

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' MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS BY GARETH HOWARD HUGHES**

Gareth Howard Hughes, a Joint Provisional Liquidator of the Home Insurance Company, has appeared in this case to support the efforts of the Liquidator in seeking this Court's approval for an agreement with AFIA Cedents. Despite his active participation in these proceedings, he has refused to engage in the discovery process. 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., move this Court for an order compelling Gareth Howard Hughes ("Mr. Hughes") to produce documents sought by the ACE Companies in response to document requests served upon Mr. Hughes and Ernst & Young Limited pursuant to this Court's Order on Remand dated October 8, 2004. In support of their Motion, the ACE Companies respectfully state as follows:

**Summary**

1. The discovery sought by the ACE Companies was served upon Mr. Hughes on January 21, 2005 (the "Document Requests," attached as Exhibit A)<sup>1</sup> pursuant to court-mandated discovery regarding the genesis, negotiation and execution of the proposed Agreement and Compromise with the AFIA Cedents (the "Proposed Agreement") which Roger A. Sevigny,

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<sup>1</sup> Those Requests were also served on E&Y to ensure the production of any responsive document which Mr. Hughes may have passed onto or placed in the possession, custody or control of E&Y.

Insurance Commissioner of the State of New Hampshire, as liquidator (the "Liquidator") of The Home Insurance Company ("Home") has presented to this Court for approval.

2. Mr. Hughes has appeared in this proceeding in his capacity as a Joint Provisional Liquidator of the Home to lend credibility to, and endorse, the arguments advanced by Liquidator in regard to the Proposed Agreement. To that end, Mr. Hughes has voluntarily interjected himself into this proceeding by submitting the Affidavit of Gareth Howard Hughes dated March 31, 2004 in Support of the Liquidator's Reply in Support of the Proposed Agreement dated April 2, 2004 (the "Hughes Affidavit," attached as Exhibit B).<sup>2</sup>

3. Now, despite his "appearance" in this matter as one of the Joint Provisional Liquidators, Mr. Hughes has refused to engage in discovery to enable the ACE Companies to test the veracity of the factual statements he has made in the Hughes Affidavit and provide the ACE Companies with a meaningful opportunity to depose and cross-examine him on credibility and other issues, discovery which would permit the parties and this Court to assess based on a more complete record the fairness and reasonableness of the Proposed Agreement.

4. The ACE Companies are entitled to a meaningful opportunity for discovery of all those entities whose involvement is directly related to the approval of the Proposed Agreement, and in particular, of Mr. Hughes who has voluntarily chosen to participate in the proceedings, and in the process, adopted a position adverse to the ACE Companies. Without the documents sought from him which are the subject of this Motion, the ACE Companies' right to discovery will be unfairly restricted.

5. The need for full discovery regarding the assertions made in the Hughes Affidavit is especially compelling because many of his assertions go to the heart of the alleged need for,

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<sup>2</sup> Additional witness statements have been signed and submitted by Mr. Hughes in the High Court of Justice in England in connection with the Home matter, which further demonstrate the extent of the involvement of Mr. Hughes as a Joint Provisional Liquidator in connection with the proceedings relating to the Home.

reasonableness of, and fairness of the Proposed Agreement. First, the Hughes Affidavit avers that, in the absence of a scheme as contemplated by the Proposed Agreement, AFIA Cedents would be "most unlikely" to file and prosecute claims in the Home liquidation due to the "time and expense" involved. (Exh. B, ¶ 13.) In as much as the claims process is relatively simple and inexpensive and that reinsurance claimants almost uniformly file claims in US insurance insolvencies, the ACE Companies should be given an opportunity to test this assertion. Second, the Affidavit references "set-off" rights available to AFIA Cedents which rights are so speculative at this juncture as to swallow any perceived exception -- simply put, no AFIA Cedent can tell with any certainty at this juncture what its set-off position will be -- accordingly, to suggest that Cedents will not prosecute a claim beyond their set-off right is an assertion that must and will be challenged. Third, the Affidavit references alternative mechanisms available to the AFIA Cedents for recovering funds from the ACE Companies and the ring fencing of "UK Assets" -- all of which measures are contrary to English law and the law applicable to this proceeding. Without the documents requested by this Motion, the ACE Companies will be unable to meaningfully challenge the positions espoused by Mr. Hughes in support of the Liquidator.

