

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**

**LIQUIDATOR'S MOTION FOR APPROVAL OF
SETTLEMENT AGREEMENT WITH OM GROUP, INC.**

In accordance with the Order Establishing Procedures for Review of Certain Agreements to Assume Obligations or Dispose of Assets entered April 29, 2004, Roger A. Sevigny, Commissioner of Insurance for the State of New Hampshire, as Liquidator ("Liquidator") of The Home Insurance Company ("Home"), moves that the Court enter an order in the form submitted herewith approving a Settlement Agreement and Mutual Release ("Settlement Agreement") between OM Group, Inc. ("OM Group") and the Liquidator. As reasons therefor, the Liquidator states as follows:

1. This motion requests approval of the Settlement Agreement between the Liquidator and OM Group resolving a collection action brought by the Liquidator against OM Group. The Settlement Agreement is subject to approval by the Court and will become effective on such approval. See Settlement Agreement ¶ 1. A copy of the Settlement Agreement, with financial terms redacted, is attached as Exhibit A. A complete copy of the Settlement Agreement is attached to the Confidential Affidavit of Peter A. Bengelsdorf, Special Deputy Liquidator, in Support of Approval of Settlement Agreement with OM Group, Inc. ("Bengelsdorf Confidential Aff.") submitted herewith under seal.

2. Home had issued two general liability insurance policies to OM Group, and in 1995 and 1996, OM Group asserted claims under these policies for coverage of losses associated

with the deterioration of utility poles treated with M-GARD, a preservative manufactured by OM Group's subsidiary, OMG Americas, Inc. ("OMGA"). Bengelsdorf Confidential Aff. ¶¶ 3-4.

3. On August 21, 1996, Home responded by reserving its rights in light of various coverage issues. However, Home agreed to fund a trust fund in the amount of \$2,750,000.00 in order for OM Group to cover M-GARD losses. Home also agreed to pay costs and expenses that OM Group and OMGA incurred in defending the M-GARD claims. These costs ultimately totaled \$1,418,190.01. Home specifically reserved its rights to recoup from OM Group the proceeds of the trust fund as well as defense costs and expenses should it be subsequently determined that Home had no duty to indemnify or defend OM Group or OMGA. Bengelsdorf Confidential Aff. ¶ 5.

4. Contemporaneous with its reservation of rights, Home commenced a declaratory judgment action in the Court of Common Pleas, Hamilton County, Ohio, captioned The Home Insurance Company of Illinois v. OM Group, Inc. and OMG Americas, Inc., Trial No. A-9601063, seeking recovery of the indemnity and defense costs it fronted to OM Group and OMGA for the M-GARD claims. In February 2002, the Court of Common Pleas ruled that Home had no duty to indemnify or defend OM Group or OMGA with respect to the M-GARD claims. In July 2003, the Court of Appeals of Ohio, First Appellate District, upheld the Court of Common Pleas' ruling, and in November 2003, the Ohio Supreme Court denied review of the Court of Appeals' decision. This conclusively established that Home had no duty to defend or indemnify OM Group or OMGA with respect to the M-GARD claims. Bengelsdorf Confidential Aff. ¶ 6.

5. In January 2004, the Liquidator asked OM Group and OMGA to return the trust fund proceeds and the defense costs and expenses that Home had fronted with respect to the M-

GARD claims. OM Group and OMGA refused, and in June 2005, the Liquidator commenced an action in this Court, captioned Sevigny v. OM Group, Inc. and OMG Americas, Inc., Docket No. 05-E-225, to collect the trust fund proceeds and the defense costs and expenses. On June 29, 2005, OM Group reimbursed the entire trust fund proceeds to Home together with applicable statutory interest, which amounted to a total payment of \$3,029,557.60. Bengelsdorf Confidential Aff. ¶ 7.

6. OM Group and OMGA continued to dispute any obligation to return the defense costs and expenses Home incurred on the M-GARD claims. They denied having a duty to reimburse Home for these defense costs and expenses alleging, among other things, that Home's reservation of rights was insufficient under Ohio law. In response to Home's complaint, OM Group and OMGA removed the action to the United States District Court for the District of New Hampshire due to diversity of citizenship. OMG and OMGA then moved to dismiss the action asserting that the district court lacked personal jurisdiction over OM Group and OMGA in New Hampshire. The district court granted the motion to dismiss in February 2006. Bengelsdorf Confidential Aff. ¶ 8.

7. Prior to the Liquidator's filing the action in Ohio, where OM Group is headquartered, the Liquidator and OM Group agreed to settle the dispute over the defense costs and expenses. That agreement is reflect in the Settlement Agreement. Bengelsdorf Confidential Aff. ¶¶ 9-10.

