

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RECEIVED & FILED
COMMONWEALTH COURT
OF PENNSYLVANIA
20 JUL 2015 15 35

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

**INTERVENOR BROADBILL PARTNERS, LP'S OPPOSITION TO
REHABILITATOR'S AMENDED APPLICATION FOR PROTECTIVE
ORDER**

Elizabeth J. Goldstein (ID No. 73779)
Dilworth Paxon, LLP
112 Market Street, Suite 800
Harrisburg, PA 17101
Telephone: (717) 236-4812
Fax: (717) 236-7811

Stephen H. Warren
Attorney Id. CA 136895
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
Telephone: (213) 430-7875
Fax: (213) 430-6700

Gary Svirsky
7 Times Square
New York, New York 10036-6524
Telephone: (212) 326-2000
Fax: (212) 326-2061

*Attorneys for Intervenor
Broadbill Partners, LP*

TABLE OF CONTENTS

Page

| | |
|---|----|
| BACKGROUND | 1 |
| <i>The Special Deputy Rehabilitator's testimony opened the door to the same issues about which Broadbill seeks discovery</i> | 1 |
| <i>This Court granted Broadbill formal intervenor status</i> | 2 |
| ARGUMENT | 3 |
| I. THE REHABILITATOR PROPOSES SHUTTING DOWN THE ADVERSARIAL PROCESS..... | 4 |
| II. IN ADDITION TO THE REHABILITATOR'S ABUSE OF DISCRETION, THE PLAN'S FEASIBILITY WILL BE AT ISSUE AT THE CONFIRMATION HEARING. | 7 |
| III. IN ANY EVENT, BROADBILL'S DISCOVERY REQUESTS FALL WELL WITHIN THE REHABILITATOR'S PROPOSED SCOPE OF DISCOVERY. | 8 |
| CONCLUSION..... | 10 |

TABLE OF AUTHORITIES

Page(s)

Cases

| | |
|---|---------|
| <i>Asbury v. Mercy Fitzgerald Hosp.</i> , 13 Pa. D. & C.5th 225 (Pa. County Ct. 2010) | 7 |
| <i>Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity</i> , 91 A.3d 680 (Pa. 2014) | 4 |
| <i>Commonwealth v. TAP Pharm. Prods.</i> , 904 A.2d 986 (Pa. Commw. Ct. 2006) | 4 |
| <i>Foster v. Mut. Fire</i> , 614 A.2d 1086 (Pa. 1992) | 5, 6, 7 |
| <i>Grode v. Mut. Fire.</i> , 688 A.2d 233 (Pa. Commw. Ct. 1986) | 7 |
| <i>HYK Constr. Co. v. Smithfield Twp.</i> , 8 A.3d 1009 (Pa. Commw. Ct. 2010) | 5 |
| <i>Klemow v. Time Inc.</i> , 351 A.2d 12 (Pa. 1976), cert. denied, 429 U.S. 828 (1976) | 5 |
| <i>Koken v. Fid. Mut. Life Ins. Co.</i> , 907 A.2d 1149 (Pa. Commw. Ct. 2006) | 7 |
| <i>Montiero v. Dow Chem.</i> , 19 Phila. 221 (Pa. C.P. 1989) | 4 |
| <i>Nissley v. Pennsylvania R.R.</i> , 259 A.2d 451 (Pa. 1969) | 5 |
| <i>Platinum v. Blong</i> , 43 Pa. D & C.4th 445 (Pa. C. P. 1998) | 4 |
| <i>Pupo v. Pupo</i> , 36 Pa. D. & C.2d 620 (Pa. C.P. 1965) | 8 |

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

40 P.S. § 221.16(d)6

Rules

Pa. R. Civ. P. 4003.13

Pa. R. Civ. P. 4003.1(a)3

Pa. R. Civ. P. 4003.1(b)4

Pa. R. Civ. P. 4009.115

Broadbill joins in the Initial Intervenor's Opposition to the Amended Application. In further opposition, Broadbill makes the following arguments.¹

