Lisa Snow Wade
lwade@orr-reno.com
Direct Dial 603.223.9150
Direct Fax 603.223.9050

Orr&Reno
Professional Association
One Eagle Square, P.O. Box 3550
Concord, NH 03302-3550
Telephone 603.224.2381
Facsimile 603.224.2318
www.orr-reno.com

May 30, 2008

VIA HAND DELIVERY

William McGraw, Clerk
Merrimack County Superior Court
163 North Main Street
Concord, NH 03301

Re: In the Matter of the Liquidation of The Home Insurance Company
Docket No. 03-E-0106

Dear Clerk McGraw:

Enclosed for filing please find Reply Memorandum of Law of Century Indemnity Company in Further Support of Motion to Lift Stay and to Compel Arbitration relative to the above captioned matter.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Lisa Snow Wade

LSW:kjc
enclosure
cc: Service List

462547_1.DOC

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

REPLY MEMORANDUM OF LAW OF CENTURY INDEMNITY COMPANY IN FURTHER SUPPORT OF MOTION TO LIFT STAY AND TO COMPEL ARBITRATION

Century Indemnity Company ("CIC"), by its attorneys, Morrison & Foerster LLP and Orr & Reno, P.A., respectfully submits this memorandum of law in reply to the Liquidator's Objection and Memorandum in Opposition to CIC's Motion to Lift Stay and to Compel Arbitration (the "Objection") and in further support of CIC's motion.

I. SUMMARY OF ARGUMENT

More than 20 years ago, Home[1] and CIC agreed to arbitrate any dispute arising under the Insurance and Reinsurance Agreement. In his Objection, the Liquidator barely acknowledges this agreement, preferring instead to insist that CIC lost its opportunity to arbitrate Home's breach of the duty of utmost good faith four years ago, when the Liquidator sought approval of the AFIA Agreement – an agreement to which CIC is manifestly not a party – under New Hampshire's liquidation statute (the "AFIA Litigation"). The Liquidator is wrong, however, because CIC not only affirmatively reserved its right to assert a claim for breach of the Insurance and Reinsurance Agreement, but also was barred from raising Home's breach of the duty of utmost good faith in the AFIA Litigation.

[1] Capitalized terms have the same meaning as in the Memorandum of Law of Century Indemnity Company Supporting Motion to Lift Stay and to Compel Arbitration ("CIC's Memorandum").

In responding to CIC's motion, the Objection improperly conflates the various issues presented. First, while the Liquidator agrees with CIC that the Stay Order may be lifted on a showing of "good cause" (Objection at 16-17), he altogether ignores the showing in CIC's Memorandum that CIC met that standard. Instead, the Liquidator puts the cart before the horse when he argues that CIC's claim is barred by res judicata, collateral estoppel or laches. These purported defenses do not inform whether CIC has shown "good cause" to lift the Stay Order. The U.S. Supreme Court has determined that the effect, if any, of res judicata, collateral estoppel or laches on CIC's claim against Home is properly for the arbitration panel to decide, not a court. In any event, CIC will demonstrate below that the purported defenses are without merit.

Second, the Objection's public policy argument confuses the two "hats" any liquidator wears. First and foremost, the Liquidator has a special role under the Insurers Rehabilitation and Liquidation Act, RSA 402-C (the "Liquidation Statute") to collect and preserve the assets of Home's estate for the benefit of creditors. But the Liquidator also takes on Home's contractual rights and obligations, including Home's position as the cedent under the Insurance and Reinsurance Agreement, where he enjoys no special rights and is owed no deference in connection with CIC's claim that Home breached the contractual duty of utmost good faith.

Third, the Liquidator misreads the Liquidation Statute when he claims that CIC's attempt to lift the Stay Order violates RSA 402-C:36 and is contrary to the policy underlying the Liquidation Statute to protect the preferred creditors of Home. As CIC demonstrated in its motion, lifting the stay to permit CIC to arbitrate its defense to Home's claims does not undermine the stay's purpose, and nothing in RSA 402-C authorizes an insolvent insurer to breach contracts with impunity, even if the breach results in benefit to the estate's creditors.

Fourth, the Liquidator ignores the New Hampshire Arbitration Act (RSA 542:1), the FAA (9 U.S.C. § 1 *et seq.*) and the public policy of New Hampshire when he urges this Court to refuse to compel arbitration of CIC's claim that Home breached the duty of utmost good faith. The great weight of authority nationwide is to require liquidators to honor agreements to arbitrate. Only two states – New York and Ohio – refuse to enforce valid arbitration agreements against insolvent insurers, while each of New Jersey, Montana, California, Kentucky, Nebraska, Pennsylvania, Vermont, Connecticut, Florida, Oklahoma and Wisconsin has required liquidators to arbitrate.

CIC has fully performed its obligations under the Insurance and Reinsurance Agreement. It now seeks to defend against the Liquidator's demands for payment under that agreement to the extent that its liability arises out of Home's breach of the duty of utmost good faith. This claim is no different from the defensive claims that liquidation courts have regularly permitted to proceed to arbitration. CIC has demonstrated that lifting the Stay Order is warranted and that, once the stay is lifted, arbitration is the appropriate forum for this dispute.

II. ARGUMENT

A. Lifting the Stay Order Is Warranted

The Liquidator does not dispute that this Court has the power to lift the Stay Order and agrees with CIC that the correct standard for this application is "good cause." He argues that three factors should be evaluated in deciding whether to lift the stay order – the merits, the balance of harms and the public interest. (Objection at 18). Each of these considerations militates in favor of modifying the Stay Order to permit CIC to pursue its defensive claims against Home. These factors also confirm that CIC has demonstrated in its motion the requisite good cause to lift the stay, in that CIC will otherwise be barred from litigating its contractual defenses to Home's multi-million dollar claim against it.

1. **The merits of CIC's claim favor lifting the stay.**

The duty of utmost good faith is the bedrock of the reinsurance relationship. *Mich. Nat'l Bank-Oakland v. Am. Centennial Ins. Co.*, 674 N.E.2d 313, 319 (N.Y. 1996). According to Black's Law Dictionary (6th ed. 1990), utmost good faith (or "*uberrima fides*") means "the most abundant good faith; absolute and perfect candor…; the absence of any concealment or deception, however slight." The Second Circuit has held that "the duty of [utmost] good faith requires the ceding insurer to place the reinsurer 'in the same situation as himself'…." *Unigard Sec. Ins. Co. v. North River Ins. Co.*, 4 F.3d 1049, 1066, 1069 (2d Cir. 1993) (citations omitted). "Although it has been said that the relationship between a reinsured and its reinsurer is not technically a fiduciary one…centuries of history have treated both as allies rather than as adversaries" (*Cont'l Cas. Co. v. Stronghold Ins. Co.*, 77 F.3d 16, 21-22 (2d Cir. 1996); indeed, "it is hard to see any principled distinction between" utmost good faith and a fiduciary duty (*Compagnie de Reassurance d'Ile de France v. New Eng. Reinsurance Corp.*, 944 F. Supp. 986, 995-96 (D. Mass. 1996)). Utmost good faith contracts have been described as "so delicate in character and so susceptible of abuse that unusual precautions must be observed by both parties in their implementation." Henry T. Kramer, *The Nature of Reinsurance*, in REINSURANCE 1. 9 (Robert W. Strain ed., 1980).

In light of this standard, the merits of CIC's claim are clear: CIC alleges that Home breached its duty of utmost good faith to CIC when it agreed to pay the AFIA cedents to file claims against Home – claims that will ultimately be borne by CIC. Since the Liquidator seeks to recover millions of dollars from CIC under the Insurance and Reinsurance Agreement, CIC is entitled to defend itself by demonstrating that Home's breach of the duty of utmost good faith relieves CIC of its obligation to pay.

The Liquidator, however, fails to address CIC's claim at all. Instead, he erroneously insists that claim or issue preclusion in the AFIA Litigation, or even the mere passage of time, defeats CIC's request that the Stay Order be lifted. The Liquidator's argument misses the mark. First, as CIC will demonstrate, arbitration, not this Court, is the proper forum to resolve issues of res judicata, collateral estoppel and laches. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *see* discussion, *infra*, at 12-14. Second, even if this Court were to evaluate these issues, none of them is applicable here. While CIC does not dispute that the AFIA Litigation settled the issue of whether the Liquidator was authorized under RSA 402-C to enter into the AFIA Agreement, Home's breach of its duty of utmost good faith in relation to the Insurance and Reinsurance Agreement, which must be resolved in an arbitral forum, was neither at issue nor decided there. *See* discussion, *infra*, at 14-26. Third, laches only applies where there has been delay *and* prejudice. The only party that will be prejudiced if the Stay Order is not modified is CIC, which will then be unable to defend itself against millions of dollars of claims that arose only because Home breached the Insurance and Reinsurance Agreement. As in *Glogower v. Miller*, Nos. 2000-CA-002971-MR, 001576-MR, 2002 Ky. App. LEXIS 2338, at *16-17 (Ky.Ct.App. Dec. 20, 2002), "it must be remembered that the conditions were brought about by the conduct of the [Liquidator]...and any...losses which might result to the [creditors]...is indeed meager in comparison to the loss and inequity which would be suffered by" CIC.

CIC has amply demonstrated "good cause" to lift the Stay Order. Only if the stay is lifted can the critical issue of Home's breach of the Insurance and Reinsurance Agreement and its effect on CIC's obligations under that contract be resolved.[2]

---

[2] The litigation stay in this very case has already been lifted, to the extent that plaintiffs challenging the constitutionality of certain provisions of the Liquidation Statute were permitted to commence and prosecute their claim against the Liquidator after the entry of the Stay Order, in both this court and the New Hampshire federal

2. The "balance of harms" weighs in favor of lifting the Stay Order and permitting CIC's breach of contract claim to proceed.

The Liquidator has failed to demonstrate that lifting the stay would harm Home's estate. First, "harm" cannot be presumed simply because the Liquidator is required to arbitrate CIC's defenses. Second, the issue of Home's breach of the duty of utmost good faith was not addressed in the AFIA Litigation. CIC expressly reserved its right to raise contractual claims at a later time (*see, e.g.*, Protocol (CIC Ex. D[3]), ¶ 7.2; *see also* discussion, *infra*, at 18-20; 29-31), and arbitration is the *only* place where these claims can be resolved. Third, lifting the stay would not amount to a "windfall" for CIC: the Liquidator confuses the relief that CIC seeks here – lifting the Stay Order – with the possible relief available in the arbitration. The "windfall" argument is thus properly saved for the arbitrators,[4] who will not only determine whether Home breached the duty of utmost good faith, but also must "interpret [the Insurance and Reinsurance Agreement] as an honorable engagement and not merely as a legal obligation." (CIC Ex. A, ¶ 7).

