

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

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

Proceeding:	2005-HICIL-14
Proof of Claim Nos.	AMBC 465096 AMBC 464386 INTL 277878 AMBC 465074
Claimant	Century Indemnity Company (“CIC”)
Account:	Kentile Floors, Inc. (“Kentile”)

**LIQUIDATOR’S RESPONSE TO CIC’S OPPOSITION  
TO METEX’S MOTION TO INTERVENE AND PARTICIPATE**

In accordance with the Scheduling Order dated July 17, 2013, Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire, as Liquidator (“Liquidator”) of The Home Insurance Company (“Home”), hereby responds to the opposition of Century Indemnity Company (“CIC”) to the motion to intervene and participate of Metex Mfg. Corporation (“Metex”). The Liquidator assented to Metex’s motion. The Liquidator provides this response to address certain points presented by CIC’s opposition that are of concern to the Liquidator.

**I. CIC’S OPPOSITION DISREGARDS THE ALTERNATIVE  
PRESENTED BY METEX’S MOTION – THAT THIS  
PROCEEDING WILL NOT PROCEED AT ALL.**

As an initial matter, CIC’s opposition ignores the salient fact that Metex is in bankruptcy and has reserved the right to seek to apply the automatic stay if its motion is denied. Metex’s motion thus does not present a choice between proceeding with Metex and proceeding without Metex. The motion instead effectively offers a choice between proceeding with Metex (with Metex’s role limited by the conditions Metex itself proposed) and not proceeding at all. The Liquidator prefers to have this matter heard now with Metex’s participation rather than to

become involved in bankruptcy litigation and potentially have to start over again in another forum. CIC – which benefits from delay because it is withholding \$5 million from the Liquidator based on its claim<sup>1</sup> – passes over this point.

In its motion, Metex states that this proceeding is potentially subject to the automatic stay of 11 U.S.C. § 362, and Metex expressly reserves the right to ask the Bankruptcy Court to impose that stay if it is not granted leave to intervene subject to the conditions it proposes. Metex Motion ¶ 10 & n. 2. The Bankruptcy Court’s June 6, 2013 order authorizing Metex to seek to intervene in this proceeding preserved Metex’s right to ask that court to impose the stay. June 6, 2013 Order ¶ 2(ii) (Metex Memo Ex. 1). It is difficult to see why the Bankruptcy Court would not grant such a request respecting an asserted \$5 million asset if Metex were denied intervention or limited as CIC proposes.

As the Liquidator noted in his May 13, 2013 position paper, the automatic stay is intended to prevent interference with assets of a debtor in bankruptcy, including rights under insurance policies. “It is well settled that the debtor’s rights under its insurance policies are property of a debtor’s estate under § 541(a) of the [Bankruptcy] Code.” In re Margulies, 476 B.R. 393, 399 (Bkrcty. S.D.N.Y. 2012) (punctuation and quotation omitted). See also MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 92-93 (2nd Cir. 1988); 3 A. Resnick and H. Sommer, Collier on Bankruptcy § 362.03[5][b], 362-33 (16th ed. 2012). CIC itself has taken the position that its claim impairs the limits of the Home policies and reduces the amounts available to Metex from the New York Liquidation Bureau. Ex. A. The Bankruptcy Court thus could reasonably conclude that if Metex cannot intervene to protect its rights in the Home

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<sup>1</sup> CIC is not prejudiced by any delay in this matter because it has been using its contribution claim as a set-off against its reinsurance obligations to Home since it first asserted the Kentile claim. While this matter is nominally a proceeding by CIC to assert a claim, it is in actuality a proceeding by the Liquidator to recover \$5 million withheld by CIC based on what the Liquidator believes is an invalid claim.

policies, then CIC's claim to \$5 million of those limits should properly be stayed and determined as part of Metex's bankruptcy proceeding. If Metex is not allowed to see the arguments made by the parties and to meaningfully participate by briefing and argument, the Bankruptcy Court is unlikely to conclude that the interests of Metex or its creditors are being properly protected.

