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

CENTURY INDEMNITY COMPANY'S RESPONSE IN OPPOSITION TO LIQUIDATOR'S REPORT AND RECOMMENDATION ON KWELM COMPANIES' PROOFS OF CLAIM

Century Indemnity Company ("CIC"), by its attorneys Lovells, respectfully submits this response in opposition to the report and recommendation (the "Report") of Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator (the "Liquidator") of the Home Insurance Company ("Home") regarding the above-captioned proofs of claim filed by the KWELM companies (Kingscroft Insurance Company Ltd., Walbrook Insurance Company Ltd., El Paso Insurance Company Ltd., Lime Street Insurance Company Ltd., and Mutual Reinsurance Company Ltd.), sometimes referred collectively as "KWELM," dated March 15, 2006 (the "Report"). As discussed more fully below, the Liquidator has no authority to issue the Report and his doing so is an attempt to circumvent both the New Hampshire RSA §§ 402-C:37 and C:38 (the "RSA"), the provisions for the determination of claims under the claims procedures order entered by this Court and the claims protocol entered into between Home and CIC (also approved by Court order), which together comprise the exclusive means for the adjudication of AFIA cedent claims against Home's estate. Further, the Report interferes with the sole and exclusive jurisdiction of this Court to administer Home's liquidation by seeking this

Court's approval of an extraneous non-judicial assessment of setoff made in the context of KWELM's foreign scheme. The "determinations" that the Liquidator asks to have allowed as claims against Home were intended to create a balance for setoff purposes only, and not to establish a debtor balance and Home's liability to KWELM.

Accordingly, CIC opposes the Report and respectfully requests (i) that the relief sought in the Report be denied in its entirety; or alternatively, (ii) that the Court's consideration of the Report be adjourned pending determination of the KWELM companies' claims in accordance with the Protocol.

SUMMARY

1. The Liquidator is without authority to issue the Report because CIC, through its agent ACE INA Services U.K. ("AISUK"), has sole responsibility for administering and servicing filed proofs of claim under the Insurance and Reinsurance Assumption Agreement, dated January 31, 1984, (the "Assumption Agreement") on behalf of Home. The Liquidator not only consented to AISUK's administration of filed claims, but insisted on it. As a result, the Liquidator and CIC, on behalf of AISUK, negotiated a protocol for the determination of claims (the "Protocol"), which was subsequently approved by Court order on the basis of this Court's exclusive jurisdiction over Home's liquidation.[1] The Liquidator here seeks to replace the negotiated and Court-ordered Protocol with a non-judicial assessment under the KWELM Scheme designed solely for purposes of setoff in order to arrive at Home's net claim for distribution in KWELM's insolvency. The relief recommended in the Report—that the KWELM companies' setoff balances be allowed as Class V claims—abrogates the Protocol, this Court's

[1] This Court has sole jurisdiction over all aspects of Home's liquidation, including the determination of claims against Home. This is made clear in the RSA, as well as in the Court's June 13, 2003 Order of Liquidation for Home, the Claims Procedures, the Protocol and substantial caselaw.

claims procedures order and the overarching RSA, which combined set forth the exclusive mechanism for the assertion, adjudication and admission of AFIA claims against Home's estate.

2. This assessment of the KWELM companies' setoff amounts was not intended to—and does not—establish Home's liability. As set forth in the accompanying affidavit of John Frederick Powell (the "Powell Affidavit"), the KWELM Scheme is not designed to determine the claims of the KWELM companies against Home for any purpose other than as assessments for setoff purposes. The contracts of reinsurance between KWELM and Home, which are governed by English law, do not allow for the recovery of estimated potential future losses, such as IBNR losses underlying some of KWELM's purported claims. The KWELM scheme does not alter the terms of such contracts. The KWELM Scheme only binds creditors of KWELM in their capacity as creditors, and is not enforceable against Home as a debtor except to the extent that it reduces Home's creditor balance by an assessed offset. In short, the KWELM companies themselves could not have sought those amounts in the Liquidator's Report from Home even under the KWELM scheme. *See* Powell Aff. at ¶¶ 23-38.

