THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of
The Home Insurance Company

ACE COMPANIES' RESPONSE TO LIQUIDATOR'S OBJECTION REGARDING AN EVIDENTIARY HEARING AND MOTION FOR STAY OF DISCOVERY

Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company, and ACE American Reinsurance Company (collectively, the "ACE Companies") hereby submit this response to the Liquidator's Objection to Objectors' Requests for Evidentiary Hearing and Liquidator's Motion Concerning Discovery dated April 2, 2004 (the "Objection and Stay Motion").[1]

INTRODUCTION

Because the Liquidator's proposed Agreement clearly violates the New Hampshire statute, the Court should deny the Motion even in the absence of discovery and an evidentiary hearing. If, however, the Court has any question about the validity of the proposed Agreement, it is essential that the ACE Companies have an opportunity to take meaningful discovery and present evidence to the Court at an evidentiary hearing.

The Liquidator admits that the proposed Agreement, which sets forth an unprecedented scheme affecting the rights of all of Home's creditors, arises out of "complex issues." (Objection and Stay Mot. at 2.) Indeed, the Liquidator has submitted six new affidavits in

[1] The ACE Companies understand that the upcoming "status conference" with the Court on April 9, 2004 will be limited to issues such as scheduling and discovery. Accordingly, the ACE Companies have not discussed the substantive merits of the Liquidator's motion to approve the proposed Agreement (the "Motion") in this response, and instead fully reserve their rights to file further submissions with the Court on those issues.

connection with his reply on the Motion for approval of the Agreement. The affidavits (some of which are from parties with a financial interest in the outcome of the Motion) present a one-sided, partial version of the facts and do not answer the ACE Companies' discovery requests. In addition, the affidavits — particularly the Hughes Affidavit — discuss new facts and issues that were never mentioned in the Liquidator's initial moving papers. The Liquidator's flood of affidavits makes clear that discovery and an evidentiary hearing are necessary in order to fairly test all the assumptions underlying the proposed Agreement and proceed in an orderly fashion.

It is significant that the Liquidator did not present the facts (albeit incomplete) that are contained in the new affidavits at the time the initial papers were filed. The Liquidator, moreover, seeks to prevent the ACE Companies from taking any discovery or evidence at a Court hearing for the purpose of inquiring into those facts and the "complex" set of circumstances that gave rise to the Agreement. Instead, the Liquidator contends that the Court should accept all the allegations in the Motion and the untested affidavits as true, and should decide this dispute that (according to the Liquidator) allegedly involves at least a hundred million dollars on the basis of a two-hour hearing consisting solely of argument by counsel. (*See* letter from Peter C.L. Roth to William S. McGraw, dated March 23, 2004, a copy of which is attached as Exhibit A hereto.) As discussed below, such an approach would violate well-established principles of law as well as New Hampshire court rules and procedures. The Liquidator argues, in the alternative, that the ACE Companies' discovery is a nullity because it was served without Court approval. The Liquidator, however, has not shown that such approval is required. Moreover, to the extent the ACE Companies were required to obtain Court permission to conduct discovery, they made a request for discovery in their papers objecting to the Motion.

The Liquidator also misconstrues the purpose of the discovery and evidentiary hearing sought by the ACE Companies. Rather than seeking to delay an adjudication of the Motion until after the June 2004 bar date for claims, the ACE Companies have taken every step to ensure that a hearing takes place in advance of the claim-filing deadline. To that end, the ACE Companies promptly served discovery demands along with their objections to the Motion. Moreover, they have asked for limited discovery that tracks the allegations in the Motion and would involve only a small number of depositions. In sum, the ACE Companies are seeking a discovery and hearing schedule that takes the bar date and all other relevant factors into account.[2]

Finally, the Liquidator apparently wants to preclude the ACE Companies from taking discovery because they allegedly are seeking a "multi-million dollar windfall" and acting contrary to the "best interests of the policyholders." (Objection and Mot. to Stay at 8.) The ACE Companies, however, have a right to ensure that any action concerning the reinsurance proceeds — in which they have an undisputed property interest — comports with New Hampshire's statutory scheme and principles of due process and fairness. The only way to do that is to expose the Liquidator's proposal to the full light of discovery and an evidentiary hearing. As a publicly appointed official, the Liquidator should welcome such scrutiny rather than seek to avoid it.

