

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

Docket No. 03-E-106

IN THE MATTER OF THE LIQUIDATION  
OF THE HOME INSURANCE COMPANY

**THE LIQUIDATOR'S OBJECTION TO VIAD CORP.'S MOTION FOR  
ORAL ARGUMENT ON VIAD CORP.'S MOTION TO RECOMMIT;  
MOTION FOR ORDER COMPELLING LIQUIDATOR TO APPLY CHOICE  
OF LAW AS TO VIAD CORP.'S OUTSTANDING DETERMINATIONS  
PURSUANT TO REFEREE'S UNOBJECTED-TO DECEMBER 4, 2008  
RULING; AND/OR, IN THE ALTERNATIVE, MOTION FOR STATUS CONFERENCE**

**I. INTRODUCTION**

VIAD Corp. ("VIAD") is before this Court solely with respect to one claim: its claim relating to remediation expenses incurred at its San Diego maintenance facility. Referee Gehris denied VIAD's claim regarding this site on April 13, 2009, and the matter is before the Court on VIAD's motion to recommit. With respect to *that* claim, VIAD's motion merely repeats its request (for the third time) for oral argument on its motion to recommit.

The *real* objective of VIAD's motion, however, is its request that the Court issue legal rulings with respect to dozens of other claims submitted by VIAD, claims for which no Notices of Determination have been issued and which have not been through the required disputed claims procedures. Because the only VIAD claim that has been through the required disputed claim procedures is its claim involving the San Diego site, VIAD's request that the Court issue a choice of law ruling regarding all of VIAD's other claims is premature.

2009 APR 13 10:00 AM

Beyond being premature, VIAD's request for a choice of law ruling on claims not before the Court is highly misleading. The essence of VIAD's argument is waiver—that because the Liquidator did not move to recommit Referee Rogers' preliminary choice of law decision, that decision is now supposedly binding with respect to VIAD's other claims. But VIAD fails to advise the Court that the parties *stipulated* that the Liquidator's objection to Referee Rogers' choice of law determination, if necessary, would come after final resolution of VIAD's claim. The disputed claims procedures issued by this Court expressly contemplate that motions to recommit will come after final resolution of a disputed claim by the Referee. Because VIAD's claim was denied in full by Referee Gehris, the Liquidator had nothing to appeal. Thus, the Liquidator had no obligation to immediately appeal the preliminary choice of law decision and waived nothing by following the procedures adopted by this Court and binding on all the parties.

For these reasons, the Court should reject VIAD's request that the Court issue rulings on claims not properly before it. As for VIAD's request for oral argument on its motion to recommit, the Liquidator has doubts about the necessity for such an argument, but stands ready to participate if the Court would find oral argument helpful.

## **II. BACKGROUND**

1. This matter is before the Court with respect to a single disputed claim, VIAD's claim for an allowance for remediation expenses incurred at its San Diego maintenance facility. This disputed claim (enumerated as 2008-HICIL-35) originally proceeded before Referee Rogers. VIAD Mot. at 1.

2. During the October 21, 2008 structuring conference, the Liquidator, through counsel, noted that the parties had a dispute regarding choice of law and that it would be helpful to determine the referee's views on that subject prior to the hearing on VIAD's claim. As a

result, Referee Rogers directed the parties to brief choice of law by November 3, 2008 and directed the parties to schedule oral argument on VIAD's claim for late January or early February 2009. Ex. 1.

3. On December 4, 2008, Referee Rogers issued an order determining that she would apply California law to VIAD's claim. Referee Rogers noted in her order the parties' agreement that the choice of law determination "will set the legal parameters of this dispute, but will not dispose of the dispute in its entirety." Ex. 2 at 1.

4. Consistent with Referee Rogers's statement that her choice of law ruling would frame the arguments at the disputed claim hearing, but would not, by itself, resolve VIAD's claim, the parties entered into the following stipulation regarding the structure of the disputed claim proceeding:

In light of the Referee's interlocutory ruling that California law shall apply, the Parties will brief the coverage issues under California law, with the Liquidator reserving his right to seek judicial review of the Referee's choice of law determination upon the Referee's ultimate resolution of the disputed claim.

Ex. 3 at 3.

5. In light of Referee Rogers' preliminary ruling on choice of law, the parties, consistent with their stipulation, briefed VIAD's coverage claim under California law. The parties argued the disputed claim on February 4, 2009, before Referee Gehris, who had been appointed to replace Referee Rogers. On April 13, 2009, Referee Gehris issued her report denying VIAD's claim in total with respect to the San Diego site.

