prompted on the part of the Rehabilitator fair presentation of the facts, the law, and the positions of the Intervenors.

Acceptance by the Court of the Rehabilitator's argument would mean that he could have *any* discussion with the NAIC or other regulators (including those in which he tells them, as Commissioner Ario effectively did, that they should disregard their responsibilities to grant appropriate and actuarially justified premium rate increases), but neither the Court nor anyone else could inquire into the extent of any such malfeasance. This makes no sense, but that is the import of the Rehabilitator's argument here.

The Intervenors make this inquiry for only one reason: especially given the continuing history of the Rehabilitator's refusal to take action, even when ordered to do so, if the Rehabilitator is communicating with fellow regulators not in an effort to pursue necessary premium rate increases but instead in an effort to help him succeed in the appeal by which he seeks *complete* reversal of this Court's May 3, 2012 Order and Opinion as well as the effective denial of his post-trial motion, he is: continuing to frustrate the rehabilitations; abusing his discretion in the preparation of rehabilitation plans; and acting in violation of the initial January 2009 Orders of Rehabilitation as well as the May 3, 2012 Order and Opinion. He is of course entitled to appropriately seek appellate relief, and he is entitled to use counsel of his choosing, but he and his chosen counsel are *not* entitled to go to the other regulators who are so instrumental to the success of the goal of complete rehabilitations and instead ask them to help convince the Pennsylvania Supreme Court to reverse this Court's rulings and effectively seal the deal on the desired liquidations.[2]

[2] The Rehabilitator wants this Court to decide that his appeal is somehow limited and that this limitation helps protect from disclosure these communications. One of the bases for the requested liquidation petitions was futility of any rehabilitation, an argument this

Laws and Orders alike deserve -- in fact require -- proper enforcement. That is why this matter is so important.

Here is what this matter is *not* about, notwithstanding the best efforts of the Rehabilitator to fashion an "impressive" array of straw men:

- This is not "Appeal discovery,"[3] whatever that means, and the Rehabilitator doesn't really attempt to explain what he means by this curious concept.

- This is not about the Intervenors wanting to "re-litigate issues."[4] Does the Rehabilitator expect the Court to rule that this inquiry is being made by the Intervenors simply as a "thinly veiled attempt to …re-litigate issues…."?[5] The Intervenors are thoroughly satisfied with the correct decision of the Court in response to the liquidation petitions; they don't need or wish to re-litigate anything. What they and the Court and the Companies and their policyholders deserve is for the Rehabilitator to finally comply with and not frustrate the Orders that he is governed by.

Court rejected in its Opinion. The Rehabilitator wants by way of his appeal "reversal of (i) the Commonwealth Court's May 3, 2012 Order and Opinion … in their entirety, and in particular: Paragraph 1 of the Commonwealth Court's Order denying the amended petitions 'for the reasons set forth in the accompanying Opinion'; Paragraph 2 leaving the Commonwealth Court's January 6, 2009 orders in effect." Notice of Appeal and Jurisdictional Statement, attached as Ex. 1 to the Response, at 2. The Rehabilitator also argued therein that he is entitled to reversal on appeal of the denial of the Rehabilitator's Post-Trial Motion. *Id.* at 3. In his Post-Trial Motion, the Rehabilitator argued that "it was error for the Court to conclude that further efforts to rehabilitate would not be futile," Post-Trial Motion at 12, and he requested that "the Court issue an order granting the Petitions for Liquidation." *Id.* at 20. It is difficult to understand how the Rehabilitator can credibly suggest that his appeal is in any way limited.

[3] Response at 11.

[4] Response Brief at 2.

[5] *Id.*

- This is not about interference with the Rehabilitator's choice of counsel.

If the Rehabilitator wishes to employ an army of lawyers -- and yet another one entered his appearance last week, increasing the count of DLA lawyers involved in the so called rehabilitation efforts to *five* -- he may do so (hopefully mindful of the cost to the estates of such significant "rehabilitation" advice and representation). This is not about the ethical conflict of interest of any lawyer or whether he should withdraw; it is not the Intervenors' place to raise that issue. But it is about the Rehabilitator acting inconsistently with the Orders that govern his actions. Proper respect for those Orders should compel the Rehabilitator to not have the same lawyers involved in the rehabilitations also talk other regulators into supporting the appeal that would if successful terminate the rehabilitations.[6]

This Court made crucial rulings after a hotly contested hearing on the liquidation petitions that expressed the clear mandates and expectations of the Court with regard to the roles of insurance regulators, including of course the Rehabilitator. The Court specifically: (1) rejected a "business as usual" approach to seeking future premium rate increases, May 3, 2012 Opinion at 111; (2) required a "unified attack on OldCo's rate structure," *id*. at 112; (3) required a "legitimate effort to devise a rehabilitation plan, noting that "[a]ggressive efforts to pursue actuarially justified rate increases and contract modification options, for policyholders and agents, all hold potential," *id*. at 139; and (4) recognized that neither the Rehabilitator's

[6] The ratio of five DLA lawyers who have entered their appearance in the rehabilitation proceedings to the one remaining Cozen lawyer (who did not sign the Response as well as other filings in the rehabilitation context) suggests that at the very least the statement in the response that "DLA Piper is the legal counsel for the appeal and is also participating in the rehabilitation proceedings" understates the role of the five DLA lawyers in the rehabilitation. As the Court is aware, on one or more occasions the Special Deputy Rehabilitator and DLA lawyers have appeared at conferences with the Court to discuss rehabilitation matters without the Cozen lawyer being present. There can be no question that the lead counsel for the Rehabilitator is Mr. Buchholz, the DLA lawyer who signed the Notice of Appeal and Jurisdictional Statement in support thereof.

"phlegmatic effort" nor his abandonment of the effort is an appropriate response to the companies' "inadequate rate structure." *Id*. at 160. Accordingly, the Court ordered that the "plan of rehabilitation must address and eliminate the inadequate and unfairly discriminatory premium rates for the OldCo business." May 3, 2012 Order at 2.

The Court was specifically concerned about the Rehabilitator advising "state regulators to follow his example and not approve pending rate filings on OldCo business." *Id*. at 10. The Court clearly and correctly held that the Rehabilitator not only "has not undertaken a meaningful effort to rehabilitate the Companies," but he has improperly "acted to frustrate the rehabilitation…." *Id*. at 1.

