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' OBJECTION TO LIQUIDATOR'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company and ACE American Reinsurance Company (collectively, the "ACE Companies"), by their attorneys, Lovells and Orr & Reno P.A., respectfully submit this Objection to the Liquidator's Proposed Findings of Fact and Conclusions of Law dated August 12, 2005 ("Liquidator's Findings and Conclusions").

Summary

1. The Liquidator is improperly attempting to rewrite the history of this case by asking the Court to enter findings of fact and rulings of law on an issue that was determined already, *i.e.*, whether the payments contemplated by the Agreement would qualify as "costs and expenses of administration" under RSA 402-C:44, I.

2. As an initial matter, the Liquidator's request for findings of fact and rulings of law on the administrative costs issue is precluded by the Court's statement at the conclusion of the evidentiary hearing that the parties' proposed findings of fact and rulings of law should be limited to the issue of the fairness and reasonableness of the Agreement. (Vol. 5-B, at 206:10-207:5.)[1]

3. The Liquidator tries to rely on the Order on Remand dated October 8, 2004 (the "Order on Remand") in support of his request, but that effort is unavailing. The Liquidator

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[1] While the Court agreed that the parties' proposed findings of fact and rulings of law should be limited to the issue of the fairness and reasonableness of the Agreement, the Court allowed the Liquidator to submit findings of fact and rulings of law on other issues. The Court specified, however, that those additional requests would be subject to objection by the ACE Companies. (Vol. 5-B, at 207:6-19.)

concedes that the Court "addressed" the administrative costs issue in the Order on Remand. (*See* Liquidator's Memo. Concerning Proposed Findings of Fact and Conclusions of Law ("Liquidator's Memo.") at 3.) What the Liquidator ignores is that the Court actually decided the administrative costs issue as a matter of law, certified it for appeal and did not anywhere refer to the need for subsequent findings of fact and rulings of law.

4. To the contrary, the Court noted that "[t]he parties agree that the record is adequate to determine the legal issue of whether the payments to AFIA Cedents are an administrative expense." (Order on Remand at 14; *see also id.* at 6 ("The parties again agreed that the issue could be determined without submission of further evidence or briefing.").)[2]

5. The Liquidator joined in the motion to this Court for approval of an agreed-upon Interlocutory Appeal Statement regarding the administrative costs issue, which is additional evidence of the parties' intent to have the New Hampshire Supreme Court decide the issue as a matter of law. (*See* Interlocutory Appeal Statement, dated Nov. 5, 2004, at 3.)

6. In a further effort to justify the request for findings and rulings on the administrative costs issue, the Liquidator argues that the Court's reference to "necessity" in the Order on Remand is directly connected to the Liquidator's argument that the proposed payments would be administrative costs under RSA 402-C:44, I. (Liquidator's Memo. at 2.) However, as discussed below, the Court made it clear that its discussion of the Agreement's "necessity" in the Order on Remand was separate from the administrative costs issue (which had already been decided) and instead related to whether it had an independent obligation to assess the fairness of the Agreement. (*See* Order on Remand at 12-14.)

7. Even if the Court finds that the record on the administrative costs issue may be supplemented, the evidence does not support the Liquidator's proposed findings of fact and

[2] As discussed below, the ACE Companies objected to any findings of fact contained in the Order on Remand on the grounds that the administrative costs issue should have been decided as a matter of law, without the need for such findings, but they agreed that the legal issue regarding the classification of the proposed payments should be determined by the New Hampshire Supreme Court.

rulings of law. The evidence overwhelmingly shows that (a) the affidavits that the Court cited in the Order on Remand are unreliable and their assertions on the relevant issues are incorrect; (b) the AFIA Cedents would have filed and prosecuted claims in the absence of the Agreement; and (c) the Court's earlier ruling on administrative costs is not supported by the facts or law.

8. Moreover, even apart from the administrative costs issue, the portions of the Liquidator's Proposed Findings and Conclusions that are identified below in Section III should be rejected because they lack any support in the record, as required by New Hampshire law.[3]

Background

9. In the order issued on September 13, 2004 (the "September 13 Order"), the New Hampshire Supreme Court held that the Court must determine "whether the payment to the AFIA Cedents qualifies as an administrative expense under RSA-C:44, I." (September 13 Order at 2.) The Supreme Court further ordered the Court to determine whether it had an independent obligation to assess the fairness of the Agreement. (*Id.*)

10. Following the September 13 Order, the Court held a hearing on October 4, 2004 and took submissions from the parties for the form of a remand order. The parties agreed that the administrative costs issue is a legal question that may be decided without the need for additional evidence submitted to the Court. (*See* ACE Companies' Written Response to Proposed Order on Remand, dated Oct. 6, 2004, at ¶ 2; Benjamin Moore & Co.'s Response and Objections to Proposed Order on Remand, dated Oct. 6, 2004, at ¶ 2.)

