THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

ACE COMPANIES' CONSOLIDATED REPLY ON (1) MOTION FOR ORDER COMPELLING PRODUCTION, OR *IN CAMERA* REVIEW, OF DOCUMENTS AND INFORMATION WITHHELD BY LIQUIDATOR AND JOINT PROVISIONAL LIQUIDATOR; AND (2) MOTION TO STRIKE AFFIDAVIT AND VERIFICATION OF RHYDIAN WILLIAMS

Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, the "ACE Companies"), by their attorneys, Orr & Reno P.A., respectfully submit this consolidated reply in further support of their Motion for Order Compelling Production, or *In Camera* Review, of Documents and Information Withheld by Liquidator and Joint Provisional Liquidator ("Motion to Compel") and Motion to Strike Affidavit and Verification of Rhydian Williams ("Motion to Strike").[1] In support of the consolidated reply, the ACE Companies respectfully state as follows:

Introduction

1. Appendix 4 to the ACE Companies' motion to compel lists 359 documents. The Liquidator and the JPL, however, did not produce <u>any</u> of those documents in response to the discovery orders entered by the Court at the May 12, 2005 hearing (the "May 12 Orders").

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[1] Although the Liquidator submitted an opposition to the Motion to Compel, the Joint Provisional Liquidator ("JPL") did not. Accordingly, the Court should find that the portion of the Motion to Compel directed to the JPL is unopposed. It should also be noted that Equitas, Ltd. ("Equitas") did not submit an opposition to the Motion to Strike.

2. Because it is clear that the Liquidator and the JPL are taking an overly narrow view of the May 12 Orders, the ACE Companies filed the Motion to Compel and pointed out that the Court had provided express guidance to the parties on what documents should be produced. In his opposition, the Liquidator ignores the Court's guidance and fails to justify his continued refusal to produce a single document from Appendix 4.

3. The ACE Companies respectfully submit that the Court should not simply accept the Liquidator's claim that there are no grounds for producing any of the documents in Appendix 4. The recent ruling by the Referee that the Liquidator improperly withheld many documents on privilege grounds — as well as the fact that the Liquidator has made several piecemeal productions of documents that were originally on the privilege logs — demonstrate that the Liquidator is determined to avoid his discovery obligations. Under the circumstances, the Court should order the Liquidator to produce all the documents in Appendix 4 or, at a minimum, should order an *in camera* review of those documents.

4. The Court should further hold that Equitas must comply with the May 12 Orders by producing additional documents immediately and, if Equitas fails to do so, the Court should strike the Williams Affidavit and the portions of the Offer of Proof that Mr. Williams verified.

5. As discussed below, Equitas still has not produced any documents regarding the legal advice it received on the alternatives to the Proposed Agreement nor any documents relating to internal discussions of the same issues. It also has not produced any documents on its internal discussions of offset or its communications with other AFIA Cedents. Equitas has produced only two documents that even mention offset, and they appear to be documents relating to external discussions. Under the circumstances of this case and the complex issues it raises, Equitas must have additional documents that are being withheld. If they are not produced in

advance of the Williams deposition, the Court should follow through with its prior order and strike the Williams Affidavit (along with the enumerated paragraphs in the Offer of Proof).

Argument

I. The Court Should Grant The Motion To Compel

A. The Court Should Order The Production, Or *In Camera* Review, Of The Documents In Appendix 4

6. In his opposition, the Liquidator states (without elaboration) that none of the documents in Appendix 4 were "relied upon" in developing the affidavits submitted to the Court. (May 31 Opp'n at ¶ 9.) The Liquidator, however, does not explain how he determined that the documents in Appendix 4 may still be withheld from production in light of the Court's orders. It is apparent — from the statements in the opposition and the description in the privilege logs — that the Liquidator has taken an overly restrictive view of the May 12 Orders by using a narrow definition of the words "relied upon."

7. The Liquidator asserts that the "bulk" of Appendix 4 documents concern the negotiation over the terms of the Proposed Agreement, whereas the affidavits "principally concern the communications with the AFIA Cedents that led the Liquidator and Joint Provisional Liquidators to conclude that an agreement with the AFIA Cedents was necessary." (*Id.* at ¶ 10.) There are several flaws in the Liquidator's argument.

