

MERRIMACK, SS.

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Docket No. 03-E-0106

In the Matter of the Liquidation of  
The Home Insurance Company

**ACE COMPANIES' MOTION TO STRIKE AFFIDAVIT AND  
VERIFICATION OF RHYDIAN WILLIAMS OR, IN THE  
ALTERNATIVE, COMPEL PRODUCTION OF DOCUMENTS BY EQUITAS**

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, Orr & Reno P.A., respectfully move for an order striking the Affidavit of Rhydian Williams dated April 1, 2004 (the "Williams Affidavit") and the portions of the Offer of Proof that were verified by Mr. Williams (paragraphs 36-40, 42-43, 50-52 and 55) or, in the alternative, compelling Equitas, Ltd. ("Equitas") to produce documents that have been improperly withheld from earlier productions. Most strikingly, Equitas failed to produce the notes Mr. Williams took at the meetings of AFIA Cedents. In support of their motion, the ACE Companies respectfully state as follows:

**Introduction**

1. The Court has held on several occasions that the ACE Companies are entitled to a complete production of Equitas' documents relating to the allegations in the Williams Affidavit and that, in the event Equitas fails to produce the documents, the Court would strike the affidavit. The Court also made it abundantly clear — both at the May 12, 2005 hearing and in a recently issued order clarifying its earlier order — that Equitas cannot avoid producing documents by

claiming that the scope of the Court's orders is narrow or that the documents sought are protected from disclosure on the grounds of privilege.

2. As revealed in Mr. Williams' recent deposition, however, Equitas has not produced several categories of documents which indisputably fall within the ACE Companies' document requests and the Court's orders on discovery. Equitas also continues to hide behind assertions of privilege, despite the Court's direction that such documents must be produced. Accordingly, the Court should strike the Williams Affidavit and his Verification.

3. As an alternative, the ACE Companies respectfully submit that the Court should enter an order stating that Equitas must produce the withheld documents or the Williams Affidavit and his Verification will be stricken. The Court should further order that Mr. Williams must appear in New York for additional questioning at a deposition since the ACE Companies were not able to examine him about the withheld documents at the recent deposition.

### Argument

#### **I. The Court Should Strike The Williams Affidavit And Verification Because Equitas Has Refused To Comply With Recent Discovery Orders**

##### **A. The Court's Orders Have Been Clear**

4. At the May 12, 2005 hearing, the Court entered an order (the "May 12 Order") holding that the ACE Companies are entitled to any documents relied upon by Mr. Williams in his affidavit. (Ex. 1 annexed hereto at 3.) The May 12 Order also stated that the Court would strike the Williams Affidavit if Equitas did not agree to produce the documents. (*Id.* at 4.)

5. Equitas tried to limit the scope of the May 12 Order by taking a very narrow view of the phrase "relied upon" and by arguing that it did not have to produce privileged documents. During the May 12 hearing, the Court expressly rejected Equitas' position:

THE COURT: Well, he said in his affidavit that he considered alternatives. If he relied on any documents in that, then they are to be produced. ...

...

MR. GORDON: So, if Equitas got legal advice on one of these alternatives, and it's in a document, I take it, your Honor is not suggesting that we have to turn over that legal advice, merely because Mr. Williams said that he considered an alternative.

THE COURT: Yes, I am suggesting that.

MR. GORDON: That that would have to be turned over?

THE COURT: Yes. Any documents that he relied on in saying he considered alternatives and rejected alternatives, presumably.

(Ex. 2 annexed hereto at 20.)

6. Despite this clear statement on the breadth of the May 12 Order, Equitas produced only a handful of documents after the May 12 hearing. These documents consisted of a one-page "Draft Counter Proposal," several pages of largely indecipherable notes apparently reflecting discussions at the Informal Creditors' Committee meetings, and an unidentified e-mail to Jonathan Rosen dated August 5, 2003 regarding "off-set scenario's" [sic] and "commercial scenario's" [sic]. The production was missing, among other things, internal Equitas documents on the alternatives referred to in the Williams Affidavit, communications with the AFIA Cedents on these issues, and any internal or external legal advice regarding the alternatives. Because Equitas' production was so clearly lacking and did not comply with the May 12 Order, the ACE Companies filed their first motion to strike on May 27, 2005.

7. Equitas, in opposing the ACE Companies' motion to strike, claimed (incorrectly, it turns out) that it had produced all internal Equitas documents as well as correspondence between Equitas and other AFIA Cedents regarding the consideration of alternative means of recovery. (Equitas' Response at ¶ 9.) Equitas further argued that the production of legal advice

was not required under the May 12 Order because the discovery guidelines in that order referred to the production of non-privileged documents. (*Id.* at ¶ 10.)

8. The Court issued another order on June 1, 2005 (the “June 1 Order”) in which it clarified that — as the Court stated at the May 12 hearing — the May 12 Order is broad and includes documents that Equitas is claiming are privileged. The June 1 Order expressly states that the word “non-privileged” had been stricken from the discovery guidelines for clarity. (Ex. 3 annexed hereto at 2.) Therefore, as of June 1, 2005, the Court had twice told Equitas that it had a choice: either produce the documents called for in the May 12 and June 1 Orders (including privileged documents) or the Williams Affidavit would be stricken.