3. In addition, the concept of comity to the KWELM Scheme's "determinations" does not come into play here because the assessments made under the Scheme were solely for purposes of setoff and not for the purpose of determining liability. There are simply no foreign claim adjudications to which to grant comity. The Powell Affidavit clearly explains why under English law the setoff assessment under the Scheme does not provide a basis for holding Home liable. Even if the Scheme had resulted in claim determinations, it would be repugnant to the RSA, the Protocol and this Court's administration of Home's liquidation to extend comity to an inquisitorial process that does not afford the parties the same due process rights as New Hampshire's claim adjudication procedure.

4. The amended order of the United States Bankruptcy Court for the Southern District of New York (the "New York Bankruptcy Court"), dated March 31, 2004, enforcing the Scheme in the United States under 11 U.S.C. § 304 (the "Amended § 304 Order") does not address, let alone compel, the allowance of the KWELM's claims as "determined" by the Scheme. The Amended § 304 Order did no more than ratify an earlier order of the New York Bankruptcy Court that was issued with respect to the KWELM companies' initial runoff scheme of arrangement (the "Original § 304 Order") and made it applicable to KWELM's cutoff scheme. The Original and Amended § 304 Orders enforce the KWELM schemes by enjoining actions asserted against the KWELM companies outside of the Schemes and channeling claims against the KWELM companies to the Scheme procedures.

5. Moreover, if, as the Liquidator contends, the Amended § 304 Order did seek to require the allowance of the KWELM companies' claims against Home's estate as assessed under the Scheme, such an order would be barred under the McCarran-Ferguson Act, 15 U.S.C. §§1012, *et seq.*, which precludes Federal law from ineffectuating state insurance regulations.

6. Finally, the Liquidator's suggestion that CIC is estopped or otherwise precluded from challenging the Report because "it has already had the opportunity to protect [its own debtor interests] through AISUK's successful representation of Home before the Scheme Adjudicator," Report at 14, is inaccurate. AISUK acted only on Home's behalf pursuant to its contractual obligation under the Assumption Agreement, and with Home's consent and insistence. At all times, AISUK made clear that it participated in the KWELM proceedings only on behalf of Home, and AISUK and CIC both reserved their rights to challenge positions taken by Home and/or the KWELM companies in the Scheme and any attempt to allow the KWELM companies' claims against Home. *See, e.g.*, the last paragraph of the letter from M.E. Durkin of AISUK to

Mark Langbridge of KWELM Management Services Ltd., dated April 12, 2005 (the "Durkin Letter"), attached as Exhibit C to the Report.

BACKGROUND

7. In 1993, a runoff scheme of arrangement for the KWELM companies was approved by KWELM's creditors, including Home, and sanctioned by the High Court of Justice in London, England as to the four English KWELM companies and the Supreme Court of Bermuda as to the Bermudian KWELM company. This runoff scheme was subsequently converted into a cutoff scheme of arrangement (the "Scheme" or the "KWELM Scheme") in order to close the KWELM companies' estates, and the Scheme was similarly approved by the KWELM companies' creditors, including Home, and sanctioned by the English and Bermudian courts in February 2004.

8. On December 14, 1993, the New York Bankruptcy Court issued the Original § 304 Order, enforcing the KWELM companies' runoff scheme of arrangement and enjoining creditors of KWELM from taking action against the KWELM companies outside of the scheme. On March 31, 2004, following the conversion of KWELM's runoff scheme to a cutoff scheme, the New York Bankruptcy Court issued the Amended § 304 Order, making the terms of the Original § 304 Order applicable to the cutoff Scheme. Neither the Original nor Amended § 304 Orders require the allowance against Home's estate of any KWELM company claims that may be determined under the Scheme (as indeed they could not under the McCarran-Ferguson Act, as discussed below), but only channeled actions against the KWELM companies to the Scheme.