3. The "public interest" is not implicated in this contract dispute.

The dispute between CIC and Home arises exclusively from Home's breach of the duty of utmost good faith and, under the provisions of the Insurance and Reinsurance Agreement, "any dispute" between the parties regarding the "interpretation [of the agreement] or their rights under it ... shall be submitted to arbitration." (CIC Ex. A, ¶ 7). In the Objection, however, the Liquidator relies on the additional powers accorded him under the Liquidation Statute to argue that he is immune to a claim that entering into the AFIA Agreement was a breach of the duty of utmost good faith so long as it was within his statutory authority. This argument fails because

---

district court. Like the plaintiffs in those actions, CIC is also entitled to raise appropriate defenses to the Liquidator's claims against CIC and the Stay Order should thus be lifted.

[3] "CIC Ex. __" refers to the exhibits submitted with CIC's motion.

[4] To the extent that the Liquidator claims that the issue of "windfall" has already been determined in the AFIA Litigation, that collateral estoppel argument is also properly addressed by the arbitrators. See, *infra*, at 23-26.

the authority accorded the Liquidator *under the Liquidation Statute* has nothing to do with Home's contractual obligations *under the Insurance and Reinsurance Agreement.*

When a statutory liquidator is involved in a dispute, the nature of the dispute determines what rights and obligations inhere to the liquidator. Where, as here, the dispute involves a contract, courts have firmly rejected the notion that liquidators should be afforded more rights than other litigants because of statutory authority granted to them under RSA 402-C and similar statutes. *Ario v. Am. Patriot Ins. Agency, Inc.*, No. 05-C-1049, 2007 WL 2743204, at *4, (N.D. Ill. Sept. 7, 2007) (the "'Liquidator has no greater rights under [a] contract than the insurer and would be subject to any defenses that may be asserted against the insurer by the other party to the contract'"). *See also Erricola v. Gaudette*, 241 B.R. 491, 497 (Bankr. D.N.H. 1999) ("The trustee stands in the shoes of the debtor and...is subject to the same defenses as could have been asserted by the defendant had the action been brought by the debtor.").

Thus, when a liquidator's rights are derived from the insolvent insurer's contract, all of the contract's terms – including the arbitration clause – govern, just as they would if the insurer was not in liquidation. Since the Liquidator has stepped into Home's shoes with respect to the Insurance and Reinsurance Agreement, Home's – and consequently the Liquidator's – rights and obligations under the agreement remain unchanged. As in *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 972 (9th Cir.1992):

> Because this dispute is in essence a contractual one, it should be arbitrated. And because the liquidator, who stands in the shoes of the insolvent insurer, is attempting to enforce Glacier's contractual rights, she is bound by Glacier's preinsolvency agreements.

The clear distinction between a liquidator acting in his statutory capacity and one acting as a party to a contract underlies the decision in the *Glogower* case. There, the liquidator of an insolvent insurance company sought payment of a debt, arguing that the debtor in question was

not entitled to the defense of setoff because of the rights granted to the liquidator under Kentucky's Insurer's Rehabilitation and Liquidation Act. The *Glogower* court noted "a running theme through the Liquidator's brief...that...the Liquidator should be treated differently from any other litigant because of [his] statutory authority...," but rejected the argument that this statutory authority preempts contractual defenses:

> [W]hen the Liquidator is acting as a plaintiff seeking to recover money owed to an insolvent insurer..., she stands in the shoes of the insolvent insurer and has the same rights and obligations, and is subject to the same defenses as the insolvent insurer....[T]he Liquidator's enhanced powers only come into effect when the case involves the distribution of the insurer's assets to creditors.

Glowgower, 2002 Ky. App. Lexis 2338, at *17-18. *See also Reider v. Arthur Andersen, LLP*, 784 A.2d 464, 467 (Conn. Super. Ct. 2001) (liquidator possesses no greater rights than the insolvent insurance company); *TIG Specialty Ins. Co. v. Koken*, 855 A.2d 900, 916 (Pa. Commw. Ct.), *aff'd*, 890 A.2d 1045 (Pa. 2004) (same); *Tex. Commerce Bank v. Garamendi*, 34 Cal. Rptr. 2d 155, 162 (Cal. Ct. App. 1994) (same); *In re All-Star Ins. Corp.* 332 N.W.2d 828, 831 (Wis. Ct. App. 1983) ("the liquidator stands in the shoes of the insurance company and is bound by its contracts"); *Okla. Prop. Cas. Guarantee Ass'n v. Tipton*, 807 P.2d 299, 301 (Okla. Civ. App. 1990) ("Fund stepped into the shoes of the insolvent insurer, Mission, and we hold that Fund is therefore bound by agreements entered by Mission..."); *Costle v. Fremont Indem. Co.*, 839 F. Supp. 265, 272 (D. Vt. 1993) (liquidator who "seeks to enforce contractual provisions requiring the payment of reinsurance proceeds...stands in the shoes" of the insolvent insurer).

Because the dispute here arises from Home's breach of the Insurance and Reinsurance Agreement and the Liquidator "stands in the shoes" of Home, he has no greater rights than Home and cannot appeal to the "public policy" underlying the Liquidation Statute to defeat CIC's request that the Stay Order be lifted.

(a) CIC's claim does not violate RSA 402-C:36.

Nor, as the Liquidator suggests (Objection at 25-28), does CIC's request that the Stay Order be lifted violate RSA 402-C:36 or "frustrate the legislative purpose of obtaining full payment from reinsurers despite an insurer's insolvency," *In the Matter of the Liquidation of The Home Ins. Co.*, 154 N.H. 472, 488 (2006). Indeed, the "amount recoverable by the liquidator from" CIC, Home's reinsurer, will not be "reduced as a result of delinquency proceedings," even if (i) the stay is lifted, (ii) CIC's breach of contract claim is arbitrated, and (iii) the arbitrators find that Home breached the duty of utmost good faith by entering into the AFIA Agreement. Instead, the "amount recoverable" will be "reduced" because the Liquidator breached Home's contract with CIC. Thus, the Liquidator's argument that lifting the Stay Order runs afoul of the Liquidation Statute fails.

(b) CIC's claim does not breach CIC's obligations under the insolvency clause of the Insurance and Reinsurance Agreement.

The Liquidator's further suggestion that the insolvency clause in the Insurance and Reinsurance Agreement somehow forecloses CIC's claim against Home is a red herring. As the Objection correctly notes, the insolvency clause states that reinsurance due under the Insurance and Reinsurance Agreement "shall be payable...on the basis of the liability of [Home] without diminution because of the insolvency of [Home]" (CIC Ex. A, ¶ 6). It does not, however, mandate payment of amounts that were incurred by Home solely as a result of breach of the duty of utmost good faith. The insolvency clause was not intended to, and does not, override Home's contractual obligations to CIC.

For obvious reasons, no court would countenance a wholesale deprivation of rights to a party to a contract. Thus, it is unsurprising that none of the cases cited by the Liquidator supports his position that CIC is obligated to pay, regardless of available contractual defenses.

Skandia Am. Reinsurance Corp. v. Schenck, 441 F. Supp. 715 (S.D.N.Y. 1977), involved the attempt of the New Jersey guaranty association to compel the reinsurer to pay reinsurance proceeds to the association, rather than to the insolvent insurer – an attempt that quite obviously failed. In *Ainsworth v. Gen. Reinsurance Corp.*, 751 F.2d 962 (8th Cir. 1985), the court rejected the reinsurer's attempt to reduce the amount it owed by settling with the claimants of the insolvent insurer directly. *In re Midland Ins. Co.*, 590 N.E.2d 1186 (N.Y. 1992), involved a dispute about setoff, and *First Am. Ins. Co. v. Commonwealth Gen. Ins. Co.*, 954 S.W.2d 460 (Mo. Ct. App. 1997), is inapposite because the party claiming the reinsurance was solvent.

(c) Refusing to modify the Stay Order does not further the public interest.

The Liquidator is also wrong when he argues that the mere assertion that Home has breached the duty of utmost good faith "contravenes public policy." The duty of the Liquidator to marshal assets for the estate does not permit him to breach a contract with impunity, merely because the result would be more money for the preferred creditors. Here, CIC's obligation to pay the claims submitted under the AFIA Agreement arose solely because the Liquidator, although acting within the boundaries of his statutory authority, breached Home's contract with CIC. Simply stated, stripping CIC of its contractual rights for the benefit of the estate does not further the public interest.

Nor would CIC reap a "windfall" if it is permitted to proceed to arbitration on its claim that Home breached its duty of utmost good faith. Webster's dictionary defines a "windfall" as an "unexpected piece of good luck." Holding Home accountable for its disregard of its contractual obligations does not result in a "windfall" for CIC, as a breach of contract can scarcely be deemed to be a "piece of good luck," unexpected or otherwise. The "windfall" argument was rejected by the court in *Mid-South Title Ins. Corp. v. Resolution Trust Corp.*, 840

F. Supp. 522 (W.D. Tenn. 1993),[5] which looked instead to the language of the title insurance policy at issue to determine whether payment was due. The *Mid-South Title* court held that, like here, "[t]here is no profit in this case, much less a windfall profit. The issue is who must suffer the loss." *Id.* at 528. *See also D&D Leasing Co. of S.C., Inc. v. Lipson*, 409 S.E.2d 794, 796 (S.C. Ct. App. 1991) ("The weight of authority recognizes the right of the parties to contractually provide for...acceleration of future rents....D&D Leasing is entitled to recover from Lipson. There is no windfall to D&D Leasing.")

Moreover, this argument is appropriately left for the arbitrators, who are bound to "interpret [the Insurance and Reinsurance Agreement] as an honorable engagement and not merely as a legal obligation." (CIC Ex. A, ¶ 7). Thus, the Liquidator may argue in connection with CIC's claim that Home breached the duty of utmost good faith that CIC should not be excused from paying the AFIA claims because CIC would otherwise receive a "windfall." The alleged specter of a "windfall" for CIC is not, however, a relevant inquiry to the issue at hand, that is, whether the Stay Order should be lifted.

