

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

2005 MAY 11 A 9:03

Docket No. 03-E-0106

In The Matter Of The Liquidation Of  
The Home Insurance Company

**BENJAMIN MOORE & CO.'S REPLY MEMORANDUM IN  
SUPPORT OF MOTION TO COMPEL  
INTERROGATORY RESPONSES AND PRODUCTION  
OF DOCUMENTS BY THE LIQUIDATOR**

Benjamin Moore & Co. (BMC"), through its undersigned counsel, submits this Reply Memorandum in support of its Motion to Compel dated April 8, 2005, and in reply to the Opposition Memorandum filed by the Liquidator dated April 20, 2005.

I. The Court Should Reject The Liquidator's Continuing Effort To Frustrate Discovery Of Information Bearing Directly Upon The Asserted Justifications For The Agreement.

1. By objecting to BMC's limited discovery requests, the Liquidator continues to prevent the parties and the Court from obtaining information essential to determining if the asserted justifications for the Agreement<sup>1</sup> are factually supportable, and if the assumptions underlying the Agreement are valid. The Liquidator's refusal to provide most of the information sought by BMC in discovery is premised on the flawed proposition—already rejected by this Court—that BMC does not have the same discovery rights as a party to adversary litigation. This is not the law of New Hampshire, nor is it consistent with the Court's prior rulings. In re Petition for Admission of Demars, 130 N.H. 21, 33 (1987) ("Once a party has been allowed to intervene as a party, he has all of the rights of a party in the case as it then exists and develops."); see also 4 R. Wiebusch, New Hampshire Practice, Civil Practice and Procedure, § 6.23 (2d. ed.). Having failed to object to BMC's intervention as a party, and having acknowledged that BMC

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<sup>1</sup> All references to "Agreement" are to the agreement before the Court for approval.

has standing to contest the Agreement at issue, the Liquidator has no basis for continuing his effort to restrict the discovery rights of BMC, beyond the normal limits imposed by the rules of civil procedure. As this Court stated in the Order on Remand, in upholding BMC's standing in this proceeding: "[T]he direct interests of . . . Benjamin Moore & Co. are interests that would be prejudiced *absent an opportunity to respond [to]* . . . the Liquidator's endorsement of the agreement as issue, about which [it has] raised various questions." Order on Remand (Oct. 8, 2004), p. 5 (emphasis added). The Court having already granted BMC the right to conduct discovery on certain issues, and having scheduled an evidentiary hearing to consider evidence offered by the parties on approval of the Agreement, there can be no doubt about BMC's right to use the normal discovery rules to find and develop evidence bearing upon the issues before the Court. Otherwise, its "opportunity to respond" to the Agreement and question its approval would indeed be hollow.

2. As a "party" to this proceeding for all purposes, BMC has the right to conduct discovery pursuant to New Hampshire's liberal discovery rules. N.H. Super. Ct. R. 35(b) (allowing "parties" to obtain discovery within the scope provided in the rule, "unless otherwise limited by order of the Court.") The Court has imposed no limits on the scope of discovery, only the issues that are the proper subject of discovery. Contrary to the Liquidator's suggestions, all of BMC's discovery requests are proper so long as they seek information that is reasonably calculated to lead to the discovery of admissible evidence concerning "the issues of the necessity, reasonableness, and fairness of the agreement." It is not a proper objection that the Liquidator does not think BMC's requests are directly "relevant" to these issues.