8. First, the Offer of Proof alleges that the first draft of the Proposed Agreement was not circulated until November 10, 2003. (*See* Offer of Proof, Ex. 1 annexed hereto, at ¶ 50.) Contrary to the Liquidator's assertion that the "bulk" of the documents in Appendix 4 relate to the negotiation of the terms of the Proposed Agreement, nearly a hundred of the documents are dated on or before November 10, 2003. (*See* Ex. 4 to Motion to Compel, item nos. 33(1), 33(2), 33(3), 34(1), 34(2), 36(1), 36(2), 38(2), 38(3), 42, 48, 62, 65, 71(1), 71(2), 71(3), 71(4), 76(1),

77(1), 77(2), 78(1), 78(2), 79, 144, 165(1), 165(2), 165(3), 170(1), 170(2), 235(1), 235(2), 237(2), 245(1), 245(2), 245(3), 252(3), 254(1), 254(2), 254(3), 255(2), 255(3), 255(4), 256(2), 256(3), 257(2), 259, 260, 273(1), 273(2), 273(3), 273(4), 286(1), 286(2), 286(3), 319(1), 319(2), 319(3), 319(4), 319(5), 323(1), 323(2), 323(3), 323(4), 324(2), 324(3), 324(4), 325(1), 325(2), 325(3), 326(1), 326(2), 328, 329, 330, 332, 333, 334(1), 334(2), 335(1), 335(2), 336(1), 336(2), 336(3), 337(3), 337(4), 340(2), 341(2), 343(1), 343(2), 344, 346, 352(1), 352(2), 353, 354 and 359). Those documents, therefore, must relate to the communications with the AFIA Cedents that allegedly led to the Proposed Agreement.

9. Second, the Liquidator suggests in his opposition that there were no communications with the AFIA Cedents in November 2003 and thereafter on the topics of cut throughs, ring-fencing and whether the AFIA Cedents would be filing Proofs of Claim. (May 31 Opp'n at ¶ 10.) In the Offer of Proof, however, the Liquidator broadly refers to discussions "during the fall of 2003" in which the AFIA Cedents allegedly stated that they would not file claims. (Ex. 1 at ¶ 38; *see also* March 26, 2004 Affidavit of Jonathan Rosen, annexed hereto as Ex. 2 at ¶ 6.) There is no evidence that the communications with AFIA Cedents after November 10, 2003 only related to the negotiation of the terms of the Proposed Agreement.

10. Third, the Court has already held that documents pertaining to the negotiations with AFIA Cedents are relevant and should be produced. In the "Guidance re: Scope of Discovery," the Court stated that documents on the reasons for "reaching and/or approving" the Proposed Agreement must be produced. (Ex. 2 to Motion to Compel at 1.)

11. In sum, it is apparent that — as the ACE Companies feared — the Liquidator construed the May 12 Orders as only requiring the production of documents that the affiants reviewed in connection with the drafting of the affidavits. Such a reading is contrary to the letter

and the spirit of the May 12 Orders, as detailed in the Motion to Compel. It is also undermined by Rule 612 of the New Hampshire Rules of Evidence, which the Liquidator cited in his opposition. As the Liquidator points out, the reporter's notes for Rule 612 state that the rule requires the production of "those writings which may be fairly said to have an impact upon the testimony of the witness." (May 31 Opp'n at ¶ 8.) Here, any communication with the AFIA Cedents on the alleged motive for the Proposed Agreement and its negotiation must have had an impact on the affidavits submitted by the Liquidator.[2]

12. Rather than addressing the issues raised in the Motion to Compel, the Liquidator seeks to divert the Court's attention by arguing at length that the ACE Companies are putting forth a "relevance" standard that the Court rejected. (*See* May 31 Opp'n at ¶¶ 2-6.) However, in the Motion to Compel the ACE Companies merely recited the contents of the JPL Order and the "Guidance Re: Scope of Discovery," in which the Court held that documents must be produced if they relate to "the rationales of the JPL and Liquidator in reaching and/or approving" the Proposed Agreement. (*See* Exs. 1 and 2 to Motion to Compel.) The subsequent order regarding the production of documents from Appendix 4 did not in any way reduce the scope of the earlier orders, which mandated a broad reading of the words "relied upon." The Liquidator has chosen to substitute his own interpretation of "relied upon" in order to avoid producing documents.[3]

