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

REHABILITATOR'S NOTICE OF MOTION AND MOTION TO QUASH UNAUTHORIZED DEPOSITION NOTICED BY THE CARVAL HOLDERS

NOTICE OF MOTION

TO: All Parties-in-Interest

PLEASE TAKE NOTICE that the Commissioner of Insurance of the State of Wisconsin, as the court-appointed Rehabilitator of the Segregated Account of Ambac Assurance Corporation, has moved the Court to quash the unauthorized deposition of Ambac Assurance Corporation noticed by a group of investors who have identified themselves as the "CarVal Holders". The grounds for this motion are set forth below.

The motion will be heard on _____ at _____ before the Honorable Richard G. Niess at the Dane County Courthouse, 215 South Hamilton Street, Madison, Wisconsin.

MOTION

The Commissioner of Insurance of the State of Wisconsin, as the court-appointed Rehabilitator ("Rehabilitator") of the Segregated Account of Ambac Assurance Corporation, moves pursuant to Wis. Stat. § 645.05(1)(k), for an order quashing the deposition of Ambac Assurance Corporation ("Ambac") noticed on February 26, 2016 by a group of investment funds who refer to themselves as the "CarVal Holders" and scheduled to take place on March 8, 2016. Both this Court and the Court of Appeals have previously ruled that non-parties to these rehabilitation proceedings, such as the CarVal Holders, do not have the right to conduct discovery. The CarVal Holders are, or should be, well-aware of that fact. Their service on Ambac of an expansive notice of deposition in disregard of those orders is an abuse of the rehabilitation proceedings. Moreover, it is a transparent, self-interested effort by the CarVal Holders to interfere with the Rehabilitator's management of the Segregated Account and pressure the Rehabilitator to increase the Interim Payment Percentage, which is the subject of a separate, unfounded motion by the CarVal Holders that the Rehabilitator will address in a response to be filed at a later date. The grounds for this motion are set forth below:

1. On Friday afternoon, February 26, 2016, the CarVal Holders sent counsel for the Rehabilitator and Ambac a "Notice of Rule 804.05(2)(e), Wis. Stats. Deposition of Ambac Assurance Corporation" ("Notice"). Counsel for the CarVal Holders did not contact counsel for the Rehabilitator or Ambac prior to sending the Notice. The Notice calls for the deposition to take place this Tuesday, March 8, 2016 at the New York City offices of the CarVal Holders' counsel. A copy of the Notice is attached as **Exhibit A** to the Affidavit of Jeffrey A. Simmons filed with this Motion.

2. The Notice demands that Ambac provide corporate designees to testify about the following nine topics:

i. "Management's criteria for the purchase of Ambac-insured securities in calendar year 2015."

ii. "Management's strategy, criteria and plans to continue purchasing Ambac-insured securities using [Ambac's] capital as a strategic priority, as stated by AFGI CEO Nader Tavakoli on AFGI's Fourth Quarter 2015 Earnings Call on February 19, 2016."

iii. "Management's strategy, criteria and plans for investment portfolio allocations at AAC, including plans for the $995 million cash settlement from J.P. Morgan Chase."

iv. "Management's rationale for the current and past state of AAC's investment portfolio, including, but not limited to, AAC's allocation of risk across investment grades."

v. "Management's future plans and strategy regarding AAC's investment portfolio, including, but not limited to, how it plans to allocate risk across investment grades."

vi. "What AFGI CEO Nader Tavakoli meant when, on AFGI's Fourth Quarter 2015 Earnings Call on February 19, 2016, he said: 'it's obvious that asset management has to be an important strategic part of what we do because of the tail on our book. And so, as long as we're sitting here, managing this liability book, we're going to have to manage a fair amount of assets. And I think the strategic deployments of that capital to leverage our abilities is going to be critical to that medium-term and longer-term vision for the company.'"

vii. "Management's communications with the Rehabilitator concerning the Rehabilitator's current plans with regard to distributions to Holders of Segregated Account obligations, and Management's understanding of those plans."

viii. "Management's communications with the Rehabilitator concerning its plans with regard to non-distribution alternatives including, but not limited to, tender of Ambac-wrapped securities, recapitalizations, or offers to policyholders to exchange their claims for new securities.

ix. "Management's long-term plan for the operation (including any contemplated acquisition strategy), liquidation, sale or other disposition of AAC."

