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

BENJAMIN MOORE & CO.'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

Objector Benjamin Moore & Co. ("BMC"), through its undersigned counsel, respectfully requests that the Court make the flowing findings of fact and conclusions of law, in addition to those proposed by the ACE Companies:

FINDINGS OF FACT

1. Despite having concluded by October of 2003 that there was no valid legal basis for AFIA cedents to seek to "wall-off" assets in the UK, the Liquidator and the UK Joint Provisional Liquidator agreed to an arrangement with AFIA cedents that gives this group of creditors the equivalent of a separate, walled-off asset for their exclusive benefit, to be distributed to them in the UK. [Hughes, Vol 3-A, 103:4-106:3].

2. The Liquidator negotiated the AFIA agreement with an informal committee of creditors organized in the United Kingdom ("ICC"), made up of the AFIA cedents holding the largest claims against Home under the AFIA treaties. [Hughes, Vol. 2-B, at 152:10-21]. Of the nine members of the committee, seven are debtors of the Home as well as creditors under AFIA treaties, with the right to set-off their claims under AFIA treaties against their liability to the estate. [Rosen, Vol. 2-A, at 60:16-63:16]. The Liquidator acknowledges that these seven AFIA cedents would have filed proofs of claim in order to preserve their set-off rights. [Id. at 63:10-16]. Another AFIA cedent (Mentor) that had no set-off rights advised the Liquidator in writing,

months before execution of the AFIA Agreement, that it intended to file a proof of claim. [BMC Ex. S]. The ninth AFIA cedent on the ICC (Agrippina) had it own incentive to file a proof of claim, as it held a claim against the Home estate for administrative expense priority, as described in the attachments to its filed proof of claim. [ACE Ex. MM]. Thus, all members of the ICC, representing the holders of the largest claims against Home under the AFIA treaties, could have been expected to file proofs of claim against the estate, irrespective of any incentive payment.

3. The Liquidator can only guess at the value of the set-off rights of AFIA cedents because neither the amount of AFIA cedent claims against the estate, nor the amount of the estate's claims against AFIA cedents, will be established for a number of years. [Rosen, Vol. 1-B, at 186:17-188:16]. The Liquidator acknowledges that the set-off positions of AFIA cedents are "large." [Id. at 188:13-16].

4. To date, the Home estate has paid approximately $4 million in fees charged by the Joint Provisional Liquidators and their counsel. [Hughes, Vol. 2-B, at 226:16-227:2]. The Joint Provisional Liquidation ("JPL") was instituted in May of 2003. Negotiations concerning the agreement before the Court for approval began in October of 2003. Thus, a significant portion of the fees for the JPL relate to the agreement before the Court, particularly in view of the fact that the sole asset of the Home UK Branch identified by the JPL was the reinsurance on the AFIA treaty business. [Hughes, Vol. 2-B, at 147:8-14].

5. The AFIA agreement contemplates that amounts recovered from ACE will be distributed to AFIA cedents pursuant to a UK scheme of arrangement, as allowed by UK law. [Liquidator's Ex. 23, ¶ 1.1.2; 1.9]. Under the proposed scheme, the current Joint Provisional Liquidators (two partners in the firm of Ernst & Young LLP, London), will serve as "Scheme Administrators." [Hughes, Vol. 3-A, at 97:13-17]. The role of the Scheme Administrators will

be to distribute payments to AFIA cedents. The fees payable for these services are estimated to be at least as much as the amount paid to date to the JPLs to date. [Id. at 97:18-98:4]. This is just an estimate that could be low; the total cost of the JPL was estimated at $20 million in a presentation made by the Liquidator to AFIA cedents in November of 2003. [Id. at 98:5-9].

6. The Liquidator decided to use a UK scheme of arrangement as a distribution mechanism for the AFIA agreement without giving any consideration to whether distributions could be made with less expense directly by Home. [Id. at 99:13-100:23]. This decision was made despite the admitted fact that, as of October 2003, the JPL's knew of no reason why the UK court would not make an order at that time to close the JPL and remit all UK assets of the Home UK Branch to the NH Liquidator. [Hughes, Vol. 3-A, at 11:12-12:20].

CONCLUSIONS OF LAW

1. Because the Liquidator is asking the Court to approve payment of an administrative expense to the AFIA cedents, the Liquidator must satisfy the requirements of R.S.A. 402-C:44,I that the proposed payments to AFIA cedents are "actual and necessary costs of preserving or recovering the assets of the insurer . . . ." The statute requires the Liquidator to demonstrate that the proposed administrative expense payments are both "actual" and "necessary" costs of recovering an asset.