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[2] The foregoing discussion assumes, for the sake of argument, that Rule 612 is even applicable here. The Liquidator does not explain why an evidentiary rule like Rule 612 should govern this pre-trial discovery dispute. Moreover, Rule 612 applies to documents that were used to refresh the recollection of the witness and there has been no testimony in this proceeding that there was a need for any such refreshing of the affiants' recollections. To the contrary, the point is that the documents in Appendix 4 must have informed the allegations by Mr. Hughes and others that they believed the AFIA Cedents would not file claims in the absence of the Proposed Agreement.

[3] In the alternative, the ACE Companies respectfully request that the Court enforce the JPL Order and "Guidance Re: Scope of Discovery," without any reference to what the affiants "relied upon" in developing their affidavits, because the Liquidator has shown that he will not interpret the "relied upon" standard in accordance with the May 12 Orders.

B. The Liquidator Has Put The Legal Advice On Cut Throughs And Ring Fencing "At Issue" In This Proceeding

13. The Liquidator argues that the "at issue" doctrine does not apply to this case because the legal advice on cut throughs and ring fencing has not been "injected into this matter." (May 31 Opp'n at ¶¶ 14-15.) There is no support for the Liquidator's contention.

14. With respect to cut throughs, Mr. Bengelsdorf stated in his affidavit that Home's legal challenge to such agreements "might not be fully effective.' (Ex. 6 to Motion to Compel at ¶ 8.) When Mr. Bengelsdorf was asked about this issue at his deposition, he admitted that the Liquidator had received an opinion from counsel on the legality of cut throughs. (*See* Ex. 8 to Motion to Compel at 26-28.) The Liquidator, however, has not produced any advice on the legality of cut throughs and he edited portions of Mr. Bengelsdorf's contemporaneous notes on the issue. The Liquidator cannot claim that the legal advice he received on cut throughs affected his decision to enter into the Proposed Agreement and then, at the same time, refuse to produce that advice on the grounds of privilege.[4]

15. The same is true for any legal advice or analysis on ring fencing. Although the Liquidator is now trying to back away from ring fencing by omitting it from the Offer of Proof and claiming that it is only a "subsidiary matter" (May 31 Opp'n at ¶ 15), he cannot deny that it figured prominently in the motion for approval of the Proposed Agreement and the supporting affidavits. (*See, e.g.*, Ex. 6 at ¶ 8.) The Liquidator even submitted an affidavit in April 2004 from Robin Knowles QC stating that litigation over the ring fencing issue would be expensive.

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[4] In the Offer of Proof, the Liquidator also suggests that the ACE Companies had an opinion on the legality of cut throughs under U.S. law. (*See* Ex. 1 hereto at ¶ 33.) The reasonableness of the Liquidator's reliance on the alleged opinion would be fatally undercut if he had an opinion from his own counsel stating that cut throughs are not permissible under U.S. law.

(*See* Ex. 3 annexed hereto at ¶¶ 11, 12.)[5] If the Liquidator has a legal opinion that is similar to the Note of Advice annexed as Exhibit 7 to the Motion to Compel (in which Mr. Knowles concludes that ring fencing posed no threat) or if the Liquidator did not receive any legal opinion contrary to the advice from Mr. Knowles, the ACE Companies are entitled to any documents or information on these points in order to rebut the Liquidator's allegation that the time and expense associated with litigation the ring fencing issue was another motivation for the Proposed Agreement.

16. Thus, the legal advice that the Liquidator received on cut throughs and ring fencing has been injected into this proceeding and the "at issue" waiver doctrine applies.

II. Equitas Should Be Required To Produce All Documents Under The May 12 Orders And, If It Refuses, The Williams Affidavit And Verification Should Be Stricken

17. Despite the Liquidator's claims that Equitas complied with the May 12 Orders (May 27 Opp'n at ¶ 2), it is apparent that Equitas has not produced all documents reflecting legal advice on the alternatives to the Proposed Agreement considered by Equitas or Equitas' legal internal evaluation of those alternatives, all external or internal Equitas documents regarding offset rights, and all documents reflecting Equitas' communications with other AFIA Cedents.