6. On April 28, 2009, VIAD filed a motion to recommit with respect to Referee Gehris's Order of April 13, 2009. Included within VIAD's motion was a request for oral argument. On May 27, 2009, VIAD filed a separate motion requesting oral argument on its motion to recommit.

## II. ANALYSIS

### A. VIAD Is Not Entitled to a Choice of Law Ruling for Claims Not Before the Court

The thrust of VIAD's motion is its assertion that the Liquidator waived any objection to the Referee's preliminary choice of law decision regarding VIAD's San Diego site by not filing an interlocutory motion to recommit that decision. From that premise, VIAD asks this Court to rule that the Referee's preliminary choice of law ruling applies as a matter of law to all of VIAD's other claims. Procedurally, VIAD's request is premature, as VIAD's San Diego claim is the only claim that has been through the disputed claims process and is before the Court. Substantively, VIAD is wrong on its waiver argument. Not only did the parties *stipulate* that judicial review of the Referee's choice of law ruling, if necessary, would come after final resolution of VIAD's San Diego claim, but this Court's disputed claims procedures specifically call for parties to file their motions to recommit after the Referee's final resolution of a disputed claim. Therefore, the Court should deny the choice of law aspect of VIAD's motion.

#### 1. VIAD's Request Is Premature

VIAD's motion asks this Court to make a choice of law ruling for all of VIAD's claims except one—the claim that is actually before the Court on VIAD's motion to recommit. The required procedures for addressing disputed claims are clear. First, the Liquidator issues a Notice of Determination.<sup>1</sup> Within sixty days of receiving a Notice of Determination, a claimant may file an objection with this Court. Liquidation Rule 8. Once a Notice of Determination has been disputed, the claim shall be adjudicated by the appointed Referee. Liquidation Rules 10-18. After completion of briefing, argument, and any evidentiary hearing, the Referee files his or her

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<sup>1</sup> Restated and Revised Order Establishing Procedures Regarding Claims Filed With The Home Insurance Company in Liquidation ("Liquidation Rules"), Rule 6(c).

report deciding the disputed claim. Liquidation Rule 19. Within fifteen days of the Referee's filing of his or her report, the claimant or the Liquidator may file a motion to recommit with this Court. Liquidation Rule 20.

VIAD's motion, however, seeks a choice of law ruling only for claims—all claims except its San Diego claim—that have not been through any of the required disputed claims procedures. These claims have not been the subject of Notices of Determination; have not had objections filed to a Notice of Determination; have not been through a hearing before the Referee; and have not been the subject of a Referee's report. Though VIAD has had a full-blown hearing on its disputed claim, it is now seeking to cut to the front of the line and have a potentially critical aspect of the rest of its claims resolved now and not as part of the orderly claims resolution process adopted by the Court.<sup>2</sup> Without a Notice of Determination, there is no disputed claim that can be decided by the Court, with the exception of the San Diego claim that has had a full hearing and is the subject of VIAD's pending motion to recommit. Therefore, the Court should reject VIAD's motion because it seeks resolution of issues relating to claims that are not currently before the Court.

## **2. VIAD's Waiver Argument Is Substantively Wrong**

VIAD's entire argument is that the Liquidator had an obligation to appeal Referee Rogers' choice of law decision when she issued it on December 4, 2008, and that the Liquidator waived any right to contest that determination, for any claim, by failing to file a motion to recommit on this decision. VIAD's argument is misleading and wrong. The parties expressly stipulated that judicial review of Referee Rogers' choice of law decision, if such review was

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<sup>2</sup> VIAD's motion incorrectly states that the Liquidator has insisted that Illinois law applies to all of VIAD's claims. This is an erroneous assertion. While the parties have had some discussions regarding possible resolution of VIAD's claims, no notices of determination, and commensurately, no choice of law determinations have been put forth by the Liquidator.

necessary, would come after the Referee's final report on VIAD's San Diego claim. Moreover, even if the parties had not stipulated to this procedure, Referee Rogers' choice of law decision was an interlocutory decision that did not resolve VIAD's San Diego claim. This Court's disputed claims procedures do not contemplate an appeal of interlocutory decisions such as this prior to the Referee's final resolution of the disputed claim.

