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Attorneys for Michael F. Consedine, Insurance Commissioner of Pennsylvania, in his capacity as statutory rehabilitator of Penn Treaty Network America Insurance Co. and American Network Insurance Co.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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

MEMORANDUM OF LAW OF MICHAEL F. CONSEDINE IN OPPOSITION TO APPLICATION OF CERTAIN INTERVENORS FOR MULTIPLE FORMS OF RELIEF

I. INTRODUCTION

The Application for Relief filed by Intervenors Penn Treaty American Corporation and Eugene Wozinski (collectively "PTAC") is the latest reprise of their receivership theme: ignore the interests of policyholders, discount the collaborative efforts of all other interested parties, engage in unwarranted character assassination of the Rehabilitator's team and, most significantly, offer no workable alternative plans for rehabilitating Penn Treaty Network America ("PTNA") or American Network Insurance Company ("ANIC," collectively "the

Companies") in a more expedient fashion. The Court should not give credence to this overtired tactic. PTAC has yet to propose a meaningful comprehensive approach to rehabilitation. The present Application seeks relief that is exceedingly vague, that has already been requested from the Court, or that, in some cases, would violate governing law. The Court should consider this Application for what it is: an improper effort to cast aspersion upon the Rehabilitator's attempts to develop a viable rehabilitation plan.

Michael F. Consedine, Pennsylvania Insurance Commissioner, in his capacity as statutory rehabilitator (the "Rehabilitator"), has undertaken significant efforts to rehabilitate the Companies in a reasonable manner. Those efforts include, among other things:

- Establishment of a Multi-Party Rehabilitation Group ("MPRG") consisting of representatives of the Rehabilitator and the Companies' policyholders, agents, shareholders and boards, as well as the National Organization of Life and Health Guaranty Associations ("NOLHGA") and certain health insurers, each with interests in these proceedings to assist in creating a rehabilitation plan;

- Identification of a business-division approach[1] as a potentially feasible method of conducting a rehabilitation to allow one of the Companies to exit receivership;

- Obtaining actuarial analysis necessary to create and support a rehabilitation plan embodying that approach; and

- Proposing a schedule for submission of a plan, soliciting comments from interested parties, and seeking Court approval of that plan.

These measures represent concrete advancement in addressing PTNA's and ANIC's insolvency issues and fully satisfy the applicable statutory provisions.

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[1] The business-division plan, sometimes colloquially referred to as a "Company A/Company B plan" or "good bank/bad bank" plan, is an approach whereby policyholders with adequately priced (otherwise known as self-sustaining) policies (*i.e.*, those for which current and future premiums are sufficient to cover liabilities) are placed in one company (which is hoped can eventually exit rehabilitation) and policyholders with non-self-sustaining policies are placed in a second company (which will be liquidated with guaranty fund protection for its policyholders), with the option of accepting certain changes to their contracts that would make them self-sustaining and enable them to elect to move to or remain in the first company.

Accordingly, PTAC's Application falls woefully short of establishing any misconduct by the Rehabilitator. The Court should summarily deny PTAC's Application in its entirety.

II.
DISCUSSION

A. The Rehabilitator has satisfied his duty under Article V by exercising reasonable efforts to rehabilitate the insolvent Companies.

Article V of the Pennsylvania Insurance Department Act provides that, upon entry of an order of rehabilitation, the Pennsylvania Insurance Commissioner ("the Commissioner") becomes the statutory rehabilitator of the troubled insurer. 40 P.S. § 221.15(c). As rehabilitator, the Commissioner "may take *such action as he deems necessary or expedient* to correct the condition or conditions which constitute the grounds for the order of the court to rehabilitate the insurer." 40 P.S. § 221.16(b) (emphasis added). "This mandate explicitly defers all actions to the skill of the Rehabilitator and implicitly recognizes [his] expertise in these matters." *Foster v. Mut. Fire, Mar. & Inland Ins. Co.* ("*Mutual Fire II*"), 614 A.2d 1086, 1091 (Pa. 1992). The broad discretion afforded by Article V allows the rehabilitator to manage the affairs of an insurer in rehabilitation as he determines appropriate, so long as he does not abuse the discretion conferred by statute. *See, e.g., Grode v. Mut. Fire, Mar. & Inland Ins. Co.* ("*Mutual Fire I*"), 572 A.2d 798, 805, 811 (Pa. Commw. Ct. 1990) (stating that the rehabilitator's conduct must be upheld unless it constitutes an abuse of discretion and affirming the rehabilitator's management of the estate as neither "unreasonable or arbitrary"). An abuse of discretion occurs only if the rehabilitator engages in "'*bad faith, fraud, capricious action, or abuse of power.*'" *Mutual Fire II*, 614 A.2d at 609-10 (emphasis in original) (quoting *Norfolk & W. Ry. Co. v. Pa. Pub. Utility Comm'n*, 413 A.2d 1037, 1047 (Pa. 1980)). Abuse of discretion "is a high standard," requiring affirmance of the administrative official's actions absent a showing of improper conduct. *D.Z. v. Bethlehem Area Sch. Dist.*, 2 A.3d 712, 722 (Pa. Commw. Ct. 2010).

