COURT OF APPEALS OF WISCONSIN
DISTRICT IV

In the Matter of the Rehabilitation of:
Segregated Account of Ambac Assurance Corporation:

Ted Nickel and Office of the Commissioner of Insurance,

Petitioners-Respondents,

Ambac Assurance,

Interested Party,

v. Appeal No. 2014AP002033

FFI Fund Ltd., FYI Ltd., Olifant Fund, Ltd.,
Axonic Capital LLC, Axonic Credit Opportunities
Master Fund LP and OC 523 Master Fund LTD,

Interested Parties-Appellants.

On Appeal From the Order of the Dane County Circuit Court,
Case No. 2010CV001576
The Honorable William D. Johnston Presiding

RESPONSE BRIEF

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ISSUE I

Should the Appellants, who are not the holders of an insurance policy subject to insurer rehabilitation proceedings, who are not parties to the written agreement interpreted by the Circuit Court, who stated that discovery was not necessary to construe that agreement, and who were permitted to submit briefs and affidavits and fully participate in the Circuit Court's hearing giving rise to the order on appeal, have been permitted to intervene in those proceedings as parties and conduct discovery, where there is no dispute that the terms of the agreement are unambiguous?

> Answered Below: No. The Circuit Court presiding over the rehabilitation proceedings, consistent with this Court's decision in *Nickel v. Wells Fargo Bank*, 2013 WI App 129, 351 Wis. 2d 539, 841 N.W.2d 482, did not permit the Appellants to intervene and conduct discovery, but instead permitted them to submit briefs and affidavits and present oral argument on the issues of interest to them.

ISSUE II

Where all parties and interested parties agree that the contractual phrase "reimbursement amounts owed to the Certificate Insurer" is unambiguous, should the phrase be given its plain meaning of an amount of money equal to those amounts paid by the Certificate Insurer?

> Answered Below: Yes. Relying on established New York law, the Circuit Court construed the word "reimbursement" to have the plain meaning set forth in common dictionaries, which was consistent with the terms and structure of the agreement at issue.

ISSUE III

Should the unambiguous language of a written agreement be construed to incorporate a contradictory statement contained in an extrinsic document that is used by a non-signatory to describe the terms of that agreement?

> Answered Below: No. The Circuit Court construed the written agreement without incorporating extrinsic evidence.

STATEMENT ON ORAL ARGUMENT

Respondents do not request oral argument. Because the primary issues in the case involve the interpretation of a written contract and issues of law, Respondents believe that these issues can be fully addressed in the parties' briefs.

STATEMENT ON PUBLICATION

The Court's opinion will not meet the criteria for publication in Wis. Stat. § 809.23. This appeal involves the application of this Court's holding in *Nickel*, 2013 WI App 129, to a fact situation that is unlikely to recur. In addition, the contractual issues in this case exclusively involve the application of New York law.

STATEMENT OF THE CASE

This appeal involves objections to a motion and order entered in the ongoing insurance rehabilitation proceedings for the Segregated Account of Ambac Assurance Corporation (the "Segregated Account"). The parties to the appeal are Wisconsin Commissioner of Insurance Ted Nickel ("Commissioner") and the Wisconsin Office of the Commissioner of Insurance (collectively with the Commissioner, "OCI"), and six investment entities (collectively "Appellants"). Appellants purport to have interests in a securities trust partially insured by a policy issued by Ambac Assurance Corporation ("Ambac"). That policy has been allocated to the Segregated Account in connection with OCI's court-approved Plan of Rehabilitation for the Segregated Account. The holder of that policy, Deutsche Bank National Trust Company ("Deutsche Bank"), appeared in the proceedings below in its capacity as trustee, but has not appealed the decision.

A. Previous Court Proceedings In The Rehabilitation Of The Segregated Account.

1. Approval of OCI's Plan of Rehabilitation

On March 24, 2010, the Commissioner commenced these rehabilitation proceedings pursuant to the Wisconsin Insurers Rehabilitation and Liquidation Act, Wis. Stat. ch. 645. Ambac is a Wisconsin insurance company that was one of the world's largest insurers of financial obligations, including municipal bonds and residential

mortgage-backed securities. In late 2007, Ambac began suffering increased losses and, in mid-2008, stopped writing new policies. Ambac's financial condition continued to worsen and, in 2010, OCI took formal regulatory action to save the company from insolvency. OCI approved the creation of the Segregated Account, assigned approximately 1,000 of Ambac's policies to the Segregated Account, and petitioned to have the Segregated Account placed in rehabilitation pursuant to Wis. Stat. § 645.31. The Commissioner then developed and moved for approval of a comprehensive Plan of Rehabilitation for the Segregated Account. *See generally Nickel*, 2013 WI App 129, ¶¶ 2-8.

During November 2010, the Circuit Court (the "Rehabilitation Court") held five days of hearings and argument on the Plan of Rehabilitation. *See id*. ¶ 9. A number of interested parties appeared at those hearings. The Rehabilitation Court allowed all interested parties to submit briefs, present evidence, examine witnesses, and present oral argument. (R.556 at 4 (¶ 10).) However, the Rehabilitation Court did not permit those interested parties to formally intervene in the proceedings or take discovery. 2013 WI App 129, ¶ 9.

The Rehabilitation Court issued an order approving OCI's Plan of Rehabilitation on January 24, 2011. (R.556.) Several interested parties appealed the Rehabilitation Court's order.

2. The Court of Appeals' Approval of the Rehabilitation Court's Procedures

This Court affirmed the Rehabilitation Court's order on October 24, 2013. *See Nickel*, 2013 WI App 129. In its decision, this Court rejected the arguments of several interested parties that they should have been permitted to formally intervene in the rehabilitation proceedings. The Court held that the Wisconsin rules of civil procedure do not apply to rehabilitation proceedings and that under Wis. Stat. ch. 645 "the rehabilitation court has the discretion to grant or deny a motion to intervene." *Id.* ¶¶ 162-163. Similarly, this Court ruled that interested parties are not entitled to discovery in insurer rehabilitation proceedings, because "[t]he legislature did not intend to bind the [Rehabilitation] [C]ourt to the rules of civil procedure when applying these rules would transform an informal management task into a formal and cumbersome legal task." *Id*. ¶ 113.

3. OCI's Ongoing Efforts to Rehabilitate the Segregated Account

While those appeals were pending, the Commissioner continued to take actions to rehabilitate the Segregated Account. In 2012, the Segregated Account began making cash payments equal to 25% of policyholders' claims, and the Commissioner recently increased those payments to 45% of the value of claims. (R.880 at 10 (¶ 31).)

Recently, the Commissioner filed a motion for approval of an amended Plan of Rehabilitation (the "Amended Plan") and Payment

Guidelines for the Amended Plan (the "Payment Guidelines"), which set forth in detail the procedures to be followed by the Segregated Account and policyholders in submitting, processing and paying claims on Segregated Account policies. The Rehabilitation Court granted the motion and the Amended Plan and Payment Guidelines went into effect on June 12, 2014. (R.888.)

In an affidavit submitted in support of the motion to amend the Plan of Rehabilitation, the Special Deputy Commissioner of Insurance for the Rehabilitation of the Segregated Account explained that OCI projects Segregated Account insurance policies for residential mortgage-backed securities (such as the one at issue in this appeal) to suffer between $1.7 billion and $1.9 billion in net losses and that OCI does not expect the Segregated Account to have the financial resources to pay policyholders for all of their losses. (R.880 at 6-8 (¶¶ 18-19, 22-25).)

4. The Importance of Reimbursements to the Rehabilitation of the Segregated Account

A significant number of policies in the Segregated Account were issued in connection with residential mortgage-backed securities ("RMBS") transactions. In an RMBS transaction, large numbers of residential mortgages are pooled together, assigned to a trust, and the principal and interest payments on the mortgages are used to pay investors who purchase certificates issued by the trust. (A-App.126, ¶ 5.) Ambac's policies

guarantee the payments on those certificates. (A-App.126 (¶ 4).) If the trustee is unable to make payments to the holders of insured certificates because of shortfalls in principal or interest payments on the mortgages, Ambac is obligated to pay the shortfall. The policy at issue in this appeal (the "Policy") is one of the RMBS policies in the Segregated Account. (A-App.126 (¶ 3).)