11. The ACE Companies and Benjamin Moore, however, had two important caveats to their agreement. First, the ACE Companies did not agree that the Court should make findings of fact on the administrative costs issue. They pointed out that the issue should instead be

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[3] In requesting that the Court reject specific paragraphs in the Liquidator's Proposed Findings and Conclusions, the ACE Companies do not waive and fully preserve their objections to other paragraphs. To the extent the Liquidator's Proposed Findings and Conclusions conflict with the ACE Companies' Request for Findings of Fact and Rulings of Law dated August 12, 2005 (the "ACE Companies' Findings and Rulings"), the latter should control.

decided as a matter of law without reference to the specific factual allegations made by the Liquidator. Second, Benjamin Moore took the position that the "necessity" of the Agreement, as well as its reasonableness, could not be determined until there was discovery and a hearing on those issues. (*See* Benjamin Moore's Response and Objections.)

12. Benjamin Moore clearly distinguished between the Agreement's "necessity" and the separate issue of whether or not the payments under the Agreement are "the actual and necessary costs of preserving or recovering the assets" of the estate (which would make them "costs and expenses of administration" pursuant to RSA 402-C:44, I). (*See id.* at ¶ 2.)[4]

13. In the Order on Remand, the Court noted the parties' agreement that the administrative costs issue could be decided as a matter of law and that no further evidence was needed. (Order on Remand at 6.) The Court concluded that the payments under the Agreement would qualify as administrative costs under RSA 402-C:44, I. (*Id.* at 14.)[5]

14. The Court did not indicate anywhere in the Order on Remand that it intended to make additional findings of fact or rulings of law on the administrative costs issue. To the contrary, the Court authorized an immediate appeal of its determination. (*Id.*)

15. In the Order on Remand, the Court also addressed the issue of its obligation to assess the fairness of the Agreement. The Court noted that the ACE Companies and Benjamin Moore had requested an evidentiary hearing on whether the Agreement is fair and reasonable and, if so, whether the Agreement is necessary. (*Id.* at 12.) (As pointed out above, Benjamin

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[4] It is the ACE Companies' view that the necessity of the Agreement is not raised in the September 13 Order and that only the fairness and reasonableness of the Agreement are at issue. Also, if the Court intends to address the Agreement's necessity, it should do so only after it has made a determination that the Agreement is fair and reasonable. (*See* ACE Companies' Post-Hearing Memorandum in Support of Request for Findings of Fact and Rulings of Law at 8-9.)

[5] To the extent that any portions of the Order on Remand may be construed as findings of fact, such findings are contrary to the parties' agreement that the administrative costs issue would be decided as a matter of law.

Moore had raised the issue of necessity with the Court; the focus of the ACE Companies was — and has been — on the fairness and reasonableness of the Agreement.)

16. The Court drew a distinction between those issues and the administrative costs issue, stating that it would hold a hearing "to determine the necessity, fairness and reasonableness" of the Agreement only if (a) the Supreme Court upheld the Court's ruling, as a matter of law, on administrative costs and (b) the Supreme Court held that a hearing on necessity, fairness and reasonableness is required. (*Id.* at 13.)

17. In light of the Supreme Court's refusal to accept the interlocutory appeal, the Court determined that it should hold an evidentiary hearing on the remaining issues.

18. Because of statements made by the Liquidator's counsel prior to the evidentiary hearing regarding the administrative costs issue, counsel for the ACE Companies sought clarification at the end of the hearing that the parties' proposed findings of fact and rulings of law would not touch upon that already decided question of law. The Court confirmed that the proposed findings of fact and rulings of law should be so limited:

> Mr. Lee: I want to be clear that none of the five issues that were sent back from the Supreme Court with the exception of the question of reasonableness and fairness are what's going to be addressed in the findings of facts and conclusions of law.
>
> The Court: Right.

