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

OBJECTION TO LIQUIDATOR'S REQUEST THAT A HEARING NOT BE SCHEDULED AND TO LIQUIDATOR'S MOTION TO STAY DISCOVERY

NOW COME Intervenors Inspiration Consolidated Copper Company, Phelps Dodge Corporation and Phelps Dodge Miami, Incorporated (together, "Intervenors"), by their attorney, and request the Court to note their Objection to the Liquidator's Request that a hearing not be scheduled and to the Liquidator's Motion to Stay Discovery, both dated August 22, 2003, and received by Petitioners on August 27, 2003;

WHICH OBJECTION is based on the following facts:

A. THE REQUEST FOR A HEARING

1. On June 3, 2003, after weeks of considering the matter, the Liquidator informed Intervenors that she would not pay their $2.5 settlement debt. On June 4, Intervenors filed the instant Petition asking the Court to allow them to intervene as parties in the liquidation proceeding and to order the Liquidator to pay the $2.5 million settlement debt prior to and outside of the company's liquidation.

2. When Intervenors first notified the Liquidators' counsel, Assistant Attorney General Roth, that they were filing this Petition and that they intended to seek to be heard at the first hearing - -then scheduled for June 9 - -Mr. Roth expressed concern that that would only complicate the proceedings on June 9. Based upon Mr. Roth's request, the parties' counsel agreed, therefore, that Intervenors' counsel would not seek to be heard at the June 9 hearing, and

that the parties' counsel would represent to the Court that the parties had agreed that the matter could be set down for a hearing in the next two (2) months or so. In accordance with that agreement, Intervenors' counsel did not seek to be heard at the June 9 hearing.

3. On June 27, 2003, Intervenors' counsel received a telephone call from Mr. Roth's secretary, saying that she had been directed by the Court to contact all parties and inform them that a further hearing had been scheduled for the following Monday, June 30, and that all parties' counsel were to "bring their calendars" to pick dates for hearings. Intervenors' counsel asked whether the Court had directed that all counsel appear or only that they provide dates when they were available for a hearing, and Mr. Roth's secretary replied that she did not understand that all counsel were directed to appear and that it would be consistent with her understanding of the Court's direction to her for Intervenors' counsel to tell Mr. Roth what dates he was available for a hearing, so Mr. Roth could communicate those dates to the Court. Intervenors' counsel then told Mr. Roth's secretary that the parties had agreed to have a hearing a couple of months after June 9 and that, due to vacations, sometime after mid-August would be best for Intervenors' counsel. Mr. Roth's secretary replied that that time period was also better for Mr. Roth.

4. Based on that understanding, Intervenors' counsel left a voicemail message for Mr. Roth just before noon on June 27, stating that he understood from Mr. Roth's secretary that it was acceptable to give Mr. Roth dates of availability for a hearing, that Intervenors could accept any date for the hearing that the Court would set but, due to vacation plans, would prefer to avoid the period from July 18 – August 2, that any time after mid-August would be preferable, and that, unless Intervenors' counsel heard from Mr. Roth to the contrary, he would presume that Mr. Roth also understood that it was acceptable for Intervenors' counsel not to appear on June 30 and instead to pass on dates of availability through Mr. Roth and that Mr. Roth would communicate

Intervenors' counsel's availability to the Court. Intervenors' counsel never heard to the contrary from Mr. Roth and presumed that Mr. Roth had communicated to the Court on June 30 their agreement to schedule a hearing a couple of months after June 9 and Intervenors' counsel's preference for mid-August or after and that a hearing date would be set shortly.

5. On July 11, 2003, Intervenors' counsel sent a letter to Liquidator's outside counsel, David Leslie, Esq., asking for information "[i]n anticipation of the hearing on relief under our Motion to Intervene". Mr. Leslie never responded to that letter.