Starting anew in the bankruptcy forum presents the problems of discovery and delay that CIC professes to want to avoid. The Liquidator is of the view that it is far better to proceed with Metex as an intervenor, with the limited role it has proposed, than to have this proceeding halted by the automatic stay in favor of proceedings in the New York bankruptcy court.

**II. THE CLAIMS PROCEDURES ORDER DOES NOT PRECLUDE METEX'S MOTION.**

CIC contends that Metex's motion to intervene is time barred, citing to paragraph 9(b) of the Restated and Revised Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company in Liquidation dated January 19, 2005 ("Claims Procedures Order"). The Claims Procedures Order, however, is not a straightjacket, and it does not preclude intervention or the imposition of agreed conditions on intervention.

The Claims Procedures Order allows the Referee to tailor the procedures to the circumstances of particular claims. It expressly provides that disputed claims proceedings are to be governed by the rules of equity or law and by the Superior Court Rules. Claims Procedures Order ¶ 10(b). Those rules themselves recognize that they do not necessarily fit or govern every situation and may be waived. See Super. Ct. R. Preface ("As good cause appears and as justice may require, the court may waive the application of any rule."). The Referee accordingly has the authority and discretion to vary the general procedures of the Claims Procedures Order when appropriate in light of the particular circumstances of a claim. See Sabinson v. Trustees of Dartmouth College, 160 N.H. 452, 461 (2010) ("[T]he trial court enjoys the discretion to regulate

the proceedings before it.”) (citing, e.g., Super. Ct. R. Preface). This includes determining that parts of the Claims Procedures Order do not apply when the circumstances warrant.

The Referee’s authority to vary procedure is shown by this proceeding. In 2006, the Referee approved procedures for CIC’s contribution claims set forth in the parties’ Joint Report and the Stipulation and Agreed Confidentiality Order, with one modification. See Referee’s Ruling dated April 17, 2006 (Paula T. Rogers, R.) (Ex. B). If the Claims Procedures Order had to be taken as literally as CIC now claims, however, the Joint Report and Confidentiality Order could not have been filed or approved. The Claims Procedures Order does not permit such filings. Claims Procedures Order ¶ 9(d) (“Once the Liquidation Clerk has issued a Notice of Disputed Claim, no other pleadings or motions shall be filed except as expressly provided in these Procedures.”).

The Referee may properly exercise her discretion to allow intervention in the circumstances here. The timeframe for intervention under Claims Procedures Order § 9(b) on which CIC relies starts with notice of disputed claim proceeding. In this case, however, the Notice of Disputed Claim Proceeding actually preceded CIC’s Kentile contribution claim. The notice for 2005-HICIL-14 was issued on November 28, 2005. Ex. C. At that time, CIC had not identified the policyholder accounts involved in its claim. CIC first specified particular accounts in 2006. See Joint Report ¶ 4 (CIC Ex. 4).<sup>2</sup> In any event, the Claims Procedures Order does not require that a notice of disputed claim proceeding be provided to anyone other than the claimant, the Liquidator, and the Referee or Court. Claims Procedures Order ¶ 9(a). The purpose of the Claims Procedures Order to provide “fair and ratable” procedures (id. ¶ 3(c)) would not be

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<sup>2</sup> The Joint Report provides that CIC and the Liquidator are to file “joint requests” that particular CIC claims be deemed matters in disputed claim proceedings within 2005-HICIL-14. The joint request regarding CIC’s Kentile claim was filed on February 7, 2011 and granted on February 10, 2011. However, while the joint requests and rulings on them serve to commence proceedings before the Referee, they are not “notices of disputed claim proceedings” within the Claims Procedures Order, which does not contemplate the procedures of the Joint Report.

served by applying a deadline to Metex based on a notice (1) issued before Kentile was identified as an account at issue and (2) that was not, and was not required to be, provided to Metex.

**III. METEX HAS A STAKE IN THIS MATTER AS A COMPETING CLAIMANT FOR THE REMAINING HOME POLICY LIMITS.**

Metex has a right at stake and a “direct and apparent” interest in this proceeding.