BACKGROUND

*The Special Deputy Rehabilitator's testimony
opened the door to the same issues
about which Broadbill seeks discovery.*

On July 13 and 14, 2015, Rehabilitator's Special Deputy Rehabilitator Patrick Cantilo offered to this Court a "narrative" in support of Plan confirmation. He testified about some of the very same issues the Rehabilitator claims are "beyond the scope of what will be addressed" at the hearing.² Mr. Cantilo

¹ This Opposition refers to (i) Broadbill Partners, LP as "Broadbill," (ii) Pennsylvania Insurance Commissioner Teresa Miller as statutory rehabilitator of Penn Treaty Network America Insurance Company and American Network Insurance Company as the "Rehabilitator," (iii) Penn Treaty Network America Insurance Company as "PTNA" and American Network Insurance Company as "ANIC," and, together, as the "Companies," (iv) the June 16, 2015 Brief in Support of the Rehabilitator's Amended Application for Entry of a Protective Order as the "Protective Order Motion," (v) Penn Treaty American Corporation as "PTAC" and with Eugene J. Woznicki as the "Initial Intervenor," and with Broadbill as the "Intervenor," (vi) the July 20, 2015 Intervenor Eugene J. Woznicki and Penn Treaty American Corporation's Brief in Opposition to the Rehabilitator's Amended Application for Entry of a Protective Order the "Initial Intervenor's Opposition," (vii) the Second Amended Plan of Rehabilitation filed by Michael F. Consedine as the "Plan," (viii) the July 10, 2015 Application to Quash Notices of Deposition Served by Broadbill Partners, L.P., and for a Protective Order as the "Application to Quash," (ix) the June 30, 2015 Notices of Video Deposition served on the Rehabilitator, Robert L. Robinson, and Jose A. Vinas as "Rehabilitator Notice," "Robinson Notice," and "Vinas Notice," respectively, (x) Attachment A to the June 30, 2015 Notices of Video Deposition served on the Rehabilitator "Attachment A," (xi) the February 13, 2015 Formal Comments of Broadbill Partners, LP to the Second Amended Proposed Rehabilitation Plan and Notice of Intent to Participate in Hearing as "Broadbill's Comments," (xii) Chief Rehabilitation Officer as "CRO," (xiii) Chief Financial Officer as "CFO," and (xiv) the Internal Revenue Service as the "IRS." Unless otherwise noted, any emphasis in quotations has been added, and all internal citations and quotation marks have been omitted.

² App. to Quash at 7.

discussed, among other things, (i) alternatives to the Plan; (ii) the Rehabilitator's supposed efforts to comply with this Court's orders; (iii) the potential for rate increases under the Plan; (iv) the bases for transfer of assets and liabilities between PTNA and ANIC under the Plan; and (v) the Plan's federal income tax consequences for policy holders and the Companies.³ Mr. Cantilo was not cross-examined and his one-sided, unsupported narrative is yet to be tested.

***This Court granted Broadbill
formal intervenor status.***

Broadbill previously objected to the Plan to the extent that it would impair the rights, claims, and assets of third parties including PTAC.⁴ Broadbill further joined in PTAC's objection to any potential action taken by the Rehabilitator under the proposed Plan that would affect PTAC's rights.⁵ On June 19, 2015 the Court permitted Broadbill to intervene formally in this matter.⁶

To shine a light on issues that have been before this Court for months, Broadbill served deposition notices on the Rehabilitator (through a person most knowledgeable), Robert Robinson (CRO for PTNA and ANIC), and Jose Vinas (PTNA's CFO).⁷ Those depositions are meant to uncover, among other things,

³ See Hearing Tr. 15:7–11, 37:6–38:1 (July 13, 2015); Hearing Tr. 8:4–19:19 (July 14, 2015).

⁴ See Broadbill's Comments.

⁵ See *id.*

⁶ See June 16, 2015 Stipulation and Order of Intervention.