9. Following court-sanction of the Scheme, AISUK acted on behalf of Home (pursuant to its obligations under the Assumption Agreement) in relation to KWELM's claim

against Home. Home not only consented to AISUK's acting on its behalf, but insisted upon it.[2] At all times, AISUK maintained the position that any claims against Home must be adjudicated and determined in Home's New Hampshire liquidation proceeding.

10. Home's claims against KWELM (after reduction by KWELM's setoff claims) were ultimately resolved by agreement with the Scheme Administrator at $19.7 Million. After setoff, each of the KWELM companies is a "net debtor" to Home, and the Scheme Administrator has subsequently made payments under the Scheme based on the KWELM companies' net liability to Home.

11. On August 10, 2004, Home and CIC entered into the Protocol, which set out the exclusive process for administering and servicing AFIA claims. The Protocol sets forth the process under which claims from AFIA cedents are to be considered and adjusted and, where agreed, are to be determined, approved and submitted to the Court for allowance in Home's liquidation. The Protocol was subsequently approved by order of the Court on November 12, 2004.

12. On January 19, 2005, the Court entered the Restated and Revised Order Establishing Procedures Regarding Claims Filed with The Home Insurance Company (the "Claims Procedures").

13. The KWELM companies timely filed their respective proofs of claim against Home, and since then have continued to participate in Home's liquidation by presenting claims to Home and AISUK for adjudication under the Protocol and Claims Procedures. To date, the

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[2] At all times during the course of its representation of Home in the Scheme proceedings, AISUK and its principal, CIC, made clear that AISUK was acting only on behalf of Home and reserved their rights to challenge positions taken by Home. *See, e.g.*, the Durkin Letter attached as Exhibit C to the Report.

KWELM companies have presented approximately $1.7 Million in claims, and of that amount, all but approximately $30,000-$50,000 has successfully gone through the adjudication process under the Protocol and Claims Procedures.[3]

14. On February 7, 2006, the Scheme Adjudicator set out his non-judicial assessment with respect to the KWELM companies' claims in an aggregate amount of $3,910,842, and allocated them among the five KWELM companies. As noted above, of that $3.9 Million, approximately $1.7 Million has already been agreed to by AISUK in accordance with the Protocol and Claims Procedures, and has been submitted and allowed against Home's estate. The amount assessed by the Scheme Adjudicator that is truly in dispute in the Report is only approximately $2.2 Million. Those amounts were and are disputed and are not recoverable under the English law-governed contracts of reinsurance relevant here.

ARGUMENT

I. LIQUIDATOR IS WITHOUT AUTHORITY TO ISSUE THE REPORT BECAUSE (I) CIC ALONE IS RESPONSIBLE FOR ADMINISTERING KWELM CLAIMS AND (II) THE REPORT CIRCUMVENTS NEW HAMPSHIRE INSURANCE INSOLVENCY STATUTE AND COURT-ORDERED PROTOCOL

A. The Liquidator Attempts To Circumvent Protocol And CIC's Responsibility For KWELM Claims Administration.

15. Under the Assumption Agreement, CIC is obligated for the ongoing administration of claims in respect of the AFIA pool, including claims of the KWELM companies against Home. The Protocol, in turn, was entered into by Home and CIC specifically

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[3] There was a dispute over the Liquidator's determination with respect to approximately $30,000-$50,000 in claims submitted by the Walbrook and Mutual KWELM companies, and those companies subsequently sought to withdraw those claims. CIC opposed their withdrawal motion. The parties ultimately agreed that Walbrook and Mutual could withdraw those claims, but would not re-present them for adjudication in Home's liquidation.

for "the establishment of a protocol for the ongoing handling by [CIC] of claims in respect of AFIA liabilities … and this letter is intended to describe the process for the continued performance by CIC of its obligations under the [Assumption Agreement]." *See* Protocol, introductory ¶¶ 1-2. The Protocol, at ¶¶ 2.2 - 2.5, sets forth the exclusive procedure for the adjudication and determination of AFIA claims against Home, and the Liquidator's Report and his recommendation that the KWELM companies' claims be allowed against Home circumvents that procedure.