In certain RMBS transactions that Ambac insures, Ambac has a contractual right to be reimbursed by the trustee out of current cash flows for past insurance policy payments if there are funds available to do so. (R.853 at 2-3 (¶ 1).) The funds associated with these reimbursements have always been an integral part of the Commissioner's Plan of Rehabilitation. The injunction entered by the Rehabilitation Court on the first day of the proceedings, and later affirmed by this Court, 2013 WI 129, ¶ 103, prohibited all persons from withholding reimbursement payments owed to the Segregated Account. (R.9 at 5 (¶ 7).) The Amended Plan and the Payment Guidelines both provide that Ambac "shall be entitled to collect any Reimbursement Amounts that it becomes, or is, entitled to receive" for payments made "by or on behalf of the Segregated Account." (A-App.334 (§ 4.09), 357 (§ 2.12).) The Payment Guidelines also expressly permit the Commissioner to make supplemental payments on Segregated Account policies for the purpose of maximizing reimbursements. (A-App.358 (§ 2.14).)

In addition, on July 11, 2013, the Commissioner filed a motion (the "Supplemental Payments Motion") asking the Rehabilitation Court to approve additional cash payments in excess of 25% for fourteen RMBS policies identified in the motion. (R.853.) The Policy was one of those policies. The Commissioner explained that the Segregated Account would lose approximately $310 million of reimbursements otherwise available to it if the Rehabilitation Court did not approve the motion (*id.* at 3 (¶ 2)) – a significant sum given that OCI estimated total net losses on all Segregated Account RMBS policies to be between $1.7 billion and $1.9 billion. (R.880 at 6-7 (¶¶ 18-19).)

The Rehabilitation Court approved the Supplemental Payments Motion on August 2, 2013. (R.865.)

5. The Policy and Reimbursements at Issue

The Policy in this appeal was issued by Ambac to insure certain trust payments in an RMBS transaction called HarborView Mortgage Loan Trust Mortgage Loan Pass-Through Certificates, Series 2006-9 (the "Harborview Transaction"). (A-App.144-49.) In the Harborview Transaction, the distribution of trust funds to certificateholders and Ambac is governed by a Pooling and Servicing Agreement ("PSA") entered into by Greenwich Capital Acceptance, Inc., Greenwich Capital Financial Products, Inc., and Deutsche Bank (collectively "Parties"). (A-App.157 (identifying parties),

A-App.164 ("Certificate Insurance Policy").) Appellants are not parties to the PSA.

The PSA is dated September 1, 2006. (A-App.157.) More than one month later, on October 3, 2006, a prospectus supplement ("Prospectus Supplement") for the Harborview Transaction was issued. (A-App.495-656.) The Prospectus Supplement states that Greenwich Capital Markets, Inc.—which is not a party to the PSA (A-App.157)—would "offer certificates pursuant to this prospectus supplement in negotiated transactions at varying prices to be determined at the time of sale." (A-App.495.) The section of the Prospectus Supplement describing the certificates and how funds will be distributed to certificateholders and Ambac, states:

> The following description is subject to, and is qualified in its entirety by reference to, the actual provisions of the pooling and servicing agreement.

(A-App.586.)

Ambac's Policy guarantees certain payments to the Class 2A-1C2 certificates ("Insured Certificates") (A-App.179), one of sixteen classes of certificates issued for the Harborview Transaction. (A-App.157.) Although Ambac is not a direct party to the PSA, Section 12.10 of the PSA expressly identifies Ambac as a third-party beneficiary. (A-App.297.)

Deutsche Bank is the trustee for the Harborview Transaction. In its role as trustee, it is Deutsche Bank—not the Harborview Transaction

certificateholders—who is the named insured on Ambac's Policy. (A-App.144.) The PSA expressly charges Deutsche Bank with making distributions of funds to all certificateholders in accordance with the PSA. (A-App.273.) The PSA grants Deutsche Bank the power to take actions binding the trust and to file lawsuits on behalf of all certificateholders to enforce the terms of the PSA. (A-App.281 (§ 8.11); A-App.282 (§ 8.13).)

Section 5.01 of the PSA governs Deutsche Bank's distribution of funds, including reimbursements, from various cash flows in the trust. (A-App.241-250.) Section 5.01(a)(i) addresses the distribution of funds from the "Interest Remittance Amount" (A-App.241), which the PSA defines as including funds attributable to both interest payments and certain principal prepayments received on the mortgage loans. (A-App.179.) Section 5.01(a)(i)(C) states that Deutsche Bank shall disburse "from the remaining Interest Remittance Amounts for both Loan Groups, ***reimbursement amounts owed to the Certificate Insurer***." (A-App.242 (emphasis added).)

The Segregated Account began making payments on the Policy in 2012 for claims submitted by Deutsche Bank. (A-App.127-128 ¶ 7.) Deutsche Bank then began making reimbursement payments to Ambac pursuant to Section 5.01(a)(i)(C) as funds became available to do so. As of March 2014, Ambac had received $27,659,972 in reimbursements for the Harborview Transaction to be used for the purpose of funding payments to Segregated Account policyholders, and was expected to receive an

additional $49,192,532 in reimbursements in the future. (A-App.129 ¶¶ 11-12.)

6. The Proceedings in the Rehabilitation Court

In the spring of 2014, the Commissioner learned that Appellant Axonic Capital LLC ("Axonic") had written a letter to Deutsche Bank contesting its reading of Section 5.01(a)(i)(C) of the PSA and insisting that Deutsche Bank, as trustee, recoup from Ambac and the Segregated Account certain reimbursements paid. (A-App.130 (¶ 15).)

To resolve the uncertainty caused by the letter, on June 9, 2014, the Commissioner filed the motion ("Motion") that gave rise to this appeal. (A-App.110-24.) The Commissioner argued that the language of Section 5.01(a)(i)(C) is unambiguous and asked the Rehabilitation Court to construe the phrase "reimbursement amounts owed to the Certificate Insurer" to mean "an amount of money equal to those amounts Ambac and the Segregated Account pay under the Polic[y], regardless of whether those amounts are attributable to principal or interest."[1] (A-App.119, (¶ 17).) Deutsche Bank supported the Commissioner's Motion. (A-App.111 & n.1; A-App.888-89.)

[1] The Motion also asked the Rehabilitation Court to make the same determination with respect to a second pooling and servicing agreement containing identical language. (*See generally* A-App.110-123.) No one objected to that portion of Motion and Appellants do not challenge the ruling as to that agreement.

The Commissioner served Axonic's counsel with a copy of the Motion papers the day after filing the Motion. (A-App.11:11-15.) On June 9, 2014, Deutsche Bank issued a legal notice to all certificateholders informing them of the Motion and that Deutsche Bank agreed with the Commissioner's construction of the PSA. (A-App.888-89.) On June 22, 2014, certain Appellants filed a motion to intervene in the rehabilitation proceedings. (A-App.424-25.)

On July 2, 2014, Appellants filed their briefs and evidentiary materials in support of their objections to the Motion. In their briefs Appellants, like the Commissioner, contended that Section 5.01(a)(i)(C) of the PSA is unambiguous. (A-App.872 (¶ 11).) Despite that lack of ambiguity, Appellants argued that language in the Prospectus Supplement precluded Ambac and the Segregated Account from receiving reimbursements for insurance payments made to compensate for shortfalls in principal payments. (A-App.871.)

On July 7, 2014, the Rehabilitation Court held a hearing on the Motion and the motion to intervene. (A-App.35-109.) During the hearing, Appellants' counsel again asserted that the relevant language of the PSA is unambiguous and stated: "We are not here saying that we are going to need discovery. . . . [B]ecause the contract is unambiguous . . . ***no discovery would be needed***." (A-App.71:5-12 (emphasis added).)