ARGUMENT

A. The Liquidator Has Not Satisfied The Requirements For Staying Discovery

The Liquidator requests a stay of discovery pursuant to Rule 35 of the New Hampshire Superior Court Rules, which requires that the moving party show "good cause" and that the discovery sought would result in "annoyance, embarrassment, oppression, or undue burden or

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[2] If, however, discovery and an evidentiary hearing cannot be completed by June 2004, the Liquidator could seek a short extension of the claim-filing deadline. Although there would be costs associated with an extension of the bar date, they are *de minimis* when compared to the amounts at issue.

expense." N.H. Super. Ct. R. 35(c).[3] The Liquidator has not demonstrated that there is "good cause" here or that the ACE Companies' discovery would impose any undue burden or expense.

It is telling that the Liquidator fails to cite a single New Hampshire case in which the court stayed or precluded discovery under similar circumstances.[4] To the contrary, the New Hampshire courts have emphasized that the discovery provisions in Rule 35 should be construed liberally. *E.g., Durocher's Ice Cream, Inc. v. Peirce Constr. Co.*, 106 N.H. 293, 294-95 (1965) ("The use of depositions and discovery as an integral part of pretrial procedure has been given a broad and liberal interpretation in this jurisdiction."); *McDuffy v. Boston & Maine R.R.*, 102 N.H. 179, 181 (1959) ("Discovery in civil actions has been regarded in this jurisdiction as a proper procedural aid for parties to prepare their case in advance of trial and has been given a broad and liberal interpretation.") *See generally* N.H. Super. Ct. R. 35(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party ... .").

Instead of citing relevant New Hampshire cases, the Liquidator relies on cases from other jurisdictions. (*See* Objection and Stay Mot. at 7-8.) Those cases, however, are easily

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[3] The Liquidator incorrectly states that the Court has the authority to stay discovery "for the convenience of the parties and in the interest of justice." (Objection and Stay Mot. at 7.) Rule 35 does not permit a stay of discovery or a protective order under those circumstances; rather, Rule 35(d) states that the Court may adjust the sequence and timing of discovery (not the availability of discovery) for the convenience of the parties and in the interest of justice. N.H. Super. Ct. R. 35(d).

[4] The Liquidator relies on *Downing v. Monitor Publishing Co.*, 120 N.H. 383 (1980), where the court held that a defendant must disclose the source of an allegedly libelous statement, but noted that "some safeguard should exist to prevent an order of disclosure when the plaintiff's claim of falsehood is entirely baseless." *Id.* at 387. Clearly, the *Downing* court was not setting forth a general standard for when discovery is appropriate, but rather applied a disclosure rule that is particular to libel actions. The only other New Hampshire case cited by the Liquidator is *State v. DeLong*, 136 N.H. 707 (1993), which stands for the unremarkable (and undisputed) proposition that "[t]he trial court has the inherent authority to exercise its sound discretion in matters relating to pre-trial discovery." *Id.* at 709.

distinguished. For example, *Harris v. Iorio*, 922 F. Supp. 588 (M.D. Fla. 1996), *aff'd*, 136 F.3d 139 (11th Cir. 1996), did not even involve a request for a stay of discovery or protective order, and instead dealt with the standard for deciding a motion to dismiss. The court noted that "[t]he standard on a 12(b)(6) motion is not whether the plaintiff will ultimately prevail [on] his theories, but whether the allegations are sufficient to allow [him] to conduct discovery in an attempt to prove [his] allegations." *Id.* at 590. The Liquidator's reliance on *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 694 (1933), and *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980), is similarly misplaced. *Sinclair* simply held that discovery on damages should be postponed until the issue of liability had been decided, while *Bruno & Stillman* (like the *Downing* case discussed above) applied the special rules in libel actions where the discovery of confidential sources is sought. The Liquidator's other case, *Vivid Tech., Inc. v. American Science & Eng., Inc.*, 200 F.3d 795 (Fed. Cir. 1999), is inapplicable because in that patent infringement action "the parties and the court knew with reasonable certainty which claims terms were at issue with respect to infringement" and "discovery was not needed for this purpose." *Id.* at 803. In this case, by contrast, discovery is necessary to uncover certain critical facts that remain unknown or, at best, unclear. (*See infra.*)