B. The Court Should Lift the Stay Order and Compel Arbitration Because There is No Preclusive Bar to CIC's Claims against Home for Breach of the Duty of Utmost Good Faith

To defeat CIC's motion, the Liquidator improperly bootstraps his affirmative defenses to CIC's contract claims with the "good cause" standard to lift the stay. The Liquidator relies on an arsenal of equitable preclusion theories, all of which hinge on CIC's assertion of statutory defenses to the AFIA Agreement in the AFIA Litigation. Each of the theories that the Liquidator proffers – that the contract claims CIC seeks to arbitrate (i) have been, or could have been, decided in the AFIA Litigation; (ii) involve issues previously litigated and determined in the

[5] *Mid-South Title* is particularly instructive because it involved Resolution Trust, a vehicle created by the United States government to manage the assets of insolvent savings and loan associations.

AFIA Litigation; (iii) are otherwise barred by laches; and/or (iv) were presumptively waived by CIC's participation in the earlier court proceedings – misses the mark.

1. The arbitrators, not the court, must decide whether res judicata, collateral estoppel and laches preclude CIC's arbitrable contract claims.

As a threshold matter, whether res judicata, collateral estoppel or laches bars CIC's claim that Home breached the duty of utmost good faith is a question properly resolved by the arbitrators. Home draws the premature conclusion that this Court can and should resolve the issue of the preclusive effect of the AFIA Litigation before it lifts the stay or compels the parties to arbitrate. *See* Objection at 17-18, n.5. The benchmark for deciding the question of who is the appropriate decision maker is *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

In *Howsam*, the Supreme Court had to decide whether an arbitrator or a court should apply an arbitration rule of the National Association of Securities Dealers involving the statute of limitations. *Id.* at 81. The Court explained that there are certain narrow categories of "gateway" disputes that raise a "question of arbitrability" presumptively for the court to decide: (1) "whether the parties are bound by a given arbitration clause," and (2) "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *Id.* at 84. By contrast, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide." *Id.* According to the *Howsam* court, the types of issues that may qualify as issues of "procedure" for the arbitrator to decide are "waiver, delay, or a like defense to arbitrability." *Id.* The Supreme Court, based upon comments to the Revised Uniform Arbitration Act of 2000, elaborated by stating that "issues of procedural arbitrability, *i.e.*, whether prerequisites such as *time limits, notice, laches, estoppel,* and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Id.*; emphasis added.

Whether the Liquidator's affirmative defenses bar CIC's claims against Home for breach of contract and the duty of utmost good faith falls squarely into the type of procedural question that the U. S. Supreme Court ruled is properly left for the arbitrator to decide. Although New Hampshire courts have not yet spoken to the issue of who decides the preclusive effect of a prior judicial determination on otherwise arbitrable claims, several other federal and state courts have.

The more recent and well-reasoned opinions conclude that arbitrators, not a court, are in the best position to resolve the preclusive effect of prior judicial determinations. For example, the Eleventh Circuit in *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109 (11th Cir. 2004), reiterated the boundaries set by *Howsam* and, in doing so, determined that two of its prior precedents "erred in considering the res judicata issue" because that was an issue "for the arbitrator to decide in the first instance." Rather, the *Klay* court determined that a district court should only decide "threshold substantive arbitrability" issues: it simply "did not have the right to make further determinations concerning arbitrability, including rulings on justiciability." *Id.* at 1110 (emphasis added).

More recently, the First Circuit refrained from deciding the relationship between the district court's prior summary judgment determination and the parties' pending arbitration proceedings. *See Berenson v. Nat'l Fin. Servs. LLC,* 485 F.3d 35 (1st Cir. 2007). Critical to the issue here, the *Berenson* court recognized:

> In the first instance, it is up to the arbitrator to decide how that [court] decision should be handled in the arbitral forum. If there is to be an appeal from the arbitration decision, [defendant] can raise in that appeal any of its concerns about the arbitrator's treatment of the district court's summary judgment ruling.

Id. at 45. *See also United States Fire Ins. Co. v. Nat'l Gypsum Co.*, 101 F.3d 813, 817 (2d Cir. 1996) (arbitrator should decide a collateral estoppel defense to arbitration based on a prior court judgment because it is a merit-based defense to arbitration); *Zurich Am. Ins. Co. v.*

Watts Indus., Inc., 415 F. Supp. 2d 887, 890 (N.D. Ill.), *aff'd*, 466 F.3d 577 (7th Cir. 2006) (arbitrator should decide collateral estoppel effect of court's finding, because the evaluation of that finding does not challenge the validity of the arbitration clause or call into question whether the stated dispute is within the scope of the arbitration clause); *Boateng v. Gen. Dynamics Corp.*, 473 F. Supp. 2d 241, 251 (D. Mass. 2007) (arbitrator is to decide waiver based upon non-litigation related conduct).

John Hancock Mut. Life Ins. Co. v. Olick, 151 F.3d 132, 138-139 (3d Cir. 1998), the one case the Liquidator cites in a footnote as support for his argument that the court should decide the preclusive effect of prior judicial determinations, pre-dates *Howsam* and thus does not reflect the current state of the law. *See* Objection at 18, n.5.

2. Res judicata does not bar CIC's claims against Home for breach of the duty of utmost good faith.

Howsam and its progeny thus dispose of the Liquidator's primary opposition to CIC's motion. If, however, this Court were to consider these threshold issues, CIC's claims against Home for breach should proceed to arbitration because res judicata does not defeat CIC's contract claims and each of the Liquidator's assertions that res judicata applies is a strawman argument. First, the claims CIC seeks to arbitrate could not have been raised earlier; second, CIC reserved its rights to bring its contract claim separately from the AFIA Litigation; third, CIC's reliance upon the Insurance and Reinsurance Agreement for standing to intervene is irrelevant; and, fourth, arbitrating the contract claims will not "nullify" the prior Approval Order.

(a) Res judicata does not apply because there were procedural barriers and CIC's breach claims could not, and should not, be litigated before this Court.

CIC did not and could not litigate claims for breach of the Insurance and Reinsurance Agreement in the AFIA Litigation. Paragraph 7 of the agreement spells this out. It requires that

"any dispute" between the parties to the agreement "with reference to its interpretation or their rights under it ... shall be submitted to arbitration" upon written request of a party. CIC Ex. A, ¶ 7. The effect of this provision is to require arbitration of all claims for breach of the Insurance and Reinsurance Agreement, as they are disputes that refer to the "interpretation" of the agreement and CIC's "rights under it." *Id.* On the other hand, CIC's statutory challenges to the Liquidator's request for approval of the AFIA Agreement could only be litigated in the New Hampshire courts under the Insurers Rehabilitation Act. *See* RSA 402-C:25.

The Liquidator, however, asserts that CIC raised, or at least could have raised, the arbitrable claims in the AFIA Litigation because there were no procedural barriers. *See* Objection at 18-21. This is simply not true.

First, the Liquidator misconstrues the scope of the court proceedings. Viewed in their proper context, CIC was *not* a party to the AFIA Agreement and did *not* institute the AFIA Litigation. ACE intervened for the limited purpose of raising statutory objections to the Liquidator's motion for approval of the AFIA Agreement and constitutional objections to the notice and summary procedure. *See* LQ Ex. 8,[6] ¶ 5. There were multiple parties before the Court *not* bound by the arbitration provision in the Insurance and Reinsurance Agreement. When there are multiple parties before the Court, some of whom are not bound by an arbitration provision, arbitration against the group cannot be compelled. *See generally Scott v. Joe Rizza Ford, Inc.*, No. 07-C-87, 2007 WL 2225904, at *2 (N.D. Ill. July 30, 2007) ("when the dispute involves multiple parties, some of which are not subject to binding arbitration, it does not mean that the arbitration provision should be ignored...The bottom line is that [one party] must arbitrate, even if [the other party] does not"); *see also* Restatement (Second) of Judgment

[6] "LQ Ex. ____" refers to the exhibits submitted with the Objection.

§26(1)(c) (res judicata does not bar a claim for relief in a subsequent action where the claim was not raised in the initial action "because of...restrictions on [the court's] authority to entertain multiple theories...in a single action"). Because all the parties to the AFIA Litigation could not be compelled to arbitration, and the defenses to the AFIA Agreement under the Liquidation Statute could only be determined by the court, CIC accordingly reserved its rights to seek arbitration against Home for breach of contract and the duty of utmost good faith.

The scope of review undertaken by a court in a letter of credit dispute illustrates that there should be no res judicata bar in this case. The court's inquiry in such a dispute is limited to whether a bank must honor its obligation to issue payment upon proper presentment of the documents required by the terms of the letter of credit. Any claims for breach of contract, in the absence of fraud, cannot serve as grounds to enjoin drawing down on the letter of credit; the court must address such claims in a separate action. *Ground Air Transfer, Inc. v. Westates Airlines, Inc.*, 899 F.2d 1269, 1272 (1st Cir. 1990) (whether beneficiary violated the terms of some other document, such as an underlying contract, "is normally beside the point.") (internal quotations omitted). Under these circumstances, a breach of contract claim (*e.g.*, to determine entitlement to the disbursed money or breach of good faith) is not barred by the earlier court review that examined only the technical compliance with the draw down. *See, e.g., Schmueser v. Burkburnett Bank*, 937 F.2d 1025, 1031 (5th Cir. 1991) (claim for declaratory judgment against bank concerning technical compliance for draw down on letter of credit was not res judicata over subsequent action against bank for breach of duty of good faith in letter of credit transaction).

The same rationale works equally well here. The issue this Court decided was whether the Liquidator had the "statutory authority under RSA chapter 402-C" to enter into the AFIA Agreement with the AFIA cedents and, if so, whether the agreement was reasonable. LQ Ex. 10,

at 2-3 (Order on Remand). Thereafter, the New Hampshire Supreme Court's order on remand obliged the Superior Court to assess whether there was an "independent obligation to assess the fairness of the agreement with the AFIA Cedents," based upon factual findings. Order, dated September 13, 2004, attached as Exhibit F, at 1-2. According to the New Hampshire Supreme Court, guidance for those factual findings were to be found in two cases: *In re Boston & Providence R.R. Corp.*, 673 F.2d 11, 13 (1st Cir. 1982), "where the bankruptcy court must 'act independently, out of its own initiative for the benefit of all creditors,'" (CIC Ex. F, at 1-2) and *In re Indian Motorcycle Mfg., Inc.*, 299 B.R. 8, 20 (D. Mass. 2003), where the "paramount interest" is the interest of creditors (CIC Ex. F, at 2; LQ Ex. 1, at 31). Because the focus rested on the creditors' paramount interest, the Approval Order entirely foreclosed any consideration of fairness to ACE beyond its rights as creditor and claimant. The "relevant" inquiry, according to the Court, "is the fairness of the agreement to ACE in its capacity as a claimant of the estate, and not as a business enterprise." LQ Ex. 1, at 31. The Court thus concluded that "ACE's rights as a *claimant and creditor and its rights to setoff* under RSA 402-C:34 are unimpaired by the pending agreement and thus the agreement is not unfair to ACE." *Id.* at 31-32 (emphasis added).