Lamarche v. McCarthy, 158 N.H. 197, 200 (2008). See Superior Court Rule 139. Metex is competing with CIC for \$5 million of the remaining Home policy limits. If CIC were to prevail in this proceeding, then Home’s limits – and thus Metex’s recovery – would be reduced by the amount of CIC’s claim. CIC itself asserts that its claim impairs the Home policy limits and reduces the amount that the NYLB can pay to Metex. See Ex. A. Metex, as a competing claimant to the limited fund represented by the Home policy limits, is a classic example of a person who may be allowed to intervene to protect its interests. See Rabbia v. Rocha, 162 N.H. 734 (2011) (competing claimant to funds in escrow); ACG Credit Co., LLC v. Gill, 152 N.H. 260 (2005) (trustee claiming interest in property).

CIC suggests that Metex should be denied the opportunity to protect its stake as a penalty because it “delayed” its motion to intervene after it learned of this proceeding in late summer 2012.<sup>3</sup> Whether or not Metex could be criticized for not seeking to intervene earlier is a moot point, however, in light of the Metex bankruptcy. The bankruptcy caused the parties to seek to stay this matter in November 2012, and in light of the automatic stay there has been sufficient doubt over proceeding that post-bankruptcy “delay” should not be considered. Any pre-bankruptcy “delay” is also irrelevant given the present alternatives of moving forward with Metex or not moving at all. In any event, as the Referee is aware, this matter has evolved and

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<sup>3</sup> CIC does not say whether it informed Metex of this proceeding. This is a curious omission given that CIC claims to have “specifically-negotiated” a provision allowing it to pursue Home as part of the CIC/Metex settlement. CIC Opp. 5, 9-10. For all that appears, CIC negotiated that provision (which only reserves “any and all rights, Claims, and proceeds”) with Metex while not informing Metex that it was actively pursuing a claim and taking a multi-million dollar setoff against Home.

proceeded by fits and starts, and some delay has been at CIC's insistence over the Liquidator's opposition. See Referee's Ruling on CIC's Motion to Stay for 90 Days (November 15, 2011). In the circumstances, the timing of Metex's motion should have no bearing on the outcome.

#### **IV. CIC'S CLAIMS OF PREJUDICE LACK SUBSTANCE.**

Metex proposes that it be allowed to intervene to review the briefs (subject to the Confidentiality Order), submit a position paper/brief on its own behalf, and participate in argument so that the Referee will hear from both of the competing claimants to the remaining policy limits. Metex Motion ¶ 2; Metex Memorandum at 2.<sup>4</sup> This is a reasonable proposal. CIC, on the other hand, seeks to divide and conquer. It attempts to prevent Metex from finding out what arguments have been made in this proceeding (so Metex cannot evaluate what is going on or determine if CIC is taking consistent positions as against Metex and Home) and to exclude Metex from the proceeding (so the Referee will not hear the competing claimant's positions and may, as a result, give primacy to CIC's claims as a co-insurer over Metex's claims as a policyholder). The Confidentiality Order is not intended to allow secret proceedings, and CIC's speculative claims of prejudice do not withstand scrutiny.

##### **A. The Parties' Briefs Are Not "Claims Evaluation Material," And They May Properly Be Disclosed To Metex Under The Confidentiality Order.**

CIC's principal contention is that Metex's request for access to the parties' briefs seeks access to "Claim Evaluation Material" protected by the Stipulation and Confidentiality Order that was approved, subject to a modification to ¶ 10, in the Referee's Ruling of April 17, 2006

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<sup>4</sup> CIC and Metex are the only two operative claimants to those limits. As explained in the Liquidator's Motion for Approval of Settlement Agreement with Metex and New York Liquidation Bureau at ¶¶ 1, 16-23 (Ex. D), the Liquidator intends to deny the claims of other claimants respecting the Home/Kentile policies once the settlement becomes effective (that is, once the requisite court approvals have been obtained and the Metex plan of reorganization has become effective). All the other claimants received notice of the Liquidator's motion, and none objected. Accordingly, contrary to CIC's suggestion (CIC Opp. 15 n. 3), the Liquidator will not be allowing other claimants' claims regarding Kentile; those claims are being held in abeyance until the settlement becomes effective.