6. Moreover, the ACE Companies' right to such discovery is highly significant because this Court, in its Order on Remand dated October 8, 2004, relied upon in the Hughes Affidavit in approving the Proposed Agreement. (The Order on Remand is attached as Exhibit C.) The ACE Companies' inability to take discovery in this action has already contributed to an order of reversal by the New Hampshire Supreme Court. Denial of discovery sought will imperil not only the ACE Companies' chances of a fair hearing, but also the sufficiency of any factual record which is ultimately presented for appellate review.

7. This Motion seeks, in particular, the production of documents and information supporting the Hughes Affidavit which have not been produced to the ACE Companies. The ACE Companies also seek formal confirmation, on the record, by Mr. Hughes that upon completion of his production to the ACE Companies, all responsive non-privileged documents in his possession, custody or control will have been produced. Finally, in the event Mr. Hughes withholds any documents based on a claim of privilege, he should be required to provide a privilege log separate from that served by the Liquidator.

8. This Motion is presented to the Court today following several attempts by the ACE Companies to obtain documents from Mr. Hughes, and the continued obstacles erected by the Liquidator and Mr. Hughes through their respective counsel to restrict access to such materials. The background of this dispute will show that the ACE Companies first accepted, in a spirit of cooperation, the Liquidator's counsel's proposal that documents which could be sought from Mr. Hughes would be produced to the ACE Companies as part of the Home's production.

9. Upon careful examination of the Home production, it became apparent to the ACE Companies that virtually no documents relating to the factual assertions made in the Hughes Affidavit were included in the Liquidator's production. This obvious gap in the Home's production was later confirmed by the Liquidator's counsel who advised the ACE Companies that neither he nor his client would make any representation with regard to the scope of the inquiry relating to, or completeness of, Mr. Hughes' "voluntary" document "production" submitted as part of the Home production. Given the clear disclaimer by the Liquidator's counsel in regard to Mr. Hughes' documents, it became necessary for the ACE Companies to prepare and propound a separate set of Document Requests to Mr. Hughes and E&Y, in order to ensure a complete production. Accordingly, on January 21, 2005, the ACE Companies served the Document Requests which are the subject of this Motion.

10. In a letter dated March 16, 2005, two months after service of the Document Requests, and after ACE had granted several extensions of time to respond, counsel for Mr. Hughes contacted the ACE Companies, asserting various technical objections to the Document Requests, but confirming that only a piecemeal production had been made to the Liquidator as part of Mr. Hughes' "voluntary" production. (Copy of Mr. Hughes' counsel's letter dated March 16, 2005 letter attached as Exhibit D.) In response, the ACE Companies renewed their request for a direct and complete production, which request was responded to by Mr. Hughes' counsel on March 21, 2005, by a vague assertion as to his inability to respond by the designated date based on "instructions from their clients." (Copy of Mr. Hughes' counsel's letter dated March 21, 2005, attached as Exhibit F.)

11. The refusal of Mr. Hughes to engage in the discovery process despite his voluntary participation in this proceeding is contrary to notions of fairness and due process. Mr. Hughes has made himself amenable to discovery first through the Hughes Affidavit and further through the application to this Court to bless the Proposed Agreement -- an agreement between the Joint Provisional Liquidators of the Home and the AFIA Cedents. The documents currently sought by the ACE Companies (which Mr. Hughes has refused to produce) go directly to the fairness and reasonableness of the Proposed Agreement. The relevance of the ACE companies' requests is bolstered by the fact that they mirror the assertions in the Hughes Affidavit submitted in support of the Proposed Agreement and cited by the Court in its Order on Remand in adopting certain facts as support for a legal finding adverse to the ACE Companies.

12. If Mr. Hughes is permitted to avoid discovery, the Court should have his Affidavit stricken from the record and the Order on Remand issued by this Court amended to remove any reference thereto.

13. For these reasons, and because Mr. Hughes has no basis for withholding any of the documents sought, this Motion should be granted and Mr. Hughes be ordered to produce all responsive documents requested by the ACE Companies.

#### **Background**

14. On October 4, 2004, the ACE Companies served a set of document requests on the Home, seeking information and documents regarding the negotiation and execution of the Proposed Agreement. The Liquidator's counsel, upon information of the ACE Companies' intent to serve a separate set of document requests on Mr. Hughes and E&Y, agreed to produce along with the Home production, all such responsive documents. (Copy of Liquidator's Response to the ACE Companies' Document Request dated November 24, 2004, attached as Exhibit G.) Following the Home production and careful examination of the documents included therein, it became clear that the production as it pertained to Mr. Hughes' documents was piecemeal at best and that virtually no documents had been produced which would support the Hughes Affidavit. Counsel for the Liquidator later refused to confirm the scope or adequacy of that production, and disclaimed any responsibility for the completeness of any documents pertaining to Mr. Hughes. (Copy of Liquidator's counsel letter dated January 14, 2005, ¶ 3.3, attached as Exhibit H.)