The Rehabilitation Court denied the motion to intervene (A-App.105:21-24), but allowed Appellants to argue their position regarding interpretation of the PSA, and rejected that position on the merits. The Rehabilitation Court granted the Commissioner's Motion, finding that "the clear language [of the PSA is] . . . that the reimbursement was for principal and interest claims that were paid." (A-App.106:15-18.) That same day, the Rehabilitation Court issued its order ("Order") stating, in relevant part:

> [T]he phrase 'reimbursement amounts owed to the Certificate Insurer' as used in Section 5.01(a)(i)(C) of the PSAs . . . means an amount of money equal to those amounts Ambac and the Segregated Account pay out under the Policies, regardless of whether those amounts are attributable to principal or interest; and . . .
>
> [a]ll parties to the PSA . . . , including the Trustee, Administrator, Ambac and the Segregated Account (and any sub-contractors, servicers, agents, third-party paying agents, calculating agents or other service providers used in connection with the Harborview Transactions by either the Trustee or Administrator) shall calculate the reimbursement amounts due with respect to cash claim payments made by Ambac and/or the Segregated Account on [the] Policy . . . in accordance with this Order.

(A-App.1-2.)

ARGUMENT

II. APPELLANTS' PROCEDURAL CHALLENGES FAIL BECAUSE THEY ARE NOT PARTIES TO THE PSA, THE ORDER PROPERLY ENJOINS DEUTSCHE BANK AS TRUSTEE, AND APPELLANTS WERE NOT PREJUDICED BY THE REHABILITATION COURT'S PROCEDURES.

Appellants' procedural challenges to the Order fail for two fundamental reasons. *First*, Appellants misunderstand the nature of the

relief granted by the Rehabilitation Court. The Rehabilitation Court did not grant relief against the individual Appellants directly. Instead, the Order is directed to Deutsche Bank, the other Parties to the PSA, and their agents. Such relief is appropriate because Deutsche Bank is a party to the PSA, acts for the trust and the certificateholders as a whole, and has formally appeared in the rehabilitation proceedings as the holder of the Policy. The Appellants are not parties to the PSA or the Policy. Nevertheless, they were granted the same opportunity to be heard on the merits as the Commissioner, Deutsche Bank, and other interested parties who have appeared in previous Rehabilitation Court proceedings. But they were not entitled to demand more, such as formal intervention and discovery.

Second, even if Appellants were so entitled, they have failed to show any prejudice. Appellants—who disclaimed any need for discovery in the Rehabilitation Court—cannot show a benefit that would have been gained from permitting them to intervene, pursue discovery and proceed to a trial, given that this dispute involves an issue of pure contract interpretation, in which all interested parties assert that the relevant contract provision is unambiguous.

A. The Rehabilitation Court's Order Properly Enjoins Deutsche Bank, As Trustee And The Policy Holder.

Much of Appellants' procedural argument rests on a fundamental mischaracterization of the scope of the Order issued by the Rehabilitation

Court. To manufacture procedural challenges to the injunction under Wis. Stat. § 645.05 and Chapter 813, Appellants repeatedly suggest that the Order is an *in personam* judgment that enjoins them individually. That mischaracterization begins on page 16 of their brief, in which Appellants quote the injunctive language of the Order as follows: "All parties . . . shall calculate the reimbursement amounts due . . . and shall promptly transmit . . . in accordance with past practice and this Order." Thereafter, Appellants repeatedly suggest that they were directly enjoined by the Order. (*See*, *e.g.*, Br. at 17 ("Wisconsin law does not permit the granting of a final declaratory judgment and a permanent injunction against non-parties (such as [Appellants]) . . . ."), 20 (suggesting Rehabilitation Court erred by issuing in personam injunction against parties "beyond the court's jurisdiction"), 21 ("[A] court may not enjoin entities that are not parties to the proceeding . . . . Here, [Appellants were never] made parties to the action.").)

In fact, the Order expressly enjoins only the Parties to the PSA, including Deutsche Bank as trustee, and any service providers engaged by Deutsche Bank. (A-App.2.) Appellants do not and cannot claim to be parties to the PSA or a service provider of Deutsche Bank. None of the entities that are the subject of the injunction are challenging the Order.

Deutsche Bank was the proper subject of the Rehabilitation Court's Order for a number of reasons. Deutsche Bank is the holder of the Policy

pursuant to which the Segregated Account and Ambac have been making payments for the Harborview Transaction. (A-App.144.) As trustee, Deutsche Bank is responsible for calculating and making the disputed reimbursement payments. Deutsche Bank has appeared in the Rehabilitation Court's proceedings since 2010 and concedes the Rehabilitation Court's jurisdiction over it for matters relating to the Policy and the PSA. (A-App.94-95.) Moreover, the PSA expressly authorizes Deutsche Bank to pursue legal claims arising under the PSA on behalf of all certificateholders. (A-App.281 (§8.12(a)).) In contrast, holders of trust certificates (such as Appellants) generally have no right to "control the operation and management of the Trust" and are generally not permitted to bring suit on behalf of the trust except in circumstances that do not apply here. (A-App.294-95 (§ 12.03).)

Moreover, directing the Rehabilitation Court's Order to Deutsche Bank was the only practical approach under the circumstances of this case. The Harborview Transaction—like most of the transactions insured by policies in the Segregated Account—involved numerous classes of certificates with original principal balances of billions of dollars. (A-App.159-160.) Certificates may be spread among thousands of owners and ownership may be constantly changing as the certificates are traded. It is impractical to personally serve and join all parties that may be affected by the court's ruling regarding the provisions of the PSA. Not surprisingly,

courts have long recognized that in such circumstances, a trustee may litigate on behalf of the holders of interests in the trust. *See Equitable Trust Co. v. Vanderbilt Realty Improvement Co.*, 140 N.Y.S. 1008, 1010 (App. Div. 1913) (appropriate for trustee to represent interests of bondholders where "their number is so large as to render it difficult to bring them all before the court"); *see also King v. Franmor Equity Corp.*, 20 N.Y.S. 2d 909, 912 (App. Div. 1940) (judgment against trustee binding as to all bondholders where trust indenture authorized trustee to represent all bondholders in actions affecting security of the trust); *Bank of New York v. Fed. Deposit Ins. Corp.*, 508 F.3d 1, 7 (D.C. Cir. 2007) (rejecting argument that noteholders must be joined where trustee is party to suit).[2]

Similar practical considerations of efficiency are fundamental to Wisconsin's insurer rehabilitation statutes. Bringing a separate lawsuit with all certificateholders as parties—especially where it is the trustee who is the Policyholder—would undermine the statutes' objectives by "transform[ing] an informal management task into a formal and cumbersome legal task." *Nickel*, 2013 WI App 129, ¶ 113.

[2] The PSA includes a section (entitled "Limitation on Rights of Certificateholders") outlining a procedure by which certificateholders can force the trustee to take such action if a sufficient percentage of them agree. (A-App.294-95 (§ 12.03).) In the absence of such action, it is Deutsche Bank as trustee that speaks for the trust as a whole—not individual certificateholders with their own particular and potentially divergent interests.

Thus, while Appellants emphasize that the injunction provision of Wis. Stat. § 645.05 cross-references Chapter 813 of the Wisconsin Statutes, it is irrelevant for purposes of this appeal because the Commissioner did not seek—and the Rehabilitation Court did not grant—injunctive relief against them.

B. The Rehabilitation Court Had Authority To Enter The Order.

The Rehabilitation Court acted well within its authority in deciding the Motion and entering the Order. Appellants contend that procedures under the declaratory judgment statute, Wis. Stat. § 806.04, and other rules of civil procedure applicable in non-rehabilitation proceedings should have governed the Motion, because "no provision of the Wisconsin insurance liquidation statutes" provided the Rehabilitation Court with "the procedural or jurisdictional basis" to enter the Order. (Br. at 19.)

Appellants are wrong on both counts. As this Court noted in affirming the Plan:

> The rules of civil procedure . . . do not apply to rehabilitation proceedings because ch. 645 prescribes its own rules of procedure in insurer delinquency proceedings. See Wis. Stat. § 645.33(5). The legislature did not intend to bind the court to the rules of civil procedure when applying these rules would transform an informal management task into a formal and cumbersome legal task. See Introductory comment to Wis. Stat. § 645.32, 1967 Wis. Laws, ch. 89, § 17.

Nickel, 2013 WI App 129, ¶ 113.

