

STATE OF NEW HAMPSHIRE

MERIMACK, SS.

SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE IN THE LIQUIDATION OF THE  
HOME INSURANCE COMPANY DISPUTED CLAIMS DOCKET

Claimant:	Century Indemnity Company
Proof of Claim Nos.:	AMBC 465096
	AMBC 464386
	INTL 277878
	AMBC 465074
Proceeding:	2005-HICIL-14

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**REPLY OF METEX MFG. CORPORATION TO CENTURY INDEMNITY  
COMPANY'S OPPOSITION TO THE MOTION TO INTERVENE AND PARTICIPATE**

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SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE IN THE LIQUIDATION OF THE  
HOME INSURANCE COMPANY DISPUTED CLAIMS DOCKET

CENTURY INDEMNITY COMPANY,  Claimant,  v.  ROGER A. SEVIGNY, INSURANCE COMMISSIONER OF THE STATE OF NEW HAMPSHIRE, AS LIQUIDATOR OF THE HOME INSURANCE COMPANY,  Respondent.	Proceeding No. 2005-HICIL-14
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**REPLY OF METEX MFG. CORPORATION TO CENTURY INDEMNITY  
COMPANY'S OPPOSITION TO THE MOTION TO INTERVENE AND PARTICIPATE**

Metex Mfg. Corporation, debtor-in-possession ("Metex"), by and through its undersigned counsel, hereby replies to the *Opposition to Metex Mfg. Corporation's Motion to Intervene and Participate* (the "Opposition"), filed by Century Indemnity Company ("Century"). In support thereof, Metex states as follows:<sup>1</sup>

**INTRODUCTION**

Century's Opposition asserts that Metex's request to intervene should be denied due to alleged untimeliness and prejudice that Century claims it will suffer. The injuries Century claims it will suffer are (1) further delay of a dispute that has been ongoing for *more than seven years*, (2) a perceived harm that any confidential information received by Metex will be subsequently disclosed to Century's detriment, and (3) additional litigation costs. Metex believes under the circumstances of this case its intervention in this disputed claims proceeding

<sup>1</sup> Capitalized terms not defined herein shall have the meanings given to them in the Metex's *Motion to Intervene and Participate* (the "Motion").

is timely. Further Metex has made clear that it wishes to intervene in this proceeding only on a going forward basis. Metex has no intention of seeking additional discovery, beyond what the parties have produced (although it desires to review such productions). Accordingly, it is difficult to see how any delay resulting from Metex's intervention may occur.

Century's assertion that its confidential information may get into the hands of asbestos plaintiff lawyers in Metex's chapter 11 case is false. As set forth more fully below, Metex has agreed to abide by the Confidentiality Order in place in this proceeding and will further agree that disclosure of sensitive information such as Claims Evaluation Materials will be limited to the Metex lawyers participating in this proceeding. At a later date, Metex may wish to disclose such confidential information to the professionals for the Unsecured Creditors' Committee and Future Claimants' Representative appointed in its chapter 11 case, but Metex will not do so without providing written notice to Century and an opportunity to object. Most importantly, none of Century's confidential information, including its Claims Evaluation Materials, will be disclosed to counsel to asbestos claimants in Metex's chapter 11 case.

## **ARGUMENT**

### **A. METEX'S MOTION IS TIMELY.**

- i. Metex exercised rights promptly upon receiving notice that its rights would be affected by this proceeding.*

Century attempts to conflate Metex's participation in The Home's ancillary liquidation in New York, Metex's negotiations in connection with the *Settlement Agreement and Mutual Release* executed in June 2012 (the "Century Settlement Agreement"), and Metex's awareness that other insurers were seeking contribution claims with adequate notice to Metex that its interests could be harmed by this proceeding. To the contrary, Metex was not aware that this proceeding could adversely affect its interests until the execution of the Proposed NYLB

Settlement on May 9, 2013, pursuant to which the NYLB agreed to pay the full remaining limits of Metex's coverage under The Home Policies less sums otherwise paid on such Policies, including any recovery in this proceeding by Century. After learning of this, Metex moved the Bankruptcy Court for authority to seek leave to intervene in this proceeding. Accordingly, Century's allegations that Metex "sat back" are simply inaccurate.