18. The sum total of the supplemental production by Equitas consist of a one-page "Draft Counter Proposal," several pages of largely indecipherable notes that apparently reflect Equitas' attendance at meetings of the Informal Creditors' Committee, and an unidentified e-mail to Jonathan Rosen dated August 5, 2003 regarding "off-set scenario's" and "commercial scenario's" [sic]. It strains credulity to believe that an operation as sophisticated as Equitas did not receive any written legal advice on its alternatives to the Proposed Agreement, did not

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[5] Mr. Bengelsdorf similarly maintained in his affidavit that the ring fencing issue could lead to "costly and time-consuming litigation." (Ex. 6 at ¶ 8.)

discuss those options internally in writing, did not have internal or external written discussions (beyond the August 5, 2003 e-mail) on the issue of offset, and did not have any written communications with other AFIA Cedents.[6]

19. Indeed, in the Williams Affidavit, Mr. Williams states that Equitas had "actively considered what alternatives may be available to it." (Ex. 5 annexed hereto at ¶ 12.) Mr. Williams goes on to list the alternatives, each of which involved fairly complex legal issues. (*Id.*) It is inconceivable that Mr. Williams and Equitas could have considered those alternatives "actively" without legal advice or extensive discussion.

20. It may be that Equitas, like the Liquidator, is attempting to take a narrow view of what Mr. Williams "relied upon" in his affidavit. The Court, however, was clear at the May 12 hearing on the breadth of the order regarding the production from Equitas:

> THE COURT: Well, he said in his affidavit that he considered alternatives. If he relied on any documents in that, then they are to be produced. ...
>
> ...
>
> MR. GORDON: So, if Equitas got legal advice on one of these alternatives, and it's in a document, I take it, your Honor is not suggesting that we have to turn over that legal advice, merely because Mr. Williams said that he considered an alternative.
>
> THE COURT: Yes, I am suggesting that.
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> MR. GORDON: That that would have to be turned over?
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> THE COURT: Yes. Any documents that he relied on in saying he considered alternatives and rejected alternatives, presumably.

(Ex. 6 annexed hereto at 20.)

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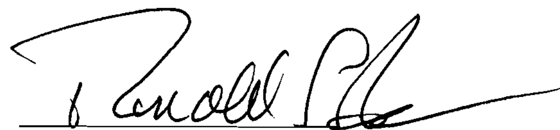
[6] The ACE Companies' insistence on full production is not just a fishing expedition. The "Draft Counter Proposal" referred to above is highly relevant and in it the author states: "Cedents are likely to present claims to optimise offset, regardless of any proposal to share in proceeds from Ace — this would allow Home the opportunity to effect some recoveries from Ace regardless of this proposal." (Ex. 4 annexed hereto.)

21. Finally, the Court should reject the Liquidator's position that the ACE Companies must take Mr. Williams' deposition first in order to inquire whether Equitas has produced all the documents ordered by the Court. The ACE Companies are entitled to have, prior to the Williams deposition, all relevant documents and will seek costs from the appropriate parties if they are forced to depose Mr. Williams a second time. Also, it would be a waste of all the parties' time and resources to depose Mr. Williams if it turns out that his affidavit will be stricken. The Court was clear in its order: if the documents are not produced by Equitas, the Williams Affidavit will be stricken. Accordingly, Equitas should be ordered to comply with the May 12 Orders immediately and, if the documents are not produced in advance of the Williams deposition, his affidavit and verification of the Offer of Proof should be stricken.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing pleading has been served on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on June 1, 2005:

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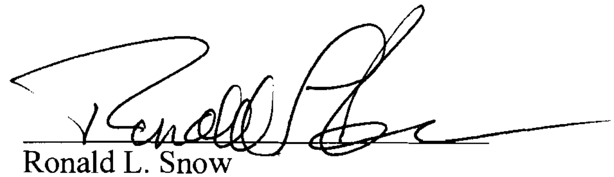

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