**B. Equitas Has Nonetheless Continued To Withhold Documents Called For Under The Court’s Discovery Orders**

9. Equitas chose to ignore the Court’s Orders. Prior to the deposition of Mr. Williams on June 3, 2005, Equitas produced a very small group of documents. However, the examination of Mr. Williams revealed that Equitas had not produced (a) documents or portions of documents reflecting legal advice it received on the relevant issues; and (b) documents that are not even allegedly privileged and should have been produced long ago.

10. The relevant documents not produced by Equitas include:

- **Documents regarding certain meetings and/or discussions among AFIA Cedents.** Mr. Williams testified that there were a “handful” of such meetings, and that all meeting notes and attendance notes had been given to his attorney. (Uncertified Transcript of Deposition of Rhydian Williams, annexed hereto as Ex. 4, at 38:25-43:4, 73:22-74:10.) The notes of AFIA Cedent meetings have not been produced. Williams conceded, moreover, that those meetings focused upon some of the same issues — such as set-off and the alleged cost and difficulty in filing claims in the Home estate — that form the basis of the Williams Affidavit. (Ex. 4 at 38:25-43:4, 73:22-74:10; Williams Affidavit at ¶¶ 7-10.) As a result, Equitas cannot seriously claim that these documents are not subject to production, and yet not a single one has been produced.

- **Drafts of the Williams Affidavit.** Mr. Williams confirmed that there were such drafts, which clearly dealt with the issues in his affidavit. (Ex. 4 at 11:11-15.) As such, they are relevant to the Williams Affidavit and should be produced.
- **Internal Equitas communications regarding the negotiation of the Proposed Agreement.** (See, e.g., *id.* at 30:7-18, 83:21-84:3.) According to Mr. Williams, when he claimed in his affidavit that Equitas had “actively considered” alternatives to the Proposed Agreement, he was referring, in part, to his discussions with other Equitas employees. (Ex. 4 at 83:21-84:3; Williams Affidavit at ¶ 12.) Likewise, Mr. Williams confirmed that he had discussed with his superior at Equitas, Jeremy Heap, the cost of filing and prosecuting a claim in the Home estate; not only did the Williams Affidavit make an assertion on this point, but the Court in its Order on Remand dated October 8, 2004 relied upon that assertion in approving the Proposed Agreement. (Ex. 4 at 30:7-31:1; Williams Affidavit at ¶¶ 7-10; Order on Remand at 8.) Having admitted that internal Equitas communications dealt with matters in the Williams Affidavit, Equitas cannot now withhold documents concerning such communications on relevance grounds.
- **Documents created by a colleague of Mr. Williams, Karen Amos, in connection with the Proposed Agreement.** (Ex. 4 at 17:6-10, 22:13-23:8, 26:14-19, 82:16-24, 94:10-17.) Mr. Williams confirmed that Ms. Amos was involved in commutation discussions with the Home that dealt with, *inter alia*, Equitas’ set-off position, and stated that Ms. Amos, not he, was involved in discussions with the ACE Companies regarding a potential cut-through arrangement. (*Id.* at 17:6-10, 22:13-23:8, 26:14-19, 94:10-17.) Because Mr. Williams, in his affidavit, claimed that Equitas would be unlikely to file a claim in the Home estate “beyond that which may be required to realize any applicable set-off,” the amount of Equitas’ set-off vis-a-vis the Home would affect Equitas’ analysis of whether to file such a claim. (Williams Affidavit at ¶ 7.) The Williams Affidavit, moreover, specifically alleges that a cut-through arrangement was one of the alternatives to the Proposed Agreement that was considered by Equitas. (Williams Affidavit at ¶ 12.) Accordingly, Ms. Amos’ documents, particularly those directly relating to the calculation of Equitas’ set-off and any alleged discussions regarding cut-through, are relevant to the Williams Affidavit and are subject to production. It is particularly important that the ACE Companies receive these documents because they are necessary to resolve a contradiction in the record; while Mr. Bengelsdorf, in his deposition, claimed that the commutation discussions between Equitas and the Home did not involve AFIA business, Mr. Williams claimed that they did (at least with regards to Equitas’ set-off position). (Transcript of Deposition of Peter Bengelsdorf, annexed hereto as Ex. 5, at 212:24-213:15; Ex. 4 at 17:6-10, 22:13-23:8, 94:10-17.)
- **Documents created by Mr. Heap in connection with the negotiation of the Proposed Agreement and preparation of Mr. Williams’ affidavit.** (Ex. 4 at 13:21-14:9, 16:17-17:5, 30:7-18, 72:1-12, 94:10-17.) Mr. Williams confirmed that he discussed the contents of his affidavit with Mr. Heap before signing it. (*Id.* at 13:21-14:9.) Moreover, Mr. Heap not only allegedly discussed with Mr. Williams the cost and difficulty of filing and prosecuting a claim, but also, according to Mr. Williams, was involved in discussions with ACE regarding a potential cut-through arrangement, and, as noted above, the

Williams Affidavit specifically alleges that such an arrangement was one of the alternatives to the Proposed Agreement that was considered by Equitas. (Ex. 4 at 30:7-18, 72:1-12, 94:10-17; Williams Affidavit at ¶ 12.) Accordingly, Equitas cannot seriously deny the relevance of Mr. Heap's documents to that affidavit.