6. Intervenors' counsel was on vacation from July 17 – August 2. When he returned to the office, he did not find either a response from Mr. Leslie to the July 11 letter or a notice of hearing from the Court. On August 13, Intervenors' counsel therefore called the Clerk's office to inquire whether a date had been set for the hearing and was told that one had not. The equity clerk explained that the file was very thick and difficult to keep up with and suggested that, in addition to making this call to remind the Clerk's office to schedule a hearing, Intervenors' counsel confirm the request by letter, explaining the background.

7. On August 13, Intervenors' counsel sent a letter to the Clerk's office confirming the request that a hearing be scheduled as the parties' counsel had agreed it would be over two (2) months before. Intervenors' counsel sent a copy of that letter to Mr. Roth and all other counsel, but had no reason to think that Mr. Roth would now oppose holding the hearing. On the same date, Intervenors' counsel sent another letter requesting discovery, this one addressed to both Mr. Leslie and Mr. Roth and offering to provide similar discovery from Intervenors, if requested. Neither Mr. Roth nor Mr. Leslie responded to that letter.

8. On August 19, Intervenors' counsel called Mr. Roth and left a message asking for a response to the August 13 request for limited discovery. Mr. Roth did not reply to that call.

9. The first indication that Intervenors' counsel had that the Liquidator had decided to oppose a hearing was receipt, by mail on August 27, of "Liquidator's Objection to Inspiration Consolidated Copper Company, et al., Request for Evidentiary Hearing and Liquidator's Motion to Stay Discovery" dated August 22. Intervenors object and request that the Court schedule the hearing as originally agreed.

B. THE MOTION TO STAY DISCOVERY

10. Intervenors also object to "Liquidator's Motion to Stay Discovery". First, no attempt has been made to comply with Rule 57-A. Despite letters from Intervenors' counsel on July 11 and August 13, a voicemail message to Mr. Roth on August 19, and Intervenors' counsel's offers on August 13 and 19 to discuss the issue of cooperative discovery, no effort was made by Liquidator's counsel to resolve the issue of pre-hearing discovery by agreement before filing this Motion. Neither Mr. Roth nor Mr. Leslie ever gave notice that he objected to discovery. Intervenors might be willing to accept more limited prehearing discovery, or, under some circumstances as discussed below, no discovery at all, if that is the only way this matter can be heard and resolved expeditiously, but Liquidator's counsel has never even inquired about the possibility.

11. The facts on which Intervenors' request for relief are based are not complex, are fully set forth in the Petition to Intervene dated June 4 and the Reply dated July 10, and are almost entirely undisputed.

12. Intervenors sued The Home in Arizona state court in 1998 for tens of millions of dollars under policies providing for environmental clean-up. After years of discovery and pretrial preparation, the case was tried to a jury for three (3) weeks during November, 2002, in the Maricopa County (Arizona) Superior Court. After the evidence was closed, the parties negotiated a settlement that provides for payment to Intervenors of $2.5 million, exchange of

general releases, and dismissal of the pending lawsuit with prejudice. Ms. Pamela A. Tanis of Risk Management Enterprises ("REM") monitored the trial and negotiated the settlement on behalf of The Home. After agreeing on the terms of the settlement, the parties prepared a three-page Settlement Termsheet, which Intervenors signed on November 27 and REM's Ms. Tanis signed on November 29. On December 2, the day that final arguments to the jury were to begin, the parties' counsel appeared before Judge Albrecht and informed her that the case had been settled. They confirmed that statement by signing a Notice of Settlement and submitting it to the Court. Judge Albrecht then dismissed the jury and adjourned the trial. Intervenors believe that none of these facts are disputed by the Liquidator.