The Court instructed that insurance regulators, "who are a necessary part of a workout," *id*. at 10, have "statutory obligations to approve actuarially justified rate increases." That the regulators are refusing to do so "presents a serious indictment of the existing system of rate regulation of long-term care insurance." *Id*. at 4. "There is no reason for presuming that state regulators will respond to rate increase filings presented as part of a rehabilitation plan, which itself will show how a turnaround can be achieved, as they have responded in the past to business-as-usual rate increase filings." *Id*. at 10

The Court also held:

- "The [Pennsylvania] Insurance Commissioner, wearing his hat as a regulator of the Pennsylvania insurance industry, refused to approve the Companies' actuarially justified rate increase filings in the amount requested, both before and after rehabilitation." *Id*. at 1. "The Rehabilitator has even included Pennsylvania in the list of problem states that have refused to approve the Companies' actuarially justified rate increase filings for the OldCo policies." *Id*. at 4.

- "One of the most troubling aspects of Milliman's July 2010 Surplus Report lies in its very low premium rate increase assumption. Unlike claims or interest rates, which cannot be controlled, rate increases can be controlled. Milliman's foot-dragging rate increase assumption appears to have been calculated to support the Rehabilitator's decision to seek liquidation." *Id*. at 120-1.[7]

- "The Court also agrees with Intervenors that rate increases for OldCo are critical and, accordingly, the Rehabilitator must prepare an action plan for obtaining such relief." *Id*. at 164.

It is beyond peradventure that the Court properly recognized that the unjustified inaction of the Rehabilitator and the other regulators has been a serious problem and that a proper approach by them to premium rate increases is an important part of the solution. If notwithstanding these clear rulings of this Court the Rehabilitator is approaching his fellow regulators not to request premium rate increases but instead to seek their help for an appeal so that they do not have to bother with those increases -- a position entirely consistent with the deficient rehabilitation plans that (still) don't involve the pursuit of *any* premium rate increases in the near future -- then the Rehabilitator is not complying with this Court's Orders and is abusing whatever discretion to which he is entitled in the presentation for approval of the rehabilitation plans.[8]

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[7] Frustratingly, the current actuarial assumptions on which the proposed rehabilitation plans are based are even worse, as they assume *no* premium rate increases.

[8] The Special Deputy Rehabilitator and his law firm count many of these same insurance departments or commissioners among his current and former clients. His practice focuses on serving the very regulators he is not pursuing here for rate increases, a point that will be further argued in the Intervenors' objections to the proposed plans.

The requested information is relevant, and the Intervenors explain below why the privilege arguments raised by the Rehabilitator are insufficient to keep from the Court and the Intervenors the limited but cardinal information requested.

II. ARGUMENT

A. The Rehabilitator has not satisfied his burden of proving that any joint-defense or common-interest privilege applies.

The presence of a third-party during attorney-client communications waives the privilege pursuant to the disclosure rule, or the failure to demonstrate the confidentiality element of the privilege. The Rehabilitator, selectively quoting from part of a footnote discussing federal common law, argues that "Pennsylvania recognizes an exception, under which correspondence with third parties remains privileged if it is 'part of an ongoing and joint effort to set up a common defense strategy.'" Response Brief at 12, quoting *In re Condemnation of 16.2626 Acre Area* ("*16.2626 Acres*"), 981 A.2d 391, 398 n.4 (Pa. Cmwlth. 2009) (rejecting privilege claims and affirming trial court's order compelling the City of Philadelphia to produce documents exchanged between the City and the Redevelopment Authority of Philadelphia and their respective attorneys); *see also* Response Brief at 12, citing *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364-65 (3d Cir. 2007) (addressing Delaware law concerning attorney-client privilege in parent-subsidiary context, and explaining that the common-interest exception to the disclosure rule was developed to allow *attorneys* to coordinate their clients' criminal defense strategies and applies only when (1) the attorney-client communication privilege is first demonstrated to apply; (2) clients share at least a substantially similar legal interest; [9] and (3) attorney, not clients, share information to coordinate legal strategies).

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[9] The *In re Teleglobe* decision noted that authorities have required an "identical legal interest" to support a common-interest privilege claim, but did not resolve that issue because "[t]he Delaware courts seem not to have taken a position on whether the

Judge Friedman writing for a panel of this Court observed in *16.2626 Acres* that "our research has identified only a few Pennsylvania cases that address the joint defense or common interest privilege." *Id.* at 398. Footnote 4 in that opinion merely observed, without adopting, the holdings of the Third Circuit that, prior to *Teleglobe*, held that "[i]n order to establish the existence of a joint defense privilege, the party asserting the privilege must show that: (1) the communications were made in the course of a joint defense effort; (2) the statements were designed to further that effort; and (3) the privilege has not been waived." *16.2626 Acres*, *supra*, at 398, n.4 (quoting *Bevill, Bressler and Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986)).

Neither the *16.2626 Acres* court nor any other Pennsylvania state court has ever embraced the broad application of the joint defense privilege urged by the Rehabilitator in this case. As set forth below, the Rehabilitator misapprehends Pennsylvania law concerning the joint defense privilege and has not met his burden of demonstrating that it applies to the withheld communications here.

1. Pennsylvania state law does not support the Rehabilitator's claim of joint defense privilege.

Notwithstanding the Rehabilitator's efforts to characterize the joint defense privilege as a commonplace, broadly-applicable doctrine, Pennsylvania state courts have not often accepted the joint defense privilege. When they have done so, they have applied the privilege under limited circumstances. The only Pennsylvania state courts examining the privilege in the civil context limit it to cases in which express joint defense agreements between counsel exist, and where the parties share *identical legal interests in defending against a*

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common legal interest must be identical, and we need not resolve the congruence-of-legal-interests question here." *Id.* at 365.

common adverse party. There is simply no basis in Pennsylvania law to expand the privilege, as the Rehabilitator requests, to include communications with third-parties without an express joint defense agreement between counsel, and without identical legal interests.

For example, rather than adopting a sweeping view of the joint defense privilege, as the Rehabilitator urges here, the *16.2626 Acres* court rejected the joint defense privilege assertion where "the record reflects only that the City and RDA have a common desire to minimize the financial obligations each owes to a common third party, arising from separate facts and distinct legal theories." *Id.* at 398.

Of the three Pennsylvania state court decisions cited by the *16.2626 Acres* court that discuss the joint defense privilege, one is plainly limited to criminal co-defendants, *see Commonwealth v. Scarfo*, 416 Pa. Super. 329, 611 A.2d 242 (1992), one involves civil co-defendants operating pursuant to a written joint defense agreement, *see Young v. Presbyterian Homes, Inc.*, 50 Pa. D. & C. 4th 190 (Pa. Com. Pl. Lehigh Cty. 2001), and one involves various insurers defending against a common insured's claim for benefits, *see Executive Risk Indem. Inc. v. Cigna Corp.*, 81 Pa. D. & C. 4th 410 (Pa. Com. Pl. Phila. Cty. 2006). Pennsylvania appellate courts had not addressed the application of the joint defense privilege in a civil context until *16.2626 Acres*.

