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HAND DELIVERED

A. John Voelker, Acting Clerk
Wisconsin Court of Appeals
110 East Main Street, Suite 215
Madison, Wisconsin 53703

Re: *In the Matter of the Rehabilitation of the Segregated Account of Ambac Assurance Corporation*; Appeal Nos. 2010-AP-1291 and 2010-AP-2022 (Consolidated)

Dear Mr. Voelker:

Pursuant to Wis. Stat. § 809.19(10), the Office of the Wisconsin Commissioner of Insurance and the Commissioner, as court-appointed rehabilitator (collectively "OCI") of the Segregated Account ("Segregated Account") of Ambac Assurance Corporation submit this letter to call this Court's attention to two court decisions pertinent to these consolidated appeals that were issued in 2011, after the initial briefing in the above appeals was completed in 2010.

The two new decisions identified below support the Rehabilitator's position that: (1) the RMBS Funds lack standing to challenge the Bank Settlement;[1] and (2) the Bank Group held insurable interests that entitled them to the same priority status as policyholders.[2]

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[1] The standing issue is discussed in the Sept. 13, 2010 RMBS Funds' opening brief (at 19-27), the Nov. 18, 2010 Rehabilitator's response (at 45-47), and the Jan. 6, 2011 RMBS Funds' reply (at 8-11).

[2] The issue of whether the Bank Group held insurable interests is discussed in the Sept. 13, 2010 LVM Bondholders' opening brief (at 10, 29-30), the Nov. 18, 2010 Rehabilitator's response (at 52-53), the Nov. 18, 2010 Ambac's response (at 27-29), the Dec. 20, 2010 LVM Bondholders' reply (at 17-18), and the Dec. 20, 2010 Federal Home Loan Mortgage's reply (at 11-12, 13-15).

DISCUSSION OF NEW SUPPLEMENTAL AUTHORITY

I. AUTHORITY RELATING TO THE RMBS FUNDS' LACK OF STANDING

A. Plan Confirmation Order

On January 24, 2011, the rehabilitation court issued its final Order approving OCI's proposed plan of rehabilitation.[3] In that Order, which followed a five-day evidentiary hearing, and a sixth day of argument, the rehabilitation court made the following Findings of Fact and Conclusions of Law about the RMBS Funds' lack of standing:

> Findings of Fact
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> . . . .
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> 146. Throughout this rehabilitation proceeding, a group of six entities named Aurelius Capital Management LP, Fir Tree Inc., King Street Capital Master Fund, Ltd., King Street Capital, L.P., Monarch Alternative Capital LP and Stonehill Capital Management LLC have referred to themselves collectively as the "RMBS Policyholders." However, the testimony at the Hearing demonstrated that none of these entities are "policyholders" of Ambac or the Segregated Account. Their description of themselves as "policyholders" in this proceeding is misleading and inaccurate.
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> 147. While the six entities identified in the prior finding have offered to provide the Court information under seal regarding their particular holdings (*see generally* 11/15/10 Statements of Counsel at 116-122), they have never offered or provided proof to the Rehabilitator or this Court as to their standing to assert legal positions in regard to any particular RMBS trust(s), despite repeated inquiries by the Rehabilitator. They have declined to identify the provisions of any particular RMBS trust indenture pursuant to which they claim to have standing to assert positions regarding the interests of a policyholder in this proceeding.

[3] The Jan. 24, 2011 Confirmation Order is the subject of Appeal No. 2011-AP-561 presently pending before this Court, and a copy of the order is included as the first document in the Joint Appendix filed with this Court on May 26, 2011 on behalf of all of the appellants and respondents in Appeal Nos. 2011-AP-561, 2011-AP-300 and 2010-AP-2835 (*see* JA.100-163). A copy of the Confirmation Order also is available electronically at the trial court-approved website, http://ambacpolicyholders.com/record-on-appeal/ at R.556.

> Conclusions of Law
>
> . . . .
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> 9. The group consisting of Aurelius Capital Management LP, Fir Tree Inc., King Street Capital Master Fund, Ltd., King Street Capital, L.P., Monarch Alternative Capital LP and Stonehill Capital Management LLC, who have been referred to themselves in this proceeding as the "RMBS Policyholders," are not policyholders in this proceeding. It is further concluded that those entities have not demonstrated the standing to assert positions or arguments as policyholders in this proceeding. They may be heard as parties-in-interest, but not as policyholders.