The burden of establishing an abuse of discretion falls upon the party challenging an administrative official's action. *Pa. State Ass'n of Twp. Supervisors v. State Ethics Comm'n*, 499 A.2d 735, 737 (Pa. Commw. Ct. 1985). It is not sufficient for the party to claim that, in the party's own opinion, another course of action would have proven more effective or have offered better results. *See Mid Valley Taxpayers Ass'n v. Mid Valley Sch. Dist.*, 416 A.2d 590, 593 (Pa. Commw. Ct. 1980) (explaining that an abuse of discretion cannot be proven by showing that a plan is "lacking in wisdom, or business sense, or common sense, or any combination of all three"). The question, instead, is whether the opponent has shown that the administrative official, here the Rehabilitator, acted "without any rational basis, as a result of self-dealing, bias or ill-will, or through a misapplication of the law." *Ario v. Fidelity Mut. Life Ins. Co.*, 935 A.2d 55, 62 (Pa. Commw. Ct. 2007).

PTAC has not made any such showing, nor could it, as the Rehabilitator has faithfully discharged his obligations under Article V. While PTAC baldly ascribes "abuses of discretion" to the Rehabilitator's conduct, *see* Application for Relief ¶ 80, it fails to demonstrate any act of irrationality, self-dealing, bad faith, bias, ill-will, or illegality by the Rehabilitator or his team. Based on its prayer for relief, it instead appears that PTAC is unhappy primarily with (1) alleged "unreasonable delay" in the rehabilitation proceedings, and (2) the absence of rate increases prior to approval of a formal rehabilitation plan. *See id.* ¶¶ 3-35. Neither of those grounds, however, constitutes an abuse of discretion by the Rehabilitator.

1. PTAC's claims of improper delay ignore the Rehabilitator's strides forward with regard to submitting amended plans of rehabilitation.

PTAC faults the Rehabilitator for failure to request approval of the proposed rehabilitation plans submitted on April 30, 2013 (the "Proposed Plans") and for supposed delay in submitting amended plans. *See* Application for Relief ¶¶ 32-35. Neither claim has merit.

The Rehabilitator never suggested that the Proposed Plans were a complete, final outline of rehabilitation, as PTAC appears to claim. *See, e.g.*, Application for Relief ¶ 32 (faulting the Rehabilitator for requesting that the Court not approve the Plans). The Plans note that they would "not fully eliminate the Funding Gap" for either Company, and that further revisions would be necessary as rehabilitation progressed. *See* Proposed Rehabilitation Plan for PTNA, at 11 (filed Apr. 30, 2013); Proposed Rehabilitation Plan for ANIC, at 11 (filed April 30, 2013). The Rehabilitator solicited comments on the Proposed Plans, and eight institutional stakeholders and hundreds of policyholders replied, identifying multiple legal and practical issues related to implementation of the Plans. Those comments raised questions about, *inter alia*, the procedures for effecting benefit reductions, whether a rehabilitation plan could unilaterally raise rates, whether benefits could be capped, and the feasibility of allowing policyholders to elect to reduce benefits to levels supported by their current premiums. *See, e.g.*, Comments of Broadbill Partners, LP to the Proposed Plans of Rehabilitation, at 5-7 (filed Aug. 30, 2013); Comments of Aetna Life Insurance Co., *et al.* to the Proposed Plans of Rehabilitation, at 2-3 (filed Aug. 30, 2013). In fact, PTAC itself filed comments raising nine separate objections to the Proposed Plans, including that the plans should focus initially on benefit reductions and that they set forth insufficient methods to monitor their success. *See* Comments of Intervenors to the Proposed Plans of Rehabilitation, at 24-28 (filed Aug. 30, 2013).