The *Young* decision, cited at page 398 of *In Re 16.2626 Acres*, specifically cautioned that "[c]ounsel seeking to assure the confidentiality of disclosures . . . would be well-advised to prepare [a written joint defense] agreement in advance of the disclosures." 50 Pa. D. & C. 4th at 200 n.1. Although the *Young* court noted that the doctrine has been applied "not only to co-defendants, but also to other parties who share a common interest," *id.* at 195, the court repeatedly limited its ensuing discussion to co-defendants. *See, e.g.*, *id.* at 197 (allowing that

confidentiality may be maintained "where the third party is counsel for a *co-defendant* and is assisting in a *joint defense*") (emphasis added); *id.* at 198 (protecting "[c]ommunications to counsel for a *co-defendant* with whom there is a *joint defense agreement*" and noting the need to allow "*defendants* the ability to pool their resources") (emphasis added).

Similarly, the *Executive Risk* decision, cited at page 398 of *16.2626 Acres*, explicitly limited the application of the joint defense privilege to communications among parties with identical legal interests. 81 Pa. D. & C. 4th at 424 ("The attorney-client privilege is not waived where the third party shares a common interest in developing a legal strategy *against identical claims*.") (emphasis added); *see also id.* at 426 (finding that the privilege no longer applied when the parties' interests "were no longer *identical*" and the joint defense agreement ceased to exist).

The Rehabilitator has not cited a single Pennsylvania case in which any court has upheld a joint defense privilege assertion to communications between counsel for clients without an express joint defense agreement, and without demonstrating the existence of identical legal interests regarding a litigation. Pennsylvania courts certainly have never expanded the doctrine to encompass communications among third-parties whose identities are not divulged, which is a prerequisite to even attempting to show that all required elements of the attorney-client communication privilege and joint defense privilege are satisfied.[10]

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[10] The "joint defense" privilege, to the extent that it has been applied in Pennsylvania, is viewed by Pennsylvania courts as "an application of the attorney-client privilege to a specific factual setting." *Young*, 50 Pa. D. & C. 4th at 195; *see also Executive Risk*, 81 Pa. D. & C. 4th at 424 ("[U]nless an individual attorney-client privilege independently shields material from discovery, the otherwise common interest among the parties is of no consequence.") It is well-settled that "[t]he party who has asserted attorney-client privilege must initially set forth facts showing that the privilege has been properly invoked." *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1266 (Pa. Super. 2007).

The Rehabilitator should not be permitted to hide behind the veil of privilege when he will not even acknowledge and identify what documents and communications regarding the appeal and the November 30, 2012 "update on Penn Treaty" that he or members of the rehabilitation team have exchanged with the NAIC and/or state insurance regulators in this matter. The Rehabilitator has not yet provided the Intervenors or the Court with a privilege log describing the identities of the persons and entities that sent or received the withheld communications and documents, preventing the Intervenors from addressing the documents in particularized fashion. Nor has the Rehabilitator submitted an affidavit describing the nature of the communications and whether each withheld communication independently satisfies all elements of each of the many privileges invoked here.[11] The Rehabilitator's failure to satisfy his burden to "initially set forth facts showing that the privilege has been properly invoked" provides yet another basis upon which his privilege claims should be rejected under Pennsylvania law. *See Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d at 1266. A privilege log will show the extent to which the Rehabilitator, Deputy Rehabilitator, other rehabilitation team members, their representatives and attorneys, and specific individuals at third-party NAIC and unidentified state insurance regulators and their representatives and attorneys were involved in the communications. A privilege log will also reveal what other third-party individuals and entities such as NOLHGA or guaranty funds, which "do not belong in the driver's seat of an insolvency proceeding[,]" were involved. May 3, 2013 Opinion at 145.

Accordingly, and for the reasons below, Pennsylvania law does not support the Rehabilitator's claim of joint defense privilege.

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[11] *See* Application at 8, n.2 (discussing Rehabilitator's burden to demonstrate privilege by detailed affidavit pursuant to *Office of the Governor v. Scolforo*, No. 739 C.D. 2011, slip op. at 7, 12, 14 (Pa. Cmwlth 2013)).

a. The Rehabilitator has not demonstrated that there is a joint defense agreement between counsel regarding this case.

The Rehabilitator's joint defense privilege assertion fails under Pennsylvania law because he has not demonstrated the existence of a joint defense agreement between counsel that applies to this litigation.

The Rehabilitator asserts that the "Information Sharing and Confidentiality Agreement between the Pennsylvania Insurance Department and Other Participating Insurance Regulators of the 50 States, the District of Columbia, and Territories and Insular Possessions of the United States" signed by Commissioner Koken and dated April 11, 2003 ("Information Sharing Agreement") is a joint defense agreement. Response Brief at 15, 26, Ex. 7; Response at 10. This is incorrect.

The Information Sharing Agreement is not a joint defense agreement. It is not an agreement regarding this litigation. It was executed not by counsel for co-parties, but by former Commissioner Koken. It was made more than 10 years ago (and six years before this proceeding commenced) and does not identify the joint defense of any litigation, let alone this case, as its purpose.

Joint defense agreements originated as a method for *counsel* for criminal co-defendants to communicate information to organize a joint defense *See Scarfo, supra*. The Information Sharing Agreement according to its own terms pertains to information -- such as financial and market conduct examination material pertaining to insurance companies to the extent made confidential by an express law -- in the possession of the *Department*, not of its counsel.

Page one of the Information Sharing Agreement states its purpose, which is *not* the sharing of legal strategies by counsel with respect to litigation. Rather, the agreement

provides: "[w]hereas, the Department may from time to time need to obtain Confidential Information relevant to its regulatory role from other insurance regulators and, conversely, to provide to such other insurance regulators Confidential information *in its possession* with is relevant to fulfilling their regulatory roles." Information Sharing Agreement at 1 (emphasis added). Confidential Information is defined as "any documents, materials or information ("document") that is confidential, privileged or otherwise protected from disclosure under the laws applicable to the insurance regulator that is the source of the documents, materials or information." *Id.* at 2.