(Vol. 5-B, at 206:23-207:5.)

Argument

I. There Is No Basis For The Liquidator's Contention That The Court Should Enter Findings Of Fact And Rulings Of Law On The Administrative Costs Issue

19. The proceedings in this case — particularly the Court's statement at the conclusion of the evidentiary hearing — demonstrate that it is inappropriate for the Liquidator to request findings of fact and rulings of law on the administrative costs issue.

20. The Court, with the agreement of the parties, has consistently held that the classification of the proposed payments is a question of law for the Supreme Court to decide. To that end, the Court authorized the parties to appeal the administrative costs issue before any evidentiary hearing was held. The Court noted that such a hearing would be on other issues.

21. Although the Supreme Court declined to hear the interlocutory appeal, nothing in the Supreme Court's December 27, 2004 Order or any subsequent rulings from this Court indicated there is any need for findings of fact or rulings of law on administrative costs.

22. Any doubt on this point was completely removed when the Court confirmed on the last day of the hearing that the findings of fact and rulings of law will be limited to only one of the five issues remanded by the Supreme Court.

23. In referring to "necessity" in the Order on Remand, the Court was addressing Benjamin Moore's argument that the Court should take additional evidence on whether the Agreement was necessary. Both the Court and Benjamin Moore differentiated between the Agreement's necessity and the issue of whether, under the language of the statute and as a matter of law, the proposed payments would qualify as Class I claims because they are "the actual and necessary costs of preserving or recovering the assets" of the estate.

24. Therefore, it is pure sophistry for the Liquidator to argue that the Court somehow authorized post-hearing findings of fact and rulings of law on the administrative costs issue.

II. Even If The Court Determines That Findings Of Fact And Rulings Of Law On Administrative Costs Are Warranted, It Should Accept The ACE Companies' Findings And Rule That The Payments Would Not Be Administrative Expenses

25. The Liquidator has asked the Court to re-affirm its earlier ruling that the proposed payments under the Agreement would be classified as administrative costs on the grounds that "they are necessary costs of recovering a substantial asset of the Home estate" and "the Liquidator could not have marshaled this asset absent the contingent payments to AFIA Cedents." (Liquidator's Findings and Conclusions at 32, ¶¶ 4-5.)

26. However, as detailed in the ACE Companies' Findings and Rulings, the evidence shows that the proposed payment of several tens of millions of dollars out of the estate's coffers is wholly unnecessary because, even in the absence of the Agreement, the AFIA Cedents would have filed and fully prosecuted their claims in Home's estate.

27. At the hearing, the ACE Companies demonstrated that:

- Reinsurance creditors typically file proofs of claim, and they do not limit the proofs of claim to the amount of their potential setoff (ACE Companies' Finding and Rulings at ¶¶ 158-159);
- Several non-AFIA Cedents who are also Class V creditors submitted proofs of claim in excess of their potential setoff (*id.* at ¶ 159);
- Well before the Agreement was proposed to the AFIA Cedents, several of the larger cedents (who later became members of the Informal Creditors' Committee) stated in writing that they would be filing proofs of claim and the amount they listed was in excess of their potential setoff (*id.* at ¶ 160);
- AFIA Cedents who have setoff positions must prosecute their claims in order to claim the offset and the availability of setoff is a "strong incentive" to present claims (*id.* at ¶ 161);
- There are other incentives to filing and prosecuting claims, including the uncertainty regarding the scope of the eventual distribution to creditors and U.S. tax laws (*id.* at ¶¶ 162-164);
- The AFIA Cedents would not, as a practical matter, be able to stop prosecuting their claims once setoff is reached because their setoff will not be determined for many years when claims are admitted in the estate (*id.* at ¶ 165);
- The prosecution of claims is not difficult or costly because (a) brokers are paid to present the claims on the AFIA Cedents' behalf; (b) the same claims are already being presented to other reinsurers; and (c) under the Claims Protocol, the Liquidator takes on much of the responsibility to prosecute claims (and also has an incentive to do so) (*id.* at ¶¶ 33-35, 166);
- The claims adjudication process thus far has not lead to any disputes with AFIA Cedents (*id.* at ¶ 88);
- Despite the allegations of cost and burden, neither Home's representatives nor the AFIA Cedents ever analyzed the expense associated with prosecuting claims (*id.* at ¶ 90); and
- The Liquidator (and the Joint Provisional Liquidators) could overcome any resistance to providing claims information through the use of subpoena powers (*id.* at ¶ 167.)