13. The only questions to be resolved are whether a binding contract to settle was made by the parties and a settlement debt incurred at or shortly after the date the Settlement Termsheet was signed and the Notice of Settlement was filed with the Court and, if it was, whether the Liquidator must honor it and pay the settlement debt outside the liquidation process. These are issues principally of Arizona and New Hampshire law, and involve only one issue of fact.

a. The Settlement Termsheet sets forth only one further condition to its becoming a binding contract to settle: "approval by the New Hampshire Department of Insurance." Settlement Termsheet at 1 The Liquidator claims that the settlement was conditioned on "approval by the Commissioner of Insurance and mutually satisfactory documentation" (Objection to Petition at 2), but the Settlement Termsheet does not say that. This issue can be resolved simply by reading the Settlement Termsheet as signed by all parties.

b. Intervenors have been informed by their Arizona trial counsel -- and are prepared to demonstrate to this Court, either by testimony or written submission -- that under Arizona law, the written and signed Settlement Termsheet became an enforceable contract to settle after the parties signed it, informed the Court that the case was settled, signed and filed the Notice of Settlement on December 2, 2002, and satisfied the sole additional condition: "approval by the New Hampshire Department of Insurance".

c. If the Liquidator will not admit that the New Hampshire Department of Insurance reviewed and approved the Settlement Termsheet before this four (4) month drafting process began, responses to Intervenors' limited requests for discovery as set forth in their letters of July 11 and August 13 should be sufficient to demonstrate it. This is only one issue of fact, and should require little discovery to resolve, even if contested.

d. Intervenors believe that, even in the absence of an admission by the Liquidator, it may fairly be inferred from the circumstances that this sole additional condition was met sometime in late November or December, 2002. Not only did REM's Ms. Tanis, who was then and continued to be reporting to and being paid by the New Hampshire Department of Insurance, approve and sign the Settlement Termsheet, but REM and Nixon Peabody, outside counsel for The Home, then proceeded to exchange drafts of "a formal settlement agreement consistent with this termsheet" (Settlement Termsheet at 3, emphasis supplied) for two (2) months before the Rehabilitator was appointed and for another two (2) months before the petition for liquidation was filed. The New Hampshire Department of Insurance must have reviewed and approved the Settlement Termsheet before this extensive work was undertaken. Intervenors have sought discovery to confirm this review and approval process, but the Liquidator has not responded and instead, by this latest motion, is seeking to avoid producing that information.

14. Based on the application of Arizona law to these facts, Intervenors have asked the Court to order the Liquidator to pay the $2.5 million settlement debt prior to liquidation. The Liquidator has objected that such an order would be inconsistent with RSA c. 402-C and that a hearing is not necessary "because even if all of the assertions made by [Intervenors] are proven true, all they would establish is a pre-liquidation claim having no entitlement to immediate payment." Objection to Request for Hearing at 2.

15. The Liquidator characterizes his objections based on RSA c. 402-C as "in the manner of a motion to dismiss" (Objection to Request for Hearing at 3) and "the functional equivalence to a motion to dismiss for failure to state a claim" (Id.) and asks the Court to resolve these objections before scheduling a hearing on Intervenors' request or allowing any discovery by Intervenors. Even if the Court grants the Liquidator's request to consider first whether Intervenors could have a right under RSA c. 402-C to be paid outside of liquidation, that issue is

easily resolved and should not delay scheduling a hearing on the merits of Intervenors' request. RSA 402-C:21(II) provides that "[u]pon issuance of the order [to liquidate], the rights and liabilities of any insurer and of its creditors, policyholders, shareholders, members and all other persons interested in its estate are fixed as of the date of filing of the petition for liquidation, except as provided in RSA 402-C:22 [relating to continuance of insurance coverage] and 39 [relating to claims contingent on obtaining a judgment, claims under terminated policies, contingent claims, and claims not due until the passage of time]". Intervenors assert that they had an enforceable settlement contract, and therefore that a $2.5 million settlement debt existed, long before the petition to liquidate was filed. Under RSA 402-C:21(II), that judgment debt became fixed on the date of filing (May 8) and can not now be avoided by the Liquidator. Rather than prohibiting the Liquidator from honoring the pre-petition settlement debt, RSA c. 402-C fixes Intervenors' right to be paid that amount in full as of the filing of the petition to liquidate.