Thus, the Information Sharing Agreement does not set up a joint defense for this or any other litigation. Rather, it merely provides that if one insurance regulator is required to provide documents in his or her possession to another insurance regulator to fulfill their regulatory roles, the requesting department will keep the documents privileged *to the extent that the documents are confidential or privileged under laws applicable to the insurance regulator that is the source of the documents*. The agreement does not apply unless there is some specific law applicable to the insurance regulator that is the source of the documents that confers confidentiality or privilege in the first place.

That the Information Sharing Agreement applies chiefly to financial and market conduct examination materials pertaining to insurance companies which may be deemed confidential by operation of a specific law such as 40 P.S. § 443(d) is confirmed by an August 2009 report issued by the NAIC, which states that the Master Information Sharing Agreement has been used to preserve the confidentiality of financial and market conduct examination and analysis material:

> The Master Information Sharing Agreement has now been entered into by and between the fifty states, the District of Columbia,

> Puerto Rico and Guam. The purpose of the agreement is to facilitate the ongoing sharing of confidential regulatory information and to satisfy the requirement in many states that the party receiving confidential information agree in writing to keep such information confidential. The Master Information Sharing Agreement is used to regularly share financial and market conduct examination and analysis material and has been used to support the sharing of information on issues such as broker compensation and disaster reporting.

National Association of Insurance Commissioners IMF Financial Sector Assessment Program Self Assessment of IAIS Insurance Core Principles August 2009 at 11, available at http://www.naic.org/documents/topics_iais_fsap_assessment.pdf (last visited June 6, 2013).

This context explains why the Information Sharing Agreement provides that in the event that the Requesting Department is served with a subpoena, motion, order, or other process requiring production of such information or testimony related thereto, the Requesting Department "may notify the company or entity to which such information pertains":

> Unless prohibited by law, immediately notify the Responding Department that such production is being sought and afford the Responding Department the opportunity to take whatever action it deems appropriate to protect the confidential or privileged nature of the Confidential Information (subject to the discretion of the Responding Department, *it may also notify the company or entity to which such information pertains*)

Information Sharing Agreement at 4 (emphasis added).

The Information Sharing Agreement also provides that "if a court of competent jurisdiction issues an order to compel the Requesting Department to produce Confidential Information covered by this Agreement, the Requesting Department may comply with such an order." *Id.* at 5.

Accordingly, the Information Sharing Agreement is inapplicable to the withheld communications, and the Rehabilitator has failed to meet his burden of proving the existence of a joint defense agreement between counsel regarding this litigation.

b. The Rehabilitator has not proven that there is an identical legal interest among all insurance commissioners.

Under Pennsylvania law, in order for a joint defense privilege to apply, the clients of the separate attorneys that have executed the joint defense agreement must have identical legal interests, such as may potentially be the case with co-defendants separately represented and facing criminal or civil liability arising from the same facts and legal theories. The Rehabilitator has failed to identify each person with whom he or members of the rehabilitation team or their counsel or representatives have made the withheld communications. Therefore, he cannot even begin to satisfy this burden of demonstrating that all such persons have identical legal interests.

With respect to the NAIC and unidentified state insurance commissioners, and without identifying specific names and titles of individuals involved, dates of communications, and a description of the communications, however, the Rehabilitator argues that "the communications among the Rehabilitator, other state insurance commissioners, and the NAIC reflect a common legal interest in the outcome of the PTNA and ANIC appeal." Response Brief at 13. This response is insufficient because the Rehabilitator has neither asserted nor demonstrated an identical (or even substantially similar) legal interest, and is incorrect for several more reasons:

- Neither the NAIC nor any other insurance regulator is a party in this proceeding, rendering their interests dissimilar to the Rehabilitator's.

- The interest that the Rehabilitator describes is at best *political*, and certainly not an identical *legal* interest such as that shared between co-defendants facing criminal or civil liability, or even a substantially similar legal interest such as that between an insurance carrier defending and indemnifying an insured in an underlying action.

- It is impossible for every state insurance regulator to have an identical legal interest in whether the Companies are rehabilitated or liquidated given the divergent interests among states such as North Dakota and Virginia whose policyholders pay adequate premium rates, and states such as Pennsylvania whose policyholders do not, and are instead being subsidized by the North Dakota's of the world.

- It is impossible for every state insurance regulator to have an identical legal interest in whether the Companies are rehabilitated or liquidated given the divergent interests among states with different levels of guaranty fund coverage ranging from $100,000 to unlimited.

The Rehabilitator next argues that as the NAIC Secretary-Treasurer, he may have attorney-client privilege protected communications with the NAIC's General Counsel and Legal Division. Response Brief at 13. This argument is irrelevant because there is no showing whatsoever that the withheld communications sought were provided by the Rehabilitator in his capacity as Treasurer-Secretary of the NAIC to the NAIC's General Counsel.[12] Communications seeking support to defeat the Court's May 3, 2012 Opinion and liquidate the Companies such as attempts to line up *amicus curiae* brief support have no bearing on internal NAIC issues. While there may be an attorney-client relationship between the NAIC's General Counsel and the NAIC, that relationship was not involved in the Rehabilitator's communications. Moreover, does the Rehabilitator assert that DLA Piper was representing him in his capacity as

[12] *See, e.g., In re: Deposition of Blumer*, 2008 WI App 160, 314 Wis. 2d 507, 758 N.W.2d 224, at ¶ 10 (Wis. App. Ct. 2008) (affirming order granting motion to compel deposition of then Office of Commissioner of Insurance deputy commissioner Blumer, and finding that Blumer acted in capacity as chair of the Financial Group of the NAIC where he wrote letter on NAIC letterhead and described himself as chair of the Financial Group seeking documents to further the task of that group).

Treasurer-Secretary of the NAIC when DLA Piper requested *amicus curiae* brief support for the appeal from the NAIC, insurance regulators, or other third parties? Were DLA Piper's fees for such work purportedly representing the Rehabilitator in his capacity as Treasurer-Secretary of the NAIC paid for by the Companies?

The Rehabilitator also argues that "given the substantial uniformity among state receivership laws due to adherence to NAIC accreditation requirements, a judicial decision in one state -- though not binding elsewhere -- is likely to have influential effects nationwide." Response Brief at 15. There is no common legal interest here because the Pennsylvania Supreme Court's decision is binding only upon the Commissioner in Pennsylvania. The Rehabilitator has not offered any persuasive support explaining why a judicial decision in Pennsylvania would have influential effects on the interpretation of state receivership laws "nationwide."