Because the Court focused on the interest of creditors, CIC's rights as debtor were not encompassed within this inquiry and there could be no consideration in the AFIA Litigation of the distinct issue whether Home breached its obligations to CIC in its capacity as reinsurer under the Insurance and Reinsurance Agreement. These are considerations properly at issue in the arbitration CIC now seeks to compel.

Second, the heart of the Liquidator's argument is that CIC should have brought its arbitrable contract defenses and nonarbitrable statutory defenses in one judicial forum because they relate to the same facts. By advancing this argument, the Liquidator's unstated assumption

is that this Court should adopt the long-rejected doctrine of intertwining – a doctrine that met an unceremonious end over 25 years ago in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). In that case, the United States Supreme Court faced the issue whether to compel arbitration of pendent state law claims when the federal court will nonetheless assert jurisdiction over a federal law securities claim. *Id.* at 216. The Court reversed the denial of the motion to compel arbitration of pendent state law claims and held that the FAA requires "district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."[7] *Id.* at 217. Consistent with this approach, the First Circuit and New Hampshire federal courts have also rejected attempts to derail arbitration of arbitrable claims when those claims may factually intertwine with nonarbitrable claims. *See Creative Solutions Group, Inc. v. Pentzer Corp.*, 252 F.3d 28, 32, 34 (1st Cir. 2001) (recognizing that factual overlap between nonarbitrable EBITDA claim and arbitrable net worth claim, and concluding that party did not waive arbitrable claim); *see also In re Tyco Int'l, Ltd.*, No. 02-1335-B, 2003 U.S. Dist. Lexis 23490, *7 (D.N.H. Dec. 29, 2003) (recognizing that factual overlap between arbitrable fraudulent inducement claim and nonarbitrable breach of fiduciary duty claim did not preclude the court from compelling arbitration).

(b) Res judicata does not apply because CIC expressly reserved its right to bring claims for breach of Home's duties under the Insurance and Reinsurance Agreement and there were procedural barriers to bringing such claims in the AFIA Litigation.

The Liquidator's argument that the AFIA Litigation precludes the otherwise arbitrable dispute CIC is pursuing here falters on a more fundamental level: CIC expressly and repeatedly

[7] Here, no motion to compel arbitration was immediately required. Early on, CIC reserved its rights to arbitrate, and, in the court-approved Protocol (CIC ExD), the parties agreed to CIC's reservation to assert that it has *no contractual obligation* to indemnify Home for any AFIA liabilities pursuant to the AFIA Agreement.

reserved the separate issue of whether the Liquidator's conduct also constituted a breach of the Insurance and Reinsurance Agreement and indicated that arbitration is the necessary forum for such issue.

ACE repeatedly made its intention clear at the outset when it objected to the Liquidator's request for approval of the AFIA Agreement. *See* LQ Ex. 6 (Memorandum of the ACE Companies in Support of their Objections and Response to the Liquidator's Motion for Approval of Agreement and Compromise with AFIA Cedents, filed in March 2004 ("Opposition Brief")), at 7, n.6. In the Opposition Brief, ACE explained that the issue of whether the Liquidator's conduct violated Home's duty of utmost good faith under the reinsurance agreement was "not before the Court" and that CIC "reserves the right to address separately" such issues, because that agreement "is governed by an arbitration clause [and] arbitration is the necessary and appropriate forum for those issues." *Id.*

Months before there was any court determination on the fairness of the AFIA Agreement, Home and CIC memorialized CIC's reservation in the Protocol, explicitly agreeing to CIC's reservation of rights to assert that it has no contractual obligation to indemnify Home for any AFIA liabilities submitted pursuant to the AFIA Agreement. *See* CIC's Memorandum at 8, n. 5, and CIC Ex. D, ¶ 7.2. The Court thereafter approved the Protocol and made it an order of the Court. *See Apparel Art Int'l, Inc. v. Amertex Enters., Ltd.*, 48 F.3d 576, 586 (1st Cir. 1995) (holding that a litigant's claims are not precluded if the court, in an earlier action, expressly reserves the litigant's rights to bring those claims in a later action). Having obtained the Liquidator's assent and the Court's approval, ACE proceeded to litigate based upon such understanding.[8]

[8] The Liquidator mentioned in passing a statement by counsel during the July 2004 oral argument before the New Hampshire Supreme Court, but nowhere relied on this comment in his equitable defense arguments.

The Liquidator cannot now renounce his express consent to the reservation of rights in his effort to wield res judicata as a sword. The Liquidator cites two cases challenging CIC's reservation, yet both are inapposite: the plaintiff in *Flood v. Besser Co.,* 324 F.2d 590, 593 (3d Cir. 1963), only asserted a unilateral reservation of rights in a proposed amended complaint that the court subsequently struck, while the petitioner in *P.R. Mar. Shipping Auth. v. Fed. Mar. Comm'n*, 75 F.3d 63, 67-68 (1st Cir. 1996), never expressly reserved its rights, never sought consent from the opposing party, and never obtained court approval. *See* Objection at 21.

The reasoning applied in the bankruptcy context is instructive. The court in *Bankvest Capital Corp. v. Gray*, 375 F.3d 51, 70 (1st Cir. 2004), for example, confirmed a joint liquidating plan of reorganization that expressly allowed the liquidating supervisor to pursue avoidance actions. The First Circuit thus determined that, because the trustee successfully and expressly reserved the right to bring avoidance actions in the parties' joint liquidating plan, res judicata did not apply to preclude a later claim. *Id.* at 70 ("Res judicata does not apply where a claim is expressly reserved by the litigant in the earlier bankruptcy proceeding."). Other courts and authorities have reached the same conclusion that res judicata will not bar a subsequent claim when there is an express consent to, or even acquiescence by defendant in, the division of claims brought in two separate proceedings. *See Calderon Rosado v. Gen. Elec. Circuit Breakers, Inc.*, 805 F.2d 1085, 1087 (1st Cir. 1986) ("recognized exception to the general rule prohibiting claim splitting is that if the parties agree, or a defendant implicitly assents, to a plaintiff's splitting his claim, then a judgment in an earlier action which normally would bar the subsequent action will

---

Nonetheless, this comment, viewed in its proper context, does not support an argument that CIC previously raised its claim for breach of the duty of utmost good faith. Counsel responded to the Court's inquiry regarding standing, and explained that it is a person aggrieved because ACE is the target of the AFIA Agreement and that ACE is "also" aggrieved because the AFIA Agreement violates Home's duty of utmost good faith. This additional aggrievance was, by the time of oral argument, expressly reserved under CIC's assertion that it could assert such issue "separately" in arbitration and CIC and the Liquidator had already signed the Protocol reserving CIC's contract defenses.

not"); *Cowan v. Ernest Codelia, P.C.*, 149 F. Supp. 2d 67, 76-77 (S.D.N.Y 2001) (defendant implicitly consented to claim splitting by failing to object prior to judgment); Restatement (Second) of Judgments § 26(1)(a).

(c) Res judicata does not apply based upon CIC's assertion of standing to intervene in the AFIA Litigation, and CIC's claims are now ripe.

The Liquidator furnishes no legal authority to support his contention that, because ACE sought to intervene in the AFIA Litigation based upon its interest in the reinsurance agreement, it should be required to bring its arbitrable defensive contract claims in the same action. *See* Objection at 19-20. The Supreme Court in *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968), rejected such an expansive view of standing:

> The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated...[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.

See also Hiatt Grain & Feed, Inc. v. Bergland, 446 F. Supp. 457, 468 (D. Kan. 1978), *aff'd*, 602 F.2d 929 (10th Cir. 1979) ("Standing focuses on the party seeking to get his complaint before a...court and not on the issues he wishes to have adjudicated.") (quoting *Flast v. Cohen*, 392 U.S. at 99). As explained above, the Court granted standing and confined the "relevant" inquiry to ACE as creditor and claimant, with the scope of the proceedings focused exclusively on the Liquidator's statutory authority under the Liquidation Statute.

CIC's claims for breach of the Insurance and Reinsurance Agreement and duty of utmost good faith are now ripe for consideration. Only recently have payments of the court-approved AFIA claims, beyond any set-off, been required. CIC thus seeks to arbitrate to obtain a defensive declaration that it may validly refuse to make payments going forward.

(d) Res judicata does not apply because arbitration of the breach claims would not nullify the Approval Order.

Although the Liquidator asserts that the Approval Order would be "nullified" by an arbitration decision adverse to the Liquidator, that allegation is based upon the unsupported conclusion that CIC seeks to "claw back" the payments previously paid out and to deter AFIA cedents from pursuing their claims. The Liquidator's doomsday predictions make little sense when the arbitral forum is perfectly capable of assessing what, if any, equitable defenses may apply based upon the Court's prior judgment.

In addition, CIC's demand for arbitration nowhere states that it seeks restitution or disgorgement of payments made. Rather, the demand seeks a defensive declaration against Home's claim that CIC is required to pay future claims.[9] *Cf.* Restatement (Second) of Judgments §22(2)(b), Illst. f ("special circumstances under which failure to interpose a counterclaim will operate as a bar" arise only when a successful subsequent prosecution seeks to allow defendant to "to enjoin enforcement of the judgment," "recover on a restitution theory the amount paid pursuant to the judgment," or deprive the plaintiff of "property rights vested to him in the first judgment").[10] CIC also verified its agreement to continue to administer and service the AFIA liabilities and make payments as they come due during the pendency of the arbitration. *See*

---

[9] The Demand for Arbitration states, in relevant part:

> In this arbitration, CIC will be seeking a declaration that any claim submitted pursuant to the AFIA Agreement or any scheme or arrangement implemented in accordance with the AFIA Agreement *is not reinsured* by CIC. CIC will also seek other related relief from the Panel including, but not limited to, attorney's fees and costs.