⁷ See Broadbill's Comments at 1; Robinson Notice; Vinas Notice.

evidence about the Rehabilitator’s proposals related to rate increases, the transfer of assets and liabilities between the Companies, and the Plan’s tax consequences.⁸ The subjects to be covered by the depositions also include the list of objection topics identified by PTAC and Broadbill, which they previously submitted to the Court.⁹

The Rehabilitator has filed a motion to quash wholesale the depositions that Broadbill has noticed, assuming throughout that pleading that this Court will grant the Protective Order Motion.¹⁰ Broadbill will separately respond to that motion in due course. But the outcome of the Rehabilitator’s request to do away with discovery may well affect that motion.

ARGUMENT

As the Rehabilitator concedes, under the Pennsylvania Rule of Civil Procedure 4003.1, a party may obtain discovery of “any matter, not privileged, which is relevant to the subject matter involved in the pending action.”¹¹ But the Rehabilitator does not cite the next sub-section of Rule 4003.1, which provides that “[i]t is not ground for objection that the information sought will be inadmissible at trial if the information sought appears to be reasonably calculated to lead to the

⁸ See, e.g., Attachment A ¶¶ 1, 5, 7.

⁹ See *Id.* ¶ 10.

¹⁰ See App. to Quash at 3, 4, 7–9.

¹¹ See Protective Order Mot. at 5 (quoting Pa. R. Civ. P. 4003.1(a)).

discovery of admissible evidence.”¹² In other words, the scope of permissible discovery is “necessarily broader” than admissibility at trial.¹³

Each of Broadbill’s discovery requests seeks information directly related to the Court’s decision to approve the Plan, which the Rehabilitator agrees is allowable discovery.¹⁴ Because the Rehabilitator offers no support for the breathtaking request to be entirely exempt from producing any discovery to Broadbill—or other Intervenors—the Protective Order Motion and the Application to Quash should be denied.¹⁵

I. THE REHABILITATOR PROPOSES SHUTTING DOWN THE ADVERSARIAL PROCESS.

The Rehabilitator asks the Court to do away with mutual discovery and set aside Pennsylvania’s “long history of liberal discovery”¹⁶ requiring production of

¹² Pa. R. Civ. P. 4003.1(b).

¹³ *Commonwealth v. TAP Pharm. Prods.*, 904 A.2d 986 (Pa. Commw. Ct. 2006); *see also* 6 Std. Pa. Prac. § 34:24 (“If there is any conceivable basis of relevancy, the discovery should be permitted.”).

¹⁴ *See* Protective Order Mot. at 5, 8 (“The scope of discovery is therefore determined by the issues that will be presented to the Court for decision”; discovery must “relate to the Plan’s contents, the actuarial methodology and data forming its basis, and objections raised by interested persons in Formal Comments on the merits of the Plan.”)

¹⁵ *Platinum v. Blong*, 43 Pa. D & C.4th 445, 447 (Pa. C. P. 1998) (holding that “unsupported contentions and conclusions” are insufficient to carry a party’s burden in support of an application for a protective order). Broadbill will also respond separately to the Rehabilitator’s motion to quash if it is not withdrawn.

¹⁶ *Montiero v. Dow Chem.*, 19 Phila. 221, 231 (Pa. C.P. 1989) (noting Pennsylvania’s embrace of “wide-ranging and mutual discovery”); *accord* *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 91 A.3d 680, 684 (Pa. 2014) (noting Pennsylvania’s “long history of liberal discovery to prevent unfair surprise at trial”).

responsive, non-privileged documents.¹⁷ Instead, she proposes to quash all of Broadbill’s discovery requests and commandeer the adversarial process by offering a “share file” without regard to the discovery propounded by any party. The Rehabilitator apparently thinks that she and her advisers—and not Broadbill—should determine how Broadbill puts on its case. The Rehabilitator of course cites no support for this radical revision of our adversarial system. On the contrary, discovery allows each party to develop evidence for its case or to test the other side’s case—discovery is “an opportunity to investigate the matter and produce rebutting or qualifying facts.”¹⁸

Moreover, because the Court does not conduct its own discovery, it must rely on the Intervenors’ discovery requests to test the Rehabilitator’s positions and determine if they comply with the law.¹⁹ Without that discovery and testing of evidence, a court cannot determine if a proposed plan will “properly conserve and equitably administer[] the assets of the involved corporation *in the interest of the investors*, the public, and others.”²⁰

¹⁷ See Pa. R. Civ. P. 4009.11.