The Plan of Rehabilitation for the Segregated Account, which was entered pursuant to Wis. Stat. § 645.33(5), approved by the Rehabilitation Court and affirmed in its entirety by this Court on appeal, *see generally* 2013 WI App 129, establishes the Rehabilitation Court's jurisdiction to enter orders and decide disputes in an array of matters concerning the Segregated Account. (A-App.336-38 (§ 6.01).) As pertinent here, the Plan notes that the Rehabilitation Court has jurisdiction "to enter such orders and injunctions as are necessary to enforce the respective title, rights, and powers of the Segregated Account, the terms of this Plan and the Payment Guidelines[.]" (A-App.337 (§ 6.01(d).) The Rehabilitation Court's authority is fully consistent with Chapter 645, which grants the Rehabilitation Court the power to enter such "orders as are deemed necessary and proper to prevent," among other things, any "action that might lessen the value of the insurers' assets or prejudice the rights of policyholders . . . ." Wis. Stat. § 645.05(1)(k).

There is no question that the Order serves those purposes. It construes a contract governing the right to reimbursements for a Segregated Account insurance policy. The Rehabilitation Court's first-day injunction, the Amended Plan, the Payment Guidelines, and the Supplemental Payments Motion, all make clear that contractual reimbursements such as those at issue here are an integral and financially significant component of the rehabilitation of the Segregated Account. The Segregated Account's

enforcement of contractual rights to reimbursement preserve its claims-paying resources and are thus vital to maximizing the benefit to all policyholders, just like the subrogation and contractual control rights preserved by the Plan and upheld by this Court against challenges on appeal. *Nickel*, 2013 WI App 129 ¶¶ 86-94, 139-145.

Further, Appellants' arguments regarding the Rehabilitation Court's authority are even less colorable than similar arguments rejected in two prior decisions arising from this rehabilitation. Unlike here, the arguments in those disputes were raised by interested parties who were actually enjoined by the orders they challenged, and who were signatories to the agreements being interpreted. In their brief, Appellants misstate the significance of these decisions.

First, in 2013 the Commissioner brought a motion seeking not merely to *construe* a contract affecting the Segregated Account, but to *reform* certain terms of that contract. *See In re Matter of the Rehabilitation of the Segregated Account of Ambac Assurance Corp.* (the "*OneWest*" decision), No. 13-cv-325-bbc, 2013 U.S. Dist. LEXIS 189046, at *9 (W.D. Wis. July 8, 2013) (A-App.925-932). As here, the motion also sought injunctive relief against the parties to the contract. *Id.* One of those parties, OneWest Bank, removed the matter to federal court, arguing that the dispute was "outside the scope of the rehabilitation court's authority" and that the matter must proceed as a separate lawsuit. *Id.* at *12-14.

The federal district court (Crabb, J.) disagreed:

> [I]t does not follow that the issue is outside the scope of the rehabilitation court's authority. . . . A review of the authorizing documents shows that the rehabilitation court is authorized to resolve disputes involving contract rights that do not differ in any relevant particular from OneWest's. . . .
>
> In sum, the dispute over OneWest's [contractual] rights is not an independent controversy but a relatively routine aspect of the management of the rehabilitation proceedings. . . . [A]llowing removal of its dispute would jeopardize the integrity of the ongoing rehabilitation proceedings and the comprehensive statutory structure the state has created to handle the rehabilitation of failing insurance companies. Resolving the servicing motion in the rehabilitation proceedings advances the purpose of those proceedings, which is to manage Ambac's business for the benefit of the policyholders.

Id. at *14-15.

Second, the Commissioner brought a similar motion seeking to construe a reinsurance contract between Ambac and a reinsurer and to enjoin the reinsurer from actions inconsistent with that construction. *See In re Matter of the Rehabilitation of the Segregated Account of Ambac Assurance Corp.* (the "*Assured*" decision), No. 2011AP1486 (Oct. 24, 2013) (unpublished[3]) (A-App.919-24). Though the appellate issues centered upon personal jurisdiction, this Court agreed that the Rehabilitation Court had authority to construe the contract at issue: "demands to be reimbursed under a reinsurance contract for claims made on

[3] The *Assured* decision was issued in this rehabilitation and is cited for law-of-the-case purposes. Wis. Stat. § 809.23(3)(a).

policies covered by the reinsurance contract are plainly 'in connection with' the underlying policies, as well as the contracts." *Id.* ¶ 18 (A-App.923).

The same is true here: the Commissioner sought construction of a PSA to which Ambac is an express third-party beneficiary, concerning its rights to reimbursements for payments made pursuant to a Policy that is now in the Segregated Account. Construction of those terms plainly concerns "the respective title, rights, and powers of the Segregated Account." (A-App.337 (§ 6.01(d)).) Under Chapter 645, the Rehabilitation Court was authorized to perform that construction and enter the Order.

C. Appellants Were Allowed To Fully Present Their Case On The Purely Legal Issue Of Contract Interpretation.

Appellants have failed to identify any meaningful purpose to the additional procedures they claim were necessary, and thus fail to identify any real prejudice from the decision. While Appellants now repeatedly argue that they were prejudiced by a lack of discovery, at the hearing before the Rehabilitation Court they asserted that "no discovery would be needed." (A-App.71:5-12.) That was because the Motion presented a pure matter of contract interpretation. Both sides agreed that the PSA is unambiguous, and differed only as to whether the Prospectus Supplement—which the Appellants were permitted to place in the record (A-App.492-93 (¶ 2))—should be construed together with the PSA. As Appellants acknowledge,

absent ambiguity, extrinsic evidence is not relevant to interpretation of that contract. (Br. at 41.)

Even the primary cases on which Appellants rely in this appeal decided the meaning of an unambiguous contract on a motion for judgment on the pleadings without resort to discovery. *See Wells Fargo Bank, N.A. v. ESM Fund I, LP*, 785 F. Supp. 2d 188, 191, 192 (S.D.N.Y. 2011) (hereafter "*Wells Fargo I*"); *Wells Fargo Bank, N.A. v. Financial Sec. Assurance Inc.*, 504 Fed. Appx. 38 (2d Cir. 2012) (unpublished) (hereafter "*Wells Fargo II*"). *See also M&T Bank Corp. v. LaSalle Bank Nat'l Ass'n*, 852 F. Supp. 2d 324, 329-34 (W.D.N.Y. 2012) (deciding issues about interpretation of trust indenture and offering memorandum on a motion to dismiss).[4]

The Rehabilitation Court treated Appellants no differently than any of the other interested parties that have appeared in these proceedings. (*See* R.556 at 4 (¶¶ 8-10).) Appellants received notice and had an opportunity to be fully heard on the Motion. They filed lengthy briefs, submitted affidavits, and argued their objections, which were heard on their merits and overruled, and they are now appealing the merits of those objections.

[4] Appellants contend in a footnote that it would have been more appropriate for the interpretation of the PSA to be resolved in an interpleader action or trust instruction proceeding. (Br. at 22 n.2.) Appellants fail to explain how such an action or proceeding would have materially differed from the procedure followed by the Rehabilitation Court. In fact, *Wells Fargo I* was an interpleader action, but the court decided the contractual interpretation issue on judgment on the pleadings, which is effectively identical to what occurred here.

There was nothing to be gained by the additional motion practice, extensive discovery, and witness testimony that Appellants now claim to have needed (Br. at 15, 27-28), because it could not result in any factual evidence that could alter the Rehabilitation Court's legal interpretation of an unambiguous contract. Given the extent to which the Rehabilitation Court permitted the Appellants to present their case, their demand for formal intervention places form over substance.

Finally, the procedures now demanded by Appellants would have served only to delay resolution of the issues, drive up the costs of the proceeding, and deplete the assets of a delinquent insurer—all outcomes the drafters of Chapter 645 specifically sought to avoid. *See, e.g.*, Introductory comment to Wis. Stat. § 645.32, 1967 Wis. Laws, ch. 89, § 17 ("This section is designed to make rehabilitation a very flexible procedure. . . . Though it is called a formal proceeding because it begins with a formal petition to a court and a hearing, thereafter it should be essentially informal in operation."); comment to Wis. Stat. § 645.33, 1967 Wis. Laws, ch. 89, § 17 ("Success may depend on the court's understanding of the imperative need for the rehabilitator to have broad discretion and the freedom to act quickly.").