There are differences in the statutes enacted by each state's legislature. Contrary to the Rehabilitator's conclusory argument, there is not a single unified statute dealing with the termination and conversion of rehabilitation proceedings into liquidation proceedings. For example, Louisiana's statute requires *both* prongs of the liquidation standard to be satisfied before Louisiana's commissioner may seek to terminate rehabilitation proceedings. *Compare* 40 P.S. § 221.18 *with* La. Rev. Stat. Ann. § 22:2009(C) ("If at any time the commissioner of insurance shall find that further efforts to rehabilitate the insurer would be futile *and* would result in loss to the creditors, policyholders, stockholders or any other persons interested, he may apply to the court in the same proceeding for an order directing the liquidation of the property, business and affairs of such insurer.") (emphasis added).

In addition, at least 13 states (Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Maryland, Oklahoma, Oregon, Virginia, Washington, West Virginia, and Wyoming)

have statutes that require efforts to rehabilitate an insurer be "useless" before the commissioner may apply to the court for liquidation. *Compare* Pennsylvania, 40 P.S. § 221.18 ("would be futile") *with* Fla. Stat. Ann. § 631.101(2) ("If at any time the department deems that further efforts to rehabilitate the insurer would be useless, it may apply to the court for an order of liquidation.)). One of the Rehabilitator's purported grounds for appeal is that the "Court erred in requiring the Commissioner to establish futility by proving that further rehabilitation would serve no useful purpose rather than by proving that rehabilitation was not feasible." Notice of Appeal and Jurisdictional Statement, attached as Response Ex. 1, at 6. If accepted by the Pennsylvania Supreme Court, the Rehabilitator's argument that "futile" does not mean "useless" would lead to less, not greater, unification of interpretation of the receivership statutes of the various states.

Accordingly, there is no identical legal interest between the Rehabilitator's asserted positions in the appeal of this proceeding and the interests of the NAIC, unidentified state insurance regulators, and other unidentified persons with whom the withheld communications were exchanged.

2. The Rehabilitator fails to accurately characterize the Application's request for "party to third-party" and "party to third-party's counsel" communications.

The Rehabilitator incorrectly argues that "Intervenors do not dispute that the requested discovery consists of communications exchanged between the Rehabilitator and his attorneys, that it pertains to facts within the scope of representation, or that the documents reflect legal advice and strategy in the appellate proceeding." Response Brief at 12. In support, the Rehabilitator selectively quotes four words (and no more than two consecutively), from the Application. *See* Response Brief at 12 (asserting "Indeed, on its face, the requested discovery seeks 'communications ... concerning the ... appeal.' *See* Application for Relief, at p. 1.")

Contrary to this assertion, the Intervenors seek not only communications and documents exchanged between the Rehabilitator's counsel and counsel for third-party insurance regulators or the NAIC, but also such "party to third-party" and "party to third-party's counsel" communications. Specifically, the Application also seeks to compel communications and documents exchanged between Commissioner Consedine or members of the rehabilitation team -- which includes both non-attorneys and attorneys such as the Rehabilitator and the Deputy Rehabilitator acting in non-legal capacities -- and third-party insurance regulators or the NAIC or their counsel or representatives. Such communications do not satisfy the elements for the attorney-client communication and therefore cannot fall within the exception to the disclosure rule. Any doubt on this point vanishes when confronted with the *Teleglobe* decision, the Rehabilitator's own cited authority regarding the common-interest exception to the disclosure rule under Delaware federal law:

> The requirement that the clients' separate attorneys share information (and not the clients themselves) derives from the community-of-interest privilege's roots in the old joint-defense privilege, which (to repeat) was developed to allow *attorneys* to coordinate their clients' criminal defense strategies. Because the common-interest privilege is an exception to the disclosure rule, which exists to prevent abuse, the privilege should not be used as a *post hoc* justification for a client's impermissible disclosures. The attorney-sharing requirement helps prevent abuse by ensuring that the common-interest privilege only supplants the disclosure rule when attorneys, not clients, decide to share information in order to coordinate legal strategies.

In re Teleglobe Communications Corp., 493 F.3d 345, 364-65 (3d Cir. 2007) (internal citation omitted) (emphasis in original).

Accordingly, all of the Rehabilitator's and rehabilitation team's communications with third-party insurance regulators or the NAIC or their respective counsel must be produced for this separate and independent reason.

B. The work-product doctrine does not apply.

The Rehabilitator fails to overcome the arguments initially set forth in the Application regarding why the work-product doctrine does not apply. In reply to the Rehabilitator's arguments set forth in his Response Brief at pages 16-18, the Court should reject the claim of work-product doctrine for the following additional reasons.

The Rehabilitator has not even argued, let alone demonstrated, that the November 30, 2012 "Update on Penn Treaty" documents and communications are subject to the work-product doctrine. *See* Application at 5, Ex. D. Likewise, the Rehabilitator has not met his burden of demonstrating that the work-product doctrine applies to any of the information sought because he has failed to provide a privilege log and affidavit in support of his sweeping assertions of the doctrine.

Moreover, communications involving support to defeat this Court's Opinion and Order are not "mental impressions, theories, notes, strategies, research and the like" as argued by the Rehabilitator. Response Brief at 16. Nor are communications to third-parties confidential and internal to the Rehabilitator's counsel. The Rehabilitator's dubious assertion of the joint-defense privilege or common-interest exception to the disclosure rule also fails for the reasons set forth in this Brief above.

Finally, and as discussed in previous sections of this Brief, all of the information sought by the Intervenors -- evidence that as a matter of fact, the Rehabilitator is communicating with other insurance regulators not to seek premium rate increases, but to overturn the Court's May 3, 2012 Opinion and Order -- is relevant to enforcement of the Court's Orders directing the Rehabilitator to do his job and not to frustrate the rehabilitation, and to issues that will be presented at the hearing on the adequacy of the rehabilitation plans.

Accordingly, the work-product doctrine does not apply.

C. The deliberative process privilege does not apply.

The deliberative process privilege is a doctrine adopted in some jurisdictions, but never in a precedential decision by Pennsylvania's highest Court, that is not absolute, and that only allows high-ranking government officials to withhold documents or information that contain "confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice." *Commonwealth ex rel. Unified Judicial Sys. v. Vartan*, 557 Pa. 390, 733 A.2d 1258, 1263 (1999) (plurality). This attempt by the Rehabilitator to prevent the Court and the Intervenors from obtaining information that is at the very heart of the enforcement of the hard-fought May 3, 2012 decision in this matter is unsupported by prevailing Pennsylvania law. The Rehabilitator's bare and sweeping assertions that the privilege shields key facts and documents that are directly related to his compliance with the Court's Orders -- which will be explored at the hearing on the inadequate rehabilitation plans submitted to the Court -- should be rejected for the reasons set forth in the Application and below.