¹⁸ *Nissley v. Pennsylvania R.R.*, 259 A.2d 451, 453 (Pa. 1969).

¹⁹ *HYK Constr. Co. v. Smithfield Twp.*, 8 A.3d 1009, 1017 (Pa. Commw. Ct. 2010) (“A trial court is not empowered to conduct its own fact-finding investigation.”) (citing *Klemow v. Time Inc.*, 351 A.2d 12, 14 n.3 (Pa. 1976), *cert. denied*, 429 U.S. 828 (1976)).

²⁰ *Foster v. Mut. Fire*, 614 A.2d 1086, 1094 (Pa. 1992).

As Broadbill stated in its formal comments, the Rehabilitator cannot misappropriate the property rights of PTAC and its stakeholders.²¹ Yet the Plan gives no assurance that the Rehabilitator will preserve the property rights of PTAC and other third parties—whose property rights are neither owned nor controlled by the Rehabilitator.²² To conduct the “extensive and thorough analysis”²³ needed to ensure that the Plan does not constitute an abuse of the Rehabilitator’s discretion, the Court must allow Broadbill the opportunity to investigate the Plan’s reassignment of assets and liabilities between the Companies. Likewise, Broadbill must be allowed to fully investigate the Rehabilitator’s request for tax rulings from this Court and the determinations by the Internal Revenue Service.

By Mr. Cantilo’s own testimony, the tax demands made by the Rehabilitator are fatal if not granted.²⁴ Therefore, in supervising the rehabilitation,²⁵ the Court should deny the Rehabilitator’s Motion because it seeks to deprive not only Broadbill but also the Court of this indispensable information.²⁶

²¹ See Broadbill’s Comments 11–13

²² *Id.*

²³ *Foster*, 614 A.2d at 614.

²⁴ See Hearing Tr. 9:5–10:4 (July 14, 2015).

²⁵ See *Foster*, 614 A.2d at 1093 (finding no abuse of discretion because the *modified* plan was thoroughly supervised and implemented with the capable assistance of the Commonwealth Court.)

²⁶ See 40 P.S. § 221.16(d); Protective Order Mot. at 1 (“The entire focus of the hearing on the Plan will be the approval, disapproval, or modification of the Plan.”).

II. IN ADDITION TO THE REHABILITATOR’S ABUSE OF DISCRETION, THE PLAN’S FEASIBILITY WILL BE AT ISSUE AT THE CONFIRMATION HEARING.

The confirmation hearing is intended not only to determine the “threshold issue”²⁷ of whether the Rehabilitator has abused her discretion but also whether the Plan is financially feasible.²⁸ As the Court is aware, the goal of rehabilitation is to “restor[e] the entity to *sound fiscal status*.”²⁹ Therefore, a Plan that is not feasible is not confirmable.³⁰ Yet the viability of the surviving company and in fact the entire Plan, hinge on two tax-related conditions—that the Rehabilitator’s Special Deputy Rehabilitator admits he does not even fully understand.³¹

Broadbill and PTAC previously have requested discovery on a number of issues related to the structure and implementation of the Plan. Mr. Cantilo’s July 14 testimony, in which he described the material uncertainties and contingencies associated with the Plan, highlights the need for the discovery Broadbill seeks.³²

²⁷ *Foster*, 614 A.2d at 1089.

²⁸ *Id.* at 1090 (noting that the court directed the Rehabilitator to submit a modified plan after determining it was not feasible).

²⁹ *Id.* at 1096.

³⁰ *See Grode v. Mut. Fire.*, 688 A.2d 233, 234 (Pa. Commw. Ct. 1986) (after rehabilitator submitted plan that was not feasible court directed her to submit amended plan); *cf. Koken v. Fid. Mut. Life Ins. Co.*, 907 A.2d 1149, 1155 (Pa. Commw. Ct. 2006) (approving the plan after concluding it was financially feasible).