16. In entering into the Protocol, CIC and Home agreed that the "Liquidator and/or HICIL and CIC shall fully cooperate with each other (including in this ACE-INA) in relation to the matters covered by this letter and in particular information relating to notices, Requests for Review and/or Objections and the defense of Claims." Protocol at ¶ 2.18. Under the Protocol, Home is to provide CIC with a copy of any proof of claim submitted against Home's estate. Protocol at ¶ 2.2. Following CIC's receipt of a claim, CIC is to administer and service the Claim and, within 10 days of receipt, must notify Home in writing of its recommendation with respect to acceptance or rejection of the claim. Protocol at ¶ 2.3. If Home disagrees with CIC's recommendation under the Protocol, Home and CIC are to confer in an attempt to resolve their disagreement and, if unable to so resolve it within ten days, the matter is to be referred to an arbitrator. Protocol at ¶ 2.5. The Liquidator's attempt to gain allowance of KWELM's claims based on both claims CIC denies should be paid and on estimates of KWELM's outstanding and IBNR losses, effectively denies CIC of its rights under the Protocol, including the right to challenge the legitimacy of the claims in issue and, where appropriate, invoke the English law dispute procedure to resolve any disputes.

17. The Protocol's function as the sole mechanism for the adjudication of the KWELM claims against Home's estate derives from this Court's exclusive jurisdiction to administer Home's liquidation under the RSA and the KWELM's companies' submission to that jurisdiction. The exclusive jurisdiction of one court over an insurance liquidation is a well-settled principle. *See Todd v. Lakeland Chrysler-Plymouth-Dodge, Inc.*, 834 P.2d 387, 390 (Kan. Ct. App. 1992) ("The need for giving one state exclusive jurisdiction over insurance liquidation proceedings has long been recognized in the courts."). Moreover, by previously submitting claims against Home in Home's liquidation pursuant RSA § 402-C:38 and by following the process set forth in the Protocol, the KWELM companies' have subjected themselves to the Court's exclusive jurisdiction over adjudication of their claims. *See Corcoran v. Frank B. Hall & Co.*, 149 A.D.2d 165, 173-74 (N.Y. App. Div. 1989) ("[I]t is well established that in filing a proof of claim in liquidation, a claimant submits itself to the jurisdiction of the liquidation court."); *In re Emmet*, 164 A.D. 586, 588 (N.Y. App. Div. 1918) ("By filing its claim with the Superintendent of Insurance against the insolvent corporation ... the Supreme Court acquired jurisdiction over the appellant ... .").

18. The Liquidator is thus obligated to adjudicate and determine the KWELM companies' claims in accordance with the Protocol: he has no alternative means for seeking allowance of the KWELM claims. The Scheme Adjudicator's assessments are not enforceable legal judgments and he is powerless to declare that "unpaid paids," outstanding loss reserves and IBNR claims must be paid by Home. These amounts may only be sought from Home by asserting claims against Home for determination in accordance with the applicable reinsurance contracts. As such, the KWELM companies' claims at issue in the Report must be presented to CIC and adjudicated in the manner prescribed by the Protocol. The Liquidator must work with

CIC to adjudicate and determine claims against Home's estate as provided for in the Protocol, and has no authority to depart from it by unilaterally seeking allowance of any claims.

B. Applicable English Law Does Not Allow For Determination Of Disputed Or Contingent Claims.

i) KWLEM Scheme Only Assesses Balances For Setoff Purposes.