CIC Ex. E, at 1-2 (emphasis added). If CIC had sought restitution or disgorgement, it would have explicitly sought such relief or, at a minimum, used the past tense to show that it "will be seeking a declaration that any claim ...*was* not reinsured." (Emphasis added). It did not do so.

[10] The Liquidator's reliance on *In re Iannochino*, 242 F.3d 36, 43 (1st Cir. 2001) and *Puerto Rico Marine* is similarly unhelpful. In *In re Iannochino*, the court concluded that res judicata applied when the debtor's subsequent order had the potential to require "disgorge[ment of] the fees" previously awarded by the court. In *Puerto Rico Marine*, the court applied res judicata when defendants' subsequent reparations action sought "restitutionary remedy." Here, the defensive declaration that CIC will seek in arbitration does not include requests for disgorgement or restitution; thus, there is no nullification.

CIC's Memorandum at 10. There can thus be no nullification as a matter of law from the present request for arbitration.

In short, res judicata has no application in the instant proceeding when Home and CIC agreed to an arbitral forum more than 20 years ago, the parties and the Court agreed to CIC's express reservation of the separate claims it now seeks to arbitrate, and the parties did not and could not litigate the issues before the courts.

3. Collateral estoppel does not bar CIC's claims against Home for breach of the Insurance and Reinsurance Agreement and of the duty of utmost good faith.

There is also no preclusive bar to CIC's claims for breach of contract and the duty of utmost good faith based upon collateral estoppel, even if this Court were to consider the defense. The well-established elements of collateral estoppel are:

> [T]he issue subject to estoppel must be identical in each action, the first action must have resolved the issue finally on the merits, and the party to be estopped must have appeared in the first action, or have been in privity with someone who did so. Further, the party to be estopped must have had a full and fair opportunity to litigate the issue, and the finding must have been essential to the first judgment.

Simpson v. Calivas, 139 N.H. 1, 7, 9 (1994) (quoting *Daigle v. City of Portsmouth*, 129 N.H. 561, 570 (1987) and Restatement (Second) of Judgments §27) (collateral estoppel only applicable if the finding in the first proceeding was essential to the judgment of that court); *Ainsworth v. Claremont,* 108 N.H. 55, 56, 226 A.2d 867, 869 (1967) (collateral estoppel only applicable to those matters "directly in issue").

The Liquidator focuses his efforts exclusively on the one factor addressing the identity of issues, extracting excerpts from the Approval Order and Findings of Fact and Conclusions of Law to suggest that the issues resolved in the "fairness" determination are conclusive of the essential elements of breach of the duty of utmost good faith and breach of contract claims. *See*

Objection at 22-25. The Liquidator's focus, however, is fatally narrow and flawed. The Liquidator cannot establish several critical elements of his collateral estoppel defense, including that the arbitrable issues are identical to those resolved in the AFIA Litigation, that the prior proceedings resolved these issues on the merits, and that the issues were essential to the Court's judgment.

First, and contrary to the Liquidator's suggestion, the issues involved in the AFIA Litigation and the arbitration are not identical. In the AFIA Litigation, the sole question addressed by the New Hampshire courts was the legality of the AFIA Agreement under the Liquidation Statute. CIC separately reserved its right to assert that it has no contractual obligation to indemnify Home for any AFIA liabilities submitted pursuant to the AFIA Agreement. *See* CIC Ex. D, ¶ 7. The Approval Order subsequently addressed only the "relevant" issue of fairness and reasonableness of the AFIA Agreement to ACE as "claimant and creditor" and its rights to setoff. *See* LQ Ex. 1, at 31-32. These creditor, claimant and setoff issues, however, are entirely distinct from the issues underlying the arbitrable claims: CIC's rights as debtor and CIC's defenses against Home's demand for payment under the Insurance and Reinsurance Agreement.

The Liquidator's own evidence proves this point. *See* Objection at 23. The Court noted in the Approval Order that its findings on fairness are "intrinsically tied to the Court's prior rulings that the Liquidator has the authority under RSA Chapter 402-C to enter into this type of agreement under the circumstances...." LQ Ex. 1, at 26. In Conclusion of Law 9, the Court concluded that the "Liquidator acted as a *reasonable liquidator* would act under the circumstances" (LQ Ex. 2, at 33) (emphasis added) and not, as would be at issue in the

arbitration, as a cedent and party to the Insurance and Reinsurance Agreement, *i.e.*, standing in Home's shoes, with the consequent contractual obligations and duty of utmost good faith.

Second, the Liquidator assumes that the issues he seeks to estop were resolved on the merits merely because the "approval motion" was "litigated" to a "final order." *See* Objection at 22. This rests on the fallacious assumption that the approval motion raised, and the "fairness" determination resolved, the very same issues that CIC will seek to arbitrate, which the preceding paragraph makes clear they do not. Further, there was no resolution "finally on the merits" for the principle findings and conclusions on which the Liquidator relies. The Approval Order did not resolve on the merits the issues whether the Liquidator failed to act in utmost good faith, whether the AFIA Agreement was fair to CIC as debtor, and whether the Liquidator's conduct breached Home's duties under the Insurance and Reinsurance Agreement.

Third, even if the Court had decided the above issues (which it did not), the excerpted portions of the Approval Order cited by the Liquidator are taken out of the narrow context on which they were decided (the statutory authority under RSA 402-C), and are not essential to the judgment in the AFIA Litigation. The Approval Order is clear on this point. *See* LQ Ex. 1, at 31-32. For example, the Court concluded that ACE's argument that fairness of the AFIA Agreement should focus on ACE as a "business enterprise" was irrelevant to the Court's review of fairness to ACE as creditor and claimant. *Id.*; *see, e.g., Ohland v. City of Montpelier*, 467 F. Supp. 324, 338 (D. Vt. 1979) (collateral estoppel defense failed when the court in an earlier proceeding did not decide the issue of plaintiff's employment status, deeming it "irrelevant," and these issues were then extremely relevant to the subsequent claim).

In short, nowhere in the AFIA Litigation did the parties or the courts address and resolve the separate issues of whether the Liquidator's actions, while legal under RSA 402-C,

nonetheless breached the Insurance and Reinsurance Agreement and the duty of utmost good faith.

4. Laches does not preclude CIC's arbitrable claims against Home for breach.

Nor is there any merit to the Liquidator's laches defense to CIC's contract claims, should this Court consider the issue. In his Objection, the Liquidator cites a litany of cases but not one actually lends support to his laches argument or grants relief based upon such defense.[11] *See* Objection at 28. As the cases cited by the Liquidator do make clear, the courts look to the statute of limitations – here, six years – for guidance. *See Jenot v. White Mountain Acceptance Corp.*, 124 N.H. 701, 710 (1984). Even putting aside CIC's timely reservations of rights, CIC demanded arbitration well within this six-year period, given that the Liquidator entered into the AFIA Agreement in January 2004, the Supreme Court approved it in December 2007, and CIC issued its demand for arbitration against Home in April 2008. *See* New York Civil Practice Law and Rules §203 (action upon contractual obligation must commence within six years).[12]

Where, as here, a delay is less than the applicable limitation period, the "party asserting laches bears the burden of proving *both* that the delay was unreasonable and that prejudice resulted from the delay." *Jenot,* 124 N.H. at 710 (emphasis added). In an effort to show "unreasonable" delay, the Liquidator essentially alleges nothing more than that CIC waited for four years before commencing arbitration. *See* Objection at 28-29. In an effort to show "prejudice" caused by the delay, the Liquidator complains that arbitration may require additional

---

[11] Only one case, *In re Henry A. Plantier*, 126 N.H. 500 (1985), partially applied laches to preclude allegations of sexual misconduct brought by one of the two plaintiff patients against the doctor. This case, however, has no bearing in the present context. The *Plantier* court conducted a "laches-type" examination, under a due process analysis, in an administrative license hearing that required a different showing of prejudice based upon the doctor's inability to defend because of the nine-year passage of time in the absence of an applicable statute of limitations for such actions.

[12] New York's statute of limitations applies here because the Insurance and Reinsurance Agreement provides that it "shall be governed by and construed and enforced in accordance with the laws of the State of New York." CIC Ex. A, ¶ 10.

expenditures. *See* Objection at 29-30. Neither the allegation of unreasonable delay nor the claim of prejudice has merit.

There is no unreasonable delay here. The Liquidator again fails to recognize the import of the advance notice of (and his consent to) CIC's repeated reservations of its right to assert defensive contractual claims throughout the purported period of delay. *See Jenot*, 124 N.H. at 709-710 (considers the 20 year statute of limitations, concludes that a nearly ten year delay in foreclosing a mortgage and enforcing a promissory note cannot be unreasonable as a matter of law, and finds no prejudice when there is no surprise that leads to a special harm by plaintiff). The Liquidator also misconceives the scope of the prior proceedings and overlooks the long-standing policy that a party need not, and here could not, raise its arbitrable and nonarbitrable claims in one proceeding. *See Dean Witter*, 470 U.S. 213. Nor is there unreasonable delay by CIC in its demand for arbitration, given the undisputed fact that only recently have payments to Home, based upon AFIA claims and beyond setoff, been required.

Not only is there no unreasonable delay, there has also been no showing of prejudice resulting from the passage of time. The Liquidator did not respond to ACE's Objection when ACE reserved its contract claims and insisted that they must be arbitrated, and he now overstates his ability to "require" CIC to litigate arbitrable and nonarbitrable claims in one forum. *See Dean Witter*, 470 U.S. 213 (rejecting the doctrine of intertwining that had required adjudication of arbitrable and nonarbitrable claims in one forum). He also cannot show prejudice merely because he could not "require" the arbitrators to accept jurisdiction to consider the Liquidator's motion for approval of the AFIA Agreement and the parties' objections to that motion. The additional parties at issue in the AFIA Litigation (*e.g.*, BMC and the AFIA cedents) were not bound by CIC and Home's arbitration provision in the Insurance and Reinsurance Agreement,

and there was no comparable arbitration provision in the AFIA Agreement. To the extent the Liquidator believes CIC's claims fall outside the scope of the arbitration agreement, there is no prejudice because the Liquidator has a forum to raise these arguments – he has asserted them here, in his Objection. The Liquidator's unwarranted presumption about unified discovery also makes no sense when the parties can use the prior relevant discovery in the arbitration, and, regardless of when the arbitration commenced, the parties would have to incur expenses for the additional discovery related to the arbitrable claims.