III. THE UNAMBIGUOUS LANGUAGE OF THE PSA PROVIDES FOR AMBAC TO BE REIMBURSED FOR ALL CLAIMS PAYMENTS.

In their brief, Appellants never address, and therefore concede, the most basic fact of this case: the relevant provision of the PSA is unambiguous on its face. In fact, Appellants repeatedly asserted that the PSA is unambiguous in the Rehabilitation Court proceedings.[5] (A-App.71:5-12, 872 (¶ 11).)

Both sides agree that New York law governs the construction of the PSA.[6] New York follows the traditional parol evidence rule governing the use of extrinsic evidence when construing written agreements. "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the

[5] Appellants also argue that the Rehabilitation Court erred by discussing extrinsic evidence during its hearing. The Rehabilitation Court, however, found that language of the PSA was "clear" and ruled on that basis. (A-App.106:15-18.) As will be shown, the language of the PSA is unambiguous and does not require the consideration of extrinsic evidence. The construction of an unambiguous contract is a matter of law that this Court reviews *de novo*. *Pasko v. City of Milwaukee*, 222 Wis.2d 274, 279, 588 N.W.2d 642 (Ct. App. 1998). As a result, any extrinsic evidence supposedly considered by the Rehabilitation Court is irrelevant and any purported error is harmless.

[6] Appellants suggest in their brief that the Rehabilitation Court committed error because it "made no finding as to what state's law should apply." (Br. at 16.) That suggestion is frivolous. Both sides agreed in their Rehabilitation Court briefs that New York law applied. Appellants' counsel confirmed that agreement at the hearing, stating: "New York law clearly applies, nobody disputes that . . . ." (A-App.84:1-3.)

writing." *W.W.W. Assocs., Inc. v. Giancontieri*, 566 N.E.2d 639, 642 (N.Y. 1990). Extrinsic evidence will not be considered in the absence of ambiguity in the relevant terms of the contract. *See R/S Assocs. v. N.Y. Job Dev. Auth.*, 771 N.E.2d 240, 242 (N.Y. 2002). "It is well settled [in New York] that extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face." *W.W.W. Assocs.*, 566 N.E.2d at 642 (internal quotation omitted).[7] "[W]here the language [of a contract] is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language." *R/S Assocs.*, 771 N.E.2d at 242.

The provision at issue is Section 5.01 (a)(i)(C), which states:

> (a) Distributions From Available Funds. On each Distribution Date . . . the Trustee, as Paying Agent, shall withdraw funds on deposit in the Distribution Account to the extent of Available Funds for each Loan Group for such Distribution Date and . . . make the following disbursements and transfers as set forth below:
>
> . . . .
>
> (C) from the remaining Interest Remittance Amounts for both Loan Groups, ***reimbursement amounts owed to the Certificate Insurer*** . . . .

(A-App.241-42 (emphasis added).) The emphasized phrase is the language in dispute. Appellants contend that the phrase should be read to limit the

[7] Appellants suggest in a footnote that the Prospectus Supplement should be used to determine whether the relevant provision of the PSA is ambiguous. (Br. at 48 n.14.) The holding of New York's highest court in *W.W.W. Assocs.* makes clear that there is no legal basis for that argument.

Segregated Account's reimbursement amounts to those paid in connection with shortfalls in interest payments.

A. The Plain Meaning Of "Reimbursement Amounts Owed To The Certificate Insurer" Is: To Pay Ambac An Amount Of Money Equal To Those Amounts Ambac Has Paid Out Under The Policy.

Under New York law, "[t]he words and phrases used in an agreement must be given their plain meaning so as to define the rights of the parties." *Mazzola v. County of Suffolk*, 533 N.Y.S.2d 297, 297 (App. Div. 1988). "[I]t is common practice for the courts of [New York] to refer to the dictionary to determine the plain and ordinary meaning of words to a contract." *Id.*; *see also*, *e.g.*, *R/S Assocs.*, 771 N.E.2d at 242 (relying on Oxford English Dictionary to define "effective" in a contract); *2619 Realty, LLC v. Fidelity & Guar. Ins. Co.*, 756 N.Y.S.2d 564,565 (App. Div. 2003) (relying on Webster's Collegiate Dictionary to define "sole dwelling" in an insurance contract).

When interpreting a contract negotiated by "sophisticated, counseled business people," "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include," and "may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *Vermont Teddy*

Bear Co. v. 538 Madison Realty Co., 807 N.E.2d 876, 879 (N.Y. 2004) (internal quotations omitted).

Here, the meaning of the phrase "reimbursement amounts owed to the Certificate Insurer" is unambiguous on its face. The PSA defines the "Certificate Insurer" as Ambac. (A-App.164.) Merriam-Webster's online dictionary defines "reimburse" as "to pay someone an amount of money equal to an amount that person has spent." www.merriam-webster.com. *See also* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1997) at 986 ("to pay back to someone"; "to make restoration or payment of an equivalent to"); BLACK'S LAW DICTIONARY (6th ed. 1991) at 891 ("To pay back, to make restoration, to repay that expended; to indemnify, or make whole."). Thus, "reimbursement amounts owed to the Certificate Insurer" means to pay Ambac an amount of money equal to those amounts Ambac (and now the Segregated Account) has paid out under the Policy, regardless of whether those amounts are attributable to principal or interest.

B. The Rehabilitator's Construction Of Section 5.01(a)(i)(C) Is Consistent With The Rest Of Section 5.01.

1. Section 5.01 creates distinct categories of contractual reimbursements for Ambac.

The Rehabilitation Court's construction of the disputed provision is consistent with the rest of Section 5.01. Section 5.01 of the PSA contains five distinct provisions granting Ambac a right to reimbursement from various sources of funds collected by the trustee. Each provision identifies

a different type of reimbursement, a different source of funds, a different triggering event for the reimbursement, or a mixture of those differences. In addition to the provision at issue, the four other provisions are as follows:

> Section 5.01(a)(ii)(B) states: "On each Distribution Date . . . on which a Trigger event *is* in effect, distributions in respect of principal to the extent of any Principal Distribution Amounts [shall be made] . . . to the Certificate Insurer, any ***Certificate Insurer Reimbursement Amounts*** due to the Certificate Insurer;" (A-App.243 (emphasis added).)
>
> Section 5.01(a)(iii)(B) states: "On each Distribution Date . . . on which a Trigger event *is not* in effect, distributions in respect of principal to the extent of any Principal Distribution Amounts [shall be made] . . . to the Certificate Insurer, any ***Certificate Insurer Reimbursement Amounts*** due to the Certificate Insurer;" (A-App.244 (emphasis added).)
>
> Section 5.01(a)(iv)(D) states: "On each Distribution Date . . . the Net Monthly Excess Cashflow shall be distributed . . . to the Certificate Insurer, *any unpaid remaining* ***Certificate Insurer Reimbursement Amounts***;" (A-App.245-246 (emphasis added).)
>
> Section 5.01(g)(ii) states: "On the Final Maturity Reserve Termination Date, the Trust shall distribute the funds on deposit in the Final Maturity Reserve Account . . . to the Certificate Insurer, any ***reimbursement amounts*** due to the Certificate Insurer ***in respect of principal***." (A-App.248 (emphasis added).)

As shown by the emphasized language, Section 5.01 identifies two different categories of reimbursements paid to Ambac: (1) "reimbursement amounts," which is used in both 5.01(a)(i)(C) and 5.01(g), and is not given a unique definition in the PSA; and (2) "Certificate Insurer Reimbursement Amounts," which is used in the three other provisions and is expressly

defined by the PSA. As discussed above, the plain meaning of "reimbursement amounts" is simply an amount of money equal to those amounts paid by the Segregated Account and Ambac.

"Certificate Insurer Reimbursement Amounts," by contrast, are defined more broadly. The PSA defines the "Certificate Insurer Reimbursement Amount" as:

> [T]he sum of (a) all amounts previously paid by the Certificate Insurer . . . for which the Certificate Insurer has not been reimbursed . . . and (b) ***interest accrued on the foregoing at the Late Payment Rate*** from the date the Trustee received such amounts paid by such Certificate Insurer to such Distribution Date.

(A-App.165 (emphasis added).) In other words, "Certificate Insurer Reimbursement Amounts" are the amounts Ambac has paid under its Policy *plus* accrued interest. Thus, "reimbursement amounts" and "Certificate Insurer Reimbursement Amounts" have distinct meanings under the PSA. *See Two Guys From Harrison-N.Y., Inc. v. S.F.R. Realty Assocs.*, 472 N.E.2d 315, 318 (N.Y. 1984) ("In construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless.").