2. The terms "actual" and "necessary," as used in Section 402-C:44,I, must be construed and applied narrowly because the goal of any liquidation is "to keep fees and administrative costs at a minimum." Otte v. United States, 419 U.S. 43, 53 (1974); In re United Trucking Service, Inc., 851 F.2d 159, 164 (6th Cir. 1988); In re O.P.M. Leasing Services, Inc., 23 B.R.104, 121 (Bankr. S.D.N Y 1982); see also 3 Collier on Bankruptcy, ¶ 503.04, at 503-23 (15th ed. 1988). Payment of administrative costs erodes the amount of assets available to pay

policyholders and other creditors, and must therefore be kept to a minimum to achieve the primary statutory goal of maximizing the recovery of policyholders and other creditors. In re Mammoth Mart, 536 F.2d 950, 953 (1st Cir. 1976); In re Dant & Russell, 853 F.2d 700, 706 (9th Cir. 1988).

3. The term "necessary" is not defined in the New Hampshire insurers liquidation statute, so it should be given its plain and ordinary meaning. State v. Nelson, 150 N.H. 569, 572 (2004)(when a particular term is undefined, the Court assigns to it its plain and ordinary meaning). The plain and ordinary meaning of the term "necessary" is defined in Webster's Dictionary as follows:

> 1. Being such in its nature that it must exist, occur, or be true; inevitable. 2. Absolutely needed to accomplish a desired result.

Webster's Concise Dictionary of the English Language, p. 484 (Int'l Enc. Ed. 1998). Other courts have given the term "necessary" its ordinary dictionary definition absent some other statutory or contractual definition. See United Savings Ass'n v. Timbers of Inwood Forest, 484 U.S. 365, 375-76 (1988)(the term "necessary to an effective reorganization" in Section 362(d)(2) of the Bankruptcy Code means "essential for an effective reorganization"); Abraham v. Insurance Co. of North America, 117 Vt. 75, 80 (1951)(the term "necessary" in a livestock insurance policy means "indispensable" or "unavoidable").

4. Other language in the New Hampshire liquidation statute indicates a clear legislative intent to give the term "necessary" in Section 44,I a narrow meaning that excludes costs and expenses that are merely expedient. For example, Section 25 of the liquidation statute uses the term "necessary" twice, each time within the phrase "necessary or expedient." R.S.A. 402-C:25, VI, XXII. Thus, the Legislature clearly meant "necessary" to mean something other than "expedient;" otherwise it would not have used both words in the disjunctive. Unlike

Section 25, Section 44 does not use the phrase "necessary or expedient." It uses the phrase "actual and necessary" instead. This is unmistakable legislative intent that the term "necessary" in Section 44 should be read to mean essential or indispensable, and not merely expedient.

5. The Liquidator has not established that the proposed administrative expense payment to AFIA cedents was indispensable to protect the estate's interest in the ACE reinsurance from threats made by AFIA cedents. There were no credible threats of litigation involving Home that made the payment of a $70+ million administrative expense to AFIA cedents essential to protect an asset of the estate. The Liquidator may have believed that the proposed pay-off to AFIA cedents was a convenient and expedient means to eliminate vague and undetermined threats to the estate's interests, but that is far from sufficient to establish the "necessity" of the payment, particularly where the evidence shows that the threats of litigation were not credible as a matter of law, and the Liquidator never bothered to estimate the costs to defend the estate's interests. The Court cannot approve any settlement agreement absent "some more reasonable basis than expediency and the desire to terminate complex and troublesome litigation . . . ." In re Chicago Rapid Transit, 196 F.2d 484, 490 (7th Cir 1952); Matter of Egolf, 102 B.R. 706, 710 (Bankr. N.D. Ind. 1989). In this case, there was not even any existing litigation, so there is no principled basis on which the Liquidator can show that this proposed administrative expense payment to AFIA cedents was either reasonable or necessary.

6. Nor has the Liquidator established that the proposed pay-off to AFIA cedents was essential to allow Home to recover reinsurance from ACE. Again, the evidence shows that the Liquidator accepted at face value, without any question, that AFIA cedents would not pursue claims, when in fact there were strong incentives for them to do so. There is no evidence that the Liquidator conducted any type of assessment of the merits of the positions taken by the AFIA

cedents. For example, there is no evidence that the Liquidator ever considered that claims information from AFIA cedents could be obtained using the Liquidator's subpoena powers once they filed claims to protect their offset or other rights. Nor is there any evidence that the Liquidator considered that claims in many cases were likely to be pursued by brokers that had already been paid fees to perform this service, or that disputes over reinsurance claims are uncommon, or that the Liquidator himself could assist with the proving up of AFIA cedent claims. How could the Liquidator come before this Court claiming that the proposed administrative expense payment to AFIA cedents is essential, without having even considered these clear weaknesses in the position of the AFIA cedents?