VIAD's waiver argument is disingenuous because the parties expressly agreed that there would be no interlocutory judicial review of Referee Rogers' choice of law decision. VIAD's disputed claim was structured by the parties such that the Referee would make a preliminary decision on choice of law, so the parties would know which jurisdictions' laws they should brief, followed in short order by merits briefing and oral argument.<sup>3</sup> The parties' agreed-upon schedule did not contemplate a delay for interlocutory judicial review between the Referee's choice of law decision and merits briefing and oral argument before the Referee. Instead, the parties contemplated, and expressly agreed in their structuring conference stipulation, that judicial review of the Referee's choice of law decision, if necessary, would take place after final resolution of VIAD's claim:

In light of the Referee's interlocutory ruling that California law shall apply, the Parties will brief the coverage issues under California law, with the Liquidator reserving his right to seek judicial review of the Referee's choice of law determination upon the Referee's ultimate resolution of the disputed claim.

Ex. 3 at 3 (emphasis added). Thus, although it does not disclose it, VIAD's waiver argument is directly contrary to the procedure for judicial review to which the parties expressly agreed.

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<sup>3</sup> Indeed, the Referee issued her choice of law decision on December 4, 2008. The parties' deadline for filing merits briefs with the Referee was January 19, 2009, with oral argument taking place on February 4, 2009.

Moreover, even if the parties had not specifically agreed that any judicial review of the preliminary choice of law decision would come after hearing on the merits of VIAD's claim, that is exactly the process contemplated by the Court's Liquidation Rules. This Court's Liquidation Rules do not require a party to file a motion to recommit on every interlocutory decision made by the Referee, which could range from scheduling decisions to discovery orders, to preliminary rulings on legal issues. Rather, as with the process for civil actions brought in Superior Court, the ordinary course of events is for appellate review to take place, on all appealable issues, after final resolution of the case.

Liquidation Rule 19 provides that the Referee shall file a report on a "Disputed Claim," and that this report shall be filed "after the completion of the filing of the written submissions and oral argument or after the close of the evidentiary hearing." Liquidation Rule 19. A "Disputed Claim" is defined as "a claim which has been disallowed in whole or in part . . . and for which the Claimant has timely filed an objection." Liquidation Rule 2(d). Thus, the Referee's report is what is filed once the Referee has made a final determination on the disputed claim.

A "Motion to Recommit" is defined as "a request by the Liquidator or the Claimant that the Court consider and review the Referee's Report of a Disputed Claim." Liquidation Rule 20 (emphasis added). As a result, the Liquidation Rules contemplate a motion to recommit once the Referee has issued a report disposing of a disputed claim, not every time the Referee makes a preliminary decision that does not resolve the claim. Referee Rogers made clear in her choice of law decision that her decision did not resolve VIAD's claim: "[T]he parties apparently agree that no matter what the ruling on choice of law may be, such will set the legal parameters of this dispute, but will not dispose of the dispute in its entirety." Ex. 2 at 1. Because the preliminary

choice of law ruling did not resolve VIAD's disputed claim, there was no obligation to file a motion to recommit. This, of course, is consistent with the New Hampshire courts' reluctance to allow piecemeal litigation through appeals of preliminary rulings that do not dispose of a case in its entirety. *See Piane v. Town of Conway*, 118 N.H. 883, 884 (1978) ("We encourage superior court judges to look less favorably upon parties' requests for interlocutory appeals in civil cases as well, and to exercise their appropriate function by rendering a final verdict before allowing the parties to bring their exceptions to us. Such a policy better applies judicial resources."); N.H. S.Ct. R. 8 (allowing interlocutory appeals only in narrow circumstances and then only with the approval of the trial judge).

Thus, the Liquidator did not waive anything regarding choice of law with respect to VIAD. The parties agreed that judicial review of the choice of law decision, if necessary, would come after final resolution of the disputed claim. This is also the procedure required under the Court's Liquidation Rules. Because the Liquidator prevailed on the merits of VIAD's claim, there was nothing for the Liquidator to move to recommit. As such, the time never arose where the Liquidator had an obligation to appeal the preliminary choice of law ruling, and the doctrine of waiver would have no application even if VIAD's request for rulings on claims not before the Court were ripe.