1. The deliberative process privilege has never been endorsed by the Pennsylvania Supreme Court.

The Rehabilitator seeks to hide behind a doctrine that has never been adopted by a majority of the Pennsylvania Supreme Court. Although the Supreme Court has been presented with more than one opportunity to establish the privilege as a part of Pennsylvania common law, it has explicitly declined to do so in every instance. *See Tribune-Review Publ'g Co. v. Dep't of Cmty. & Econ. Dev.*, 580 Pa. 80, 93, 859 A.2d 1261, 1269 (2004) (discussing but declining to adopt the privilege in a dispute arising under the Right to Know Act); *Kennedy v. Upper Milford Township Zoning Hearing Bd.*, 575 Pa. 105, 126 n.28, 834 A.2d 1104, 1118 n.28 (2003) (finding it inappropriate "to decide whether quasi-judicial deliberations are protected by a judicial or deliberative process privilege"); *LaValle v. Office of Gen. Counsel*, 564 Pa. 482, 496, 769 A.2d

449, 457 (2001) (noting that the privilege has not been "definitively adopted" and explicitly finding adoption of the privilege to be "beyond the scope of the present opinion"); *cf. In re: Interbranch Comm. on Juvenile Justice*, 605 Pa. 224, 988 A.2d 1269, 1277-78 (2010) (plurality with respect to Sections III and IV) (discussing in Section III-C privilege with respect to confidential deliberations of the Judicial Conduct Board of Pennsylvania); *Vartan*, 557 Pa. 390, 733 A.2d 1258 (plurality) (discussing and applying the privilege where a plaintiff sought to depose former Chief Justice Nix).

While the Response Brief summarily refers to the privilege as though it is a well-established doctrine in Pennsylvania law, it only cites two decisions of the Commonwealth Court, neither of which supports the assertion of the privilege here. Response Brief at 18-21. The Commonwealth Court not only overwhelmingly rejected the majority of privilege assertions in *Office of the Governor v. Scolforo*, but the Court ruled that a Commonwealth agency has the burden of proving that the deliberative process privilege applies by affidavit containing sufficient detail and which is specific enough to permit scrutiny. *See Scolforo*, *supra*, slip op. at 7, 12, 14.[13] The Response fails to do this. As a result, the Rehabilitator has not met his burden to demonstrate the applicability of the privilege.

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[13] To the extent that the Rehabilitator improperly insists on relying upon federal common law, he still fails to meet his burden that any privilege applies. *See Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 752-54 (E.D. Pa. 1983) (rejecting HUD's assertions of the deliberative process privilege). To assert the predecisional deliberative process privilege, three requirements must be satisfied: (1) "there must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer"; (2) "a demonstration, usually by affidavit of the responsible agency official, of precise and certain reasons for preserving the confidentiality of the governmental communication"; and (3) "a specific designation and description of the documents claimed to be privileged, of sufficient detail to allow a reasoned determination as to the legitimacy of the claimed privilege." *Id.* In addition, "[n]either the predecisional deliberative process privilege nor the work-product privilege

The second Commonwealth Court case cited by the Rehabilitator is distinguishable because its ruling stemmed from the finding that the information sought was "not relevant." *Ario v. Deloitte & Touche*, 934 A.2d 1290, 1294 (Pa. Cmwlth. 2007). In the end, the *Ario* court shielded the Commissioner from inquiries related to a deliberation that the court deemed irrelevant to the issues in dispute. The same cannot be said regarding the information that the Intervenors are seeking in this case. As discussed in previous sections of this Brief, all of the information sought by the Intervenors -- evidence that as a matter of fact, the Rehabilitator continues to promote liquidation of the Companies to other insurance regulators -- is relevant to enforcement of the Court's Orders directing the Rehabilitator to do his job and not to frustrate the rehabilitation, and to issues that will be presented at the hearing on the adequacy of the rehabilitation plans.

Numerous other Pennsylvania cases have wholly rejected or narrowly construed the privilege. *See, e.g., Rae v. Pa. Funeral Dirs. Ass'n*, 925 A.2d 197 (Pa. Cmwlth. 2007) (holding that the privilege did not shield employees of the Bureau of Professional and Occupational Affairs from providing information about their agency's investigation into the business practices of an insurance agency and its owner); *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24 (Pa. Cmwlth. 2001) (refusing to apply the privilege where a plaintiff sought documents related to the City's ongoing review of inmate health in a case alleging that negligence of the City's prison health contractor led to the death of plaintiff's daughter).

The practical effect of applying the privilege in a case such as this one would be to render the Intervenors helpless in the face of a Rehabilitator who wishes to ignore the Court's Orders that he act in earnest to rehabilitate the Companies and not frustrate or undermine the

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is absolute, and each can be overcome if the party seeking discovery shows sufficient need for the otherwise privileged material." *Id.* at 752.

ordered rehabilitations. Acceptance by the Court of the Rehabilitator's argument would mean that he could have *any* discussion with the NAIC or other regulators (including those in which he tells them, as Commissioner Ario effectively did, that they can and should disregard their responsibilities to grant appropriate and actuarially justified premium rate increases), but neither the Court nor anyone else could inquire into the extent of any such malfeasance. The Intervenors would be unable to enforce this Court's May 3, 2012 decision or fairly challenge aspects of the rehabilitation plan at the upcoming hearing, as the Rehabilitator could act to undermine the plan and argue against proposed modifications while hiding safely behind a claim of privilege. As a matter of fundamental fairness, the Rehabilitator cannot be permitted to invoke a limited privilege, which has never been endorsed by a majority of the Commonwealth's highest court, in order to conceal information and documents that go to the very heart of the dispute in this case.

2. If the deliberative process privilege does apply here, the Rehabilitator's response invokes it in a summary fashion that is insufficient.

If the Court finds that there is some basis in Pennsylvania law for applying the privilege to the instant matter, it is clear from the body of caselaw discussing the privilege that the Rehabilitator's bald assertions in the Response are insufficient to warrant application of the privilege here. "The initial burden of showing privilege applies is on the government." *Joe*, 782 A.2d at 33. To satisfy this burden, the party asserting the privilege "must present more than a bare conclusion or statement that the [information] sought [is] privileged." *Id.* at 33-34. Even the case cited by the Rehabilitator indicates that "the party asserting the privilege must show that the information is both pre-decisional and deliberative." *Ario*, 934 A.2d at 1293.