8. The Settlement Agreement provides that OM Group will pay Home a final settlement sum by wire within ten days after the effective date. Settlement Agreement ¶ 2. The other provisions of the Agreement, including mutual releases of claims regarding the defense

costs (Settlement Agreement ¶¶ 5, 6), are set forth in the Agreement. Bengelsdorf Confidential Aff. ¶ 10.

9. For the reasons set forth at paragraphs 3-10 of the Confidential Bengelsdorf Affidavit, the Liquidator submits that the Settlement Agreement is fair and reasonable and in the best interests of the policyholders and other creditors of Home. The Settlement Agreement will convert a contingent, unliquidated asset into immediate cash and avoid delay, cost and uncertainty in the collection of this asset through a litigation process that the Liquidator would be obliged to pursue in OM Group's home forum. Bengelsdorf Confidential Aff. ¶ 11.

WHEREFORE, the Liquidator respectfully requests that this Court:

- A. Grant this Motion;
- B. Enter an Order in the form submitted herewith approving the Settlement Agreement with OM Group, Inc.; and
- C. Grant such other and further relief as justice may require.

Respectfully submitted,

ROGER A. SEVIGNY, COMMISSIONER
OF INSURANCE OF THE STATE OF
NEW HAMPSHIRE SOLELY AS
LIQUIDATOR OF THE HOME
INSURANCE COMPANY,

By his attorneys,
KELLY A. AYOTTE
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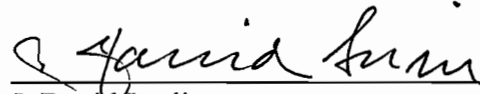


J. David Leslie
Eric A. Smith
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(617) 542-2300

August 7, 2006

Certificate of Service

I hereby certify that a copy of the foregoing Liquidator's Motion for Approval of Settlement Agreement with OM Group, Inc., and the Proposed Order, were sent, this 7th day of August, 2006, by first class mail, postage prepaid to all persons on the attached service list. The Confidential Bengelsdorf Affidavit was not so served.



J. David Leslie

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

In the Matter of the Liquidation of
The Home Insurance Company
Docket No. 03-E-0106

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SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (the "Settlement Agreement") is made this 21st day of July 2006, by and between OM Group, Inc. ("OMG"), on its own behalf and on behalf of its subsidiary OMG Americas, Inc., formerly known as Mooney Chemicals, Inc. ("OMGA"), and Roger A. Sevigny, Insurance Commissioner of the State of New Hampshire (the "Liquidator"), solely in his capacity as Liquidator of The Home Insurance Company ("Home"). OMG and the Liquidator are hereinafter collectively referred to as the "Parties."

WHEREAS, Home issued the following general liability insurance policies to OMG ("the "Policies"):

| <u>POLICY NO.</u> | <u>POLICY PERIOD</u> |
|--------------------------|-----------------------------|
| SLM-9261154 | 7/15/93 – 7/15/94 |
| SLM-C148694 | 7/15/94 – 7/15/95 |

WHEREAS, Home, under reservation of rights, incurred \$1,418,190.01 in costs and fees as a result of defending claims brought against OMG and OMGA with respect to the alleged deterioration of utility poles treated with M-Gard, a preservative manufactured by OMGA ("M-Gard");

WHEREAS, Home commenced a declaratory judgment action in the Court of Common Pleas, Hamilton County, Ohio (the "Court of Common Pleas"), asserting that it had no duty to defend or indemnify OMG or OMGA under the Policies with respect to the M-Gard claims;

WHEREAS, the Court of Common Pleas ruled that Home had no duty to defend or indemnify OMG or OMGA with respect to the M-Gard claims;

WHEREAS, Home was placed into liquidation effective June 11, 2003, by Order of the Superior Court of the State of New Hampshire, Merrimack County (the "Liquidation Court"), pursuant to which the Liquidator was appointed as Liquidator of Home;

WHEREAS, in July 2003, the Court of Appeals of Ohio, First Appellate District (the “Court of Appeals”), upheld the trial court’s finding that Home had no duty to defend or indemnify OMG and OMGA with respect to the M-GARD claims;

WHEREAS, on November 19, 2003, the Ohio Supreme Court denied review of the ruling of the Court of Appeals;

WHEREAS, in January 2004, Home demanded repayment of the defense costs and fees it incurred in providing a defense to OMG and OMGA with respect to the M-Gard claims;