*ii. Metex is entitled to Due Process*

Metex disputes Century's assertion that "initiation" of the disputed claims proceeding "starts the thirty day period within which a non-party must seek to intervene." See Wiebusch on New Hampshire Civil Practice and Procedure § 6.28 ("A motion to intervene may be filed at any time before verdict or decree."). NH RSA 402-C:41 requires notice of a hearing on disputed claims be given to "claimant or his attorneys, and any other persons directly affected" prior to that hearing. This statutory right to receive notice ensures that parties with rights or interests that might be affected are given Due Process. Such rights must not be affected without an opportunity to appear and be heard. See *Berube v. Belhumeur*, 139 N.H. 562, 567, 663 A.2d 598 (1995) ("For more than a century, the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."); *In re Kilton*, 156 N.H. 632, 638, 939 A.2d 198, 203 (2007) ("The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing.") (citation omitted). Metex never received direct notice of this disputed claims proceeding or of its right to intervene.<sup>2</sup>

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<sup>2</sup> The deficiency in such notice would be further compounded by the fact that Metex is an out-of-state corporation and that notice of this disputed claim proceeding was not served upon it in a manner prescribed by RSA 510:4. RSA 510:4 provides the rules for service upon nonresident litigants, and this provision does not authorize notice by publication on a website. Rather, it requires that notice be served by mail upon a nonresident or his attorney, after service of process is initially made to the New Hampshire Secretary of State. See RSA 510:4, II. Notice in this case did not track the requirements of the statute. Cf. *South Down Recreation Association v. Moran*,

Century further argues that the publication of the Order initiating this proceeding on the Liquidation Court's website triggered the thirty-day period to move to intervene. However, as the United States Supreme Court noted in *Mullane v. Central Hanover Bank & Trust Co.*, where a claimant with rights affected by a proceeding is known, publication without more is insufficient to give notice sufficient to satisfy Due Process. 339 U.S. 306, 317 (1950) ("As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing"). See also *Sununu v. Clamshell Alliance*, 122 N.H. 668, 672, 448 A.2d 431, 434 (1982) ("An elementary and fundamental requirement of due process ... is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.") (holding publication without order of Court is insufficient to satisfy Due Process).

Moreover, publication on the Liquidation Court's website is not equivalent to publication notice under state constitutional law. The information contained on the Liquidation Court's website regarding the Liquidation spans eleven years of litigation involving many different parties and matters. New Hampshire law does not support Century's claim that a single listing within the vast amount of information contained on the website constitutes proper notice under state constitutional law. Requiring Metex to monitor information continuously posted on the website before it has been made a party to the proceeding would impose an unreasonable burden. Cf. *Sununu*, 122 N.H. at 673 ("If we were to recognize the plaintiff's argument that 'media notification' is a substitute for our statutes governing service, people would have to either read, watch or listen to the media in order to be vigilant in the protection of their rights. Our constitution does not impose such an unreasonable burden.").

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141 N.H. 484, 486, 686 A.2d 314 (1996) ("Proper services of process is a necessary prerequisite to obtaining jurisdiction over an out-of-state defendant.").

iii. *The Century Settlement Agreement does not affect these proceedings.*

Century's assertions that by virtue of the Century Settlement Agreement Metex had notice of these proceedings and that its proposed intervention is "fundamentally inconsistent" with the provisions of the Century Settlement Agreement are each without merit. *See* Opposition, pp. 1, 4-5. Though Century's rights in this proceeding were carved-out of the assignment of claims provision in the Century Settlement Agreement, there was no disclosure by Century or in the Settlement Agreement of the exact nature of this proceeding or its potential adverse effects on Metex.

Assuming, somehow, the Century Settlement Agreement amounted to notice, which Metex contests, the Century Settlement Agreement expressly provides that "nothing contained in this Agreement is or shall be deemed to be an admission ... by Kentile or Metex as to the validity of any of the coverage positions or defenses to coverage that have been or could have been asserted by Century..." and that "[t]he Parties agree that no part of this Agreement may be used in any proceeding as evidence of the respective rights, duties or obligations of the Parties under the Insurance Policies." *See* Century Settlement Agreement, §§ XII., A and C. Additionally, Century and Metex agreed, "By entering into this Agreement, the Parties have not waived nor shall be deemed to have waived any right, obligation, privilege, defense or position they may have asserted or might assert in connection with any Claim, matter, Person or insurance policy outside the scope of this Agreement." *Id.* at § XII., B. Put simply, Metex's agreement to the Century Settlement Agreement in no way waived any rights Metex may have in this disputed claims proceeding.