**B. The Liquidator Does Not Believe Oral Argument Is Necessary**

As for the only issue addressed in VIAD's motion that is properly before the Court—VIAD's request for oral argument on its motion to recommit—the Liquidator does not believe that oral argument would be an efficient use of judicial resources. The Liquidator notes that oral argument before Referee Gehris lasted more than four hours. Nevertheless, the Liquidator stands



ready to participate in oral argument on VIAD's motion to recommit if the Court believes that argument would assist it in evaluating Referee Gehris's report.<sup>4</sup>

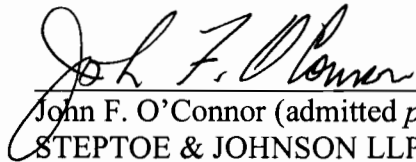
#### IV. CONCLUSION

For the foregoing reasons, the Court should deny VIAD's motion.

Respectfully submitted,

ROGER A. SEVIGNY, INSURANCE COMMISSIONER,  
AS LIQUIDATOR OF THE HOME INSURANCE  
COMPANY,

By his attorneys,



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October 19, 2010

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<sup>4</sup> VIAD's motion suggests that the Liquidator "unilaterally cancelled" the status conference scheduled for September 16, 2010. The Liquidator does not control this Court's docket. Consequently, while the Liquidator had come to view the status conference as unnecessary, and noted in his Motion to Cancel Status Conference that "the unopposed items . . . that prompted the Liquidator to seek the conference . . . [were] addressed," he did not have the power to unilaterally cancel it.

## CERTIFICATE OF SERVICE

I certify on this 19th day of October, 2010, I served a copy of the foregoing, along with the accompanying exhibit, by first class U.S. Mail, postage prepaid, on the following counsel of record:

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John F. O'Connor

**BEFORE THE COURT-APPOINTED REFEREE  
IN RE THE HOME INSURANCE COMPANY IN LIQUIDATION  
DISPUTED CLAIMS DOCKET**

**In Re Liquidator Number:** 2008-HICIL-35  
**Proof of Claim Number:** EMTL 705271-01  
**Claimant Name:** VIAD  
**Claimant Number:**  
**Policy or Contract Number:** HEC 9557416  
HEC 9304783  
HEC 4344748  
**Insured or Reinsured Name:** VIAD (predecessor The Greyhound  
Corporation / Transportation Leasing  
Company)  
**Date of Loss:**

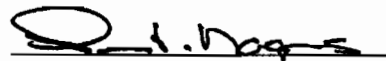
**ORDER**

A telephone conference in this matter was conducted on October 21, 2008. Counsel for the claimant and the Liquidator have agreed on procedures to address the presentation of evidence relating to this disputed claim. Further, counsel have agreed to select a date in late January or early February, 2009 for oral argument, which is expected to require 2-3 hours of hearing time. Notice of the date and time selected shall be provided to the Liquidation Clerk, along with a stipulation outlining agreed upon procedures.

There remains, nonetheless, disagreement on choice of law to be applied and whether that should be determined as a preliminary matter. Therefore, counsel shall brief both the timing and the substance of the choice of law issue by November 3, 2008.

So ordered.

October 22, 2008  
Date:

  
Referee, Paula T. Rogers

**BEFORE THE COURT-APPOINTED REFEREE  
IN RE THE HOME INSURANCE COMPANY IN LIQUIDATION  
DISPUTED CLAIMS DOCKET**

In Re Liquidator Number: 2008-HICIL-35  
Proof of Claim Number: EMTL 705271-01  
Claimant Name: VIAD  
Claimant Number:  
Policy or Contract Number: HEC 9557416  
HEC 9304783  
HEC 4344748  
Insured or Reinsured Name: VIAD (predecessor The Greyhound  
Corporation / Transportation Leasing  
Company)  
Date of Loss:

**ORDER REGARDING CHOICE OF LAW ISSUE**

*Procedural Background:*

On June 11, 2003 VIAD Corporation ("VIAD") filed a proof of claim in the amount of \$28,570,814.00 in conjunction with its exposure to environmental remediation costs relating to forty-one (41) separate locations in twenty (20) states. On January 25, 2008, the Liquidator disallowed that portion of VIAD's claim which seeks coverage for remediation costs associated with a bus maintenance facility in San Diego California. VIAD then initiated this disputed claim proceeding.

The Liquidator bases his disallowance upon his determination that under the terms of the policies at issue VIAD failed to provide The Home Insurance Company ("Home") with timely notice of the potential liability relating to the San Diego site. During the telephonic structuring conference with the Referee on October 21, 2008, the parties raised a choice of law issue as a preliminary matter.