19. Although the Liquidator says, no fewer than fourteen times, that the KWELM companies' claims against Home have been "determined," no determination of the unresolved KWELM companies' claims has been made to date, either under the Scheme or the Protocol. All that has occurred under the Scheme is the assessment of balances for setoff purposes. The Scheme is not binding on Home as a debtor, but merely provides a mechanism for the KWELM companies to set-off their obligations to Scheme creditors (such as Home). After this set-off, a net amount to be paid by one party or the other is ascertained. The Scheme's set-off mechanism does not establish the liability of either party, and indeed the mechanism only operates to the extent that the amount owed to a KWELM company does not exceed the amount owed by a KWELM company to its creditor. If the amount owed to a KWELM company exceeds the amount owed to the creditor, the creditor's claim in the Scheme is zero. The Scheme, therefore, arrives at a debtor balance solely for the purpose of a payment to the creditor. *See* Powell Aff. at ¶¶ 2, 7-19.

20. The Scheme does not determine liability or debtor balances, and indeed the Scheme Adjudicator had no basis for properly determining the amount of the KWELM companies' respective claims against Home because he was never provided with the KWELM claims files. All that the Scheme provides for with respect to KWELM's claims is, in large part, a high level assessment of disputed, contingent or prospective claims that may never materialize

for purposes of offsetting the KWELM companies' liability to creditors by the amount of KWELM's assessed claims against such creditor and enabling a distribution to creditors under the Scheme. *Id.*

21. Section 2.5.3 of the Scheme sets forth the Scheme's set-off provision, as follows:

> "When quantifying the amount of a Scheme Creditor's Established Scheme Liabilities (but not otherwise), such Established Scheme Liabilities shall be reduced or eliminated by set-off of the amount agreed and/or determined ... and/or prospective liabilities of the Scheme creditor to the relevant Scheme Company."

Section 2.5.3 of the Scheme is clear that the "contingent and/or prospective liabilities" of Home to a KWELM company may be used to setoff the established liability of the KWELM companies to Home, but not otherwise. In other words, under the Scheme, the "contingent or prospective liabilities" of Home to the KWELM companies cannot be used to determine KWELM's claims against Home.

22. The KWELM companies themselves recognize that the Scheme and the Protocol serve different functions. In correspondence with AISUK, KWELM has stated that the determination of debtor balances under the Scheme is solely for setoff purposes, and that the debtor balances themselves must be recovered "by agreement, or ... by arbitration under the relevant contracts." *See* letter from Mark Langbridge of KWELM Management Services Ltd. to Jonathan Rosen, dated April 14, 2005, attached as Exhibit B to the Report. The KWELM companies have acted in accordance with such view and have filed proofs of claim against Home in Home's New Hampshire liquidation proceeding and have successfully sought allowance of approximately $1.7 Million under the Protocol and Claims Procedures.

ii) Outstandings and IBNR Losses Are Not Recoverable Under The Reinsurance Contracts Or English Law.

23. There are three elements to the unresolved $2.2 Million that the Liquidator seeks to have determined as claims in the Report: (i) paid amounts that are unreimbursed; (ii) outstanding loss reserves; and (iii) amounts that are incurred by not reported ("IBNR"). Unlike the amounts already agreed by CIC, each is disputed. Under English law, these amounts are not recoverable simply by virtue of the Scheme Adjudicator's assessment and view based on setoff. They do not have the force of a judgment or Court order in any way, shape or form as to Home's liability to KWELM. Rather, whether any one of these items can be sought from Home is determined solely by reference to the contracts of reinsurance between the KWELM companies and Home. *See* Powell Aff. at ¶¶ 24-39. And, as set forth in the Powell Affidavit, neither the terms of the reinsurance contracts at issue nor English law allow for recovery against a reinsurer, like Home, of outstanding loss reserves or an estimated potential loss such as an IBNR claim. [4]

24. By effectively conceding Home's liability on grounds that the KWELM companies themselves could not establish if they had independently submitted claims against Home's estate outside of the Scheme context, the Liquidator's aim is to avoid actual review and determination of the KWELM companies' claims in accordance with the Protocol. Under the Protocol (unless the Liquidator agreed with CIC's earlier recommendation to deny the KWELM