The comments on the Proposed Plans thus revealed that, while the Plans outlined adequate first steps toward a comprehensive rehabilitation scheme, they required reworking to respond to concerns identified by PTAC and other commenters. It is therefore disingenuous for PTAC to suggest that the Rehabilitator has somehow acted improperly in refraining from seeking Court approval of the Proposed Plans when PTAC itself raised many of the objections that the

Rehabilitator is now seeking to remedy. Certainly, PTAC cannot be suggesting that the Rehabilitator should have expended estate resources to fight legal battles that he believed might be avoided or mitigated, and not in the best interests of policyholders, creditors, and the public.

All of the Rehabilitator's efforts since receiving comments on the Proposed Plans have been designed to explore alternatives and build consensus regarding a revised approach for the Companies' rehabilitation. In late 2013, the Rehabilitator convened the MPRG, which consists of representatives for the policyholders and from all six entities who lodged institutional comments on the Proposed Plans, as well as other individuals interested in the proceedings. The composition of the MPRG includes:

- Representatives of the Rehabilitator, including the Rehabilitator's counsel, the Special Deputy Rehabilitator ("Special Deputy"), and the Companies' Chief Rehabilitation Officer;
- Counsel for the Policyholders' Committee;
- The Companies' Actuaries (PricewaterhouseCoopers);
- Counsel for Broadbill Partners, LP (which is a significant shareholder of PTAC);
- The PTAC Intervenors;
- Counsel for NOLHGA;
- Counsel for Aetna Life Insurance Co., Cigna Corporation, and other insurers who filed formal comments on the Proposed Plans (and would be required to contribute to any guaranty fund assessments made to benefit the estates); and
- Counsel for 5 Star Companies, LLC, A Best Brokerage Service, Inc., and certain other agents of the Companies.

Throughout late 2013 and 2014, the MPRG met as a group on 18 separate occasions to consider and develop alternate potentially viable methods of rehabilitating the Companies. Counsel for the Rehabilitator also periodically met individually with each member of the MPRG to gain a better understanding of each member's concerns. All of these efforts remain ongoing; however, the most significant development from the MPRG thus far is the emergence of a broad (but not unanimous) consensus to pursue a business-division plan as the best option for

rehabilitating the Companies. *See* Transcript of Proceedings, at 7 (Dec. 17, 2013). Under that plan, the Rehabilitator anticipates that policyholders with self-sustaining policies will be separated from those without self-sustaining policies. As counsel for the Policyholders' Committee and for NOLHGA informed the Court on December 17, 2013, self-sustaining policies can likely be rehabilitated successfully, while non-self-sustaining policies will be placed into a wind-down vehicle. *Id.* at 14-16. Since then, the Special Deputy has been engaged in developing amended plans for both Companies and obtaining the actuarial analyses necessary to implement those plans. In particular, throughout the spring of 2014, actuarial attention has focused on developing formulas to determine which policies are self-sustaining. That process has been time-consuming, because determining which policies are self-sustaining and how the estate's assets should be allocated between Companies A and B are crucial to the success of the business-division plan. Nonetheless, the amended plans are currently on track to be filed on or before August 8, 2014, and the Court has accepted that schedule.

The Court should not be persuaded by PTAC's claims of delay. The Rehabilitator has acted reasonably in pursuing a business division plan, obtaining support from interested parties, soliciting the actuarial analysis necessary to support a request for Court approval of that plan, and inviting PTAC to participate in the process. PTAC's complaints to the contrary are unwarranted.

2. PTAC's demand for immediate involuntary rate increases is hypocritical, faces significant obstacles from state regulators, and would likely hinder implementation of fully developed plans of rehabilitation.