3. The issues of the necessity, reasonableness, and fairness of the Agreement are inherently broad because these are by definition elastic concepts, to be applied by the Court

sitting in equity. For example, on the question of necessity, the Liquidator has set forth in his Offer of Proof the reasons he concluded the Agreement was necessary, including: (i) that the liquidation estate would have no ability to recover indemnity payments under the INA Assumption Agreement without sharing some of that recovery with AFIA cedents, and (ii) that making the settlement agreement with the AFIA cedents permitted the Liquidator to avoid costly and complex litigation with the AFIA cedents and the ACE Companies. Liquidator's Offer of Proof, ¶¶75-80. These assertions raise numerous factual questions about any alternatives to the Agreement considered by the Liquidator, the validity of the assumption that AFIA cedents would file no claims absent the incentive provided by an approximately \$74 million payment to them, and the estimated expense of the litigation the Liquidator says is avoided by the Agreement, in comparison to the legal expense incurred in connection with the Agreement. The Liquidator responds uniformly to BMC's discovery requests aimed at these questions that they are irrelevant and impose undue burdens on the estate. BMC submits that if the Liquidator were confident in the wisdom and reasonableness of the AFIA Agreement, he would welcome the opportunity to so demonstrate by responding to BMC's targeted information requests.

4. The Liquidator's objection to providing information about Home's evaluation of the amount of AFIA cedent claims is illustrative of his skewed vision of the scope of permissible discovery. The Liquidator's discovery responses say that Home did some of its own evaluation of the gross ultimate value of AFIA cedent claims, a value that was also estimated by ACE-INA as of the end of 2002. But the Liquidator refuses to produce Home's evaluation. He does so because he says that this information is not responsive to BMC's request, and is not relevant. What BMC asked for in its Interrogatory No. 4 was information concerning any estimates made by Home of what indemnity or reinsurance it could recover on AFIA cedent claims. Since Home

claims to have full indemnity or reinsurance coverage with the ACE Companies, the value of AFIA cedent claims and the value of recoverable indemnity should be the same. The Liquidator has offered no legitimate justification for withholding this clearly discoverable information, which may bear directly upon the size of the pool of money the Liquidator has agreed to share with the AFIA cedents.<sup>2</sup> He should not be permitted to avoid his discovery obligations by mischaracterizing discoverable information as unresponsive, and making specious and unsupported claims of undue burden.<sup>3</sup>

5. Another example of the Liquidator's effort to avoid legitimate discovery requests by BMC is his refusal to provide information concerning other similar situations where he has agreed to commute reinsurance agreements *that cover Home's exposure as a reinsurer*.<sup>4</sup> BMC has requested at this time only that the Liquidator provide a listing of those insurers in this limited category that have agreed to commute their contracts, and the face amount of coverage commuted.<sup>5</sup> This information may shed light on the Liquidator's contention that the estate would have no hope of recovering indemnity from the ACE Companies absent payment of millions of dollars to AFIA cedents as an incentive for them to file claims against Home. In a related request (Interrogatory No. 8), BMC asked the Liquidator to list and produce for inspection proofs of claim filed by Class V claimants like the AFIA cedents, who have filed claims under contracts of reinsurance, excluding claims stating they are filed for offset purposes

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<sup>2</sup> In his Offer of Proof, the Liquidator makes statements about estimates of what may be recovered by the estate through the Agreement, which are based on outdated actuarial estimates of AFIA cedent claims now well more than two years old. Offer of Proof, ¶ 90 and Ex. 36. If the Liquidator has evaluated the 2002 estimates and has more up to date or more current information about AFIA cedent claims, there is no reason this information should not be available to creditors like BMC who have an interest in the matter.

<sup>3</sup> The Liquidator has never indicated why production of this information would be burdensome. On its face, the information would not appear to be extensive.

<sup>4</sup> The Liquidator mischaracterizes this request in his Opposition Memorandum as a request for all reinsurance commutations. Liquidator's Opposition, ¶ E. BMC has only requested information about instances where Home has commuted indemnity coverage for its exposure as a reinsurer, as is the case with respect to its AFIA exposure.

<sup>5</sup> This request is made in BMC Interrogatory No. 7.

only. This request seeks to determine if other Class V creditors, situated similarly to the AFIA cedents, have filed proofs of claim absent a large monetary incentive like the one the Liquidator proposes to give to the AFIA cedents. What could be more relevant to the Liquidator's contention that the AFIA cedents would not file claims absent the Agreement? The Liquidator refuses to even allow BMC to review these proofs of claim, on the basis that this would be an "open ended fishing expedition." To the contrary, this is precisely the kind of discovery that is essential to allow BMS to assess whether the Liquidator's asserted justifications for the Agreement are sound and based on credible facts and valid assumptions.