³¹ *See* Hearing Tr. 9:13 (July 14, 2015) (“I’m not a tax expert.”).

³² *See* Hearing Tr. 8:5–18:8 (July 14, 2015); *Asbury v. Mercy Fitzgerald Hosp.*, 13 Pa. D. & C.5th 225, 283 (Pa. County Ct. 2010) (finding it “axiomatic in the law of this Commonwealth” that parties may not object to testimony that they elicited themselves).

Positions that the Rehabilitator has taken in her Plan, many of which could have serious consequences to the estate and its stakeholders, should be subject to exploration and development by the Intervenors.

III. IN ANY EVENT, BROADBILL'S DISCOVERY REQUESTS FALL WELL WITHIN THE REHABILITATOR'S PROPOSED SCOPE OF DISCOVERY.

The Rehabilitator concedes that the Intervenors should be permitted to conduct discovery related to objections raised in their formal comments.³³ Each of Broadbill's discovery requests falls within the Rehabilitator's self-defined view of permissible discovery:³⁴

- possible rate increases on account of the PTNA and ANIC policies;³⁵
- the Rehabilitator's supposed efforts to comply with the Court's December 28, 2012 Order;³⁶
- the Rehabilitator's supposed efforts to correct any financial problems suffered by PTNA and ANIC;³⁷
- the ability of PTNA or ANIC to write new policies;³⁸

³³ See Protective Order Mot. at 4, 6, 8; see also List of Issues Raised by Certain Formal Comments to the Second Amended Plan of Rehabilitation/Liquidation B1–B6.

³⁴ See *supra* note 22.

³⁵ Attachment A ¶ 1; Broadbill's Comments at 5–10.

³⁶ Attachment A ¶ 2; Broadbill's Comments at 1–9. Broadbill notes that paragraph two of Attachment A specifies "Rehabilitator's efforts to date and going forward to comply with the terms of the Court's December 28, 2010 Order." As Broadbill's Comments make clear, the order was entered on December 28, 2012. In seeking discovery, a typographical error may be corrected. See *Pupo v. Pupo*, 36 Pa. D. & C.2d 620, 621–22 (Pa. C.P. 1965) (overruling objection to interrogatory quoting the wrong rule).

³⁷ Attachment A ¶ 3; Broadbill's Comments at 13.

³⁸ Attachment A ¶ 4; Broadbill's Comments at 10.

- transfer of assets and liabilities between PTNA and ANIC under the Plan;³⁹
- third-party property rights the Plan may affect or impair;⁴⁰
- impact of the Plan on the rights and property interests of PTAC;⁴¹ and
- other objections asserted by PTAC, which Broadbill has expressly joined.⁴²

Therefore, even on the Rehabilitator’s theory, discovery into the above should be permitted.

On top of that, Mr. Cantilo’s “narrative” in this Court injected other topics about which Broadbill wishes to inquire: (i) financial statements, projections, forecasts, and estimates prepared by PTNA and ANIC after rehabilitation began;⁴³ (ii) the relevant entities’ tax returns;⁴⁴ (iii) the Plan’s tax implications;⁴⁵ (iv) potential rate increases;⁴⁶ (v) the Companies’ ability to write new policies;⁴⁷

³⁹ Attachment A ¶ 5; Broadbill’s Comments at 11–13.

⁴⁰ Attachment A ¶ 8; Broadbill’s Comments at 11–13.

⁴¹ Attachment A ¶ 9; Broadbill’s Comments at 1–2, 11–13.

⁴² *See List of Issues Raised by Certain Formal Comments to the Second Amended Plan of Rehabilitation/Liquidation; Formal Comments of Intervenors Eugene J. Woznicki and Penn Treaty American Corporation to the Proposed Second Amended Plan of Rehabilitation; Broadbill’s Comments at 1; Hearing Tr. 8:4–9 (“And I should have been including Broadbill in those objections because they’ve joined in those objections and comments.”).*

⁴³ *See Attachment A ¶ 12.*

⁴⁴ *See id.* ¶ 11.