PTAC demands that the Rehabilitator "immediately and aggressively pursu[e] actuarially justified premium rate increases." *See* Application for Relief ¶ 80(b). That request, however, is belied by PTAC's position throughout these proceedings and would frustrate rehabilitation efforts if immediately pursued.

a. PTAC has represented to the Court that it "ha[s] no problem with an approach that at the outset focuses primarily on benefit reductions."[2]

Over the last two years, the Rehabilitator had worked with PTAC to develop rehabilitation plans that initially focused on benefit reductions, with rate increases implemented as a secondary method of addressing the Companies' insolvency. That approach favored policyholders and would have benefited the Companies in several ways. Most importantly, it would have provided policyholders with the ability to tailor their benefits to current premium levels—likely a key concern for aging policyholders with fixed incomes who may be unable to afford the average threefold rate increases that would be required to preserve current benefit levels in many states. A benefit-reduction approach also would have prevented unnecessary policy lapses and ensured that policyholders continued to receive some of the benefits for which they contracted, even if they cannot afford to pay the rates that would be necessary to return the Companies to solvency. Avoiding lapses likewise benefits the Companies by providing a continued undiminished stream of premium.

To further those ends, the Proposed Plans provided as follows:

> The Plan[s] contemplate[] implementing certain temporary modifications or benefit suspensions following the Plan's approval, gauging the effect of those modifications, and potentially implementing additional temporary modifications as warranted by the effect of initial benefit suspensions and additional experience. In addition, the Plan contemplates that premium rate increases may be sought as a means of mitigating the need for additional benefit suspensions.

See Proposed Rehabilitation Plan for PTNA, at 12 (filed Apr. 30, 2013); Proposed Rehabilitation Plan for ANIC, at 12 (filed April 30, 2013). The Rehabilitator anticipates that the amended plans

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[2] *See* Comments of Intervenors to the Proposed Plans of Rehabilitation, at 8 (filed Aug. 30, 2013).

will provide policyholders the ability to elect between voluntary benefit reductions and voluntary rate increases as part of the Companies' rehabilitation.

PTAC has always recognized the wisdom of focusing on benefit reductions in the first instance. In fact, its comments on the Proposed Plans concede as follows:

> The [PTAC] Intervenors ***have no problem with an approach that at the outset focuses primarily on benefit reductions, and as set forth that was the approach suggested by the [PTAC] Intervenors***, but there must also be timely pursuit of premium rate increase in conjunction therewith.
>
> * * *
>
> The [PTAC] Intervenors recognize with gratitude that the Rehabilitator adopts to some degree the important initial concept of this approach, benefit reductions. Although they don't agree with the Rehabilitator as to how the initial benefit reduction approach should be handled, ***they recognized the deference that should be afforded to the Rehabilitator on the issue of the types and extent of benefit reductions***....

See Comments of Intervenors to the Proposed Plans of Rehabilitation, at 8, 15 (filed Aug. 30, 2013) (emphases added). Thus, regardless of whether PTAC believes that rate increases may ultimately be necessary, it is hypocritical for it to insist upon immediate rate filings when it has never disputed the primacy of benefit reductions to any rehabilitation plan.

b. Immediate involuntary rate increases face significant obstacles and would deprive policyholders' of the ability to elect benefit reductions instead of increased rates.

As the Court has recognized numerous times, immediate involuntary rate increases likewise face practical hurdles. PTAC demands rate increases as if the success of rate-increase filings were a foregone conclusion. But that is not the case. In fact, multiple obstacles would impede implementation of rate-increases at present. Most of those obstacles, however, will be removed once the Court approves plans for both Companies.

PTAC suggests that rate increases can be obtained simply by filing an application showing actuarial justification for the requested rates. That oversimplifies the rate-increase process, particularly for companies in rehabilitation. State regulators have a statutory duty to protect the policyholders in their states, and it is the Rehabilitator's belief that many regulators will be hesitant to approve rate increases for companies that may ultimately be unable to meet their insuring obligation or that may impose benefit reductions on policyholders. Indeed, PTNA's and ANIC's inability to achieve actuarially justified rate increases during the late 1990s and early 2000s illustrates that—rightly or wrongly—regulators do not approve rate increases based on actuarial justification alone. Regulators are unlikely to approve rate filings for a trouble insurer without an approved rehabilitation plan, especially if they anticipate that policyholders will face benefit reductions as part of a future rehabilitation plan or as the result of liquidation. Moreover, even if PTNA and ANIC sought and obtained rate increases, those approvals would likely come from states that have historically granted their increase requests, thereby exacerbating the existing rate disparity between policyholders in different states.