(the “Confidentiality Order”) (Ex. B). This is incorrect.<sup>5</sup> The briefs with the parties’ arguments regarding CIC’s claim against Home are not “Claim Evaluation Material.” That category is limited to material concerning CIC’s evaluation of claims against it, not the Liquidator’s evaluation of CIC’s claims against Home. The briefs here do not fall in the protected category, and CIC has failed to identify any actual prejudice from disclosure of the briefs to Metex.

1. The Confidentiality Order expressly distinguishes between Confidential Material and Claim Evaluation Material and allows disclosure of the former to policyholders and claimants. The Confidentiality Order defines Confidential Material (¶ 2(e)); provides that filings containing Confidential Material “shall be filed under seal in accordance with the rules of the Court, and kept under seal until further order of the Referee” (¶ 12 (emphasis added)); and provides that Confidential Material may be disclosed to other claimants or policyholders (such as Metex) unless it is designated as Claim Evaluation Material (¶ 6(f)). Specifically, ¶ 6(f) allows Confidential Material to be provided to:

a claimant or Home policyholder with a proof of claim under a Home policy where the Home policy is involved in a [claim by CIC], or officer, director, agent, representative, consultant, counsel, or employee of such claimant or policyholder; provided that a designator may sub-designate Confidential Material relating to the designator’s evaluation of a claim against it as “Claim Evaluation Material” that may not be disclosed to a claimant or policyholder, in which case the recipient shall not, absent written agreement with the designator, disclose the designated Claim Evaluation Material to a claimant or policyholder without leave of the Referee upon motion; provided further, that any such motion shall show the factual and legal support for disclosure of the Claim Evaluation Material to the other claimant or policyholder. [Emphasis added]

2. The briefs may properly be disclosed to Metex because they are not Claim Evaluation Material. The briefs were originally designated as Confidential Material, not Claim Evaluation Material, and such material may be disclosed under ¶ 6(f) to Metex as a “claimant or

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<sup>5</sup> The Referee did not address this issue in the April 2, 2013 order on the Liquidator’s motion for leave to disclose briefs to Metex, which denied the motion without explanation. So far as appears, the Referee may have denied the motion on the ground that Metex should make its own request for access (as it has now done).

Home policyholder with a proof of claim under a Home policy” that is involved with the CIC claim. When the question of disclosure to Metex arose, however, CIC redacted almost half of the briefs as “Claim Evaluation Material.” These blanket redactions are improper.

As CIC concedes (CIC Opp. at 11), to designate material as Claim Evaluation Material the material must concern “the designator’s evaluation of a claim against it.” Confidentiality Order ¶ 6(f) (emphasis added). CIC’s redactions, however, concern the Liquidator’s determination of CIC’s claim against Home and the Liquidator’s arguments against that claim, not CIC’s “evaluation of a claim against it.” See Confidential Exs. A1 at 23-30 (redacting CIC’s arguments against the Liquidator’s denial); A2 at 12-27 (redacting the Liquidator’s application of law to CIC’s contribution claim); A3 at 7-17 (redacting CIC’s reply to Liquidator’s arguments); A4 at 3-9 (redacting entirety of Liquidator’s sur-reply argument).<sup>6</sup> Even argument headings in the tables of contents and the tables of authority have been struck out. See Confidential Exs. A1 at i-iv; A2 at ii-v; and A3 at i-ii. CIC’s excisions are improper because the Liquidator’s arguments against CIC’s claim and CIC’s counterarguments are not CIC’s evaluations of claims against CIC.