15. On January 21, 2005, the ACE Companies served a separate set of Document Requests upon Mr. Hughes and E&Y, addressed specifically to Mr. Hughes, which tracked, virtually line by line, the statements made by Mr. Hughes in his Affidavit.

16. On March 16, 2005, counsel for Mr. Hughes responded to the Document Requests by asserting a number of technical objections, but also stating that while a few responsive documents had been provided on a voluntary basis to the Liquidator, Mr. Hughes would refuse to produce any documents directly to the ACE Companies in response to the Document Requests.

17. Given Mr. Hughes' refusal to produce, and as required under New Hampshire law, the ACE Companies attempted on March 17, 2005, to "meet and confer" by responding to his counsel's letter and the objections asserted therein. (A copy of the ACE Companies' letter of March 17, 2005, is attached as Exhibit E.) Given the upcoming discovery completion date of April 15, 2005 imposed by the Court, the ACE Companies offered to withhold filing a motion to compel until a substantive response was received from Mr. Hughes no later than March 21, 2005.

18. On March 21, 2005, Mr. Hughes' counsel advised the ACE Companies that no substantive response would be forthcoming, and proposed no date for a production. (Exh. B, ¶ 12.)

19. In light of the parties' unresolved disagreement regarding disclosure of the outstanding documents, and the upcoming date for close of discovery, judicial intervention has become necessary.

### **Request for Relief**

#### **I. The Document Requests to Mr. Hughes Track His Own Affidavit and Mandate a Complete Production for Due Process Considerations.**

20. The Document Requests served on Mr. Hughes contain requests designed to track, line by line, the factual assertions made by Mr. Hughes in his affidavit submitted in support of the Liquidator's Motion for Approval of the Proposed Agreement. Mr. Hughes, in his capacity as a Joint Provisional Liquidator of the Home, has worked closely with the Liquidator and the AFIA Cedents in negotiating the terms of the Proposed Agreement. Documents relating to his activities in connection with those entities and the Proposed Agreement will shed light upon the facts underlying the various assertions made in the Hughes Affidavit -- issues that go to the heart of the need for, the reasonableness of and the fairness of the Proposed Agreement.

21. The Hughes Affidavit avers that, in the absence of a scheme as contemplated by the Proposed Agreement, AFIA Cedents would not file a claim against the Home estate, for

reasons including the time and expense inherent in prosecuting such claims. (Exh. B, ¶ 12.) The claims filing process is relatively simple and inexpensive and there is ample support for the fact that reinsurance claimants almost uniformly file claims in US insurance insolvencies. The ACE Companies should be given an opportunity to test the assertions made in the Hughes Affidavit. Second, the Hughes Affidavit references "set-off" rights available to AFIA Cedents which rights are highly speculative: no AFIA Cedent can predict with any certainty at this juncture what its set-off position will be. For Mr. Hughes to suggest that AFIA Cedents will not prosecute a claim beyond their set-off right is an assertion that must and will be challenged by the ACE Companies. Third, the Hughes Affidavit references alternative mechanisms available to the AFIA Cedents for recovering funds from the ACE Companies and the ring-fencing of "UK Assets" -- all of which are contrary to English law and the law applicable to this proceeding. These matters are all relevant to the court-mandated discovery into the necessity, fairness and reasonableness of the Proposed Agreement and factual discovery from Mr. Hughes must be permitted without limitation.

22. The ACE Companies will also seek to take Mr. Hughes' deposition on the substance and bases for the above factual assertions made by him in this proceeding. Without all of the documents which support the factual statements he has made in support of the Liquidator's arguments, the ACE Companies will be unable to meaningfully depose and cross-examine this witness. A refusal to produce or a piecemeal production will severely prejudice the ACE Companies by depriving them of their due process rights in connection with such discovery.

23. This prejudice to the ACE Companies is particularly significant given that this Court has relied upon the Hughes Affidavit in issuing a ruling adverse to the ACE Companies and finding in its Order on Remand dated October 8, 2004 that payments under the Proposed Agreement constitute "administrative expenses" under RSA 402-C:44, thereby approving the



Proposed Agreement. (Exh. C, ¶¶ 12-15.) The Court, in finding that there were "circumstances which put collection of the asset at risk," specifically relied on the Hughes Affidavit for the same argument advanced by the Liquidator and the claim that AFIA Cedents would be unlikely to file or prosecute proofs of claim if neither setoff nor an eventual distribution were likely. *Id.* at 8. That justification is central to the inquiry into whether the Proposed Agreement is fair and reasonable, and makes the documents reflecting Mr. Hughes' views and the positions he has endorsed on the Proposed Agreement necessary to the inquiry at hand.