The Liquidator asserts that "[t]he discovery sought by the ACE Companies is burdensome and unlikely to provide meaningful information beyond that already supplied, as the Liquidator's reasons for endorsing the Agreement have been explained in the motion papers." (Objection and Stay Mot. at 6.) The Liquidator apparently believes that the Court and any party opposing the Motion must accept all the statements in the Motion as true, even though many of them are vague and made without citation to any supporting evidence. The very purpose of the ACE Companies limited and focused interrogatories is to determine the factual basis for the

Liquidator's allegations. Also, while the Liquidator has recently provided affidavits in support of the Motion, those affidavits do not provide all the information sought by the ACE Companies and represent only one side of the story (often from the viewpoint of financially interested affiants). For example, a key aspect of the Agreement is the proposal to pay 50% of the "Net Recoveries" to some AFIA cedents as an "incentive" to file claims. The Liquidator's moving papers and seven affidavits (in total) are completely silent on why certain AFIA cedents should receive payments that the Liquidator estimates to be in excess of $50 million. The ACE Companies' discovery requests seek information on this specific issue. (*See, e.g.*, Ex. A to ACE Companies' Objections, Interrogatory Nos. 8-10; Ex. B to ACE Companies' Objections, Request for Production Nos. 11-13.) In the absence of such discovery, the ACE Companies (and the Court) would have no way to evaluate the payments set forth in the proposed Agreement.[5]

The Liquidator maintains that the discovery will "create unnecessary burdens on the estate" and that the ACE Companies' document requests are overly broad because they seek documents relating to the "background" facts in the Motion. (Objection and Stay Mot. at 6.) First, the minimal expense that will be caused by the ACE Companies' discovery pales in comparison to the tens of millions of dollars that the Liquidator intends to pay AFIA cedents (on the unsupported grounds that they are "administrative expenses"). Second, as the Liquidator notes, the document requests are not just related to "background" information; they are directly

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[5] The foregoing is merely one example of the deficiencies in the information provided by the Liquidator. Among other things, the Liquidator has also failed to make available the "presentations and further documentation" that were given to the AFIA cedents on the "walling off" of UK assets. (Motion at 6.) Since the Liquidator has described the "walling off" threat as an impetus for the proposed Agreement, it should be required to turn over those documents. The recent affidavits submitted by the Liquidator do not provide any details on the presentations and other documentation on the "walling off" issue.

tied to events, facts and witnesses referred to in the Motion. Presumably, these documents have been gathered already and should be readily available for production. In essence, the Liquidator castigates the ACE Companies for seeking documents on matters that the Liquidator himself brought to the Court's attention. Given the amounts at stake, it is not unreasonable or burdensome for the ACE Companies to request the production of such documents.

The Liquidator also argues, in the alternative, that the discovery propounded by the ACE Companies was improper because the Court did not approve it in advance. (Objection and Stay Mot. at 5.) The Liquidator cites no New Hampshire rule or case requiring the Court approval of discovery in liquidation proceedings. To the extent, however, that such approval is necessary, the ACE Companies previously requested the right to take discovery in the memorandum of law in support of their objections to the Motion. (*See* Memo. of ACE Companies at 22.) The ACE Companies attached the discovery requests to the memorandum of law and served them on the Liquidator in order to expedite the discovery process.

B. The Liquidator Has Not Demonstrated That A Summary Procedure Is Appropriate

In opposing the ACE Companies' request for an evidentiary hearing, the Liquidator argues that the Court should conduct a "summary" hearing instead because (a) he has already proven in the Motion and affidavits the "reasonableness" of the proposed Agreement; and (b) the Motion "is time-sensitive." (Objection and Stay Mot. at 2.)[6]

Moreover, to the extent the Liquidator's affidavits fill in some of the gaps in the Motion, the ACE Companies are entitled to cross-examine the affiants and probe their statements. Affidavits submitted by counsel for the Liquidator are not an adequate substitute for oral testimony by the affiants.

[6] The type of hearing envisioned by the Liquidator is spelled out in Mr. Roth's letter of March 23, 2004, in which he states that "a hearing of no more than 2 hours should be sufficient to hear each of the parties." (Ex. A.)