28. The Liquidator has requested that the Court enter a ruling of law on the administrative costs issue based, in part, on the Hughes, Williams and Warmuth affidavits referred to in the Order on Remand. (Liquidator's Findings and Conclusions at 32, ¶ 4.) Those affidavits were not offered into evidence at the hearing and thus cannot be used to establish anything in the rulings of law. Also, as shown above, the evidence flatly contradicts the assertions in the affidavits that the AFIA Cedents would not have filed and prosecuted claims in the absence of the huge incentive payments set forth in the Agreement.

29. In addition to showing that the Liquidator's sole justification for the necessity of the proposed payments is utterly groundless, the ACE Companies adduced other evidence at the hearing demonstrating that the payments cannot be classified as administrative costs.

30. First, payments of pre-liquidation claims may not be reclassified as administrative costs in order to circumvent the priority statute. *See Oxendine v. Commissioner of Ins. (In re Liquidation of Coastal States Life Ins. Co.)*, 494 S.E.2d 545, 547-48 (Ga. App. 1997). The testimony of the Liquidator's witnesses and his own documents show that the proposed payments directly relate to the AFIA Cedents' pre-liquidation claims. At a November 28, 2003 presentation, the Liquidator used slides describing the payments to the AFIA Cedents under the Agreement as a "dividend" and distinguishing those payments from "administrative costs." (Liquidator's Trial Ex. 32 at H00396-99; Bengelsdorf, Vol. 3-B, at 193:2-194:12.) Ms. Ellis and Mr. Williams similarly testified that the proposed payments are on account of, and relate to, the AFIA Cedents' pre-liquidation claims. (*See* ACE Companies' Finding and Rulings at ¶ 171.)

31. Second, administrative costs must be reasonable in amount. *See In re Sanborn, Inc.*, 181 B.R. 683, 690 (Bankr. D. Mass. 1995) ("Pursuant to § 503(b)(1)(A), the moving party must establish that the expense was 'reasonable, necessary and benefitted the estate.'") (*citing In re Butcher*, 108 B.R. 634, 637 (Bankr. E.D. Tenn. 1989)). A request for administrative costs will be disallowed if the costs are disproportionately large when compared to the potential gain. *See*

Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.), 181 F.3d 527, 537 (3d Cir. 1999) (refusing to allow break-up fee as administrative cost where cost-benefit analysis revealed that the size of the break-up fee was uneconomical). As noted above, the Liquidator's witnesses conceded that no analysis was ever undertaken to determine what the costs of prosecuting the AFIA Cedents' claims would have been or whether the same benefit could have been obtained at a lower cost.

32. Accordingly, if the Court should revisit its prior ruling, the ACE Companies respectfully request that the Court enter the ACE Companies' requested findings of fact and hold that the proposed payments under the Agreement would not qualify as administrative costs.

III. The Court Should Reject The Liquidator's Proposed Findings Of Fact That Are Not Supported By Admissible Evidence

33. Under New Hampshire law, findings of fact must be supported by admissible evidence. *See, e.g., Hudon v. City of Manchester*, 141 N.H. 420, 423-24 (N.H. 1996); *Sorenson v. Wilson*, 124 N.H. 751, 755-56 (N.H. 1984); R. Wiebusch, NEW HAMPSHIRE PRACTICE SERIES: CIVIL PRACTICE AND PROCEDURE § 31.11 (2d ed.).

34. In the chart below, the ACE Companies have listed below the specific findings of fact requested by the Liquidator that do not comply with New Hampshire law:

What The Liquidator Proposes or Alleges	What The Evidence Shows
Findings relating to the BAFCO Agreements. (*See* Liquidator's Findings and Conclusions at ¶¶ 18-21.)	Agrippina and Equitas testified that they examined their various options under the Assumption Agreement, not the BAFCO Agreements. (Warmuth, Vol. 4-A at 26:11-28:1; Williams, 4-B, at 119:7-15, 120:8-14, 130:13-19.) The Liquidator's witnesses similarly testified that they were concerned about litigation under the Assumption Agreement. (Hughes, Vol. 3-A at 66:3-13.) The ACE Companies' witnesses testified that the operative document providing reinsurance to the AFIA Cedents is the Assumption Agreement. (Durkin, Vol. 4-B, at 165:19-166:14; Wamser, Vol. 5-B, at 149:8-21.) Therefore, the BAFCO Agreements are not relevant and no findings relating to those agreements are necessary.
"The trust account drawn on by ACE INA Services to pay AFIA Cedents' claims was funded principally by CIRC, as successor to BAFCO, on behalf of Century, as well as third party reinsurance and the AFIA sellers (to the extent of uncollectible third party reinsurance)." (*Id.* at ¶ 22; emphasis added.)	Mr. Durkin of ACE-INA Services specifically testified that CIRC was not the principal source of the funding for the trust account. (Durkin, Vol. 4-B, at 201:20-202:23.) This testimony was not contradicted. Moreover, since the Assumption Agreement is the sole agreement at issue, it is not relevant what the source of funding for the trust account was.
Findings relating to the effect of Home's liquidation on the BAFCO Agreements. (*See id.* at ¶¶ 23, 25.)	As noted above, the BAFCO Agreements are not relevant. Furthermore, there is no support for the proposed finding that post-liquidation "CIRC must make payments under the BAFCO Agreements ... to Home or its Liquidator (or the Joint Provisional Liquidators, as appropriate), not the AFIA Cedents." (Liquidator's Findings and Conclusions at ¶ 25.) There was no evidence at the hearing that pre-liquidation CIRC ever made payments directly to the AFIA Cedents (or their brokers), as was the case with Century. (Durkin, Vol. 4-B, at 169:15-170:4.)

What The Liquidator Proposes or Alleges	What The Evidence Shows
"Mr. Williams made statements [during a September 2003 meeting with Equitas] that indicated (and were intended to indicate) to Mr. Rosen that Equitas was in discussions with ACE to resolve their global relationship and that the discussions included AFIA liabilities." (*Id.* at ¶ 40.)	As an initial matter, the Liquidator has cited to testimony by Mr. Rosen and he did not (and cannot) testify as to what Mr. Williams "intended." There at least three other evidentiary problems with the Liquidator's proposed finding regarding the conversation: (1) Mr. Williams, who allegedly made the statements, testified that he never told Home about an Equitas-ACE side deal regarding the AFIA liabilities. (Williams, Vol. 4-B, at 135:1-4.) Mr. Hughes confirmed that Equitas did not tell Home about any side deals with ACE during the relevant time period. (Hughes, Vol. 3-A, at 64:12-65:1.) (2) Mr. Rosen testified that Mr. Williams had only "intimated" that discussions between ACE and Equitas were taking place and conceded that he had not received any specifics. (Rosen, Vol. 2-A, at 9:6-10:7.) Mr. Bengelsdorf aptly described the conversation as an inference of an intimation of "a discussion heard of someone else that may have heard something." (Bengelsdorf, Vol. 3-B, at 145:8-11.) (3) Any discussions between ACE and Equitas had nothing to do with the AFIA liabilities. (O'Farrell, Vol. 5-A, at 13:3-14:16, 16:23-17:16, 64:5-10.)

What The Liquidator Proposes Or Alleges	What The Evidence Shows
"ACE and Equitas were also in the process, at approximately that time [September 2003], of exchanging information with respect to Home's AFIA-related liabilities." (*Id.* at ¶ 41.)	The proposed finding is misleading because the AFIA liabilities came up during the ACE-Equitas commutation discussions only in the sense that the parties were gathering information in order to isolate and set aside those liabilities. (O'Farrell, Vol. 5-A, at 11:6-16, 13:3-13, 15:16-16:17.) Mr. O'Farrell testified repeatedly that a commutation of the AFIA liabilities was never contemplated. (*Id.*, at 14:8-16, 16:23-17:9, 17:23-18:2, 20:7-12.)
"Counsel in both the UK and US advised Equitas that [cut through] was permissible." (*Id.* at ¶ 42.)	Mr. Williams testified that U.S. counsel advised him that, under controlling New York law, a cut through to the Assumption Agreement was not possible. (Williams, Vol. 4-B, at 127:6-10.)[6] Mr. Williams further testified that his U.K. counsel advised him to seek U.S. counsel advice because the Assumption Agreement (under which any cut-through attempt would arise) is governed by New York law. (*Id.*, at 149:9-150:10.) Therefore, the description of the advice given to Equitas is inaccurate and incomplete, and any advice from U.K. counsel is irrelevant.