At the Referee's direction the parties submitted memoranda outlining their respective positions on which jurisdiction's law should be applied to resolve the pending dispute. Subsequent to the telephonic conference, and as reflected in the recently filed pleadings, the parties apparently agree that no matter what the ruling on choice of law may be, such will set the legal parameters of this dispute, but will not dispose of the dispute in its entirety.

*Discussion and Positions of the Parties:*

Home issued three excess general liability policies to the Greyhound Corporation ("Greyhound") covering policy periods between 8/31/66 and 6/19/72. When the first two policies were issued, the principal place of business of Home was in New York, as were the headquarters of Greyhound. When the third policy was issued, Greyhound had moved

its headquarters to Phoenix, Arizona. VIAD is the successor in interest to Greyhound under these policies.

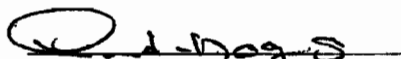
VIAD takes the position that the site of the damage controls construction of the policies at issue, arguing that for this particular dispute California law governs because this claim involves environmental contamination occurring in that state. The Liquidator argues that under New Hampshire law the Referee must apply New York law in construing the two earlier policies, and New York or Arizona law in the latest of the three.

In giving consideration to the parties' positions on this issue, the Referee considers the character and expansiveness of the risk that Home insured. Under the two earlier policies, excess of underlying insurances and subject to a number of exclusionary endorsements, Home agreed to broadly insure the "business operations" of "The Greyhound Corporation and its Subsidiary Companies more than 50% owned". In the initial contract, potential territorial limitations were stricken and only Cuba, by way of endorsement, was excluded. As for the second of the two earlier contracts, a litany of countries was excluded, largely those considered politically aligned with the then Soviet Union. The third contract restricted coverage to occurrences in the U.S., its territories and Canada. While negotiating coverage for both national and international operations with few locations excluded, as was the case in the first two policies and for locations in the U.S (including territories) and Canada in the last contract, the parties were silent as to which jurisdiction's law should apply in the event of coverage disputes.

New Hampshire's choice of law principles require that consideration be given to which state has "the most significant relationship" to the insured risk. Consolidated Mut. Ins. Co. v. Radio Food Corp., 240 A.2d 47,49, 108 N.H. 494, 496 (N.H. 1968). The Referee has given due consideration to the Liquidator's argument that under the circumstances presented here the place of contracting should be recognized as the state with the most significant relationship, particularly when there is the potential for dispute over more than 41 separate environmental claims emanating from a significant number of different jurisdictions. The Referee is, however, unable to agree. The Referee must assume that the contracting parties were well aware of the expansiveness of the risks to be insured and the wide geographical exposures inherent to the contracts they negotiated. They were, nonetheless, silent as to applicable choice of law. Under these circumstances, and in the absence of an explicit choice by the parties, the state with the most significant relationship to the contract is the state where the risk is located. Ellis v. Royal Ins. Co., 530 A.2d 303, 129N.H. 326 (N.H. 1987).

Consistent with the foregoing and agreeing with the Claimant, the Referee finds that the substantive law of the State of California applies to this dispute.

December 4, 2008  
Date:

  
Referee, Paula T. Rogers

**BEFORE THE COURT-APPOINTED REFEREE  
IN RE THE HOME INSURANCE COMPANY IN LIQUIDATION  
DISPUTED CLAIMS DOCKET**

In Re Liquidator Number: 2008-HICIL-35  
Proof of Claim Number: EMTL 705271-01 (San Diego, Calif)  
Claimant Name: VIAD  
Claimant Number:  
Policy or Contract Number: HEC 9557416  
HEC 9304783  
HEC 4344748  
Insured or Reinsured Name: VIAD (predecessor The Greyhound  
Corporation/ Transportation Leasing  
Company)  
Date of Loss: 1966-1972

**JOINT STIPULATION FOR STRUCTURING CONFERENCE**

Pursuant to the Restated and Revised Order Establishing Procedures Regarding Claims Filed with the Home Insurance Company in Liquidation, and New Hampshire Superior Court Rule 62, Viad Corp ("Viad") and the Liquidator, through their respective counsel, stipulate as follows:

**1) Trial/Oral Argument**

The parties stipulate that the hearings in this action are limited to coverage relating to the claim arising out of the loss in San Diego, California, and the matter will be decided upon on the Parties' oral argument, the Case File, affidavits submitted, deposition testimony (if any), and the Parties' briefs, including any attachments or exhibits to the Parties' briefs. The parties stipulate and agree that an evidentiary hearing in which live testimony is taken is not necessary in this matter. The hearing in this matter concerns only the Parties' dispute with respect to the San Diego site. Viad and the Liquidator reserve all rights, and waive no rights, concerning the availability of coverage for the other sites set out in Viad's proofs of claim in the Home liquidation.