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[4] The Liquidator will undoubtedly argue that, since the KWELM companies are winding down and their contingent outstanding and IBNR losses will never become absolute, CIC will reap a windfall unless the KWELM companies' claims are now allowed against Home's estate. The timing of the KWELM companies' wind down, however, is not within the control of Home or CIC and does not justify the highly unusual measure of seeking allowance of disputed claims against the estate without proper adjudication under the Protocol. The solution to any perceived "windfall" is not to completely ignore the RSA and the Protocol, which, if they had been followed, would have been consistent with both the law and the practice in Home's liquidation thus far. CIC reserves all of its rights under the Assumption Agreement with respect to the Liquidator's attempt to allow the KWELM claims outside of the Protocol in this fashion, including the right to argue that such actions violate Home's duty of utmost good faith to CIC.

claims under Protocol ¶¶ 2.3-2.10), a Disputed Claim proceeding would be commenced with respect to the KWELM submissions under Protocol ¶ 2.13. Such a Disputed Claim proceeding would be governed by New Hampshire Law (Protocol ¶ 2.14), but where English law is applicable to the underlying reinsurance contracts (as here), the Referee is to appoint a retired English judge or Queen's counsel as an expert to issue a report and recommendation on resolution of the Disputed Claim. Such an expert would no doubt decide that the amounts determined by the Scheme Adjudicator are only assessments of KWELM's outstanding and IBNR losses for setoff purposes, for which reinsurance payments are not recoverable. *See* Powell Aff. at ¶¶ 24-39.

25. In short, the Liquidator knows that his attempt to seek allowance of the Scheme's assessment of KWELM's setoff balances as claims circumvents the Protocol and Claims Procedures, and that his only option is to try to play on another field altogether—"comity," which, as shown below, is equally unavailing.

II. COMITY PROVIDES NO BASIS FOR ALLOWANCE OF KWELM SETOFF BALANCES BECAUSE (I) THE SCHEME DID NOT RESULT IN CLAIM DETERMINATIONS AND (II) THE SCHEME PROCEDURE IS REPUGNANT TO THE PROTOCOL AND NEW HAMPSHIRE LAW AND POLICY

26. The Liquidator requests that the Court allow KWELM's claims as "determined" by the Scheme Adjudicator as a matter of comity. *See* Report at ¶ 8, 14. Knowing, as he must, that the Scheme Adjudicator has not "determined KWELM's claims" but rather only assessed them for setoff purposes, the Liquidator falls back on the general principle of the comity. At most, however, comity would only apply to allowance against Home's estate of claims that had actually been determined as claims in a foreign proceeding. The principle has no application here because the Scheme did not determine any claims that could be allowed against Home: the

Scheme only arrived at setoff assessments. As discussed above, under the Scheme and applicable English law, a KWELM company could not collect from Home based upon the setoff amount assessed under the Scheme. *See* Powell Aff. at ¶ 23-39. Since there is no foreign determination of claim here, there is nothing to accord comity to.

27. In the Report, the Liquidator puts forward the novel proposition, wholly lacking in support, that where there are "two potentially competing insolvency proceedings," it is appropriate to "centralize proceedings" and "resolve claims, including lesser offsetting claims" in the net debtor forum for the sake of consistency. Report at 11. Yet, because the Scheme only assessed the KWELM companies' claims against Home for setoff purposes, there is no "competing proceeding." Nonetheless, the Liquidator concludes that it is "not obviously repugnant" to New Hampshire policy to have KWELM's claims against Home determined in a foreign proceeding "where that determination is part of the determination of Home's larger claims against the foreign insurer." Id. (emphasis in original). On the contrary, it is antithetical to the Court-ordered Protocol and Claims Procedures to determine KWELM's claims by reference to a setoff assessment performed for administrative purposes under the Scheme and where the KWELM companies have voluntarily submitted themselves to the claim determination procedure under the Protocol. To ask this Court to allow as a claim an amount that was arrived at under a foreign mechanism designed solely to assess setoff is a complete abnegation of the process under the Protocol and is repugnant to New Hampshire's insolvent insurer liquidation statute and policy.