Moreover, there is no prejudice from having litigated setoff, contribution and other claims for the simple reason that the Liquidator, estate and claimants have benefited from such proceedings: these claims would have arisen in any event and CIC would always have brought its setoff and contribution claims. *See Miner v. A&C Tire Co.*, 146 N.H. 631, 634 (2001) (no prejudice when defendants benefited from being able to operate an illegal non-conforming use in a residential zone for several more years). Any additional expenses that may be associated with arbitration should not be a factor when arbitration was the forum chosen by the Home and CIC in the Insurance and Reinsurance Agreement, the proceedings will resolve important questions of law, and the Liquidator was aware that CIC might pursue its separately reserved claims for breach. *See Wood v. Gen. Elec. Co.*, 119 N.H. 285, 289 (1979) (defendants' argument that they were prejudiced and inconvenienced by the expense of an unnecessary trial was insufficient to constitute laches when an important question of law was presented and the defendants knew that the plaintiff was attempting to pursue his claim). The Court likewise should reject the Liquidator's circuitous logic that "delay" can somehow constitute evidence of "prejudice caused by the delay," or that he can somehow satisfy his burden to show prejudice through speculation that AFIA cedents may suffer uncertainty.

5. CIC did not waive its right to seek arbitration for Home's breach of contract by intervening in the AFIA Litigation because CIC early and expressly reserved its right to assert those claims.

The fallback position advanced by the Liquidator is that CIC, by intervening and participating in the AFIA Litigation, has impliedly waived its right to compel arbitration. New Hampshire courts recognize that the issue of a party's waiver of its right to arbitrate, based upon engaging in litigation-related conduct, is "usually a question for the court to decide." *See Tothill v. Richey Ins. Agency, Inc.*, 117 N.H. 449, 454 (1977). However, it does not appear that New Hampshire courts have addressed this issue after the U.S. Supreme Court's *Howsam* decision.[13]

To establish waiver under New Hampshire law, there must be "a finding of an actual intention to forego a known right," which can be inferred from actions inconsistent with the notion that the arbitration agreement was in effect or that the party did not seek to avail itself of such provision. *Tothill*, 117 N.H. at 454. The federal courts look to virtually the same standards, recognizing that "[w]aiver is not to be lightly inferred, and mere delay in seeking [arbitration] without some resultant prejudice to a party cannot carry the day." *Creative Solutions Group v. Pentzer Corp.*, 252 F.3d at 32-33 (brackets in original) (citation omitted).

Many of the reasons discussed above show that there has been no implied waiver here and the Liquidator's suggestion that CIC seeks to "forum shop" and obtain a second chance in an arbitral setting is wrong. The Liquidator (not CIC) sought approval of the AFIA Agreement from this Court in March 2004. CIC quickly intervened in that action to object to the Liquidator's conduct on the bases that it exceeded his statutory authority and violated the Insurers Rehabilitation Act, RSA 402-C. As early as its March 2004 Opposition Brief, CIC

---

[13] Nevertheless, the First Circuit recently applied the *Howsam* framework and recognized that the issue of "waiver by conduct, at least where due to litigation-related activity," is for the court to decide. *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 12-13 (1st Cir. 2005).

reserved the separate issue whether the Liquidator's conduct also constituted a breach of the Insurance and Reinsurance Agreement (LQ Ex. 6, at 7, n.6). CIC continued to assert its explicit reservation of this issue on appeal in its June 24, 2004 appellate brief, and ultimately in the Protocol (CIC Ex. D, ¶ 7.2). The Court approved the Protocol, thus making CIC's reservation of rights a court-approved order. Based upon the parties' mutual understanding – indeed, agreement – that CIC had properly reserved its rights to assert that it has no contractual obligation to indemnify with respect to the AFIA liabilities, and the Court's approval of this reservation, CIC took no action that was inconsistent with its right to arbitrate separately Home's contractual breach.

It is not surprising then that none of the cases relied upon by the Liquidator address a purported "implicit" waiver of the right to arbitrate in the context of an "express" reservation of arbitrable contract claims. *See* Objection, at 32-34. Here, CIC, the Liquidator and the Court agreed to CIC's express reservation of rights. There are additional reasons why many of the cases cited by the Liquidator are inapposite to the present case. Of the cases that did find waiver, some involve a party who first chose the judicial forum and only later sought arbitration, unlike here where the Liquidator filed its motion for approval in the Superior Court and CIC was required to intervene in those proceedings. *See Logic Assocs., Inc. v. Time Share Corp.*, 124 N.H. 565, 570-71 (1984); *Saga Communc'ns of New Eng., Inc. v. Voornas*, 756 A.2d 954, 960 (Me. 2000). Still other cases involve a party that sought to arbitrate the very same claims that the parties had already litigated, unlike here where CIC separately reserved and did not litigate its contract defenses under the Insurance and Reinsurance Agreement. *See Second Congregational Soc'y v. Hugh Stubbins & Assocs.*, 108 N.H. 446, 448-49 (1968); *Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 775-76 (D.C. Cir. 1987) (additionally

involves entirely different waiver standard, where no prejudice need be shown). One case involves a party that explicitly refused arbitration and then later sought to invoke the arbitral forum after the court entered default judgment against it. *See Menorah Ins. Co. v. INX Reinsurance Corp.*, 72 F.3d 218, 219-222 (1st Cir. 1995).

The Liquidator further seeks to elevate the purported delay by CIC and the alleged burden from litigation and further proceedings to near dispositive factors. This ignores the numerous authorities that hold that delay in seeking arbitration alone cannot constitute waiver of an arbitration clause. *See, e.g., Babcock v. Sol Corp. of Me.*, 118 N.H. 340, 342 (1978) (recognizing that "[d]elay is a factor in finding, but alone does not constitute, waiver of an arbitration clause," and holding that the trial court did not err as a matter of law in finding no waiver simply because ten months passed between commencement of court action and the motion to dismiss). Moreover, as a matter of common sense, prejudice cannot be found when a party is merely required to comply with its own contractual obligation to arbitrate, whether or not additional expenses are incurred.

Even accounting for these factors, there was no delay here and any perceived burden associated with prior and additional proceedings can come as no surprise, much less prejudice, to the Liquidator. CIC made known early in the judicial proceedings its intent to assert that CIC has no "contractual obligation" to indemnify with respect to the AFIA liabilities under the AFIA Agreement – a dispute that must be raised in arbitration under the Insurance and Reinsurance Agreement.

C. Once the Stay Order is Lifted, the Liquidator Must Be Directed to Arbitrate CIC's Breach of Contract Claim

CIC seeks to have the Stay Order lifted and to compel arbitration so that it may assert its claim that Home breached its duty of utmost good faith by entering into the AFIA Agreement,

the sole purpose of which is to increase the amount of reinsurance CIC must pay. The Liquidator argues, however, that even if the Stay Order is lifted he should not be required to arbitrate as a matter of state statute and public policy. This contention is without merit.

CIC claims that Home breached the Insurance and Reinsurance Agreement, a contract that unambiguously provides that *all* disputes arising out of the agreement *must* be arbitrated. Both the FAA and the New Hampshire Arbitration Act make clear that any arbitration provision contained in the parties' agreement "*shall be valid, irrevocable, and enforceable* save upon such grounds as exist at law or in equity for the revocation of *any* contract." FAA §2 (emphasis added); RSA 542:1 (same). New Hampshire courts have been equally clear in affirming this state's strong public policy in favor of arbitration. *See, e.g., John A. Cookson Co. v. N.H. Ball Bearings, Inc.,* 147 N.H. 352, 356 (2001). Arbitration provisions are, as here, a negotiated feature of most reinsurance agreements. *See Sevigny v. Employers Ins. of Wausau,* 411 F.3d 24, 25 (1st Cir. 2005).

1. <u>This Court should follow the majority of courts that have held that arbitration is proper in the liquidation context.</u>

That one of the parties to the arbitration agreement is an insolvent insurer does not change the law or the public policy. The vast majority of courts – both state and federal – that have addressed this issue have required liquidators to arbitrate disputes arising out of the insolvent insurer's contracts. *See Suter v. Munich Reins. Co.*, 223 F.3d 150 (3d Cir. 2000) (New Jersey); *Quackenbush v. Allstate Life Ins. Co.*, 121 F.3d 1372 (9th Cir. 1997) (California); *Bennett*, 968 F.2d 969 (9th Cir. 1992) (Montana); *In re Amwest Surety Ins. Co.*, 245 F. Supp. 2d 1038 (D. Neb. 2002) (Nebraska); *Koken v. Cologne Reinsurance (Barbados), Ltd.*, 34 F. Supp. 2d 240 (M.D. Pa. 1999) (Pennsylvania); *Nichols v. Vesta Fire Ins. Corp.*, 56 F. Supp. 2d 778 (E.D. Ky. 1999) (Kentucky); *Costle v. Fremont Indem. Co.*, 839 F. Supp.265 (D. Vt. 1993)

(Vermont); *Amcomp Preferred Ins. Co v. Koken*, 916 So. 2d 986 (Fla. Dist. Ct. App. 2005) (Florida); *TIG Specialty Ins. Co. v. Koken*, 855 A.2d 900 (Pa. Commw. Ct. 2004) (Pennsylvania); *Glogower v. Miller*, Nos. 2000-CA-002971-MR, 2001-CA-001576-MR, 2002 Ky. App. LEXIS 2338 (Ky. Ct. App. Dec. 20, 2002) (Kentucky); *Reider v. Arthur Andersen, LLP*, 784 A.2d 464 (Conn. Super. Ct. 2001) (Connecticut); *Texas Commerce Bank - El Paso, N.A. v. Garamendi*, 34 Cal. Rptr. 2d 155 (Cal. Ct. App. 1994) (California); *Oklahoma Prop. Cas. Guaramtee Ass'n. v. Tipton*, 807 P.2d 299 (Okla. Civ. App. 1990) (Oklahoma); *In re All-Star Ins. Corp.*, 332 N.W.2d 828 (Wis. Ct. App. 1983) (Wisconsin).