3. The Confidentiality Order contemplates the situation presented here by providing that Confidential Material may be used “for determining any other proofs of claim in the Home liquidation . . . relating to the same Home insurance policies as a [CIC] Claim.” Confidentiality Order ¶ 5. This reflects the fact that CIC’s contribution claims concern policies issued by Home that are likely to be the subject of direct policyholder or third party claims. In this case, Metex and other claimants have filed proofs of claim under the Home policies. The Confidentiality Order allows Confidential Material to be disclosed to these persons in connection with the

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<sup>6</sup> These confidential exhibits show the redacted parts of the briefs as struck out so that the Referee can see what CIC has redacted. The confidential exhibits are accordingly filed under seal and are not being provided to Metex.



determination of their claims under the policies. Id. ¶ 6(f). That is what Metex requests here, where Metex’s entitlement to \$5 million of the Home policy limits will be determined in this proceeding.

These provisions are intended to avoid the determination of related claims in isolation, with potentially inconsistent results. This concern is particularly apt for contribution claims. The fundamental question in such claims is whether an insurer has paid more than its “fair share,” which necessarily calls for evaluation of the insurer’s payments in the context of other payments and the loss. See, e.g., Maryland Cas. Co. v. W.R. Grace & Co., 218 F.3d 204, 212 (2d Cir. 2000); Scottsdale Ins. Co. v. Century Sur. Co., 105 Cal. Rptr. 3d 896, 906 (Cal. App. 2010); Lockwood v. Dickey, 83 N.H. 365, 368-69 (1928). CIC seeks to have its claim determined in a separate silo without regard to other claims. The Confidentiality Order, however, is intended to shield only information concerning a designator’s evaluation of an underlying claim against it, not to allow a litigant to avoid the Referee’s consideration of competing arguments or claims.

In short, the Confidentiality Order is a limited shield from disclosure. It is not intended to serve as a sword to prevent policyholders from evaluating CIC’s claims which would reduce the policyholders’ claims. See Confidentiality Order ¶ 6(f). Metex properly may learn of the arguments concerning CIC’s claims against Home where CIC is competing with Metex for policy proceeds. See id. ¶ 5.

**B. CIC Will Not Suffer Any Cognizable Prejudice From Allowing Metex Access To The Briefs.**

CIC’s opposition fails to specifically identify any particular harm that it would suffer from disclosure of the briefs to Metex. CIC does not describe why disclosure of those briefs (or any fact or argument in them) to Metex would cause it harm, nor why disclosure of the briefs to

counsel for asbestos claimants would cause it harm. CIC just presumes harm because it is adverse to Metex in stayed coverage litigation and its settlement with Metex has not yet become final. See CIC Opp. at 11-13. However, the mere fact that parties are past and, possibly, future adversaries is not enough to demonstrate legal prejudice. By that logic, discovery should be denied in litigation because it might “prejudice” the disclosing party. Disclosure of the Liquidator’s arguments and CIC’s counterarguments over CIC’s claim against Home would not improperly disadvantage CIC. It would merely inform and allow meaningful participation by a competing claimant, Metex, who stands to lose \$5 million through this proceeding.<sup>7</sup>

The import of CIC’s position is that the Confidentiality Order requires CIC and the Liquidator to litigate in secret, excluding competing claimants to the same policy limits. Such a result would be highly unusual, and it would require concrete justification, not speculation. CIC’s asserted fear that Metex may seek to “relitigate” matters and raise new arguments is difficult to understand given that Metex does not know – because CIC has denied it access to the briefs – what specific arguments the Liquidator has made. But even if Metex were to raise a new argument, that would not unfairly prejudice CIC. The Confidentiality Order did not grant CIC a right to litigate free of competing claims and parties. Allowing additional briefing does not constitute prejudice, and, unlike the Liquidator, CIC benefits from the slight delay it may require. In any event, as noted in Part I, the alternative is not going forward without Metex but litigation with Metex in the Bankruptcy Court over the automatic stay, and potentially the merits. Finally,

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<sup>7</sup> CIC implies that such a result would be fair because the provision in the Metex/CIC settlement was “specifically negotiated,” suggesting that Metex understood and agreed to the consequences of CIC’s claim against Home. CIC Opp. 9-10. That is not credible. If true, Metex would have agreed to a settlement that nominally calls for an \$11 million payment but that in actuality provides only \$6 million. Under CIC’s view, the Metex/CIC settlement would only benefit Metex by a net \$6 million (the \$11 million CIC payment less the \$5 million reduction in the Home limits to be paid by the NYLB), and CIC would only pay a net \$6 million (the \$11 million payment less the \$5 million recovery by setoff against Home based on CIC’s contribution claim).