The Rehabilitator thus determined that the best method for resolving the rate discrepancy is to allow policyholders to elect to either increase their premiums or reduce their benefits. He anticipates that the forthcoming amended plans will establish parameters for that election. This approach removes the possibility that regulators will deny rate-increase requests, and reduces the possible need for serial rate-increase petitions that might otherwise arise if the Rehabilitator pursued the requests sought by PTAC, only to learn once the rehabilitation plans are complete that further increases are necessary. Since the Companies have historically obtained diminished returns on successive requests over a short period of time, the Rehabilitator believes that

structuring increases as a voluntary policyholder election presents the greatest likelihood for obtaining rates capable of supporting benefits.

The Rehabilitator therefore did not abuse his discretion by deciding to forgo immediate rate-increase applications of the sort demanded by PTAC.[3] Nor can he be faulted for the pace of the rehabilitation, particularly when he has informed the Court that amended plans are forthcoming and the Court has accepted a schedule for their submission. PTAC's application should therefore be denied.

B. The Rehabilitator has committed no improprieties in the manner in which he has administered the rehabilitation efforts.

In addition to unwarranted claims of abuse of discretion, PTAC's Application is rife with improper *ad hominem* attacks on the Rehabilitator, his staff, his appointees, and his representatives, yet nowhere does PTAC identify any meritorious basis for any of these allegations. Contrary to PTAC's unsupported assertions, the Rehabilitator's management of estate assets and involvement in this matter has complied with Article V in every respect.

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[3] PTAC's Application implies that the Commissioner is responsible for management of the Senior Health Insurance Company of Pennsylvania ("SHIP"), and that he has abused his discretion by administering the present rehabilitation differently from the affairs of that insurer. *See* Application for Relief ¶¶ 9-12. That analogy is improper because SHIP was never subject to receivership, and thus the Commissioner never exercised management authority over it. SHIP, formerly known as Conseco Senior Health Insurance Company, was created when its parent corporation transferred the company to a nonprofit oversight trust for the purpose of running off its long-term care obligations. *See* Plan to Transfer Conseco Senior Health Insurance Company to Independent Trust, at 3-5 (Aug. 11, 2008), attached to the Rehabilitator's Response as Exhibit A. The Commissioner approved that transaction pursuant to the Insurance Holding Companies Act, which requires the Commissioner to grant approval unless the transaction would harm the public in certain statutorily defined ways. 40 P.S. § 991.1402(f)(1). At present, SHIP is operated by an independent board of trustees. *See* Senior Health Insurance Co., About the Trust http://www.shiplte.com/about/about-the-trust.php. Thus, with regard to rate-increase petitions, the Commissioner 's relationship with SHIP is the same as with any other insurer licensed in Pennsylvania, nothing more.

1. The Rehabilitator has acted properly with regard to his involvement in the proceedings and the payments made from the estates.

The Rehabilitator has been appropriately involved in the rehabilitation, and has made payments from the estates in accordance with applicable law. PTAC provides no basis for its requests to force the Rehabilitator to become more personally involved in the proceedings, to reimburse the estates for certain payments, or to make payments to PTAC's counsel that PTAC has neither formally requested nor substantiated.

a. PTAC's attempt to compel personal involvement from the Rehabilitator beyond his current level of participation is improper.

One of the "multiple forms of relief" PTAC requests is the compulsion of the "personal involvement" of the Rehabilitator in these rehabilitation proceedings, including "attendance at meetings and court conferences, including oversight of the Special Deputy Rehabilitator." Application for Relief ¶ 80(d). PTAC makes this request as though the Rehabilitator has not been fully and personally involved to date, and as though it is entitled to an order compelling the Rehabilitator to exercise his statutorily conferred discretion in a manner of PTAC's choosing. Neither is true, nor may the Rehabilitator be stripped of his authority to delegate responsibility for the rehabilitation to a special deputy.

While PTAC does not say so expressly, the relief it seeks in this regard is tantamount to a writ of mandamus. Such a writ is not available in circumstances such as these and, therefore, PTAC's request should be denied.