Of course, the issue of whether the proposed Agreement is appropriate and in keeping with New Hampshire law must be determined by the Court, not the Liquidator. In making that determination, the Court should have the opportunity to consider all the evidence, as opposed to the conclusions of counsel, and should be able to assess the credibility of witnesses (as well as the weight to be given to their testimony). The "summary" hearing proposed by the Liquidator would unnecessarily preclude the Court from performing those vital functions. The Liquidator's assertion that an evidentiary hearing would delay the resolution of the Motion is equally misplaced. As noted above, the ACE Companies are cognizant of the claim-filing deadline and there is no reason why an evidentiary hearing cannot be scheduled with that deadline in mind.

The Liquidator contends that a summary proceeding "in these circumstances ... should be constitutionally adequate." (Objection and Stay Mot. at 3.) However, the cases cited by the Liquidator do not involve the same circumstances as this case. In three of the Liquidator's cases, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599-600 (1950), *Fahey v. Mallonee*, 332 U.S. 245, 253-54 (1947), and *American Land Co. v. Zeiss*, 219 U.S. 47, 64-71 (1911), there was a statute expressly authorizing summary proceedings. There is no such statute in this case. *See New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404, 407 (1960) (stating that the courts have been "extremely reluctant" to allow summary proceedings "in the absence of express statutory authority"). In the other two cases cited by the Liquidator, *In re Bloomgarde*n, 780 F.2d 657, 661-62 (7th Cir. 1985), and *Drislor Assocs. v. Metro North State Bank (In re Dislor Assocs.)*, 110 B.R. 937, 940-41 (D. Colo. 1990), the courts interpreted the "notice and hearing" requirements for relief from the automatic stay under 11 U.S.C. § 362(e). As noted in *Drislor*, "Congress intended that hearings under Section 362 should be expedited, summary proceedings." 110 B.R. at 940. There is no evidence of similar legislative intent here.

Moreover, *Bloomgarden* and *Drislor*, in contrast to this case, did not involve an adjudication of substantive rights, but rather a determination on the procedural issue of whether to lift the stay.

The Liquidators relies on two additional cases, *S.E.C. v. Basic Energy & Affiliated Resources, Inc.*, 273 F.3d 657 (6th Cir. 2001), and *S.E.C. v. Wencke*, 783 F.2d 829 (9th Cir. 1986), for the proposition that the Court may "fashion abbreviated procedures" in this case and the ACE Companies must show how they would be prejudiced by the lack of a full evidentiary hearing. (Objection and Stay Mot. at 3-4.) *Basic Energy* and *Wencke*, however, were disgorgement proceedings where the substantive issue of the defendant's liability had been determined previously. Also, in both cases, the courts noted that the parties opposing the summary proceeding had not demonstrated any prejudice. *See Basic Energy*, 273 F.3d at 669-70; *Wencke*, 783 F.2d at 838. Here, the ACE Companies have shown that they would be prejudiced. As noted above, a summary hearing would deprive the ACE Companies of an adequate and meaningful opportunity to present evidence to the Court, and to have the Court assess the weight and admissibility of witness testimony.

Finally, in citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), the Liquidator recognizes that a summary proceeding is inappropriate where there are parties with property interests at stake. (Objection and Stay Mot. at 4.) The Liquidator, however, mischaracterizes the objections to the Motion by stating that they are "more directed towards the process in the abstract and not towards an articulable deprivation of property." (*Id.*) The ACE Companies noted in their memorandum of law in opposition to the Motion that the proposed Agreement, if implemented, would directly affect the economic interests of Home's policyholders, cedents and reinsurers (which include the ACE Companies). (*See* Memo. of ACE

Companies at 20.) Thus, it could not be clearer that there are tangible property interests at stake in this case and that an evidentiary hearing is warranted.

CONCLUSION

For the foregoing reasons, the ACE Companies respectfully request that the Court (1) schedule an evidentiary hearing with respect to the Motion; and (2) deny the Liquidator's motion for a stay of discovery.

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CERTIFICATE OF SERVICE

I, Ronald L. Snow, certify that I served by hand-delivery and/or first-class mail a copy of this pleading on April 8, 2004 to the attached service list.

Ronald L. Snow

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