7. The proposed administrative expense payment to AFIA cedents is also not an "actual" cost of administration. The plain and ordinary meaning of "actual" is: "1. Existing in fact; real. 2. Being in existence or action now; existent; present." Webster's Concise Dictionary of the English Language, p. 8 (Int'l Enc. Ed. 1998). The agreement before the Court calls for payments to be made in the future to AFIA cedents when and if reinsurance is recovered from ACE, and only after certain expenses are paid first. Given the conditions precedent to the estate's obligation to pay AFIA cedents, the estate has not incurred any "actual" expenses. Nor can it be said that AFIA cedents will incur any "actual" costs or expenses under the agreement, as they are simply being paid to make claims. Section 402-C:44,I uses the term "actual" to limit administrative costs to those items of expense that exist in fact as a result of some service or benefit that has in fact been provided to the estate by the claimant. The proposed future payment to AFIA cedents do not fall within the category of expenses that can be paid as actual costs of administration.

8. The proposed AFIA agreement must also be shown by the Liquidator to be fair. Fairness in this context means "fairness of the deal in relationship to the rights and interests of other creditors who are not able to participate in the settlement." Matter of AWECO, 725 F.2d 293, 298 (5th Cir. 1984); Matter of Egolf, 102 B.R. 706, 710 (Bankr. N.D. Ind. 1989). Thus, the Court must determine if similarly situated creditors will be equally treated. In re Rajneesh Neo-Sannyas Intern. Commune, 59 B.R. 49, 52 (Bankr. D. Or. 1986). Furthermore, the court "abuses its discretion in approving a settlement with a junior creditor unless the court concludes that priority of payment will be respected as to objecting senior creditors." Matter of AWECO, 725 F.2d at 298.

9. The AFIA agreement is not fair under either prong of the fairness test. It is not fair to other reinsurance creditors of Home because they have not been offered any incentive payment. Indeed, the Liquidator's witnesses consistently testified that they had never heard of a situation where a reinsurance creditor has been paid an incentive to file and prosecute claims. The Liquidator's position that the AFIA cedents stand in a unique position because their claims are 100% reinsured by ACE does not does not permit deviation from the command of R.S.A. 402-C:44 that "no subclasses shall be established within any class." All reinsurance creditors fall within the same class of creditors under the New Hampshire statute, whether or not their claims are reinsured. The statutory language does not permit the preference of certain reinsurance creditors over others based upon the happenstance of the existence of reinsurance covering a reinsurance claim against the estate.

10. The proposed AFIA agreement is also unfair because it gives to the AFIA cedents a separate "ring-fenced" asset of at least $70 million for their exclusive benefit, notwithstanding the fact that the Liquidator concluded before entering into the agreement that the law did not

entitle the AFIA cedents to this remedy. Unfairness to other creditors is also inherent in that millions of dollars in estate assets are proposed to be paid to UK scheme administrators to distribute the proceeds payable under the AFIA agreement, in circumstances where there is no demonstrable reason for maintaining any aspect of the ancillary proceeding in the UK any longer. The AFIA cedents appear to be receiving everything they sought under the terms of the proposed agreement, even rights to which they are not entitled under the law, leaving Class II creditors to pay the costs of both administration of the proposed UK scheme, and the costs to defend the legality of the proposed agreement. This is unfair, and cannot be approved by the Court.

11. The AFIA agreement is also unfair to BMC because it allows a massive preferential payment to the AFIA cedents, absent any evidentiary basis for a finding that Class II creditors will be better off with the agreement than without. Moreover, the Liquidator offered no evidence that he has even considered whether the agreement may jeopardize the ACE reinsurance by putting ACE into a position to claim breach of the duty of good faith and fair dealing owed by a reinsured to a reinsurer. Traveler's Indemnity Co. v. Scor Reins. Co., 62 F.3d 74, 76 (2d Cir. 1995). The Court is not in a position to even assess this risk, as the Liquidator has not addressed it. This lapse is indicative of the shallow consideration given by the Liquidator to the alternatives to, and potential consequences of, the AFIA agreement.

Respectfully submitted,

August 12, 2005

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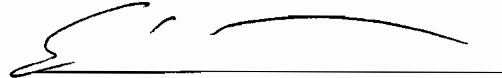
By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this day 12th of August, 2005, a copy of Benjamin Moore & Co.'s Requests for Findings of Fact and Conclusions of Law was served by first class mail, postage prepaid to the following:

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