6. The Liquidator also refuses to provide basic information concerning the professional costs and expenses incurred by the estate to date to make the Agreement with AFIA cedents, and obtain court approval of its terms. BMC seeks this information because the Liquidator has posited that the Agreement allows the estate to avoid extensive litigation costs that would be inevitable absent the agreement.<sup>6</sup> It seems to BMC that the reasonableness of the Agreement with AFIA cedents should be assessed with reference to, among other things, the professional costs and expenses it has caused the estate to incur compared to the litigation costs the Liquidator says are avoided by the Agreement. There is no burden to the estate in providing this information. It is unmistakably one item of information the Court should have in assessing the reasonableness of the Agreement. It appears the only way this information will be available to the Court is if its production is ordered.

7. Finally, the epitome of the Liquidator's disregard of the estate's discovery obligations is his refusal to provide the names of all the person involved in consideration of

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<sup>6</sup> We do not know what these avoided litigation costs would be, however, as it does not appear that the Liquidator has ever estimated these costs, or even assessed the estate's likelihood of prevailing in the litigation over "cut-through" agreements and "ring-fencing" that the Liquidator has said would have occurred but for the settlement agreement with AFIA cedents. Liquidator's Offer of Proof, ¶ 45; Liquidator's Motion for Approval of Agreement (2/11/04), ¶¶7, 8.

alternatives to the Agreement, or preparation of any estimates of recovery under alternative scenarios.<sup>7</sup> The Liquidator has made his own arbitrary determination of the “principal persons” involved in that activity, and refuses to provide the names of others involved, on grounds that such other persons are “subordinates and counsel” to the principals involved. While the Liquidator may not think it “productive” for him to identify others involved, Liquidator’s Opposition (4/20/05), p. 3), that is not the standard for discoverability under New Hampshire law. And it is not sufficient for the Liquidator to point BMC to the listing of persons appended to the Liquidator’s privilege log, as this is not a listing of persons involved in consideration of alternatives to the Agreement, but a presumably much broader listing of persons with some connection to allegedly privileged documents. The Liquidator should provide the names of all persons, as they all may be witnesses with relevant information, and identification of such witnesses is a central purpose of discovery.

WHEREFORE, BMC respectfully requests that the Court enter an Order:

- A. Requiring the Liquidator to respond fully and completely to BMC Interrogatories No. 3, 4, 5, 7, and 8; and
- B. Requiring the Liquidator to produce documents responsive to BMC Request to Produce Nos. 2 and 3, either by providing copies thereof or allowing BMC to inspect and copy originals; and
- C. Granting such other and further relief as the Court deems just and proper, including, but not limited to, fees and costs incurred by BMC in filing and prosecuting this Motion.

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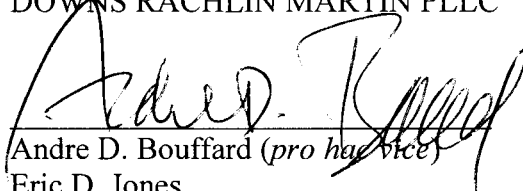
<sup>7</sup> This request is made in BMC Interrogatory No. 3.

May 10, 2005

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day 10<sup>th</sup> of May, 2005, a copy of Benjamin Moore & Co.'s Reply Memorandum in Support of Motion To Compel Interrogatory Responses And Production Of Documents By The Liquidator was served by first class mail, postage prepaid to the following:

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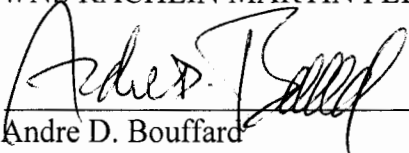


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May 10, 2005

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