Despite these decisions in federal and state courts throughout the country, the Liquidator insists that arbitration in a liquidation context is both problematic and prohibited. Relying on *Knickerbocker* and its progeny, the Liquidator invites this Court to reject well-established New Hampshire law and public policy, as well as the weight of nationwide authority, and instead join New York and Ohio, the only two states that refuse to enforce arbitration agreements against statutory liquidators in the absence of a specific state statute forbidding arbitration.

But none of the cases cited by the Liquidator is persuasive. For example, *In re Knickerbocker Agency, Inc.*, 149 N.E. 2d 885, 889 (N.Y. 1958), is based upon the now discredited view that arbitration involves turning over important matters to "private individuals who are subject to selection by the parties themselves and who are charged with the execution of no public trust..." (citation omitted). This decision thus should not be persuasive to a New Hampshire court which must pay heed to the New Hampshire Arbitration Act, the FAA and New Hampshire's own strong public policy favoring arbitration.

The decision in *Corcoran v. Ardra Ins. Co.*, 567 N.E. 2d 969, 973 (N.Y. 1990) not to enforce arbitration relies on the *stare decisis* effect of *Knickerbocker*, which the *Corcoran* court

characterizes as "established precedent." In *Covington v. Am. Chambers Life Ins. Co.*, 779 N.E.2d 833, 837-38 (Ohio Ct. App. 2002), the court denied arbitration because (unlike here), "the issues Protective seeks to have resolved by arbitration primarily involve set off and proof of claims. These are precisely the types of disputes that the Ohio insurance liquidation statutes were designed to resolve." *Benjamin v. Pipoly,* 800 N.E.2d 50, 59 (Ohio Ct. App. 2003), broadly declared that "where, as here, private arbitration impinges upon a broad statutory scheme that invests sweeping powers in a state official, enforcement of arbitration ipso facto violates public policy." Nothing in New Hampshire statutes, case law or public policy suggests that *Pipoly's* extreme public policy declaration should be applicable here.

2. Arbitration provisions in general, and the Insurance and Reinsurance Agreement's arbitration provision in particular, are enforceable under the Federal Arbitration Act and New Hampshire law.

The Liquidator's argument that the arbitration of this controversy will impair the Liquidation Statute and disrupt the "centralized" liquidation proceedings by putting the dispute into the hands of private arbitrators ignores several obvious facts.

First, New Hampshire law strictly enforces arbitration provisions. *See, e.g., In re Lincoln-Woodstock Coop. School Dist.*, 143 N.H. 598, 600 (1999) ("when a[n agreement] contains an arbitration clause, a presumption of arbitrability exists, and...only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail"). Indeed, New Hampshire federal courts have enforced arbitration provisions even if enforcing those clauses results in piecemeal litigation. *See Klinedinst v. Tiger Drylac, U.S.A., Inc.*, No. 01-CV-040, 2001 WL 1561821 (D.N.H. Nov. 28, 2001).

For example, in *Klinedinst,* the New Hampshire District Court granted a defendant's motion to compel arbitration and stay the proceedings over plaintiffs' numerous objections that

the arbitration clause was unenforceable and invalid. The *Klinedinst* court correctly concluded that:

> the enforceability of arbitration provisions is governed by the FAA ... As a general matter, courts are consistently mindful of the strong federal policy favoring arbitration ... Any doubt concerning arbitrability should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability ... In other words, the FAA creates a presumption in favor of arbitrability.

Id. at *4, 5.

Second, the FAA and the New Hampshire Arbitration Act (RSA 542:1) expressly command that arbitration provisions "shall be enforceable" except "upon grounds that exist at law or in equity for the revocation of any contract," whereas the Liquidation Statute mentions arbitration only once and in a context wholly inapplicable here.[14] Contrary to the Liquidator's argument, RSA 402-C's statutory silence regarding arbitration does not "demonstrate an unmistakable legislative intent" to override express statutory and public policy support for arbitration. As in *In re Levin v. Nat'l Colonial Ins. Co.*, 806 N.E.2d 473, 478 (N.Y. 2004) the Liquidation Statute "was not intended as a comprehensive scheme displacing all state laws, substantive and procedural, relating to liquidation of insolvent [insurers]."

Third, an arbitration panel that consists of industry representatives is eminently qualified to resolve contractual disputes arising between insurers and reinsurers, even in the liquidation context, and it is this expertise that the parties agreed to years ago by entering into the Insurance and Reinsurance Agreement. *See* CIC Ex. A, ¶ 6 (addressing payments to a liquidator in the event of an insolvency), ¶ 7 (arbitration clause for disputes arising under this agreement). A

[14] Kentucky's Liquidation Act, for example, contains a specific anti-arbitration clause under which choice of law or arbitration provisions are subordinated to the Liquidation Act. See Ky. Rev. Stat. Ann. § 304.33-010(6). However, even the Kentucky statute specifically excludes arbitration clauses contained in reinsurance agreements from the prohibition's ambit.

panel of industry experts is consistent with the New Hampshire legislature's declared appreciation of the value that industry experience brings, as RSA 402-C:1 (b) itself calls for "enlisting the advice and management expertise of the insurance industry." Indeed, industry experience is seen as a useful component of effectively understanding the nature and range of issues that emerge in insurance and reinsurance agreements; industry experts have a better understanding of the industry's norms of doing business and the consequences of proposed lines of decision that strike a balance between expertise and impartiality. *See Blue Cross Blue Shield of Tenn. v. BCS Ins. Co.*, 517 F. Supp. 2d 1050 (N.D. Ill. 2007).

3. Public policy favors arbitration

The Liquidator tries to evoke doubts about arbitration as an effective, impartial and neutral means of resolving disputes. Such doubts have long since been rejected by case law and public policy.

Cases over the last fifty years have expressly rejected the notion that courts should be suspicious of arbitration. In reinsurance, arbitration has historically been the preferred dispute resolution mechanism. *See Compagnie de Reassurance D'Ile de France v. New Eng. Reinsurance Corp.*, 944 F. Supp. 986, 993 (D. Mass. 1996) ("Historically, litigation involving reinsurance contracts was a rarity"); *see also Old Republic Ins. Co. v. Fed. Crop Ins. Corp.* 746 F. Supp. 767, 770 (N.D. Ill. 1990) *aff'd*, 947 F.2d 269 (7th Cir. 1991) ("Indeed, the Insurers acknowledge that [reinsurance] disputes do arise and are typically resolved by less formal means of adjudication such as arbitration."). Even outside the reinsurance context, the First Circuit has encouraged courts to be on guard for outdated antipathy toward arbitration. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 29 F.3d 727 (1st Cir. 1994), *aff'd*, 515 U.S. 528 (1995). Finally, New Hampshire bankruptcy courts have emphasized that such qualitative judgments about the desirability of arbitration procedures, which the Liquidator is now proffering in this

case, is not a proper factor in the decision whether to enforce an arbitration provision. *See In re Chorus Data Systems, Inc.* 122 B.R. 845 (Bankr. D.N.H. 1990).

Like the case law, public policy firmly favors arbitration. The *In re Chorus* case is one example of the weight given by courts to the policy favoring arbitration. There, the New Hampshire bankruptcy court emphasized that, in inquiring whether the text or the purpose of the Bankruptcy Code is violated by enforcing an arbitration clause, it is not open to the court to define broadly a conflict in order to swallow up the policies underlying the FAA. *Id.* at 852. Rather, the party opposing arbitration must demonstrate: (1) that there is a specific conflict between enforcing an arbitration clause and the textual provisions and/or purposes of the statute to justify the exercise of discretion by a court to refuse to enforce an arbitration clause, and (2) that enforcement of the arbitration clause seriously jeopardizes the objectives of the statute. *Id.* at 850-52. In the end, there must be a good faith effort to balance competing statutory policies as applied to the particular case. *Id.*

Applying this analysis, the Liquidator fails on all counts. The Liquidator does not demonstrate a specific conflict between the text and purpose of the Liquidation Statute and the enforcement of the arbitration clause, and does not show how arbitration seriously jeopardizes the objectives of RSA 402-C. The Liquidation Statute omits arbitration from its purview and, based upon the contractual nature of the dispute, resolution of CIC's contract defenses to payment under the reinsurance agreement do not implicate the liquidation court or its policies.

Finally, an important public policy consideration that the Liquidator does not address is the consequence of adopting the Liquidator's line of argument: namely, a complete exclusion of arbitration from the purview of insurance liquidation in New Hampshire. This has the potential to substantially harm the general public, whom the Liquidator has alleged he seeks to protect,

and insurers in this state and elsewhere. The reinsurance market is highly international: U.S. insurers cede their reinsurance risks to more than 4,200 reinsurers in 95 jurisdictions across the world.[15] The majority of these international reinsurance agreements contain an arbitration clause. Should the enforceability of arbitration clauses in reinsurance agreements be open to doubt in this state, New Hampshire insurers' ability to cede their financial risk would be put in peril. Other courts have recognized the risks that smaller insurers face, should larger insurers not be able to count on smaller insurers satisfying their obligations, making new market entry harder and precipitating failures of firms in difficulty. *See Prudential Reinsurance Co. v. Superior Court*, 842 P.2d 48 (Cal. 1992). This, in turn, would lead to higher insurance premiums to the most vulnerable part of the equation, the citizens of New Hampshire.

4. The McCarran-Ferguson Act does not reverse preempt the FAA.

The Liquidator's final effort to defeat arbitration – reverse preemption of the FAA by the McCarran-Ferguson Act – is also without merit. First, the New Hampshire Arbitration Act, not just the FAA, requires arbitration of this dispute, and McCarran-Ferguson does not reverse preempt state statutes. Moreover, McCarran-Ferguson only applies if the FAA impairs or interferes with a statute regulating the "business of insurance." As demonstrated in CIC's Memorandum, the forum in which this contract claim between CIC and Home is resolved has nothing to do with the regulation of the business of insurance, and the Liquidation Statute is not impaired or interfered with by compelling arbitration here.

None of the cases cited by the Liquidator supports reverse preemption under these circumstances. For example, in *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277 (10th Cir. 1998), the plaintiff filed an action in federal district court to compel arbitration, despite a state injunction against commencing suits against the insolvent insurer. The court held that the

[15] Reinsurance Association of America, *Alien Reinsurance in the U.S. Market 2006 Data 2* (2007).

statute that authorized the stay met "the test of having been enacted for the purpose of regulating the business of insurance" and that "[a]llowing a putative creditor to...force arbitration contrary to the blanket stay...would certainly impair the progress of the orderly resolution of all matters involving the insolvent company." *Id.* at 1281. Similarly, in *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 591 (5th Cir. 1998), the court noted that the existence of an injunction precluding Munich from commencing or prosecuting the FAA action "later served as the basis for the district court's decision to dismiss Munich's FAA petition." As CIC has moved to lift the Stay Order, *Davister* and *Munich American* are entirely inapposite.