24. To prevent discovery of factual statements made in this proceeding which the Court itself has cited in approve the Proposed Agreement would be highly prejudicial to the ACE Companies. To allow a witness to participate actively in the proceedings and then deprive the party adversely impacted by that active participation is contrary to notions of fairness and due process and would jeopardize any chances of having a fair hearing regarding the fairness and reasonableness of the Proposed Agreement.

## **II. The Documents Sought from Mr. Hughes Are Central to the Discovery Ordered by This Court.**

25. The documents requested by the ACE Companies which are in the possession, custody and control of Mr. Hughes (or passed on by him to E&Y) are relevant to "the necessity, reasonableness, and fairness of the [Proposed Agreement]" and thus fall squarely within the scope of discovery authorized by the Court's Order on Remand. Under New Hampshire law, "[p]retrial discovery ... has been regarded ... as a proper procedural aid for the parties to prepare their case in advance of trial and has been given a broad and liberal interpretation." *Calderwood v. Calderwood*, 112 N.H. 355, 357-58, 296 A.2d 910, 912 (1972). Relevance under this Court's rules is defined very broadly and is based on the substance of a document or communication rather than the identity of the author or recipient of the document or communication. Superior

Court Rule 35 states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." N.H. SUPER. CT. R. 35(b)(1) (emphasis added). Requests for information or documents will satisfy the relevance standard if they "appear[] reasonably calculated to lead to the discovery of admissible evidence." Id. See also McDuffy v. Boston & Maine R.R., 102 N.H. 179, 182, 152 A.2d 606, 609 (1959) ("[D]iscovery has been allowed of facts which are material to the proper preparation of the plaintiff's action or the defendant's defense thereof."); Ingram v. Boston & Maine R.R., 197 A. 822, 823 (N.H. 1938) (production of documents will be ordered "if the court can fairly find that [the evidence sought] may in any way be material to the [party's] cause"). The sole question is whether the requested documents might "in any way" shed light on the "subject matter pending in the action." N.H. SUPER. CT. R. 35(b)(1); Ingram, 197 A. at 823.

26. The ACE Companies' requests for documents held by Mr. Hughes seek discoverable information which go to the heart of how the Proposed Agreement was negotiated and ultimately executed by and between the parties including the matters raised with the AFIA Cedents to enlist their support for the Agreement, the nature of "UK Assets," alternative means of recovery and the impact of legal procedures on claims. An evaluation of the fairness and reasonableness of the Proposed Agreement cannot be made here without the benefit of full disclosure of all relevant documents, including those in Mr. Hughes' possession, custody and control, concerning the genesis, negotiation and execution of the Proposed Agreement. Given New Hampshire's liberal standard for "relevance" in discovery, Mr. Hughes' refusal to withhold responsive documents on the basis of a relevance objection is inappropriate.

27. Indeed, Mr. Hughes has already conceded that documents and communications regarding the Proposed Agreement are relevant by "voluntarily" producing "certain" of those documents relating to communications with the Liquidator regarding the Proposed Agreement.

Moreover, having conceded that the requested documents are discoverable, Mr. Hughes may not now withdraw from the process and evade submission to jurisdiction and his disclosure obligations by using a partial production to the Liquidator as a shield. A piecemeal production -- as was suggested by his own counsel in the March 16 letter and as confirmed in writing by the Liquidator's counsel -- falls short of satisfying Mr. Hughes' obligation to produce all responsive non-privileged documents directly to the ACE Companies. The ACE Companies should be permitted to discover *any* nonprivileged document in the possession, custody or control of Mr. Hughes which may "in any way be material" to the fairness and reasonableness of the Proposed Agreement. Ingram, supra, 197 A. at 823.

28. Because the Document Requests so closely track the Hughes Affidavit, they cannot be viewed as either "irrelevant" (as asserted throughout the objections), "vague" (as argued by Mr. Hughes' counsel in objections to Request nos. 11, 23 and 60 in Exh. D) or "burdensome" (asserted as a general objection in the same letter) since each request corresponds directly to a factual assertion made by Mr. Hughes in his Affidavit. To preserve fairness and due process, Mr. Hughes must be required to substantiate his own statements and cannot be allowed to evade discovery based on unjustifiable objections to the scope and breadth of the Document Requests.