"A writ of mandamus is an extraordinary remedy which compels the official performance of a ministerial act or a mandatory duty only where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and a lack of any other appropriate or adequate remedy." *Petsinger v. Dep't of Labor & Indus., Office of Vocational Rehab.*, 988 A.2d 748, 754 n.6 (Pa. Commw. Ct. 2010) (citing *McGill v. Dep't of Health, Office of Drug & Alcohol Programs*, 758

A.2d 268 (Pa. Commw. Ct. 2000)). A writ of mandamus "is not available to revise a public official's decision that results from the exercise of discretion.... As a high prerogative writ, mandamus writs are rarely issued and *never* where the plaintiff seeks to interfere with a public official's exercise of discretion." *Chadwick v. Dauphin Cnty. Office of Coroner*, 905 A.2d 600, 603 (Pa. Commw. Ct. 2006) (emphasis added). While "[i]t is true that a writ of mandamus can be used to compel a public official to exercise discretion where he refuses to do so," it cannot be used to direct the official to exercise that discretion in a particular way. *Id.* Such a remedy is available only to compel a tribunal or administrative agency to act when it has been "sitting on its hands." *Id.* at 698.

Here, by asking this Court to direct the Rehabilitator to attend meetings and conferences, and to conduct some elevated level of oversight of the Special Deputy, PTAC has impermissibly sought to interfere with the Rehabilitator's exercise of his discretion under Article V. The very premise of PTAC's request is therefore flawed; this Court may not order the Rehabilitator to exercise his discretion the way PTAC wants it exercised. And, as PTAC cannot dispute, the Rehabilitator has properly exercised his discretion, including by appointing the Special Deputy to manage the rehabilitation of the Companies.

Section 516(a) permits the Rehabilitator to delegate responsibility for the rehabilitation to a special deputy, and to compensate the special deputy, providing as follows:

> The commissioner as rehabilitator may appoint a special deputy who shall have all the powers of the rehabilitator granted under this section. The commissioner shall make such arrangements for compensation as are necessary to obtain a special deputy of proven ability. The special deputy shall serve at the pleasure of the commissioner.

40 P.S. § 221.16(a). Thus, notwithstanding the baseless invective that PTAC directs at the Special Deputy, it cannot dispute that he was properly appointed and is properly compensated

under Article V. Nor has PTAC shown (or even alleged) that the Special Deputy has abused his appointment in any way. The Rehabilitator's statutory delegation of responsibilities to the Special Deputy was permissible; the Rehabilitator is not—and cannot be—required to manage every aspect of the rehabilitation personally; and PTAC's attacks on the Special Deputy are little more than attempts at character assassination.

b. No authority exists for PTAC's demand that the Rehabilitator reimburse the estates for funds expended to conduct the rehabilitation.

PTAC purportedly objects to the administrative costs and expenses paid in respect of these collective receiverships that have been incurred by the Department. Application for Relief ¶ 41. PTAC further demands that the Department return the administrative expense funds to the estate. Application for Relief ¶ 80(f). PTAC's objection and request for relief have no merit.

Pennsylvania's administrative receivership scheme and the Rehabilitation Orders for the Companies plainly contemplate that all costs of administration be paid from the estate. *See* 40 P.S. § 221.16(a)-(b); 40 P.S. § 221.44(a); *see also* Jan. 6, 2009 Order, ¶ 6. There is no provision in the law for paying such expense out of the Insurance Department's operating budget at the general public's expense, and no authority exists—and PTAC cites none—for the estates to be reimbursed for payments made to defray receivership administrative costs. Moreover, this Court's consistent approval of the Department's administrative costs in various liquidation proceedings, which are reimbursed by estate assets, further supports the fundamental principle of receivership proceedings that allows valid administrative costs, regardless of their source, to be reimbursed by the estate of the company in receivership. *See, e.g.*, *Koken v. Colonial Assurance Co.*, 885 A.2d 1078, 1085, 1090, 1105 (Pa. Commw. Ct. 2005) (approving a plan of liquidation that provided for the insurer's estate to reimburse the Department for the "[c]osts associated with Insurance Department employees providing services" to the receivership). This fundamental

principle applies whether the company in question is in rehabilitation or liquidation, and thus the company's receivership status is a distinction without a difference for purposes of reimbursing receivership costs. *See Phillippi v. Sec'y of Banking*, 5 A.2d 430, 432 (Pa. Super. Ct. 1939) ("According to the ordinary rules of receivership, it is quite universally settled that the expenses of a receivership properly created are a charge on the fund administered.") In sum, PTAC's argument on this point lacks merit, and the associated requested relief should be denied.

c. PTAC's demand for payment of its legal fees is premature.