In each of the cases discussed throughout the previous subsection of the Intervenors' Brief, the parties seeking to apply the privilege provided the courts with specific information regarding the nature of the information and documents that were sought to be

shielded. In other words, at the very least, the parties invoking the privilege recognized their burden in advancing such a claim and made attempts to satisfy that burden. The courts were therefore able to assess the specific facts presented in each matter and reach case-specific conclusions with regard to the application of the privilege. Here, the Rehabilitator has merely made vague assertions, unsupported by a detailed affidavit. The Rehabilitator makes absolutely no efforts to explain its claim of privilege by enlightening the Intervenors and the Court about exactly whom and what requires protecting, and proving that all of the elements of the privilege, including confidentiality, support the claim.

The Rehabilitator's utter disregard for the standards governing the privilege it seeks to invoke is a fatal defect. A party seeking to avail itself of the privilege should, at the very least, provide the opposing party and the Court with a privilege log describing the parties and information in question. If such information were not required, and if bare assertions like those made by the Rehabilitator here were deemed sufficient, "the [party asserting the privilege], not the court, would have the power to determine the availability of the privilege." *Joe*, 782 A.2d at 34. Any request for the application of the privilege before such information is furnished by the Rehabilitator fails, or at least is premature. The Court must not tolerate the Rehabilitator's attempts to evade production of this highly relevant information where he has failed to meet his burden of establishing that the privilege applies.

3. Even where the deliberative process privilege is properly raised, it does not shield factual information that can be severed from any deliberations at issue.

The final flaw in the Rehabilitator's overly-broad invocation of the privilege in the Response Brief is the impropriety of using the privilege to shield information that is factual, rather than deliberative. The privilege by its definition only applies to information that is "deliberative in character," meaning information that is "a direct part of the deliberative process"

and that "makes recommendations or expresses opinions on legal or policy matters." *Vartan*, 557 Pa. at 401, 733 A.2d at 1264. "Information that is purely factual, even if decision-makers used it in their deliberations" does not fall within the parameters of the privilege. *Id.* Again, the case originally raised by the Rehabilitator's counsel illustrates the misapplication of the privilege here, indicating that "[t]he privilege does not apply to factual information . . . [that] is severable from the advice or underlying confidential deliberations of law or policymaking." *Ario*, 934 A.2d at 1293.

The Rehabilitator's blanket assertion of the privilege ignores the distinction between information that is factual and information that is deliberative. Specifically, the Rehabilitator has objected based on the privilege to even providing an answer as to whether "the Rehabilitator or any of his representatives, including lawyers, have directly or indirectly discussed potential amicus support for the appeal from state regulators, the NAIC or their representatives, including any requests to obtain amicus support." April 12, 2013 e-mail from D. Christian to S. Schwab, Application Ex. B. Providing the dates of communications, names of people and entities involved, and a generalized description regarding the subject matter of the communications is all information that is indisputably factual in nature. The November 30, 2012 "Update on Penn Treaty" documents and communications appear factual in nature. *See* Application at 5, Ex. D. Likewise, communications that are promotional or campaign like in character or that otherwise lack deliberative characteristics are also factual in nature. The privilege plainly does not apply to such requests. A further examination of this issue is rendered impossible by the Rehabilitator's failure to provide a privilege log describing the information in question.

What is clear, however, is that the Rehabilitator's bare assertions regarding the deliberative process privilege -- an uncertain doctrine that has yet to be formally adopted by the Pennsylvania Supreme Court -- fail to meet his applicable burden to demonstrate privilege, seek an unreviewable blanket application of the privilege, and cannot be sustained.

D. Section 202-A of the Insurance Department Act does not apply.

1. Statutes establishing evidentiary privileges must be construed narrowly.

The burden is on the Rehabilitator as the party asserting the privilege to prove that all of the information he seeks to protect falls squarely within the statute. The Supreme Court has often recognized that statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth. *See Baldrige v. Shapiro*, 455 U.S. 345, 360, 71 L. Ed. 2d 199, 102 S. Ct. 1103 (1982) ("A statute granting a privilege is to be strictly construed so as 'to avoid a construction that would suppress otherwise competent evidence'" (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218, 7 L. Ed. 2d 240, 82 S. Ct. 289 (1961)). *See also, e.g., University of Pennsylvania v. EEOC*, 493 U.S. 182, 189, 107 L. Ed. 2d 571, 110 S. Ct. 577 (1990) (declining to create a common-law privilege to protect peer review materials from discovery in a Title VII case); *Zimmerman v. Norfolk S. Corp.*, 706 F.3d 170, 184 (3d Cir. 2013) ("statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for the truth."). *See generally United States v. Nixon*, 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974). Likewise, this Court has ruled that privileges such as a government agency's attempt to exempt documents from disclosure under the Right to Know Law are narrowly construed due to the public's interest in prohibiting state secrets, scrutinizing the actions of public officials, and making officials accountable for their actions. *Scolforo*,

supra, at 7. The Rehabilitator's interpretation of Section 202-A is overly broad and has not been demonstrated to apply to the specific withheld communications at issue.

2. The Rehabilitator has failed to meet his burden of proving that any specific regulatory privilege applies.

The Rehabilitator argues that Section 202-A, 40 P.S. § 65.2-A, protects the communications at issue in this proceeding. Response Brief at 24. The Rehabilitator is incorrect for at least three reasons.

First, subsection (a) of Section 202-A does not apply because it only provides that "[t]he *commissioner* shall maintain as confidential any documents, materials or other information *received from* the [NAIC] . . . , or from regulatory or law enforcement officials of this Commonwealth or other jurisdictions. . ." upon a showing that the "documents, materials or other information are confidential by law in those jurisdictions." *Id.* (emphasis added). Here, subsection (a) is inapplicable to the extent that the Intervenors seek documents, materials or other information, *inter alia*, provided by the commissioner *to* the NAIC.[14] It is also inapplicable to members of the rehabilitation team other than the commissioner, and to state insurance regulators generally, outside of the NAIC. In addition, subsection (a) does not itself operate to confer confidentiality, even as to any documents, materials or other information sent by the NAIC to the commissioner, but rather, only potentially applies, assuming all other prerequisites are met, where some other jurisdiction's law first applies to confer confidentiality. No such other law has been shown to apply to the communications and documents sought here.

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[14] *See, e.g.*, *In re: Deposition of Blumer*, *supra*, 758 N.W.2d 224 at ¶¶ 10-12 ("We first examine whether the documents at issue were either obtained by OCI from one of the listed entities or provided by OCI to one of them. We can immediately eliminate the latter option. . . . Because we conclude the first requirement of WIS. STAT. § 601.465(3) is not met, we do not examine the second requirement. Specifically, we do not take up the issue whether the documents were obtained for 'the purpose of assisting in the conduct of an investigation or examination.'")