- **Documents created by in-house counsel for Equitas, Robert Fleming, in connection with the negotiation of the Proposed Agreement.** Mr. Williams confirmed that Mr. Fleming was involved, *inter alia*, in the drafting and review of counterproposals set forth by Equitas in its negotiations with the Home over the Proposed Agreement. (*Id.* at 13:21-14:21, 16:7-17:5.) It would strain credulity to claim that those negotiations did not involve the matters referenced in the Williams Affidavit, since that affidavit addresses the very reasons for entering into the Proposed Agreement. Indeed, the "Draft Counter Proposal" produced by Equitas recites certain facts that "form an important backdrop" to those negotiations, and those facts — such as the AFIA Cedents' status as Class V creditors and the fact that the AFIA Cedents were likely to "present claims to optimize off set" — form the basis of the Williams Affidavit. ("Draft Counter Proposal" (Bates stamped A 0845), annexed hereto as Ex. 6, at A 0845; Williams Affidavit at ¶¶ 7-10.) Equitas cannot, on one hand, claim that Mr. Fleming played a role in the negotiation of the Proposed Agreement, and, on the other hand, claim that Mr. Fleming's role did not touch upon the matters raised in the Williams Affidavit. Accordingly, Mr. Fleming's documents are relevant and subject to production.
- **Unwarranted redactions:** (1) A portion of the "Draft Counter Proposal" comprising Exhibit 6; (2) Portions of a document concerning a conference between Mr. Williams and outside counsel regarding the Proposed Agreement (Bates stamped 000937-38); (3) Portions of another document concerning a conference between Mr. Williams and outside counsel regarding the Proposed Agreement (Bates stamped 000935-36); and (4) Portions of another document concerning a conference between Mr. Williams and outside counsel regarding the Proposed Agreement (Bates stamped 000939-40). (These four documents are annexed hereto as Ex. 7.) As noted above, Equitas cannot withhold the redacted portions of the documents on privilege grounds. Moreover, to the extent Equitas has redacted portions of these documents on relevance grounds, the redactions should be reviewed *in camera* by the Court. The redactions appear on documents that deal with highly relevant matters. Especially in light of Equitas' past attempts to impermissibly narrow the scope of its discovery obligations, *in camera* review would be necessary.

11. There is no excuse for Equitas' failure to produce the above documents and it is apparent that Equitas is seeking to impede the meaningful cross-examination of Mr. Williams. In light of Equitas' gamesmanship and given that Equitas was warned several times regarding the consequences of its failure to comply with the Court's Orders, the Court should strike the Williams Affidavit and the paragraphs in the Offer of Proof noted above.

**II. In The Alternative, The Court Should Order Equitas To Produce The Documents Withheld And To Make Mr. Williams Available For Further Testimony**

12. If the Court is not inclined to strike the Williams Affidavit and his Verification, the ACE Companies respectfully submit that the Court should enter an order stating that the Williams Affidavit and verification will be stricken if Equitas does not produce the documents noted above. The Court should also order that the ACE Companies are entitled to the production of documents relating to the submission of the same claims to reinsurers other than Home. Mr. Williams testified that the claims against Home would also be presented to other reinsurers on the slip. (Ex. 4 at 53.) Documents regarding such claims are relevant because Mr. Williams stated in his affidavit (and the Liquidator has alleged) that Equitas (and other AFIA Cedents) would have incurred significant costs in prosecuting their claims in the estate. If Equitas had already gathered (or would be gathering) the information for the submission of claims to other reinsurers, then there is no burden or expense.

13. In addition to requiring the production of documents, the Court should order that Mr. Williams must appear for additional questioning at a deposition or the Williams Affidavit and his Verification will be stricken. Equitas should be required to produce Mr. Williams in New York because the ACE Companies incurred substantial expense in traveling to London for the first deposition, only to learn that critical documents had not been produced.

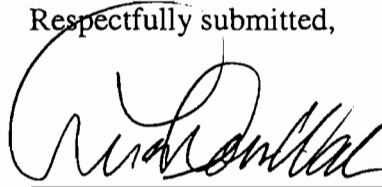
WHEREFORE, the ACE Companies respectfully request that the Court enter an order:

A. Striking the Williams Affidavit and verification of the paragraphs in the Offer of Proof set forth above;

B. In the alternative, stating that (a) Equitas must produce the documents or portions of documents identified above or the Williams Affidavit and verification will be stricken; and (b) Mr. Williams must appear in New York for a continuation of his deposition; and

C. Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,



Date: June 9, 2005

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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 June 9, 2005:

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A handwritten signature in black ink, appearing to read "Ronald L. Snow", written over a horizontal line.

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