In addition, Section 5.01(g)(ii) shows that the Parties knew how to limit Ambac's reimbursements when they wanted to do so. Section 5.01(g)(ii) states that payments from the Final Maturity Reserve Account will be made "to the Certificate Insurer, [for] any ***reimbursement amounts***

due to the Certificate Insurer ***in respect of principal***." (A-App.248 (emphasis added).) The language in 5.01(g)(ii) is identical to the disputed language in Section 5.01(a)(i)(C), except that it expressly limits Ambac's reimbursements to its payments made "in respect of principal." The Parties could have added a similar phrase to Section 5.01(a)(i)(C) limiting Ambac's reimbursement to those "in respect of interest," but they did not do so. *See Quadrant Structured Prods. Co. v. Vertin*, 16 N.E.3d 1165, 1172 (N.Y. 2014) ("[E]ven where there is ambiguity, if parties to a contract omit terms . . . the inescapable conclusion is that the parties intended the omission.").

2. Section 5.01 contemplates overlap between funds associated with principal and interest.

While Appellants do not dispute the plain meaning of "reimbursement amounts," they contend that the structure of Section 5.01 somehow makes this meaning implausible. According to Appellants, Ambac only can be reimbursed for payments made for interest shortfalls out of the so-called "interest waterfall" and be reimbursed for payments made for principal shortfalls out of the so-called "principal waterfall." But Appellants are attempting to impose artificial limitations on Section 5.01 that are not supported by the text of the document. Section 5.01 does not use those labels and does not follow such neat distinctions.

What Appellants label as the "interest waterfall" is the pool of funds described as the "Interest Remittance Amounts" in Section 5.01(a)(i)(C). The PSA, however, defines "Interest Remittance Amount" to include *both* interest received with respect to mortgage loans and certain *principal* prepayments on those loans. (A-App.179.)

The "principal waterfall," on the other hand, is the pool of funds described as the "Principal Distribution Amount." The PSA defines "Principal Distribution Amount" to primarily include amounts received with respect to principal payments on mortgages. (A-App.193.) However, Appellants concede that the Principal Distribution Amount can be used to reimburse Ambac for payments it makes with respect to *both* principal *and* interest. (*See* Br. at 47.)

Thus, the structure and language of Section 5.01 as a whole shows that the Parties did not intend a rigid division between principal and interest cash flow streams as Appellants contend.

3. Section 5.08 shows that the Parties contemplated funds associated with Section 5.01(a)(i)(C) being used to reimburse Ambac for both principal and interest payments.

Section 5.08 of the PSA reinforces the conclusion that the Parties intended Ambac to be reimbursed for both principal and interest payments under Section 5.01(a)(i)(C). Section 5.08 addresses the allocation of "Recoveries" between certificate holders and Ambac. The PSA defines a

"Recovery" as an amount received with respect to a "Liquidated Mortgage Loan" (often a foreclosed loan). (A-App.196; A-App.181 ("Liquidated Mortgage Loan"); A-App.198 ("REO Property").) With respect to certificateholders, Section 5.08(a) calls for Recoveries to be used to compensate for "Realized Losses." "Realized Losses" are unpaid *principal* amounts for Liquidated Mortgage Loans. (A-App.195.) With respect to Ambac, however, Section 5.08(b) provides:

> To the extent that the Certificate Insurer ***has made a payment in respect of Realized Losses and such amount has not previously been reimbursed pursuant to Section 5.01(a)(i)(C) . . .*** the Certificate Insurer will be subrogated to the rights of the Holders of the Insured Certificates and will be entitled to the amount of any such Realized Losses paid by it to the Insured Certificates that remains unreimbursed prior to any recoveries being allocated to Holders of the Insured Certificates.

(A-App.257 (emphasis added).) As the emphasized language shows, Section 5.08(b) expressly contemplates that Ambac will be reimbursed for payments for "Realized Losses" (*i.e.*, principal shortfalls) from the funds available under Section 5.01(a)(i)(C) (the so-called "interest waterfall"). If the Parties had intended Ambac's reimbursements pursuant to Section 5.01(a)(i)(C) to be limited solely to payments Ambac made with respect to interest, they would not have drafted Section 5.08(b) in this manner.

C. Ambac's Contractual Reimbursement Rights Are Not Co-Extensive With Subrogation Rights.

Finally, Appellants contend that Ambac's reimbursements under Section 5.01(a)(i)(C) must be limited to payments made with respect to interest shortfalls because, in their view, "Ambac's reimbursement rights under the waterfall provisions of the PSA are co-extensive with the rights of subrogation conferred by the PSA and the Polic[y]." (Br. at 53.) But again, Appellants ignore the plain language of the PSA. The PSA makes clear that Ambac has two distinct rights: a subrogation right and a contractual reimbursement right.

1. The PSA states that Ambac's right to reimbursement under Section 5.01 is distinct from its right of subrogation.

In support of their argument, Appellants rely heavily on *Wells Fargo I*. In explaining its decision, the *Wells Fargo I* court stated:

> If the drafters had intended to provide Assured with a reimbursement right separate from its right of subrogation, it is implausible that they would use the waterfall to grant such a right ***and not include any mention of it in the section of the PSA expressly devoted to the rights of the Certificate Insurer . . . .***

785 F. Supp. 2d at 197 (emphasis added).

Here, the PSA contains precisely the language that was missing in *Wells Fargo I*. Section 4.05 of the PSA describes the Policy and Ambac's rights as the Certificate Insurer. Section 4.05(d) states:

> the Certificate Insurer will be entitled to be subrogated to any rights of such Holder to receive the amounts for which such Insured Amount or Preference Claim was paid, to the extent of such payment, ***and will be entitled to receive the Certificate Insurer Reimbursement Amount as set forth in Section 5.01***.

(A-App.240 (emphasis added).) The plain language of the PSA makes clear that Ambac's right to reimbursement is in addition to its right of subrogation. Reading the emphasized language as merely a restatement of Ambac's right of subrogation, as Appellants suggest, would render that language surplusage, which is improper under New York's rules of construction. *See NML Capital v. Republic of Argentina*, 952 N.E.2d 482, 490-91 (N.Y. 2011) (construing the word "and" in a contract to mean an intent to create two separate obligations); *Two Guys From Harrison-N.Y.,* 472 N.E.2d at 318 ("[O]ne of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless."); *Reyes v. Metromedia Software, Inc.*, 840 F. Supp. 2d 752, 756 (S.D.N.Y. 2012) (It is a "cardinal rule that a contract should not be read to render any provision superfluous.").

2. The text of Section 5.01(a)(i)(C) indicates that Ambac's right of reimbursement is not co-extensive with its right of subrogation.

Finally, Section 5.01(a)(i)(C) itself refutes Appellants' argument. Under the PSA, the mortgage loans that provide the cash flows for distribution to certificateholders are divided into two "Loan Groups." (A-

App.181 (defining "Loan Group 1" and "Loan Group 2".) The mortgages in Loan Group 1 are the primary source of payment for the Class 1A-1A Certificates, which are not insured by Ambac. (A-App.177 (defining "Group 1 Mortgage Loan" and "Group 1 Certificates"; A-App. 179 ("Insured Certificates"); A-App. 162 ("Available Funds".) The mortgages in Loan Group 2 are the primary source of payment for Ambac's Insured Certificates and four other classes of uninsured Certificates. (A-App.178 ("Group 2 Mortgage Loan"; "Group 2 Certificates".)

Section 5.01(a)(i)(B) expressly segregates payments of the Interest Remittance Amount between the separate Loan Groups and the Certificates linked to each Group, stating that distributions shall be made "from the remaining Interest Remittance Amount ***for the related Loan Group*** to the holders of [each class of certificates], ***as applicable*** . . . ." (A-App.241 (emphasis added).) While Insured Certificateholders have a limited right to the Interest Remittance Amount from Loan Group 1 to cover shortfalls in the Monthly Interest Distributable Amount, they cannot obtain funds from Loan Group 1 to pay the Unpaid Interest Shortfall Amount, even if such funds are available. But Ambac can obtain these same funds pursuant to its right to reimbursement set forth immediately below in Section 5.01(a)(i)(C), which provides: "from the remaining Interest Remittance Amounts ***for both Loan Groups***, the reimbursement amounts owed to the Certificate Insurer," without limitation. (A-App.242 (emphasis added).) In

other words, Ambac has an express contractual right to be reimbursed from certain cash flows that Insured Certificateholders have no right to obtain, and which Ambac could not obtain through subrogation.

