STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

In the Matter of the Rehabilitation of:

Segregated Account of Ambac Assurance Corporation

Case No. 10 CV 1576

MOTION TO PRESENT *IN CAMERA* EVIDENCE REGARDING PRICING OF TWO PARTIAL SYNTHETIC COMMUTATIONS

By the Commissioner of Insurance of the State of Wisconsin, as Rehabilitator of the Segregated Account of Ambac Assurance Corporation

By this motion, the Commissioner of Insurance of the State of Wisconsin, as court-appointed rehabilitator (the "Rehabilitator") of the Segregated Account (the "Segregated Account") of Ambac Assurance Corporation ("Ambac"), seeks an order permitting him to present *in camera* testimony and documentary evidence regarding the pricing of two partial synthetic commutations with different groups of investors (the "Goldman and Fortress Commutations"), both involving Financial Guaranty Policy Nos. AB1114BE, AB1115BE, AB0676BE and AB0900BE (the "Policies"). The liabilities of Ambac under the Policies were allocated to the Segregated Account. The Rehabilitator believes it is in the best interests of the Segregated Account and the general public that this pricing information be kept under seal and be considered only by the Court *in camera*, because public disclosure could have the significant adverse consequences discussed below.

In support of this motion, the Rehabilitator states as follows:

1. The background facts relating to Ambac, its deterioration, the decision to create and allocate impaired policies to the Segregated Account, and the rehabilitation of the Segregated Account are set forth in this Court's May 27, 2010 Findings of Fact and

Conclusions of Law, and in its January 24, 2011 Order Confirming the Rehabilitator's Plan of Rehabilitation, which are incorporated herein by reference.

2. This Motion relates to a limited portion of the evidence supporting the Rehabilitator's Motion for Approval of Two Partial Synthetic Commutations of Policy Nos. AB1114BE, AB1115BE, AB0676BE and AB0900BE. The Policies insure the payment of principal and interest on bonds backed by student loans held by the following securitization trusts: The National Collegiate Student Loan Trust 2007-3, The National Collegiate Student Loan Trust 2007-4, and The National Collegiate Master Student Loan Trust I (the underlying transactions creating the trusts and issuing the insured bonds will be referred to collectively as "National Collegiate Transactions"). Those bonds are publicly traded and are held by a variety of investors. Because of the large number of investors, it is effectively impossible for the Rehabilitator and Ambac to negotiate one, global commutation of the Policies. Instead, it is more practical to negotiate separate, partial commutations with those investors who have expressed an interest in pursuing commutation discussions, using the "synthetic" commutation structure described in the Court's August 31, 2011 Order Confirming Procedures For Resolving Claims Through Alternative Methods Including Synthetic Commutations.

3. Because the Rehabilitator and Ambac generally negotiate with separate investors in connection with synthetic commutations, each negotiation is likely to result in a different commutation price. Each investor has its own considerations affecting the price it is willing to accept for any particular bond in order to effect a consensual commutation. Typically, different investors purchase their bonds at different times and prices, hold a different mix of the various tranches of bonds, and each has their own

assessment about the amounts and timing of future expected losses on the policies, and each has their own individual business circumstances, capital requirements, credit limitations and liquidity needs, to name a few. The difference in the prices that different investors negotiate – if they don't know what other investors have negotiated – is potentially significant.

4. As a result, it is important that the price paid by the Segregated Account for each partial commutation be kept confidential until no further partial commutations are likely to occur for a particular policy. The parties that the Rehabilitator and Ambac are negotiating with are highly-sophisticated investors who aggressively negotiate to receive the highest price they can obtain for a commutation. If the pricing of each partial commutation is publicly disclosed, it is inevitable that the highest price negotiated by the Rehabilitator and Ambac for a partial commutation of a particular policy will become the minimum price other investors will demand for all further commutations of that policy. The end result will be a loss of millions of dollars that would otherwise inure to the benefit of other Segregated Account policyholders.