28. Moreover, the Scheme is not a quasi-judicial procedure akin to the Court-ordered Protocol and Claims Procedures, and the parties are not afforded the same due process rights under the Scheme as they have in the New Hampshire proceedings. *See* Powell Aff. at ¶ 22. As outlined in the Powell Affidavit, the assessment process performed by the Scheme Adjudicator

bears no resemblance to the claims determination process under the Protocol. The Scheme is essentially an inquisitorial system in which the Scheme Adjudicator (who is not a lawyer qualified to analyze the provisions of the governing reinsurance contracts) decides what he needs to know and when he needs to know it. The parties have a very limited ability to advocate their positions. Under the Scheme there is:

- No right to make oral submissions or advocate position
- No reasonable deadline or time period for addressing complex dispute issues
- No right to arbitrate
- No right to appeal

It would be uniquely repugnant to the New Hampshire RSA and this Court's administration of Home's liquidation to grant comity to a foreign Scheme's claim "determinations" where they result, as here, from a procedure so different in purpose and practice from New Hampshire's own.

III. THE SECTION 304 ORDERS DO NOT COMPEL ALLOWANCE OF KWELM SCHEME ASSESSMENTS AND THE MCCARRAN-FERGUSON ACT PRECLUDES A FEDERAL INJUNCTION REQUIRING ALLOWANCE OF KWELM CLAIMS UNDER THE SCHEME

29. The Amended § 304 Order does not compel allowance of KWELM's claims. The Amended § 304 Order (which merely ratified an original order of the New York Bankruptcy Court and made it applicable to KWELM's cutoff scheme) enforces the Scheme only insofar as it enjoins actions asserted *against* the KWELM companies outside of the Schemes. The Amended § 304 Order makes the Scheme binding on Scheme creditors, such as Home, only to the extent that such creditors must proceed against the KWELM companies in the United Kingdom through the Scheme itself. The Amended § 304 Order operates as a channeling injunction only: it does

not address, let alone compel, the allowance of the KWELM companies' claims against Home's estate as may be "determined" under the Scheme. The Liquidator's assertion that the Amended § 304 Order requires the allowance of the KWELM companies' claims in accordance with the Scheme is baseless.

30. Even if the Liquidator were correct that the Amended § 304 Order seeks to enjoin the adjudication of the KWELM companies' claims in Home's liquidation under the RSA and Court-ordered Protocol, such an injunction would be ineffective under the McCarran-Ferguson Act, 15 U.S.C. §§ 1012, *et seq.*

31. Section 1012(b) of the McCarran Ferguson Act provides in relevant part:

> No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance.

It is a well-settled principle that while § 304 orders may centralize resolution of claims against a foreign debtor by directing that creditors assert their claims against the debtor in a foreign bankruptcy proceeding, they may not operate to preempt state insurance regulations under the McCarran-Ferguson Act. Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 42 (1996) (because bankruptcy laws use general language that does not specifically relate to the business of insurance, the McCarran-Ferguson Act's anti-preemption rule applies).

32. Nor can the doctrine of comity be used to override preemption by the McCarran-Ferguson Act. "Comity [under 11 U.S.C. § 304] is to be accorded a decision of a foreign court as long as that court is of competent jurisdiction *and as long as the laws and public policy of the forum state are not violated.*" *In re Culmer*, 25 B.R. 621, 629 (Bankr. S.D.N.Y. 1982) (emphasis added). Allowing a foreign court to make a determination of Home's liability based on a setoff

amount violates such "law of the forum state;" here, the RSA, Home's Order of Liquidation, the Claims Procedures Order, the Protocol, and various rulings by the Court asserting exclusive jurisdiction over Home's liquidation procedures. The Liquidator's comity argument, even if valid, cannot stand in light of the clear preemption of the Amended § 304 Order by the McCarran-Ferguson Act.

