

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Rehabilitation of
The Home Insurance Company

Docket No. 03-E-0106

**REPLY TO LIQUIDATOR'S OBJECTION TO
INSPIRATION CONSOLIDATED COPPER COMPANY, PHELPS DODGE CORPORATION
AND PHELPS DODGE MIAMI, INCORPORATED'S
PETITION TO INTERVENE**

NOW COME Intervenor Inspiration Consolidated Copper Company, Phelps Dodge Corporation and Phelps Dodge Miami, Incorporated, by their attorneys, Hale and Dorr LLP, and respectfully submit the following Reply to the Liquidator's Objection to their Petition to Intervene:

1. The Intervenor note that the Liquidator does not object to the intervention, which the Court has already granted, but rather to the relief sought by the Intervenor.

2. The Liquidator's Objection to that requested relief rests on five (5) erroneous claims:
 - a. That the Intervenor are asking to be treated differently from "other similarly situated policy claim-holders" (Objection at 1);
 - b. That the settlement embodied in the Settlement Termsheet dated November 27 and 29, 2002, which the Intervenor are seeking to enforce, "was subject to approval by the Commissioner of Insurance and mutually satisfactory documentation" (Objection at 2);
 - c. That "approval of the settlement was delayed from early December, 2002, until the present" (Objection at 2);
 - d. That "the delays experienced in the settlement process were not the result of bad faith" (Objection at 4); and

- e. That “delay in the negotiation [of a “formal settlement agreement”]... has [not] caused [the Intervenor] any detriment”. (Objection at 4)

3. First, the three (3) week jury trial in Maricopa County (Arizona) Superior Court was terminated on December 2, 2002, because the parties informed Judge Albrecht that the case was settled and confirmed that statement by signing a Notice of Settlement and submitting it to the court before 9:30 a.m. on December 2, 2002, the time when the jury was scheduled to be back in the jury box to hear closing arguments. In reliance on the parties’ confirmation that there was a settlement, Judge Albrecht then dismissed the jury. According to the Intervenor’s trial counsel in Arizona, under Arizona law, that written and signed Settlement Termsheet became an enforceable contract to settle after the parties had signed it (November 27 by Intervenor and November 29 by The Home), informed the Court that the case was settled (December 2), and satisfied any further conditions set forth in that document. The only further condition set forth in that document was “approval by the New Hampshire Department of Insurance,” not, as the Liquidator claims in her Objection, “approval by the Insurance Commissioner and working out suitable further documentation.” Immediately following submission of the Notice of Settlement to the court and termination of the jury trial, counsel who were being paid by the New Hampshire Department of Insurance began to draft a “formal settlement agreement”. The first draft of that “formal settlement agreement” was received by Intervenor’s counsel on January 10, 2003. It is reasonable to infer that counsel paid by the New Hampshire Department of Insurance would not have begun drafting the “formal settlement agreement” unless the Department had reviewed and approved the Settlement Termsheet. This must have happened either before the Notice of Settlement was submitted to the court on December 2, 2002, or sometime later in December 2002. From that date, all conditions in the Settlement Termsheet had been met and the Settlement Termsheet was an enforceable contract to settle.

4. Second, there is no evidence and no reason to believe that any other person is in the same position as the Intervenors. Other litigants may have been in various stages of litigation or settlement discussions with The Home at the time the liquidation petition was filed. But inquiries of the Liquidator's outside counsel strongly suggest that the Intervenors are the only claimants who had an enforceable settlement contract in place more than five (5) months before the petition was filed. The Intervenors are thus in a unique, not a common, position. They are threatened with the loss of millions of dollars merely because they relied on the New Hampshire Department of Insurance and its representatives to honor the settlement agreement, even if it took months to work out the language of a more formal document confirming the obligations of that agreement.

5. While the Intervenors have not alleged "bad faith", they also have not agreed that no "bad faith" was present. It is important to remember what The Home—and therefore the estate now being administered by the Liquidator—obtained from the settlement agreement concluded in December, 2002. The effect of the Intervenors' agreement to accept \$2.5 million, instead of pursuing a jury verdict for damages in the tens of millions of dollars and immediate action to obtain security for or execution on the resulting judgment, was to preserve significant assets of The Home for other creditors. The acquiescence by the Intervenors in a five (5) month process of trying to agree on the wording of a "formal settlement document" that would only confirm the terms of the enforceable settlement agreement already in place allowed The Home to hold the \$2.5 million in settlement funds for an additional five (5) months. The Home and its Liquidator have thus already obtained more than the entire financial benefit that The Home bargained for in the settlement. The Intervenors, on the other hand, who have waited patiently, trusting the New Hampshire Department of Insurance and its agents to fulfill The Home's obligations to them

under the December, 2002, settlement agreement, have yet to receive a dime. The Liquidator's position now is that she should be allowed to divert the entire \$2.5 million settlement fund that has been owed to the Intervenors since December, 2002, to the payment of other creditors' claims simply because she declined to agree upon and sign a "formal settlement agreement" before filing the liquidation petition. The Liquidator's argument is inequitable, and the result she hopes to achieve by it should not be countenanced by a court of equity.

6. The Settlement Termsheet did anticipate that its terms would be "memorialized in a formal settlement agreement consistent with this termsheet", but it did not require that the wording of such a "formal settlement agreement" be arrived at or that the Insurance Commissioner sign it before the settlement became a binding contract. The Settlement Termsheet contained all the terms necessary to effect a full settlement of the dispute. If the parties had not been able to agree on the wording of a "formal settlement agreement", the Intervenors could have sought specific performance of the settlement contract as described in the Settlement Termsheet. The Intervenors allowed the New Hampshire Insurance Department and its agents to take an unreasonably long time to agree on the wording of a "formal settlement agreement" because they trusted these public officials and agents to deal fairly with them and they believed that the settlement would be honored. They were entitled to assume that the settlement debt would be paid as agreed and releases exchanged, no matter how long it took to confirm the settlement terms in a second document. The fact that the wording of this "formal settlement agreement" was finally settled only ten (10) days before the liquidation petition was filed and that the Liquidator subsequently refused to honor the five (5) month old settlement contract despite The Home having already received the entire benefit of its bargain under that settlement contract, may or may not be evidence of bad faith, but it is certainly not what should

be expected from an official endowed with the public trust. Only the testimony and records of Pam Tanis, Harry Hagen and the other representatives of The Home and the New Hampshire Insurance Department who made the settlement, signed the Settlement Termsheet, affirmed the settlement to Judge Albrecht, and then dragged out the negotiation of a "formal settlement agreement" to within ten (10) days of the filing of the liquidation petition can establish whether there was "bad faith". The circumstances, however, do not rule it out.

7. For these reasons, the Intervenors respectfully submit that they are not in the same situation as any other claimant; they have had an enforceable settlement contract since at least December, 2002; and they are entitled to an order from this Court requiring the Liquidator to perform the requirements of the Settlement Termsheet and pay the \$2.5 million settlement debt before liquidation.

WHEREFORE, Intervenors respectfully pray that the Court will order the Liquidator to honor the Settlement Termsheet and pay the full settlement debt immediately and grant such other and further relief as may be just and proper.

Respectfully submitted,

Inspiration Consolidated Copper Company, Phelps
Dodge Corporation, and Phelps Dodge Miami,
Incorporated,

By Their Attorneys,



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Date: July 10, 2003

CERTIFICATION OF SERVICE

I certify that a copy of the foregoing Reply has this day been served on all other counsel by depositing a copy in first class mail, postage prepaid, addressed to their offices.

Date: July 10, 2003