5. The Goldman and Fortress Commutations evidence the rationale supporting this request for confidentiality about pricing. Each of these sophisticated investors has negotiated different commutation prices as to their respective bonds. Absent confidentiality during the negotiation and court-approval processes, each would have insisted that they receive no less than the other, invariably resulting in the higher price point setting the floor. If the Goldman and Fortress Commutations are approved, approximately 72% of the National Collegiate bonds insured by the Policies will still be outstanding. The Rehabilitator is currently negotiating with another National Collegiate

investor to synthetically commutate a significant portion of the Policies, and the Rehabilitator hopes to engage in similar negotiations with other National Collegiate investors in the near future. It is in the best interests of Segregated Account policyholders and the general public to negotiate the most favorable synthetic commutations with other holders. Disclosing the prices of the Goldman and Fortress Commutations will have a significant adverse financial impact to the Segregated Account with respect to ongoing and future commutation negotiations with other National Collegiate holders. Because the bonds insured by the policies are publicly traded, public disclosure of the pricing information, particularly prior to court-approval and closing of the commutations, also could cause trading and disclosure concerns.

6. In assessing the present motion to keep pricing terms confidential, it is important not to lose sight of the wealth of information which the Rehabilitator is disclosing publicly in regard to the Commutations. The Rehabilitator is disclosing that these Commutations will be effected entirely in cash without surplus notes or other forms of consideration. He is also disclosing the particulars of the underlying policies affected by the Commutations, the nature of the transactional documents governing the Commutations, the identity of the lead investors with whom the Rehabilitator negotiated the Commutations, and that the different pricing points negotiated by Goldman and Fortress are both below the amount of the cash consideration paid to the three bank counterparties in the AAArdvark IV policy commutation this Court recently approved (without objection from any interested party) by Order dated October 13, 2011. When the cash commutation prices paid in the AAArdvark IV commutation are computed as a percentage of the Rehabilitator's projection of estimated future losses, that percentage

was higher in regard to the court-approved AAArdvark IV commutation than the comparable percentage to be paid to either Goldman or Fortress in the present Commutations. Additionally, as was the case with the AAArdvark IV commutation, the proposed Goldman and Fortress Commutations are at a price which the Rehabilitator believes results in a material savings to the Segregated Account as compared to the amount the Rehabilitator projects would otherwise be paid them pursuant to the rehabilitation, under either the presently confirmed form of the Rehabilitator's Plan of Rehabilitation or under any of the other amended forms presently being actively considered by the Rehabilitator. In that sense, these proposed commutations are favorably accretive to the rehabilitation; *i.e.*, they create value for the benefit of non-settling policyholders and beneficiaries in the Segregated Account. The evidence being publicly disclosed about the Commutations is adequate for parties-in-interest in this proceeding to assure themselves that the Rehabilitator's support for these Commutations is a reasonable exercise of his discretion in this proceeding.

7. Wisconsin courts have the inherent authority to limit the public disclosure of evidence and receive evidence *in camera* where the administration of justice so requires. *See Ampco Metal, Inc. v. O'Neill*, 273 Wis. 530, 536, 539, 78 N.W. 2d 291, 925, 926 (1956) ("[W]ere [state statutes] to be construed as depriving courts in administering justice of their inherent power to take certain evidence *in camera* where the rights of parties, or witnesses, could not otherwise be protected, they would be unconstitutional."). The test is whether the public interest in maintaining confidentiality outweighs the public's right to have access to the evidence. *See C.L. v. Edson*, 140 Wis. 2d 168, 182-83, 409 N.W.2d 417, 422 (Ct. App. 1987).

8. In this instance, the interests served by maintaining the confidentiality of evidence relating to the prices of the Goldman and Fortress Commutations greatly outweigh the public's right to have access to that evidence. Wisconsin statutes make it clear that the public has a substantial interest in the successful rehabilitation of insurance companies such as the Segregated Account and Ambac. The Rehabilitator is expressly charged with protecting the interests of Ambac's insureds, creditors, and the general public. *See* Wis. Stat. § 645.01(4)(a). The primary way the Rehabilitator fulfills that charge is by taking all possible steps to maximize the limited claims-paying resources available to fund the rehabilitation. Negotiating lower prices for commutations increases those resources to the benefit of other policyholders and creditors, which contributes to the stabilization of the company and, thus, benefits the general public. Conversely, disclosing the pricing information to the public will unquestionably reduce the claims-paying resources otherwise available to the Segregated Account, because investors will refuse to accept anything less than the best price the Rehabilitator has agreed to pay other beneficiaries for a partial commutation of the same policy.