Metex has agreed not to seek discovery, and the Referee can reasonably condition Metex's intervention on that agreement given the authority discussed in Part II.

**V. CIC'S "PROPOSAL" IS UNWORKABLE.**

CIC finally proposes that Metex's motion be addressed by (1) having the Liquidator and CIC negotiate over what more of the briefs can be provided to Metex, and (2) allowing Metex's counsel to "sit in" at argument but not disclose what is said to others. CIC Opp. at 16-17.

Neither part of this makes sense.

1. The Liquidator and CIC should not be directed to "negotiate" because they have already arrived at an impasse on the critical question of what is Claim Evaluation Material. As CIC's Opposition and this Response show, CIC and the Liquidator fundamentally differ over whether the parties' arguments concerning CIC's claim against Home set forth in the briefs are Claim Evaluation Material. The disagreement is not over a few paragraphs or sentences, but over redactions of almost half the briefs. Unless one party is willing to change its basic position, it is not productive to direct negotiations. Instead, there is an impasse and a need for a decision by the Referee.<sup>8</sup>

In any event, CIC disregards the fact that Metex is the one seeking access and intervention, and that Metex needs to decide whether to seek to apply the automatic stay. Even if the Liquidator and CIC were somehow to agree on redactions, Metex might well not accept them as sufficient or appropriate. Indeed, it would have no basis to judge them, since it does not know what is being withheld. CIC's proposal is a recipe for delay and further proceedings later.

2. CIC's proposal that Metex be allowed to "sit in" the argument without the ability to speak or even report back to the Bankruptcy Court fails to meaningfully address Metex's

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<sup>8</sup> The Liquidator presumes CIC's redactions reflect its considered position over what is Claim Evaluation Material. If CIC intended the redactions as an opening bid for a negotiation, it should immediately advise the Liquidator and Referee what it really thinks constitutes Claim Evaluation Material.

request for an opportunity to be heard. It seems destined to drive Metex back to the Bankruptcy Court. It is also contrary to ¶ 10 of the Confidentiality Order as modified by Referee Rogers in the Referee's Ruling dated April 17, 2006 (Ex. B).

In that ruling, the Referee expressed discomfort with the initial proposed order's "assumption that material treated as confidential for discovery purposes 'shall not lose its status as Confidential Material' when offered in open court proceedings." *Id.* at 1. The Referee modified ¶ 10 of the Confidentiality Order to provide that:

In the event that a party or participant intends to offer any Confidential Material concerning the Claims in open court proceedings, a party or participant may move for an order that will preserve confidentiality and prevent unnecessary disclosure, including a request for in camera review. The Referee will then determine whether the proffered evidence requires continued confidential treatment and, if so, what protections should be afforded.

*Id.* at 2 (emphasis added). The Referee thus required a party to justify confidentiality of matters to be presented at the hearing, and she intended that arguments would be public even if some evidence was not.

CIC's proposal disregards its burden of showing that matters properly discussed in open court should remain confidential, and it assumes that the Referee can and should impose a gag order on Metex as a price of admission. CIC offers no support for this draconian position.

**CONCLUSION**

The Referee should allow Metex to intervene and participate on the conditions proposed.


Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE  
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HAMPSHIRE, AS LIQUIDATOR OF THE  
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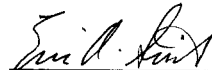


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August 30, 2013

Certificate of Service

I hereby certify that a copy of the foregoing Response to CIC's Opposition to Metex's Motion to Intervene and Participate was emailed to counsel for CIC and counsel for Metex on August 30, 2013.



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Eric A. Smith