29. Moreover, any jurisdictional objections to the Document Requests is inappropriate given Mr. Hughes' voluntarily appearance as affiant in this case for the purpose of addressing issues relating to the very factual inquiry ordered by the New Hampshire Superior Court. Given these facts, Mr. Hughes must be deemed to have submitted to the jurisdiction of this Court and be made available for document discovery, deposition and a meaningful opportunity for cross-examination by the ACE Companies.

30. By voluntarily producing certain documents as part of the Liquidator's production, Mr. Hughes has waived any objection to the jurisdiction of the Court and to service under the Hague Convention. Any argument that Mr. Hughes has not waived those objections is without merit. Mr. Hughes submitted the Hughes Affidavit in support of the Liquidator's Reply in Support of the Proposed Agreement: given that he has taken affirmative steps to participate in the process, Mr. Hughes must be found to have submitted to jurisdiction. See, e.g., Lyford v. Trustees of Berwick Academy, 97 N.H. 167, 168, 83 A.2d 302, 302 (1951) (objection to jurisdiction waived when party, by general appearance "or otherwise," submits to court any question other than sufficiency of service of process or notice); Druding v. Allen, 122 N.H. 823, 826, 451 A.2d 390, 393 (1982) (applying Lyford rule to nonparty who submitted to court's jurisdiction). It would be unfair to allow Mr. Hughes to use this forum solely for the purposes of supporting one party's position, and then evading discovery by denying the significance of that appearance. For the same reasons, Mr. Hughes' objections to service are inappropriate. Mr. Hughes had accepted to produce certain documents through the Liquidator. He may not now argue - once an objection has been raised by the Ace Companies to his piecemeal production - that service of process was improper.

### **III. The ACE Companies Do Not Seek the Production of Privileged Materials.**

31. The ACE Companies have advised Mr. Hughes that, to the extent that documents sought by the Document Requests constitute privileged communications or materials, Mr. Hughes is required to provide a privilege log.

32. To the extent that Mr. Hughes intends to assert a claim of privilege,<sup>3</sup> he bears the burden of demonstrating that any communication or document withheld from production is in fact privileged. State v. Gordon, 141 N.H. 703, 705, 692 A.2d 505, 506 (1997); Moore v.

Medeva Pharmaceuticals, Inc., No. Civ. 01-311-M, 2003 WL 1856422, at \* 2 (D.N.H. Apr. 9, 2003) (applying New Hampshire law). Thus, with regard to any documents as to which a claim of privilege is asserted, Mr. Hughes must provide the ACE Companies with a detailed privilege and redaction log to allow the latter to ascertain the bases for the privilege claims as to each document. Accordingly, if this Court is inclined to entertain any privilege claim by Mr. Hughes, it should order Mr. Hughes to produce a privilege and redaction log.

33. Any claim of privilege asserted by the Liquidator - which were separately disputed in a Motion to the Court by the ACE Companies - cannot simply be incorporated by reference by Mr. Hughes, and asserted by him as a beneficiary of any rights claimed by a third party. Rather, Mr. Hughes has a separate burden of proof on any claim of privilege which he intends to assert and must demonstrate an independent basis under New Hampshire law for any document which he intends to withhold on that basis.

34. Finally, if Mr. Hughes could not be compelled by this Court to produce the documents requested, the ACE Companies respectfully request that Mr. Hughes' Affidavit be stricken from the record and the Court's Order on Remand dated October 8, 2004 amended to remove any reference to the Hughes Affidavit.

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

- A. Requiring Mr. Hughes to produce all nonprivileged documents responsive to the ACE Companies' Document Requests; and
- B. Requiring Mr. Hughes to provide a detailed privilege log for any document withheld on grounds of privilege and a redaction log for any portion of a document withheld on grounds of privilege; and
- C. Granting such other and further relief as this Court deems just and proper, including, but not limited to, the fees and costs incurred by the ACE Companies in bringing this Motion.

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<sup>3</sup> A general objection as to "privilege" was asserted as to the Document Requests in paragraph 4(a) of Mr. Hughes'

Respectfully submitted,

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

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 I served a copy of the foregoing on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on March 24, 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.  
Rackermann, 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. Callahan, Esq.  
Preti, Blaherty, Beliveau, Pachios & Haley, PLLP  
57 North Main Street  
PO Box 1318  
Concord, NH 03302-1318

Ronald L. Snow by  
Ronald L. Snow mrd

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