33. In support of his position that comity and the Amended § 304 Order requires this Court's recognition of the Scheme Adjudicator's "determination" of the KWELM companies' claims against Home, the Liquidator cites to In re Rubin, 160 B.R. 269 (Bankr. S.D.N.Y. 1993). In re Rubin, however, stands for exactly the proposition that CIC maintains: that a claim must be pursued in the forum with jurisdiction over the debtor's insolvency. In Rubin, the New York Bankruptcy Court issued a § 304 injunction, prohibiting claimants from pursuing an action for trust proceeds in New York and requiring, instead, that they proceed in Israel where the Israeli bankruptcy court administered the Israeli debtor reinsurer's liquidation. The New York Bankruptcy Court held that the McCarran-Ferguson Act was not violated by a § 304 order that required creditor claims to be filed against the Israeli debtor in the Israeli court and determined that comity considerations mandated the injunction because principles of Israeli bankruptcy law are similar to those under the United States Bankruptcy Code. The principle behind Rubin is that a creditor must proceed against a foreign debtor insurance company in a foreign tribunal where there is substantial similarity in the underlying bankruptcy law and the relevant state's insurance laws are not impeded or invalidated. For that reason, it was entirely appropriate for Home, as a creditor, to participate in the KWELM Scheme as a creditor. But there is nothing in Rubin or the other cases cited by the Liquidator that supports the conclusion that foreign claim determinations must be allowed in a domestic insolvency proceeding. To the contrary, just like the trust

claimants in Rubin, the KWELM companies must seek allowance of their purported claims as provided for in the jurisdiction of Home's liquidation.

IV. CIC IS NOT ESTOPPED FROM CHALLENGING DETERMINATION OF KWELM PAYMENTS

34. Finally, the Liquidator's suggestion that CIC is estopped from challenging the Report because "it has already had the opportunity to protect [its own debtor interests] through AISUK's successful representation of Home before the Scheme Adjudicator," Report at 14, is baseless. It was not CIC that participated in the Scheme proceedings, but AISUK, which did so only because it was required to under the Assumption Agreement and at the insistence of Home. At all times, AISUK acted only on behalf of Home under a full reservation of its position that claims against Home must be adjudicated and determined in Home's New Hampshire liquidation proceeding. There is simply no ground upon which CIC may be estopped or otherwise precluded from challenging the Report and the Liquidator's position.

CONCLUSION

Accordingly, CIC respectfully requests that the Court enter an Order:

A. Denying the relief sought in the Report in its entirety; or alternatively,

B. Adjourning consideration of the Report pending determination of the Claims in compliance with the Protocol; and

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

Dated: March 27, 2006

Respectfully submitted,

By: Gary S. Lee

Gary S. Lee
Karen Ostad
Matthew P. Morris
LOVELLS
590 Madison Avenue
New York, New York 10022
Telephone (212) 909-0600
Facsimile (212) 909-0666

Attorneys for Century Indemnity Company

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document has been served on Roger A. Sevigny, Commissioner of Insurance, Peter Bengelsdorf, Special Deputy, and the following counsel via First Class mail on March 28, 2006:

J. Christopher Marshall, Esq.
NH Attorney General's Office
Civil Bureau
New Hampshire Department of Justice
33 Capitol St.
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

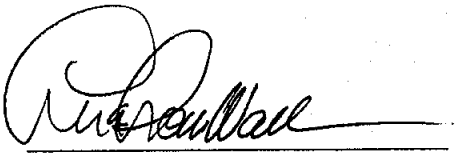
George T. Campbell, Esq.
Robert Stein & Associates, PLLC
One Barberry Lane
P.O. Box 2159
Concord, NH 03302-2159

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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