16. The Liquidator has also raised as affirmative defenses the claims that Intervenors are being treated equitably and as well as all "similarly situated" persons. Objection to Petition at 1 and 4-5. Intervenors doubt that there are any "similarly situated" persons, but, as part of pre-hearing discovery, have asked for evidence to support that defense. Intervenors are prepared to drop their request for pre-hearing discovery on this point if the Liquidator does not plan to rely on this affirmative defense at a hearing. Intervenors have also requested facts in pre-hearing discovery to support the defense that they are being treated "equitably." Again, if that affirmative defense is withdrawn, no discovery will be necessary. On both points, whether discovery is necessary is entirely within the Liquidator's control. Either way, it is worth noting that RSA 402-C:25(IX) allows the Liquidator to pay this settlement debt "upon such terms as are

fair and reasonable, subject to the express permission of the Court," and that the Liquidator is therefore correct that equitable principles should be applied to Intervenors' claim.

17. Intervenors assert that their request to be paid the $2.5 million settlement debt, far from being inconsistent with the provisions of RSA c. 402-C, is actually intended by that statute's requirement that pre-existing debts be fixed as of the date of the petition (RSA 402-C:21) and that the Liquidator deal with the property of the insurer "upon such terms as are fair and reasonable". To the extent the Liquidator's prior filings constitute a motion to dismiss for failure to state a claim under RSA c. 402-C, that motion should therefore be denied.

C. CONCLUSION

18. Intervenors have asked the Court to order the Liquidator to pay the $2.5 million settlement debt without further delay and outside the liquidation process. The facts on which the request is based are largely admitted – only the question of when the New Hampshire Department of Insurance first reviewed and approved the Settlement Termsheet remains open. It should not "create unnecessary burdens on the estate and the Liquidator" (Objection to Request for Hearing at 4) to answer this simple question. If the Liquidator refuses to provide that information, the Court may draw a negative inference that to do so would be unhelpful to the Liquidator's position and would support Intervenors' position. All other issues are matters of law which the parties can brief and argue and the Court alone can decide.

19. If the Liquidator plans to rely on factual defenses that he is treating Intervenors the same as all "similarly situated" persons or that he is acting equitably toward Intervenors, he should be required to produce limited pre-hearing discovery of facts related to those defenses. Whether those issues need to be explored is entirely within the Liquidator's control, and his desire to raise fact-based affirmative defenses should not be a ground to deny Intervenors an

early hearing on a debt that has been outstanding for nine (9) months and the full economic benefit of which was long ago obtained by the company being liquidated.

WHEREFORE, Intervenors respectfully pray that the Court will:

A. Set a date for a hearing on their request to be paid the $2.5 million settlement debt without further delay;

B. Deny the Liquidator's "Motion to Dismiss for failure to state a claim";

C. Deny the Liquidator's Motion to Stay Discovery and order the parties to exchange information relating to "approval by the New Hampshire Department of Insurance";

D. Require the Liquidator to declare whether he intends to rely on the affirmative defenses that Intervenors are being treated equitably and the same as "similarly situated" persons and, if so, to provide information relating to those defenses;

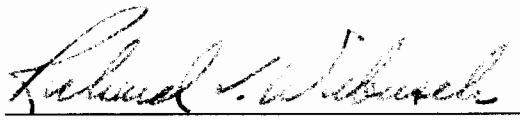
E. After hearing, order the Liquidator to pay the $2.5 million settlement debt without further delay; and

F. 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,



Dated: September 2, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2003, a true and correct copy of the foregoing Objection to Liquidator's Request That A Hearing Not Be Scheduled And To Liquidator's Motion To Stay Discovery was mailed to Peter C.L. Roth, Senior Assistant Attorney General, counsel for the Insurance Commissioner, and to all other counsel listed on the attached source list.

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