Had the Parties intended Ambac's reimbursement rights under the PSA to be co-extensive with its right to subrogation with respect to the Insured Certificateholders, they would not have drafted Section 5.01(a)(i)(C) to permit Ambac to be reimbursed from the Interest Remittance Amounts for both Loan Groups, because Loan Group 1 is not available to Insured Certificateholders for all purposes. The Commissioner made this point during the hearing in the Rehabilitation Court (A-App.66:6-67:18) and Appellants wholly fail to address it in their brief here. There is no way to reconcile the plain language of Section 5.01(a)(i)(C) with Appellants' argument.[8]

IV. NEW YORK'S WELL-ESTABLISHED LAW AND THE CONTENTS OF THE PSA AND THE PROSPECTUS SUPPLEMENT DICTATE THAT THE PROSPECTUS SUPPLEMENT NOT BE USED TO VARY THE PLAIN LANGUAGE OF SECTION 5.01.

Recognizing that the relevant language of the PSA is unambiguous, Appellants contend that it is somehow still appropriate to consider the language of the Prospectus Supplement when construing the terms of the

[8] The fact that Section 5.08(b) (discussed in section II.B.3 *supra*) provides that Ambac will be subrogated to the extent it was not already reimbursed under Section 5.01(a)(i)(C) further demonstrates that reimbursement is distinct from subrogation.

Parties' agreement. Appellants baldly assert that such an approach is required by the "long-standing" law of New York. (Br. at 29.) In fact, their arguments rest entirely on dicta in a December 2012, unpublished, non-precedential, two-page decision from a federal appeals court, the district court decision it reviewed, and a subsequent district court case citing back to the unpublished decision. Those few decisions misstate, and are contrary to, the long-standing law of New York. Moreover, Appellants' argument is refuted by the contents of the PSA and the Prospectus Supplement.

A. For Many Years, New York Courts Have Held That Offering Documents Such As The Prospectus Supplement Cannot Be Used To Interpret Agreements Such As The PSA.

New York case law dating back many years consistently rejects the proposition that offering documents such as the Prospectus Supplement should be referenced when construing terms in securities-related agreements. In 1945, a New York state court in *Hassett v. S. F. Iszard Co.*, 61 N.Y.S.2d 451 (Sup. Ct. 1945), addressed a dispute between shareholders regarding dividend payment provisions in stock certificates. *Id*. at 452-53. The plaintiff argued that the court should consider statements in the sales prospectus to determine the meaning of those provisions. *Id.* The *Hassett* court rejected the consideration of such extrinsic evidence because there

was "nothing ambiguous or uncertain about the meaning" of the provisions in the certificates. *Id.* at 454. The court explained:

> The prospectus and advertisements used in the promotion of the sale of the preferred stock were offered in evidence by the plaintiff and excluded on objection by the defendant. This evidence might be competent in an action in fraud by a purchaser of stock to recover damages or rescind the sale, but this is not such an action. This is an action to enforce rights based on contract, in which the stock certificate constitutes the contract between the parties. The written contract is complete, definite and void of ambiguity. The evidence offered is incompetent and irrelevant on any issue involved in this case.

Id. at 455.

Similarly, in 2006 a New York state court in *Bank of New York v. BearingPoint, Inc.*, No. 600169/06, 2006 N.Y. Misc. LEXIS 2448 (Sup. Ct. 2006), rejected a defendant's argument that statements in a securities offering memorandum should be used to construe the terms of a trust indenture agreement. The court stated: "the referenced provisions of the Offering Memorandum . . . would only be considered upon finding of ambiguity in the Indenture. . . . Having found that the terms of § 5.02 are unambiguous, Bearingpoint's attempts to modify the terms of the provisions of the Indenture by referring to the Offering Memorandum is unavailing." *Id.* at *20-22.

More recently, a New York federal district court rejected an argument strikingly similar to those advanced by Appellants. In *M&T Bank Corp.*, 852 F. Supp. 2d 324, the court held that a securities offering

memorandum could not be considered in determining whether the terms of a trust indenture agreement were ambiguous. The court explained:

> [Plaintiff] does not contend that the Indenture's terms are incomplete, on their face, such that it should not be considered an integrated agreement. Rather, it urges that, because the Indenture makes reference to the final "Offering Memorandum," the OM is not extrinsic evidence, but is itself part of the agreement allegedly breached. . . .
>
> . . . .
>
> Because the Indenture appears as a complete agreement on its face, and does not rely on the OM to establish rights and obligations, it is an integrated agreement as a matter of law. Accordingly, the OM cannot be considered unless the challenged provisions [in the Indenture] are ambiguous.

Id. at 332-33. *See also Wayland Investment Fund, LLC v. Seacarriers, Inc.*, 111 F. Supp. 2d 450, 455 (S.D.N.Y. 2000) (contents of prospectus and offering circular could not be used to vary terms of exchange notes and trust indenture agreement).

B. Nothing In The PSA Suggests That Section 5.01 Should Be Read Together With The Prospectus Supplement.

In an effort to skirt the requirements of the parol evidence rule, the Appellants suggest—but never come right out and say—that the Prospectus Supplement is actually part of the Parties' agreement under the doctrine on contractual integration. (*See*, *e.g.*, Br. at 32.) Nothing in New York law or the contents of the PSA or the Prospectus Supplement supports their position.

1. There is no dispute that the Prospectus Supplement is an offering document provided by third parties to third parties.

As a threshold matter, Appellants concede that the Prospectus Supplement is not an independent contract between the Parties. (Br. at 38.) Instead, the Prospectus Supplement is an offering document used to market the certificates to investors. The federal Securities Act of 1933 defines a "prospectus" as a communication "which offers any security for sale or confirms the sale of any security . . . ." 15 U.S.C. § 77b(a)(10). The purpose of a prospectus is solicitation and disclosure to third parties. *See Greenapple v. The Detroit Edison Co.*, 618 F.2d 198, 210 (2d Cir. 1980).

In this case, the Prospectus Supplement states that Greenwich Capital Markets, Inc. is the entity offering the certificates pursuant to the Prospectus Supplement. (A-App.495.) Greenwich Capital Markets, Inc. is not a party to the PSA. (A-App.157.) The Prospectus Supplement was issued on October 3, 2006—more than a month after the date of the PSA. (A-App.495; A-App.152.)

2. The contents of the PSA and the Prospectus Supplement show that the Parties did not intend to incorporate the Prospectus Supplement into Section 5.01.

Under New York law, a written contract that is complete on its face is considered to be an integrated agreement as a matter of law. *See M&T Bank Corp.*, 852 F. Supp. 2d at 332; *see also William H. Waters, Inc. v.*

March, 269 N.Y.S. 420, 427 (N.Y. App. Div. 1934) ("[W]here the contract is complete upon its face . . . it is conclusively presumed to integrate the final intentions of the parties and may no more be extended by the inclusion of additional terms than it may be contradicted by parol."); *Battery Steamship Corp. v. Refineria Panama, S.A.*, 513 F.2d 735, 738 n.3 (2d Cir. 1975) ("[U]nder New York law a contract which appears complete on its face is an integrated agreement as a matter of law.") (citing *Higgs v. De Maziroff*, 189 N.E. 555, 557 (N.Y. 1934)). Even where a contract is only partially integrated, extrinsic evidence may not be considered to contradict or vary the contract's unambiguous terms. *See Solomon v. Van De Maele*, 250 N.Y.S.2d 772, 774 (App. Div. 1964).

Section 5.01 of the PSA is complete on its face. The section fully sets forth in lengthy detail how funds are to be distributed under the PSA and nowhere makes reference to the Prospectus Supplement.

Acknowledging the complete absence of any language in Section 5.01 suggesting that the Prospectus Supplement should be read together with the PSA, Appellants cite to two provisions of the PSA that have nothing to do with the distribution of funds. In fact, to the extent those provisions are relevant at all, they strongly suggest that Section 5.01 does not incorporate the provisions of the Prospectus Supplement.