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[6] The testimony is as follows:

Q. ... So the assumption agreement [is] governed by New York law and in the one conversation that you had with US counsel, he told you that New York law didn't provide for cut-through; is that correct?

A. He appears to have said that, yes.

What The Liquidator Proposes or Alleges	What The Evidence Shows
"Mr. Rosen was concerned about cut through or circumvention because of his September 2003 meetings with Equitas and Agrippina." (*Id.* at ¶ 43.)	Any concern that Mr. Rosen had as a result of his meeting with Equitas was not reasonable in light of the testimony noted above. In addition, the description in the Liquidator's Findings and Conclusions of the September 2003 meeting with Agrippina states that Agrippina was threatening to "attempt to get some consideration or reward from ACE" unless "Home was prepared to offer consideration" to prevent the termination of Treaty R. (Liquidator's Findings and Rulings at ¶ 38.) In fact, by September 2003 Home had already communicated to Agrippina that it would offer consideration in order to prevent the termination and Agrippina promised not to seek a side deal with ACE while it was waiting for the proposal from Home. (Warmuth, Vol. 3-B, at 215:13-21, 216:8-9; Warmuth, Vol. 4-A, at 64:4-15, 66:11-67:23; Hughes, Vol. 3-A, at 77:1-6, 78:1-3.) Agrippina never discussed a side deal with ACE during the relevant time period and ACE did not tell Home that such discussions were taking place. (Warmuth, Vol. 4-A, at 9:12-16; Durkin, Vol. 4-B, at 179:20-180:22; O'Farrell, Vol. 5-A, at 10:20-22, 11:17-22; Wamser, Vol. 5-B, at 154:20-155:16.) Mr. Warmuth never told Home during the relevant time period that he had asked ACE for consideration in exchange for termination of Treaty R or that ACE had offered such consideration to Agrippina. (Rosen, Vol. 2-A, at 25:18-20, 27:8-12; Warmuth, Vol. 4-A, at 4:7-11, 7:20-8:2, 51:17-23.)
Findings that the *Nationwide* and *Legion* cases were a legitimate cause for concern in September 2003. (*Id.*)	The ACE Companies have demonstrated that the *Nationwide* case is a bar to cut throughs and cut throughs are even harder to accomplish in the event of insolvency. (*See* ACE Companies' Findings and Rulings at ¶¶ 115-16.) They have also shown that the *Legion* case is easily distinguishable. (*See id.* at ¶ 120.)

What the Liquidator Proposes or Alleges	What the Evidence Shows
Findings regarding the reconciliation process during the Home-ACE commutation discussions. (*See id.* at ¶¶ 63-65.)	The Liquidator tries to blame ACE for the slow progress in the reconciliation, but overlooks the evidence showing that Home and E & Y made a commitment to show ACE why Home's numbers were more accurate. Home and E & Y never did so. (*See id.* at ¶¶ 70-71, 78.)
A finding that, during the October 16, 2003 call, Mr. Wamser did not provide the assurances sought by the Liquidator on side deals and, in particular, would not commit that ACE would avoid side deal discussions with the AFIA Cedents. (*See id.* at ¶¶ 67-68.)	The Liquidator attempts to rely on Mr. Bengelsdorf's testimony regarding the October 16 call. However, the testimony cited by the Liquidator as well as Mr. Bengelsdorf's contemporaneous notes clearly demonstrate that Mr. Wamser committed to (a) give notice to Home in the event of a side deal with the AFIA Cedents; and (b) to forego any side deal discussions with the AFIA Cedents while the Home-ACE commutations were ongoing. (ACE Trial Ex. CC at H00647; Bengelsdorf, Vol. 3-B, at 185:5-23.) This evidence was corroborated by Mr. Wamser and by Mr. Hughes. (Wamser, Vol. 5-B, at 174:22-175:13, 188:3-11; 191:10-192:3; Hughes, Vol. 3-A, at 86:14-21.)[7]
A finding that ACE reduced its estimate of Home's AFIA-related liabilities from the December 31, 2002 figure "in part ... to increase its negotiating leverage with the Liquidator." (*Id.* at ¶ 69.)	Mr. O'Farrell testified that ACE reduced its estimates based on actuarial analysis and his testimony shows that it was not connected with the commutation discussions between ACE and the Liquidator. (O'Farrell, Vol. 5-A, at 37:10-52:9.)