WHEREAS, OMG and OMGA denied having any obligation to reimburse Home for the defense costs and fees incurred with respect to the M-Gard claims;

WHEREAS, the Liquidator, on behalf of Home, commenced an action in June 2005 against OMG and OMGA in the Liquidation Court seeking recovery of the defense costs and fees Home incurred with respect to the M-Gard claims (the “Liquidator’s Action”);

WHEREAS, OMG and OMGA removed the Liquidator’s Action to the United States District Court for the District of New Hampshire (the “New Hampshire Federal Court”);

WHEREAS, OMG and OMGA filed a motion in the New Hampshire Federal Court to dismiss the Liquidator’s Action on the grounds that the Liquidator lacked personal jurisdiction over OMG and OMGA in New Hampshire;

WHEREAS, the New Hampshire Federal Court granted OMG and OMGA’s motion to dismiss the Liquidator’s Action;

WHEREAS, the Parties now wish to settle and fully and finally resolve their disputes with respect to Home’s assertion that it is entitled to obtain reimbursement from OMG and OMGA of defense costs and fees it incurred in defending the M-Gard claims;

NOW, THEREFORE, in consideration of the mutual covenants and representations herein contained, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Effective Upon Approval. This Settlement Agreement is conditioned and shall only become effective upon approval by the Liquidation Court (the "Effective Date"). In the event that the Liquidation Court does not approve this Settlement Agreement it shall be null and void and of no force and effect.

2. Payment to Home. In addition to all amounts previously paid, within ten (10) days after the Effective Date, OMG shall pay to Home, by wire transfer, the total sum of [REDACTED] (the "Settlement Sum"). The Settlement Sum shall constitute full and final settlement of Home's claim against OMG and OMGA for defense costs and fees incurred in defending the M-Gard claims, with time being of the essence in the performance by OMG. Said wire transfer shall be directed to:

| | |
|---------------------|--|
| Bank: | Citizens Bank - Manchester, NH |
| ABA: | 011500120 |
| For the Account of: | The Home Insurance Company in Liquidation 286 Commercial Street, Manchester, NH 03108 |
| Account: | 3303030687 |

Payment shall be transferred free and clear of and without any deduction for or on account of any set-off or counterclaim.

3. Interest. Without prejudice to the Liquidator's right to terminate this Settlement Agreement under paragraph 4 below, if OMG fails to pay any portion of the Settlement Sum within ten (10) days after the Effective Date, it shall pay (a) interest on any unpaid amount at the rate of 9% (simple rate) per annum from the Effective Date; and (b) any reasonable costs, including reasonable attorneys' fees, incurred by the Liquidator or Home in recovering the

Settlement Sum in full (the "Collection Costs"). The acceptance by Home of the Settlement Sum together with all interest and Collection Costs due, if any, in respect of late payment as determined and calculated as aforesaid shall constitute a full and final settlement and release hereunder as if payment of the Settlement Sum had been made in full within ten (10) days after the Effective Date.

4. Remedies upon Default. Notwithstanding the provisions of paragraph 3 above, in the event that OMG fails to pay any portion of the Settlement Sum (and notwithstanding any claim that may be asserted for interest and Collection Costs) the Liquidator shall be entitled by notice in writing to OMG to terminate this Settlement Agreement. For the avoidance of doubt, in the event that this Settlement Agreement shall be terminated then:

- a. all of the rights of the Liquidator and Home shall be fully reinstated as if this Settlement Agreement had never been made and the Liquidator and Home shall be entitled to pursue their claims for recovery of the defense costs and fees Home incurred in defending the M-Gard claims; and
- b. OMG shall remain liable to pay any Collection Costs incurred by the Liquidator and Home in pursuing recovery of the defense costs and fees Home incurred in defending the M-Gard claims.

5. Release by the Liquidator. Subject to the terms of this Settlement Agreement and in consideration of the payment of the Settlement Sum, the Liquidator, on his own behalf, and on behalf of Home and its officers, directors, employees, agents, attorneys, shareholders, predecessors, successors or assigns (including its liquidator or any other statutory successor), releases and discharges OMG and OMGA and their respective parents, subsidiaries and affiliates, and each of its and their present and former officers, directors, employees, attorneys, liquidators, shareholders, servants and agents, and the successors and assigns of each of them from any and all actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises,

variances, trespasses, damages, judgments, executions, claims, counterclaims and demands whatsoever in law or in equity, which the Liquidator or Home ever had, now has, or hereafter may have against OMG and OMGA by reason of any matter whatsoever solely with respect to the reimbursement of defense costs and fees Home incurred in defending the M-Gard claims.