Finally, *Washburn v. Corcoran*, 643 F. Supp. 554, 557 (S.D.N.Y. 1986), found reverse preemption based upon *Knickerbocker*, holding:

> As the highest court of New York has ruled that arbitration is incompatible with the commands of Article 74, it necessarily follows that enforcement of a federal statute requiring arbitration would defeat this provision of the state statute.

The inapplicability of *Knickerbocker*'s reasoning to this case is discussed above; thus, *Washburn* is also not instructive here.

There is no reverse preemption of the FAA, and arbitration of CIC's contract dispute with Home should be arbitrated in accordance with the parties' agreement, the FAA, the New Hampshire Arbitration Act and New Hampshire's strong public policy favoring arbitration.

III. REQUEST FOR ORAL ARGUMENT

CIC's motion presents complex issues of law involving, for example, modification of a court order, res judicata, arbitration, reverse preemption and public policy. CIC submits that oral argument will further assist the Court in determining these issues and, accordingly, requests that the Court schedule oral argument of its motion.

IV. CONCLUSION

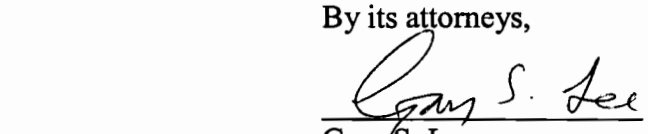
WHEREFORE, for all the foregoing reasons and for all the reasons set forth in CIC's Memorandum, Century Indemnity Company respectfully requests that the Court modify the Stay Order, compel arbitration of CIC's defensive claims and grant such further relief as the Court deems just.

Dated: May 30, 2008

Respectfully submitted,

CENTURY INDEMNITY COMPANY

By its attorneys,



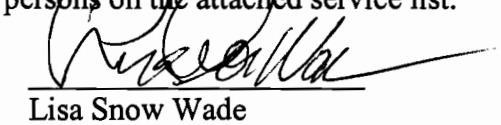
Gary S. Lee
Kathleen E. Schaaf
James J. DeCristofaro
Morrison & Foerster LLP
1290 Avenue of the Americas
New York, New York 10104
Telephone: (212) 468-8000

-and-

Lisa Snow Wade
ORR & RENO, Professional Association
One Eagle Square
P.O. Box 3550
Concord, New Hampshire 03302-3550
Telephone: (603) 224-2381

Certificate of Service

I hereby certify that a copy of the foregoing Reply Memorandum of Law of Century Indemnity Company in Further Support of Motion to Lift Stay and to Compel Arbitration was sent this 30th day of May, 2008, by first class mail to all persons on the attached service list.



Lisa Snow Wade

SERVICE LIST

J. Christopher Marshall, Esq.
NH Attorney General's Office
Civil Bureau
New Hampshire Department of Justice
33 Capitol St.
Concord, NH 03301-6397

J. David Leslie, Esq.
Eric. A. Smith, Esq.
Rackemann, Sawyer & Brewster
One Financial Center
Boston, MA 02111

Pieter Van Tol, Esq.
LOVELLS
590 Madison Avenue
New York, NY 10022

Gail M. Goering, Esq.
Adam Goodman, Esq.
Eric Haab, Esq.
LOVELLS
One IBM Plaza
330 N. Wabash Avenue, Suite 1900
Chicago, Illinois 60611

Peter G. Callaghan, Esq.
Preti, Flaherty, Beliveau, Pachios & Haley, PLLP
57 North Main Street
PO Box 1318
Concord, NH 03302-1318

Martin P. Honigberg, Esq.
Sulloway & Hollis, PLLC
9 Capitol Street
P.O. Box 1256
Concord, NH 03302-1256

George T. Campbell, Esq.
Robert Stein & Associates, PLLC
One Barberry Lane
P.O. Box 2159
Concord, NH 03302-2159

Jack B. Gordon, Esq.
Fried Frank Harris Shriver & Jacobson LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505

David M. Spector, Esq.
Dennis G. LaGory, Esq.
Kristy L. Allen, Esq.
Schiff Hardin LLP
6600 Sears Tower
Chicago, IL 6060

Andrew W. Serell, Esq.
Rath, Young and Pignatelli
One Capital Plaza
P.O. Box 1500
Concord, NH 03302-1500

Stephan P. Parks, Esq.
Doreen F. Connor, Esq.
Wiggin & Nourie, PA
670 N. Commercial Street, Suite 305
P.O. Box 808
Manchester, NH 03105-0808

Michael Cohen, Esq.
Cohen & Buckley, LLP
1301 York Road
Baltimore, MD 21093

Robert D. Hunt, Esq.
401 Gilford Ave, Suite 125
Gilford, NH 03249

David H. Simmons, Esq.
Mary Ann Etzler, Esq.
de Beaubien, Knight, Simmons, Mantzarias & Neal, LLP
332 North Magnolia Avenue
Orlando, FL 32801

John F. O'Connor
Steptoe & Johnson LLC
1330 Connecticut Ave, N.W.
Washington, DC 20036

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0319, In the Matter of the Liquidation of The Home Insurance Company, the court on September 13, 2004 issued the following order:

Having considered the briefs and oral arguments of the parties and the record on appeal, the court concludes that a formal written opinion is not necessary for the disposition of this appeal. We vacate and remand.

The intervenors appeal the order of the Superior Court (McGuire, J.) granting the motion filed by the Liquidator of The Home Insurance Company (Home) for approval of an agreement between Home and certain of its reinsureds, the AFIA Cedents. The agreement gives the AFIA Cedents a financial incentive to file claims against Home in the liquidation proceedings. According to the Liquidator's allegations, the agreement permits the AFIA Cedents to receive approximately $72.5 million of an estimated $231 million that the Liquidator will receive from the ACE Companies when the AFIA Cedents' claims against Home are filed and prosecuted.

The trial court ruled that the agreement complied with RSA chapter 402-C, which governs rehabilitation and liquidation of insurers. The court found the agreement "consistent with the goals and purposes of [RSA chapter 402-C] to protect the interests of the insureds and creditors." The trial court reached its conclusion without conducting an evidentiary hearing, however. On appeal, the parties raise arguments that they raised below, but upon which the trial court did not rule. We decline to rule upon these arguments in the first instance, absent a sufficient evidentiary record.

Moreover, although the trial court, in its June 1, 2004 order, acknowledged "[t]he agreement will be the subject of further proceedings and applications for approval in both regulatory and judicial settings in the United Kingdom," the court did not consider whether it had an independent obligation to assess the agreement's fairness through fact-finding proceedings. Cf. Matter of Boston & Providence R. Corp., 673 F.2d 11, 13 (1st Cir. 1982) (in reorganization proceeding, bankruptcy court must "act independently, out of its own initiative, for the benefit of all creditors" when assessing fairness of compromise with

creditors); In re Estate of Indian Motorcycle Mfg., Inc., 299 B.R. 8, 20 (D. Mass. 2003) (listing factors for bankruptcy court in Chapter 7 proceeding to consider when assessing whether compromise is fair).

Nor did the court consider whether comity concerns require that the New Hampshire liquidation proceedings be stayed pending completion of the proceedings in the United Kingdom. See Allstate Ins. Co. v. Hughes, 174 B.R. 884, 890 (S.D.N.Y. 1994) (discussing whether court may take action that calls into question validity of scheme of arrangement approved by court in United Kingdom).

For all of the above reasons, we vacate the trial court's order approving the agreement and remand for further proceedings consistent with this order. On remand, the trial court shall consider: (1) whether the New Hampshire liquidation proceedings should be stayed pending the completion of the regulatory and judicial proceedings in the United Kingdom; (2) whether the New Hampshire court has an independent obligation to assess the fairness of the agreement with the AFIA Cedents; (3) whether the intervenors have standing to contest the agreement; (4) whether the "Necessity of Payment Doctrine" or some other equitable doctrine authorizes the Liquidator or the court to vary the mandatory priorities set forth in RSA 402-C:44 (Supp. 2003); and (5) whether the payment to the AFIA Cedents qualifies as an administrative expense under RSA 402-C:44, I.

On remand, the trial court may resolve these issues through offers of proof, unless it determines that a full evidentiary hearing is necessary.

The trial court shall support its determinations on these issues with factual findings, as appropriate. For instance, if, on remand, the trial court determines that the agreement is lawful under New Hampshire law in part because Class II recipients will benefit from it and because it does not impair the rights of Class V recipients, the court shall set forth the factual basis for this conclusion. Similarly, if, on remand, the trial court determines that the agreement is lawful under New Hampshire law in part because it does not create subclasses within Class V, the court shall set forth the factual basis for this determination as well.

In Case No. 2004-0319, In the Matter of the Liquidation of The Home Insurance Company, the court on September 13, 2004 issued the following order:

The court does not intend this order to impede in any way the regulatory and judicial proceedings in the United Kingdom.

Vacated and remanded.

BRODERICK, C.J., and NADEAU, DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
Merrimack County Superior Court 03-E-0106
Honorable Kathleen A. McGuire
Honorable Robert J. Lynn
Office of the Liquidation Clerk
Andrew D. Bouffard, Esquire
Eric D. Jones, Esquire
Peter C. L. Roth, Esquire
J. David Leslie, Esquire
Ronald L. Snow, Esquire
Martha Van Oot, Esquire
Pieter Van Tol, Esquire
Adam Goodman, Esquire
Gary Lee, Esquire
Eric A. Haab, Esquire
Gail M. Goering, Esquire
Eric A. Smith, Esquire
Rebecca W. McElduff, Esquire
Roger B. Phillips, Esquire
Matthew W. Wulf, Esquire
Doreen F. Connor, Esquire
Suzanne Sahakian, Esquire
Bruce A. Harwood, Esquire
Monica A. Ciolfi, Esquire
Debra J. Hall, Esquire
Suzanne M. Gorman, Esquire
Marcia McCormack, Supreme Court
Loretta S. Platt, Supreme Court
Irene Dalbec, Supreme Court
Case Manager
File