For these reasons, Metex's Motion is timely and should be granted.

**B. METEX'S INTERVENTION WILL NOT UNFAIRLY PREJUDICE CENTURY.**

*i. Century's Confidential Information will be protected.*

Century argues that the disclosure of confidential information contained in its briefs, including "Claim Evaluation Material," to Metex will harm it. *Opposition*, pp.11-12. To ensure that Century will not be harmed, Metex has agreed to be bound by the terms of the Confidentiality Order, which already provides for disclosure of such information to Metex as the policyholder. *See* Confidentiality Order, ¶ 6(f). Metex further would agree that any sensitive Claims Evaluation Material will be limited to Metex's attorneys' eyes only. Such information will not be disclosed to plaintiff-attorneys for claimants with asbestos-related injuries.

At some point, Metex may wish to disclose certain confidential information to counsel to the Unsecured Creditors' Committee (the "Committee") and Future Claimants' Representative (the "FCR") appointed in Metex's chapter 11 case. Any such disclosure will be strictly limited to the professionals of the Committee and FCR, who would need to agree to be bound by the Confidentiality Order. Prior to disclosure, Metex will provide written notice to Century. If Century objects to the disclosure, any disputes can be resolved by the Referee. Metex will not disclose any materials to which Century objects until such objection is resolved.

*ii. Metex does not seek to re-litigate issues*

Century argues Metex's intervention will cause re-litigation of issues, thereby harming it. Nevertheless, Century suggests that Metex be permitted to intervene on the conditions set forth in its Opposition. *See* Opposition, pp. 15-16. Metex agrees with the essence of Century's proposal – that its intervention should be limited to a going forward basis. For example, Metex does not intend to seek leave to file briefs out of time for matters that have been fully briefed. Nor will Metex seek additional discovery. However, to the extent the Referee or the parties

agree new matters must be addressed or a hearing or argument is scheduled, Metex should be permitted to participate fully. Any concerns Century may have that Metex will raise duplicative arguments can be alleviated by full disclosure of the briefings to Metex's attorneys, subject to the confidentiality procedures set forth above.

Metex disagrees with Century's claim that the Liquidator can represent its interest. Whereas the Liquidator has taken the position that remaining limits of the Policies will be paid either to Metex or to Century and, therefore, has no economic stake in the outcome, Metex has a direct economic interest and could suffer a substantial loss of property (\$5.5 million). Because Metex and the Liquidator have different interests, Metex should not have to rely on the Liquidator to represent it. *See, e.g., See Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 45 (1st Cir. 1992) (holding governmental interest in protecting broad public interest not adequate to represent economic interest of specific industry); *Georgia v. U.S. Army Corps of Engineers*, 302 F.3d 1242, 1256 (11th Cir. 2002) (noting that Army Corps which sought conservation of resources did not adequately represent state's direct interests in receiving share of water). For the same reason, Century's proposal that Metex's participation be limited to passive listening is unreasonable and inconsistent with Metex' rights to defend its interests.

### CONCLUSION

Should Metex be permitted to intervene on terms consistent with those set forth herein, Metex agrees to be bound by the determination of the Referee and the Courts of New Hampshire, and that it will not seek to impose the automatic stay or re-litigate the substantive issues in this matter in its chapter 11 case.

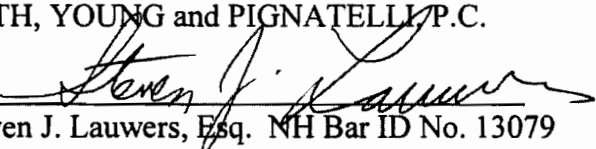
For the reasons set forth herein, Metex should be permitted to intervene in this disputed claims proceeding.



Dated: August 30, 2013

Respectfully submitted,

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