(Jan. 24, 2011 Order at 51, 55.)

Although the RMBS Funds appealed the Confirmation Order generally (*see* Appeal No. 2011-AP-561), their opening briefs on appeal contain no specific challenge to the trial court's above-quoted Findings of Fact and Conclusion of Law regarding their lack of standing.

B. *In re Innkeepers USA Trust*, 448 B.R. 131 (Bankr. S.D.N.Y. 2011)

Another recent decision further shows that the RMBS Funds lack standing as policyholders.

On April 1, 2011, the bankruptcy court in *In re Innkeepers* ruled that a similar hedge fund (Appaloosa) that owned beneficial interests in trusts holding mortgage-backed securities did not have party-in-interest standing to assert legal positions in the reorganization proceeding. 448 B.R. at 138-145. The court noted:

> Appaloosa has no privity or other relationship with the Debtors which would confer on it standing to be heard. While Appaloosa asserts [] that [it] is not a "creditor of a creditor" but rather that it holds a beneficial interest in the assets of the C-6 and C-7 Trusts, this does not change the result. As the court pointed out in *Shiloh Inn* [*Diamond Bar, LLC,* 285 B.R. 726 (Bankr. D. Or. 2002)], in a securitization, the investors' relationship is with the special purpose vehicle holding the assets (in this case, the C-6 and C-7 Trusts), and the right to payment comes from the cash generated by the assets, not from the debtor as originator of the assets itself. While Judge Perris recognized that the investors in *Shiloh Inn* held certificates evidencing a beneficial interest in the trust funds, she found that the investors, as certificateholders, did not have any direct interest in the obligations of the debtors. Rather, their interests were in the assets of the trusts, and the trusts

> were the debtors' creditors. *See In re Shiloh Inn*, 285 B.R. at 729. This comports with the Second Circuit's holding in [*In re*] *Refco, Inc.* [505 F.3d 109, 117-19 (2d Cir. 2007)] that a creditor of a creditor is not a "party in interest" within the meaning of section 1109(b) of the Bankruptcy Code.
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> * * *
>
> Granting standing to a certificateholder would not only override the terms of the C-6 Servicing Agreement . . . but it would also encourage and embolden other certificateholders to hire their own counsel to challenge the special servicer's authority and to advance their individual and conflicting pecuniary interests. This would dramatically alter the CMBS [commercial mortgaged-backed securities] landscape and render the delegation to a special servicer meaningless. In addition, it would inevitably serve to delay and complicate bankruptcy cases as debtors are forced to litigate issues with additional parties who previously were contractually obligated to speak with one voice, that of the special servicer. The Court seeks to avoid such a scenario here.

In re Innkeepers, 448 B.R. at 144-145.

II. AUTHORITY RELATING TO THE BANK GROUP SETTLEMENT

Appellants allege that the Bank Group did not own the underlying securities that were the subject of the Bank Settlement, and argued that the rehabilitation court should have granted their motion for a preliminary injunction against the Bank Settlement because it allegedly compromised Ambac's non-policy claims before full payments are made on Segregated Account policy claims.

Based on the evidence introduced during the five-day hearing on confirmation of the Rehabilitator's Plan, the rehabilitation court found as fact that the Bank Group members held the underlying securities for the credit default swap ("CDS") transactions that were insured by policies that were identical in form to Ambac's other policies (and thus had an insurable interest), had suffered economic losses and were projected to suffer substantial additional economic losses in the absence of the Bank Settlement. (Jan. 24, 2011 Order at 16-17 (Finding of Fact ¶ 44).)

The Court made additional Findings in the Confirmation Order pertaining to the Bank Group Settlement relevant to this issue. (*See id.* at Findings ¶¶ 43, 45-48.)

As in the case of the above-referenced issue about standing, although the appellants in Consolidated Appeals Nos. 2010-AP-1291 and 2010-AP-2022 appeal the confirmation order generally in Appeal No. 2011-AP-561, their opening briefs in that appeal from the Confirmation Order contain no specific mention of, nor challenge to, the above-referenced Findings of Fact regarding the Bank Group Settlement. There is no argument by any of the appellants in any of their multiple appeals that these Findings of Fact are clearly erroneous.

Very truly yours,

FOLEY & LARDNER LLP

Michael B. Van Sicklen, SBN 1017827

cc: Counsel of Record (via email)