Second, only subsection (a) of Section 202-A contains the language: "Documents or other information obtained by the commissioner under this section shall be given confidential treatment, may not be subject to subpoena and may not be made public by the commissioner or any other person." This only limits dissemination of documents, materials or other information received *from* the NAIC. It does not protect any and all documents, material, and information that the Rehabilitator happens to decide to provide to the NAIC. Subsection (b) of Section 202-A, which relates to confidential documents, material or other information sent by the commissioner to the NAIC, does not contain this language.

Third, subsection (b) of Section 202-A is also not demonstrated to apply here because all it says is that "[t]he commissioner *may share* confidential, documents, materials or other information relating to any company, insurer or person with regulatory or law enforcement officials of this Commonwealth or other jurisdictions" or the NAIC as long as those parties agree in writing "to provide to it the same confidential treatment as required by this article." *Id.* (emphasis added). No such other provision of "this article," Article II-A of the Insurance Department Act -- or any other article of the Act -- has been shown to apply to the communications and documents sought here. In addition, there is no limitation in subsection (b) on who else the commissioner may share the documents, materials or other information with.

Accordingly, the Rehabilitator has failed to demonstrate that Section 202-A, 40 P.S. § 65.2-A shield the documents and communications sought by the Application.

E. Any privileges argued to apply have in any event been waived.

The Rehabilitator fails to overcome the alternative arguments initially set forth in the Application regarding why any purported privileges that might have attached are waived. 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* May 3, 2012 Opinion at 36; Ex. R-58. The Rehabilitator has now submitted proposed rehabilitation plans that do not contemplate the pursuit of any premium rate increases in the near future. Likewise, the current actuarial assumptions on which the proposed rehabilitation plans are based are even worse, 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 on applications for plan approval, the Intervenors will object and propose modifications including premium rate increases as a component. The Rehabilitator's and his rehabilitation team's communications to the NAIC and other insurance regulators in an effort to support the appeal and, in effect, promoting liquidation of the Companies, will be critical evidence to rebut the Rehabilitator's anticipated arguments that premium rate increases cannot or should not be obtained. The Rehabilitator has sought to introduce testimony that premium rate increases are unobtainable, and the Interveners are entitled to demonstrate that it is his communications to other insurance regulators promoting liquidation that are standing in the way, and that an earnest approach to rehabilitation would achieve the desired cooperation of other regulators.

F. The Court is authorized to order the provision of the information under multiple rules governing practice and procedure in this proceeding.

The Rehabilitator also argues that the Intervenors' April 29, 2013 Application should be denied because "no legal basis exists for the discovery sought." Response Brief at 3. This is incorrect.

The Intervenors need the information to enforce the January 6, 2009 Orders of Rehabilitation and the Opinion and Order of May 3, 2012 that the Court entered as Judgment on

September 28, 2012, and to use at the hearing on the Rehabilitator's April 30, 2013 Applications for Approval of the Plans of Rehabilitation for PTNA and ANIC. At that hearing, the Intervenors will object to the plans as failing to comply with the Court's Orders and Judgment, and request the Court to modify and approve as modified the plans that "the rehabilitator shall carry out." Article V, Section 516(d), 40 P.S. § 221.16. It is in this dual context of enforcement of court orders and a judgment and for use at a hearing that the Court is authorized to order the provision of the requested information under multiple rules governing practice and procedure in this proceeding.

The "notice and hearing" provision of Section 516(d) of Article V provides that: "[u]pon application of the rehabilitator for approval of the plan, and *after such notice and hearing as the court may prescribe*, the court may either approve or disapprove the plan proposed, or may modify it and approve it as modified." (emphasis added). The Court is authorized to prescribe discovery in connection with the upcoming hearing. Every other section of Article V that provides for either "notice and hearing" or a "hearing", *see, e.g.*, 40 P.S. §§ 221.40(f) and 221.41, has been interpreted to permit discovery. *See* Pa.R.A.P. 3774(c)(3) and 3781(e)(4). For example, both the Rehabilitator and the Intervenors took discovery in connection with the hearing on the Rehabilitator's liquidation petitions. This discovery was clearly of use to both parties in creating a proper factual record so that the Court could resolve the petitions.

The Rules of Appellate Procedure also 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. The scope of discovery is not limited to use at trial. 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 plans. *See* Pa.R.C.P. 4001(c) (any party may take the testimony of any person . . . for use at a hearing upon petition, motion or rule"); Pa.R.C.P. 4001(d) ("any party may obtain discovery by . . . production of documents and things (Rule 4009)."

Likewise, it would be anomalous for a litigant to be permitted to take discovery to enforce a garden variety money judgment, but not to enforce an order and judgment of great consequence and magnitude such as the May 3, 2012 Opinion and Order and Notice of Judgment of September 28, 2012. Any communications with regulators undermining PTNA and ANIC's ability to obtain premium rate increases frustrate rehabilitation and violate these orders and judgment directing the Rehabilitator to earnestly rehabilitate the Companies. The Judgment would be rendered toothless if the Rehabilitator is permitted to disobey them under a veil of secrecy.

Finally, Pennsylvania's Rules of Appellate Procedure concerning summary and formal proceedings against insurers (which were made effective July 30, 2012 after this action

commenced) vest the Court with the authority to grant the relief sought in the Application. *See* Pa.R.A.P. 3774(c)(3) ("Following the entry of an order to rehabilitate or liquidate the business of an insurer, the Court may enter a case management order to supplement these Rules"); Note to Pa.R.A.P. 3775 ("Intervention, whether general or limited in scope, may be granted for purposes such as, but not limited to: "(1) Oppose a petition by the Commissioner for an order of liquidation or rehabilitation; (2) Oppose an application by the receiver for an order relating to the administration of the insurer's business or of estate;" . . . "(5) Assert any rights or interest afforded to the person by Article V and for which neither Article V not prior orders of the Court provide an avenue for redress[.]")

Accordingly, there are multiple rules governing the practice and procedure in Article V proceedings permitting the discovery sought in the Application.

III. CONCLUSION

Accordingly, the Intervenors respectfully request that the Application be granted.

Respectfully submitted,

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Dated: June 11, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2013, I caused a true and correct copy of the foregoing Intervenors' Reply to Response to Application for Relief and To Compel to be served via e-mail and first-class U.S. Mail on the counsel listed below:

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