⁴⁵ *See id.* ¶ 6; *supra* at 6–7.

⁴⁶ *See supra* note 35; Hearing Tr. 248:16–250:18 (July 13, 2015).

⁴⁷ *See supra* note 38; Hearing Tr. 220:12–222:11 (July 13, 2015).

(vi) transfer of assets and liabilities between the Companies;⁴⁸ (vii) the Rehabilitator's efforts to comply with the Court's orders;⁴⁹ and (viii) alternatives to the Plan.⁵⁰ These subjects are all proper for developing in discovery.

CONCLUSION

For the foregoing reasons, the Rehabilitator's Protective Order Motion and Application to Quash should be denied.

⁴⁸ See *supra* note 39; Hearing Tr. 75:18–80:10 (July 13, 2015).

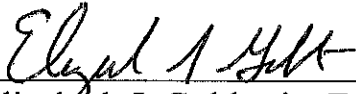
⁴⁹ See *supra* note 36; Hearing Tr. (34:12–35:2).

⁵⁰ See Hearing Tr. 39:15–40:3 (July 13, 2015).

Dated: Harrisburg, Pennsylvania
July 20, 2015

Respectfully submitted,

DILWORTH PAXON, LLP

By: 
Elizabeth J. Goldstein, Esq.
Attorney Id. PA 73779
Dilworth Paxon, LLP
112 Market Street, Suite 800
Harrisburg, PA 17101
(717) 236-4812 (phone)
(717) 236-7811 (fax)
egoldstein@dilworth.com

Stephen H. Warren
Attorney Id. CA 136895
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-7875 (phone)
(213) 430-6700 (fax)
swarren@omm.com

Gary Svirsky
7 Times Square
New York, New York 10036-6524
(212) 326-2000 (phone)
(212) 326-2061 (fax)
gsvirsky@omm.com

Attorneys for Broadbill Partners, L.P.

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2015, I caused a true and correct copy of the foregoing Intervenor Broadbill Partners, LP's Opposition To Rehabilitator's Amended Application For Protective Order to be served via e-mail and U.S. Mail upon counsel for the Rehabilitator, and via e-mail upon the following counsel:

Douglas Y. Christian
Benjamin J. Schmidt
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7300
christiand@ballardspahr.com
schmidtb@ballardspahr.com

Carl M. Buchholz
Stephen Schwab
Jayne Anderson Risk
Adam Brown
Nathan Heller
DLA Piper LLP (US)
One Liberty Place
1650 Market Street, Suite 4900
Philadelphia, PA 19103-7300
carl.buchholz@dlapiper.com

James R. Potts
Cozen O'Connor
1900 Market Street – 4th Floor
Philadelphia, PA 19103
JPotts@cozen.com

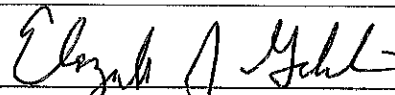
Paul M. Hummer
Saul Ewing LLP
Centre Square West
1500 Market Street, 38th Floor
Philadelphia, PA 19102-2186
PHummer@saul.com

Stephen H. Warren
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071
swarren@omm.com

Harold S. Horwich
Benjamin J. Cordiano
Morgan Lewis LLP
One State Street
Hartford, CT 06103-3178
harold.horwich@morganlewis.com
benjamin.cordiano@morganlewis.com

Thomas A. Leonard
Richard P. Limburg
Obermayer Rebmann Maxwell & Hippel LLP
One Penn Center, 19th Floor
1617 John F. Kennedy Blvd.
Philadelphia, PA 19103-1895
thomas.leonard@obermayer.com
richard.limburg@obermayer.com

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



Elizabeth J. Goldstein

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. ANI 2009

ORDER

AND NOW, this ____ day of _____, 2015, upon consideration of the Rehabilitator's Amended Application for Entry of a Protective Order dated June 16, 2015, (Amended Application), Broadbill Partners, LP's Opposition thereto, and any other responses, it is hereby **ORDERED** that the Amended Application is **DENIED**.

MARY HANNAH LEAVITT, Judge