[7] In support of the proposed finding, the Liquidator cites testimony from Mr. Bengelsdorf in which he states: "I don't think we got any assurances from [ACE]." (Bengelsdorf, Vol. 3-B, at 151:14; emphasis added.) That statement is belied by Mr. Bengelsdorf's own testimony at the hearing and notes showing that Mr. Wamser gave assurances during the October 16 call.

What The Liquidator Proposes or Alleges	What The Evidence Shows
Findings that ACE did not make a commutation proposal to Home from October 2003 to February 2004, and "did not follow up in any way on the September 30 or October 16 discussions." (*Id.* at ¶ 71.)	The Liquidator's proposed findings incorrectly imply that it was ACE's obligation to follow up with Home. To the contrary (and as noted above), Home committed to getting back to ACE with a justification for its higher numbers, which it never did. (*See* ACE Companies' Findings and Rulings at ¶¶ 70-71, 78.) ACE thought that the commutations discussions were continuing, never told Home it was not interested in commutation, never learned from Home that Home wished to stop the discussions and fully cooperated with E & Y in the reconciliation process. (*Id.*, at ¶¶ 78-79.)
Findings relating to the filing and prosecution of claims. (*See, e.g., id.* at ¶¶ 73, 75-78.)	For the reasons stated above (*see supra* at Section II), there is no evidence to support findings that the AFIA Cedents would not have filed and prosecuted their claims in the absence of the Agreement.[8]

35. Accordingly, the ACE Companies respectfully request that the Court reject the Liquidator's proposed findings of facts that are cited above.

WHEREFORE, the ACE Companies respectfully request (a) the rejection of the Liquidator's proposed findings of fact and conclusions of law regarding administrative costs or, in the alternative, a ruling that the proposed payments under the Agreement would not qualify as administrative costs under RSA 402-C:44, I; (b) the rejection of the Liquidator's proposed findings at paragraphs 18-23, 25, 40-43, 63-65, 67-69, 71, 73, 75-78 and 86 (as set forth above); and (c) such other and further relief as may be just and proper.

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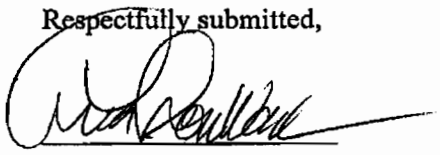
[8] The Liquidator states that Mr. Craig, an expert witness for the ACE Companies, offered "no credible testimony concerning what AFIA Cedents would do with respect to claims beyond offset." (Liquidator's Findings and Rulings at ¶ 86.) Mr. Craig, however, noted that in his experience there is little burden associated with prosecuting claims. (Craig, Vol. 5-A, at 109:14-110:1.) Furthermore, as noted above, the ACE Companies presented a wealth of other evidence on why AFIA Cedents would prosecute claims beyond setoff.

Respectfully submitted,



Lisa Snow Wade
ORR & RENO, Professional Association
One Eagle Square
P.O. Box 3550
Concord, New Hampshire 03302-3550
Telephone (603) 224-2381
Facsimile (603) 224-2318

-and-

Gary S. Lee
Pieter Van Tol
LOVELLS
900 Third Avenue, 16th Floor
New York, New York 10022
Telephone (212) 909-0600
Facsimile (212) 909-0666

Attorneys for Respondents Century Indemnity Company, ACE Property and Casualty Insurance Company, Pacific Employers Insurance Company, and ACE American Reinsurance Company

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing pleading has been served on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on August 16, 2005:

Paula T. Rogers, Esq.
Case Administrator
Office of the Liquidation Clerk
The Home Insurance Company
286 Commercial Street
Manchester, NH 03101

Suzanne M. Gorman, Esq.
Senior Assistant Attorney General
Environmental Protection Bureau
New Hampshire Department of Justice
Attorney General's Office
33 Capitol Street
Concord, NH 03301-6397

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

Andre Bouffard, Esq.
Downs, Rachlin, Martin, PLLC
199 Main Street
Box 190
Burlington, VT 05402

Eric D. Jones, Esq.
Downs, Rachlin, Martin PLLC
199 Main Street
Box 190
Burlington, VT 05402

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

David Steinberg, Esq.
Clifford Chance LLP
10 Upper Bank Street
Canary Wharf
London E14 5JJ
United Kingdom

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

Lisa Snow Wade

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