PTAC has not filed any new or supplemental application for payment of its fees and expenses, and, as PTAC acknowledges, it has not yet provided documentary support for the payment request. Application for Relief at ¶ 71 n.6. Any relief in the form of such payment is premature, and this Court should address it only if and when an application is filed and PTAC has demonstrated an entitlement to relief under Article V.

The Rehabilitator does not oppose the payment of fees and expenses incurred by PTAC in this rehabilitation to the extent that such payment is authorized by law and PTAC demonstrates an entitlement thereto. To date PTAC has twice requested, and the Rehabilitator has not opposed, the award of fees and expenses related to PTAC's defense against the petitions seeking liquidation orders for the Companies. *Id.* at ¶ 70. The Rehabilitator has, however, expressly reserved his rights to assess each such request on its individual merits, and to determine in his discretion whether PTAC is entitled to payment under Article V.

The Rehabilitator reiterates his reservation of rights, and objects to the premature request in the instant Application. In the event that PTAC submits a proper application for fees and expenses, supported by appropriate documentation and legal authority, the Rehabilitator will make a determination as to whether to consent to the award of that relief.

2. Portions of PTAC's application for relief are redundant of the application that it filed on April 29, 2013, which remains pending with the court, and further briefing of those issues is unnecessary.

On April 29, 2013, PTAC filed with this Court an "Application for Relief and to Compel." In the April 29, 2013 Application, PTAC sought the compelled production of non-discoverable, privileged, and otherwise protected communications between the Rehabilitator and third parties such as the National Association of Insurance Commissioners ("NAIC"); and raised a purported conflict of interest arising from the involvement of Rehabilitator's counsel in the appeal pending before the Pennsylvania Supreme Court regarding legal issues decided in the earlier liquidation proceedings. That Application remains pending.

PTAC raises some of the exact same arguments in the instant Application as it did in the April 29, 2013 Application. For example, PTAC seeks "transparency" in the Rehabilitator's communications with the NAIC and insurance regulators, and it asks the Court to direct the Rehabilitator "to refrain from using the same counsel to represent him in both the rehabilitation and the appeal." Application for Relief ¶¶ 7, 11. Therefore, the Rehabilitator incorporates by reference its briefing on the April 29, 2013 Application, and asks that the Court disregard the redundant requests for Relief made in the instant Application.

3. The Rehabilitator does not oppose certain requests made by PTAC.

As discussed above, the Rehabilitator does not oppose, in concept, the payment to PTAC of fees and expenses to which it is entitled by law. Application for Relief ¶ 80(j). To the extent that PTAC believes that any such fees and expenses remain outstanding, it should file an application seeking their payment, along with supporting evidence, and the Rehabilitator will make a determination at that time as to whether he will oppose the request. There is, however, no reason for this Court to order such relief now, when it is not properly before the Court and is, in any event, unsubstantiated.

Nor does the Rehabilitator oppose PTAC's request that its actuary, Karl Volkmar, be permitted to complete his analysis and provide an actuarial opinion to all interested parties. *Id.* ¶ 80(i). PTAC may then file an application seeking his fees and the Rehabilitator will make a determination at that time as to whether to consent to or oppose the requested relief. Again, PTAC is free to pursue this avenue without an order of the Court, and requesting relief to this effect is improper and unnecessary.

III.
CONCLUSION

Accordingly, for the reasons set forth above, the Rehabilitator respectfully requests that the Court summarily deny PTAC's Application for Multiple Forms of Relief.

Respectfully submitted,

Dated: May 30, 2014

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CERTIFICATE OF SERVICE

I certify that I will cause a Notice of Filing of the foregoing Response and Opposition to Application of Certain Intervenors for Multiple Forms of Relief to be served on all parties listed on the Master Service List by electronic mail or facsimile, or by U.S. Mail where no electronic mail address or facsimile number was available, and that I on May 30, 2014 served the foregoing Opposition to Application, upon Intervenors Penn Treaty American Corporation and Eugene J. Woznicki as follows:

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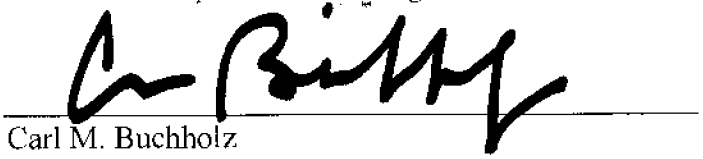

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