First, Appellants cite to Section 6.02, which addresses the registration of certificates that have been transferred or exchanged by

investors. (A-App.262.) As Appellants explain, Section 6.02(d) provides that neither "the Trustee, the Certificate Registrar or the Depositor shall have any liability for transfers . . . made in violation of the restrictions on transfer described in the Prospectus Supplement." (Br. at 36 (*quoting* A-App.226).) That provision has no connection at all to the provisions in Section 5.01 governing distributions. In fact, rather than incorporating the provisions of the PSA into the Parties' contract, Section 6.02(d) does precisely the opposite: it states that Parties to the PSA will not be liable for actions that are contrary to statements in the Prospectus Supplement.

Next, Appellants cite to Section 12.01, which governs amendments to the PSA. But that section only reinforces the conclusion that the Parties did not intend to include the Prospectus Supplement as part of their agreement. Section 12.01 states that the PSA "***may*** be amended . . . to conform the terms hereof to the description thereof provided in the Prospectus [Supplement] . . . ." (A-App.292 (emphasis added).) Had the Parties intended the description of the Prospectus Supplement to control over the express terms of the PSA they would have either made such amendments mandatory ("shall" instead of "may") or expressly incorporated all of the provisions of the Prospectus Supplement by reference. Instead, the Parties left such amendments to their discretion.

Finally, the contents of the Prospectus Supplement expressly refute any notion that the Parties intended to incorporate the contents of that

document when it came to the distribution provisions at issue. The distribution provisions of the PSA are described in the section of the Prospectus Supplement titled "Description of the Certificates". That section begins with the following statement:

> The certificates will be issued pursuant to a pooling and servicing agreement. Set forth below is a description of the material terms and provisions pursuant to which the certificates will be issued. ***The following description is subject to, and is qualified in its entirety by reference to, the actual provisions of the pooling and servicing agreement. When particular provisions or terms used in the pooling and servicing agreement are referred to, the provisions and terms are as specified in the pooling and servicing agreement.***

(A-App.586.) That statement could not be clearer—the terms of the PSA control over any statements contained in the Prospectus Supplement. *See Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 948 n.21 (5th Cir. 1981) (applying New York law and rejecting argument that trust indenture for debentures should be construed together with prospectus where prospectus "warn[ed] the investor that the contractual obligations and rights that attend the Debenture are governed solely by the Indenture").

Appellants make no mention of this statement in their brief because there is no way to reconcile it with the positions they have taken in this appeal.

C. The Few Cases Cited By Appellants Do Not Support Their Position And Misstate New York Law.

The three recent, aberrant decisions cited by Appellants cannot save their appeal. All of those cases build on one another in misstating New York law.[9]

1. *Wells Fargo I* did not address the issue in dispute here.

The first of these decisions is *Wells Fargo I*. The district court in that case addressed a dispute involving the distribution provisions of a pooling and servicing agreement. Unlike what Appellants ask the Court to do here, the court in *Wells Fargo I* did not consider the pooling and servicing agreement and the prospectus supplement to be part of one integrated contract. Nor did the court use the prospectus supplement to interpret the provisions of the pooling and servicing agreement. In fact, there is no discussion in the case about whether the PSA was an integrated

[9] To create the appearance of additional legal support for their position, Appellants cite to other decisions that have no bearing on this case. *See DaCruz-Crossely v. U.S. Bank Nat'l Ass'n*, 926 F. Supp. 2d 405, 407 & nn. 6, 7 (D. Mass. 2013) (foreclosure action in which plaintiff cited to prospectus supplement in complaint and court rejected plaintiff's position); *Smith v. Litton Loan Servicing, LP*, No. 10-14700, 2012 U.S. Dist. LEXIS 58656 (E.D. Mich. Apr. 26, 2012) (quiet title action for real property; plaintiff cited to prospectus supplement for support and court rejected plaintiff's position); *MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC*, 927 N.Y.S.2d 517, 527-28, 532 (Sup. Ct. 2011) (claims for breach of contractual representation and warranty that prospectus and prospectus supplement did not contain untrue statements); *Steed Fin. LDC v. Nomura Sec. Int'l, Inc.*, No. 00 Civ. 8058, 2001 U.S. Dist. LEXIS 14761 (S.D.N.Y. Sep. 20, 2001) (securities fraud case involving no issues of contract interpretation).

agreement or whether extrinsic evidence should be considered for any purpose.

Instead, the court found that the terms of the pooling and servicing agreement were "unambiguous." *Id.* at 194. To the extent *Wells Fargo I* relied on descriptions in the prospectus supplement for the transaction, it was to show that the court's reading of the unambiguous terms of the pooling and servicing agreement were *consistent* with the prospectus supplement. *See*, *e.g.*, *id.* at 195. Nothing in the decision suggests that any party objected to the court using the prospectus supplement in that manner.

In short, the *Wells Fargo I* did not address the issues in dispute here. It is merely a fact-specific example of a court construing a pooling and servicing agreement and reviewing the provisions of a prospectus supplement.

2. *Wells Fargo II* is not binding precedent and misstates New York law.

The second decision relied on by Appellants, *Wells Fargo II*, is the appeal of the district court's decision in *Wells Fargo I*. *Wells Fargo II* is a two-page "summary order" which, under the Second Circuit's local rules and internal operating procedures, has "no jurisprudential purpose" and no precedential value. *See* Second Circuit Local Rule 32.1.1(a); IOP 32.1.1.

In a two-sentence paragraph in its decision, the Second Circuit suggested that it was permissible for the district court to have considered

the prospectus supplement when interpreting the pooling and servicing agreement because, in its view, New York law permits a court to "consider[] all writings forming part of a single transaction." 504 Fed. Appx. at 40. The Second Circuit provided no discussion or analysis to support that statement. It merely cited to an earlier Second Circuit decision. *See id*. (citing *This Is Me, Inc. v. Taylor*, 157 F.3d 139 (2d Cir. 1998)).

As an initial matter, the Second Circuit's statement of the law was dictum for two reasons. First, the Second Circuit found the pooling and servicing agreement to be unambiguous and did not refer to the contents of the prospectus supplement anywhere in its decision. *See id*. Second, the court pointed out that the appellant itself had asked the district court to consider the prospectus supplement when interpreting the PSA, *see id.* ("as Assured itself asked the district court to do below"), thus precluding the appellant from contesting that issue on appeal.

Regardless, the Second Circuit's stray comment about New York law cannot be read in the sweeping manner Appellants suggest. In support of its statement that a court may consider "all writings forming part of a single transaction," the *Wells Fargo II* court cited to *This Is Me, Inc.*, 157 F.3d 139. That case involved three written contracts, *see id.* at 143, one of which stated that it was expressly intended to be read in conjunction with another. *See id.* at 144-145. As discussed above, nothing in Section 5.01

of the PSA suggests that the Parties intended that provision to incorporate extrinsic documents as was done in *This Is Me*.

3. *In re American Home Mortg. Inv. Trust 2005-2* improperly relied on the dicta from Wells Fargo II.

In the third decision Appellants rely on, *In re American Home Mortg. Inv. Trust 2005-2*, No. 14 Civ. 2494, 2014 U.S. Dist. LEXIS 111867 (S.D.N.Y. July 24, 2014), the stray comment in *Wells Fargo II* took on a life of its own. The district court in that case cited exclusively to the *Wells Fargo I* and *Wells Fargo II* decisions to support its assertion that "courts reading one document from a deal will consider other documents from the same deal in deciding whether it is ambiguous." *Id*. at *50. That statement is directly contrary to New York law as articulated by that state's highest court. *See W.W.W. Assocs.*, 566 N.E.2d at 642 ("It is well settled [in New York] that extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear on its face."). *See also R/S Assocs. v. N.Y. Job Dev. Auth.*, 771 N.E.2d 240, 242 (N.Y. App. Div. 2002) (same). The *In re American Home Mortgage* decision plainly misstates the law of New York and cannot be a basis for reversing the Rehabilitation Court's decision.

CONCLUSION

For all of the reasons set forth above, the decision of the Rehabilitation Court should be affirmed.

Dated this 8th day of December, 2014.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced using the following font:

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