9. The harm to the public of non-disclosure of specific pricing information is minimal. The parties interested in negotiating commutation prices are not harmed, because they are always free to reject the Rehabilitator's offer and accept the long-term benefits otherwise provided by the rehabilitation. And while the general public has an interest in confirming that the Rehabilitator is efficiently managing the Segregated Account, disclosing specific prices is unnecessary to fulfill that interest. That interest is sufficiently met by the Rehabilitator's disclosure of the fact that the prices paid for these commutations are less than what the Rehabilitator would otherwise pay through the

rehabilitation – a fact that the Court can confirm through its *in camera* consideration of the specific pricing information.

10. OCI and the Rehabilitator generally favor conducting these proceedings in as open a manner as possible, but the current situation places them and other interested parties in a "Catch-22": while policyholders and the general public have an interest in knowing whether the Rehabilitator is negotiating the best prices possible, disclosing the pricing information would make it impossible for the Rehabilitator to achieve that goal. The situation is similar to that confronted by the Wisconsin Supreme Court in *Ampco*. In that case, the plaintiff sought an injunction restricting the use of trade secrets. The Supreme Court held that it was appropriate for the trial court to hear evidence about the trade secrets *in camera*, because if the plaintiff were "required to give evidence in public as to the nature of its trade secrets which it seeks to protect in the pending circuit court action, such public disclosure will destroy the value of such trade secrets so sought to be protected." 273 Wis. at 533, 78 N.W.2d at 923.

11. Wisconsin law also recognizes that information about certain business dealings may be entitled to confidential treatment, even if that information does not rise to the level of a trade secret. Section 804.01(3)(a)7, Wis. Stat., expressly grants courts the authority to issue protective orders limiting the disclosure of confidential "commercial information." In this case, the prices paid for the Goldman and Fortress Commutations is commercial information that Ambac would never disclose in the ordinary course of its business because of the adverse affect it would have on its negotiations with other parties.

12. Finally, nothing in Wisconsin's insurance rehabilitation statutes requires disclosure of this information. Indeed, those statutes suggest that restoring the finances of the insurer is the Rehabilitator's, and Wisconsin's, primary interest and that the Rehabilitator should manage the insurer similar to a private business to the extent possible. The statutes direct the Rehabilitator to engage in the "prompt application of appropriate corrective measures" and to avoid "the kind of publicity that would needlessly damage or destroy the insurer." Wis. Stat. § 645.01(4)(a). To achieve those purposes, the Rehabilitator is granted "the powers of the officers and managers" of the insurer, Wis. Stat. § 645.33(2), and is to carry out his tasks "with minimum interference with the normal prerogatives of proprietors." Wis. Stat. § 645.01(4). Similarly, the official comments to § 645.32 explain, "[the Rehabilitator] must act under the supervision of the court, of course, but the court's control should be liberal, not strict, and should be provided without cumbersome procedures." Wis. Stat. Ann. § 645.32, cmt. In this case, the "normal prerogatives" of Ambac would be to keep pricing information confidential, so as not to significantly weaken its bargaining position with other counterparties. Applying that business practice here, under the supervision of the Court, is in the best interests of policyholders and the general public, and is consistent with Wisconsin law. *Cf. Melco System v. Receivers of Trans-America Ins. Co.*, 105 So.2d 43, 51-52 (Ala. 1958) (attorney for insurance company's receivers, who recommended that court approve settlement with reinsurers, not required to disclose his estimated value of underlying cases covered by the reinsurance, because disclosure of those estimates would be "highly prejudicial and injurious to the rights of the receivers" in separate litigation of those cases).

13. For all of the reasons stated above, the Rehabilitator respectfully requests that the Court approve this Motion and permit the Rehabilitator to present *in camera* testimony and documentary evidence regarding the prices to be paid for the Goldman and Fortress Commutations and maintain that testimony and evidence under seal.

Dated this 28th day of October, 2011.

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