2) **Discovery**

- a. By December 17, 2008, Viad will identify all persons who will submit affidavits as part of Viad's briefing of the coverage issues in this action, either by providing a copy of such affidavits or providing a short statement of the subjects on which the affiant will provide testimony by affidavit. The Liquidator will be entitled to take one deposition of the corporate representative of Viad as well as the deposition of any identified affiant. The Liquidator shall advise Viad by December 24, 2008 which, if any depositions he intends to take. With respect to any such depositions, the Parties shall agree upon a date and method (e.g., in person or via telephone) to conduct the deposition, and Viad shall make such deponents available at mutually agreeable dates in January 2009, but prior to January 15, 2009. While the Liquidator does not anticipate submitting any affidavits in this matter, he reserves the right to identify affiants if Viad's December 15, 2008 disclosures place at issue a disputed fact for which rebuttal by affidavit would be appropriate. In such a case, the Liquidator will promptly identify any such affiant and make that affiant available for deposition prior to January 15, 2009. *(Handwritten: 17, 9, AKS)*
- b. The Parties agree that mandatory disclosures have been exchanged, that the Liquidator has received approximately seven (7) boxes of documents as submitted by Viad in support of its proof of claim for the San Diego environmental site.

3) **Evidence**

- a. The Parties agree to the use of affidavits as evidence and the Parties' use of any depositions taken.
- b. The Parties agree to the authenticity and admissibility of documents produced to each other thus far in this matter, except for those documents subject to claims of privilege or confidentiality. The parties agree that various communications between Viad's counsel and Kevin Kelly, Ron Barta, and/or Jim Cahill on behalf of The Home Insurance Company in Liquidation in which the parties discussed potential settlement of this disputed claim shall not be admitted into evidence for the purpose of establishing liability or lack thereof. Should a dispute arise regarding authenticity and/or admissibility, the Parties shall submit the issue to the Referee.

4) **Merits Briefing and Hearing**

- a. The Parties shall file with the Liquidation Clerks, and serve on the other Party, merits briefs and any exhibits on which they intend to rely no later than January 19, 2009. *(Handwritten: 9, AKS)*

- b. The Parties shall file with the Liquidation Clerks, and serve on the other Party, any response to the other Party's merits brief no later than January 26, 2008. *9 MKS*
- c. The oral argument, which shall not be an evidentiary hearing at which live testimony is taken, shall take place on February 4, 2008, beginning at 9:00 a.m., or at such other date and time as the Referee may designate, at a place designated by the Referee. *9 MKS*

**5) Claims, defenses, and primary issues**

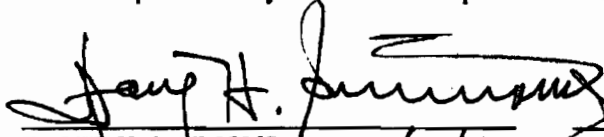
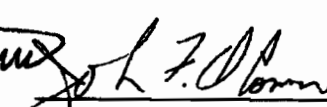
The Parties will comprehensively outline the issues and their respective positions regarding this disputed claim in their respective briefs that will be submitted to the Referee. In light of the Referee's interlocutory ruling that California law shall apply, the Parties will brief the coverage issues under California law, with the Liquidator reserving his right to seek judicial review of the Referee's choice of law determination upon the Referee's ultimate resolution of the disputed claim.

The Parties agree that the following three Home Insurance policies are at issue in this disputed claim:

<u>Policy Number</u>	<u>Policy Term</u>	<u>Policy Limits</u>
HEC 9557416	08/31/66 – 01/01/69	\$4.25 million
HEC 9304783	01/01/69 – 03/31/72	\$4.25 million
HEC 4344748	03/31/72 – 06/19/72	\$ 500,000



Stipulated to by counsel for the parties below this 16<sup>th</sup> day of December, 2008.

   
12/17/08

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