6. Release by OMG. Subject to the terms of this Settlement Agreement and the release referenced in paragraph 5 above, OMG, on its own behalf and on behalf of OMGA, and their respective officers, directors, employees, agents, attorneys, affiliates, shareholders, parents, predecessors, successors and assigns, hereby irrevocably and unconditionally releases and discharges the Liquidator and Home and each of their present and former officers, directors, employees, attorneys, liquidators, shareholders, servants and agents, and the successors and assigns, from all actions, causes of action, liabilities, adjustments, obligations, offsets, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, premiums, losses, salvage, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law, admiralty or equity, which OMG and OMGA ever had, now has or hereafter may have against the Liquidator and Home by reason of any matter whatsoever solely with respect to the reimbursement of defense costs and fees Home incurred in defending the M-Gard claims. However, OMG maintains all insurance and other coverage available to it pursuant to the Policies and applicable law (including the New Hampshire and/or Ohio Insurance Guaranty Fund) if it has a future insured loss covered by the Policies.

7. Further Assurances. The Parties shall take all further actions as may be necessary to carry out the intent and purpose of this Settlement Agreement and to consummate the transactions contemplated herein.

8. Governing Law and Venue. This Settlement Agreement shall be governed by and construed in accordance with the laws of the State of New Hampshire without regard to the conflicts of law provisions thereof. The Parties agree that the exclusive venue for any dispute between and among the Parties arising out of this Settlement Agreement shall be the Liquidation Court.

9. Due Diligence. The Parties acknowledge and agree that, in executing this Settlement Agreement, they have relied upon their own judgment and upon the recommendations of their legal counsel, if any, that they have read the Settlement Agreement and have had the opportunity to consider the terms and effects of each and to ask any questions that they have of anyone, and that they have executed this Settlement Agreement voluntarily and with full understanding of its terms and effects.

10. Counterparts. This Settlement Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This Settlement Agreement shall be of no force and effect until executed by all Parties.

11. Power and Authority to Execute. Each Party hereto represents and warrants that it has the full power and authority to execute, deliver and perform this Settlement Agreement, that each individual signing on behalf of a Party has been duly authorized by that Party to execute this Settlement Agreement on its behalf, and that no claims being released under the terms of this Settlement Agreement have been assigned, sold, or otherwise transferred to any other entity.

12. Successor-in-Interest Bound. This Settlement Agreement shall be binding upon, and shall inure to the benefit of the Parties and their respective officers, directors, employees, affiliates, attorneys, liquidators, administrators, agents, representatives, successors and assigns.

13. Entire Agreement. This Settlement Agreement constitutes the entire agreement and understanding among the Parties with respect to the subject matter thereof. This Settlement Agreement supersedes all prior agreements and understandings, whether written or oral, concerning such matters.

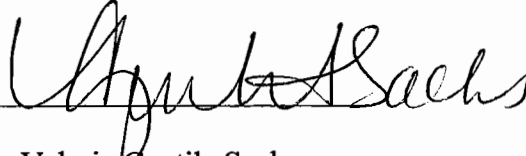
14. Survival of Warranties and Representations. The warranties and representations made herein shall survive the execution of this Settlement Agreement.

15. Validity of Settlement Agreement. Subject to approval of this Settlement Agreement by the Liquidation Court, each Party represents and warrants that this Settlement Agreement is a legal, valid and binding obligation, enforceable in accordance with its terms and that there are no laws, rules or regulations that prohibit its enforceability. The provisions of this Settlement Agreement are severable, and if any part is found unenforceable, the remainder shall remain valid and enforceable.

16. No Waiver. No waiver of any right under this Settlement Agreement shall be deemed effective unless contained in writing signed by the Party or an authorized officer of the Party charged with such waiver, and no waiver of any breach or failure to perform shall be deemed to be a waiver of any future breach or failure to perform or of any other provisions of this Settlement Agreement. This Settlement Agreement may not be amended except in a document signed by the Party or an officer of the Party to be charged.

WHEREFORE, the Parties have caused this Settlement Agreement to be executed on their respective behalves as of the date below the signatures of their duly authorized representatives.

**OM GROUP, INC., on its own behalf and
on behalf of OMG Americas, Inc.**

By: 

Name: Valerie Gentile Sachs

Title: Vice President, General Counsel and Secretary

Date: July 31, 2006

**ROGER A. SEVIGNY, Insurance Commissioner
of the State of New Hampshire in his capacity as
Liquidator of The Home Insurance Company**

By: 

Name: Jonathan Rosen

Title: Chief Operating Office

Date: July 24, 2006