3. The Notice follows on the heels of the CarVal Holders' February 11, 2016 motion demanding that the Rehabilitator show cause why the Interim Payment Percentage – the percentage of Segregated Account policy holder claims currently being paid in cash – should not immediately be increased from 45% to more than 83.6%. The Rehabilitator will address that motion in a separate brief. It suffices for now to say that the Rehabilitator believes the CarVal Holders' demand ignores the interests of other affected policyholders and beneficiaries, especially those whose claims may not materialize until many years in the future.

4. Despite the name they have given themselves, the CarVal "Holders" are not holders of insurance policies allocated to the Segregated Account. Instead, they are investors in securities insured by policies that have been allocated to the Segregated Account. (*See* Jan. 24, 2011 Decision and Final Order Confirming the Rehabilitator's Plan of Rehabilitation, With Findings of Fact and Conclusions of Law ¶ 146 ("[T]he testimony at the Hearing demonstrated that none of these [investment funds] are 'policyholders' of Ambac or the Segregated Account. Their description of themselves as 'policyholders' in this proceeding is misleading and inaccurate.")). The policyholders are generally trustees – typically large banks – that administer the funds that are ultimately disbursed to investors. All of the most significant trustee policyholders have appeared in these proceedings.

5. The law is crystal-clear that in these rehabilitation proceedings -- which are governed by Wis. Stat. ch. 645, Wis. Stats., and not by the rules of civil procedure -- non-parties such as the CarVal Holders do not have a right to take discovery. This Court

has never permitted discovery in this proceeding, despite multiple requests at different times from interested parties to take depositions of the Office of the Commissioner of Insurance ("OCI") and Ambac.

6. This Court first explained the reasons for denying such requests in a decision issued on May 27, 2010, just two months after this proceeding began:

> Movants' request for discovery is also denied. As policyholders, Movants do not have standing as parties to seek discovery in this proceeding. Moreover, even if Movants were parties and there were a basis for them to seek discovery in this proceeding, documents relating to OCI's regulatory decision-making are statutory[il]y privileged under Wisconsin law. *See* Wis. Stat. §§ 601.465(1m)(a), (2m)(a). Finally, the discovery Movants seek would be futile because the scope of the Court's review of [OCI's] decision-making is very narrow . . . . As a matter of law, policyholders such as Movants cannot challenge the wisdom of OCI's decision-making, so long as OCI had a rational basis for its regulatory choices.

(May 27, 2010 Findings of Fact and Conclusions of Law Regarding Motions of Certain RMBS Policyholders and Certain LVM Bondholders, Concl. of Law ¶ 8 (pg. 16-17).)

7. The Court of Appeals affirmed this Court's denial of discovery, holding that: (1) non-parties (such as the CarVal Holders here) have no right to take discovery in any proceeding; and (2) there is no right to take discovery in rehabilitation proceedings in any event, because the rules of civil procedure do not apply to these types of proceedings. The Court of Appeals explained:

> [Section] 804.01(2)(a) limits the right to discovery to "parties" and, as the circuit court correctly determined, the interested parties are not "parties" within the meaning of the statute. Because the interested parties are not parties within the meaning of the discovery statute, we conclude

> that the circuit court properly denied the interested parties' requests for discovery.
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> . . . .
>
> [W]e agree with the circuit court that the interested parties are not entitled to discovery in this rehabilitation proceeding. . . . The rules of civil procedure, including rules pertaining to discovery, 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 v. Wells Fargo Bank, 2013 WI App 129, ¶¶ 111, 113, 351 Wis. 2d 539, 841 N.W.2d 482.

8. The rationale for these holdings is especially strong given the expansive nature of this proceeding. As of December 31, 2015, there were approximately 370 policies allocated to the Segregated Account, insuring approximately $15.4 billion net par value of outstanding obligations, and thousands of investors with interests in those obligations. If every entity or person with some interest in an obligation insured by a Segregated Account policy were to obtain the right to obtain discovery, these proceedings would become completely unmanageable.

9. In addition, while the Notice of Deposition is improper as a whole, topics 7 through 9 are also improper because they seek information protected from disclosure by the statutory privilege that applies to the interactions of OCI with the insurers it regulates. Section 601.465(1m) grants OCI the right to prohibit parties from disclosing information

obtained, produced, or created during the course of OCI's inquiries of an insurer. The privilege may only be waived by the express, written consent of the Commissioner. Wis. Stat. § 601.465(2m)(a). The purpose of the statutory privilege is to ensure that insurers will freely share with OCI confidential business information necessary for the effective regulation of those insurers. Topics 7 through 9 of the Notice seek information regarding the Rehabilitator's communications with Ambac management relating to the future of both the Segregated Account and Ambac as a whole. The CarVal Holders' attempt to depose Ambac management on those topics is an effort to interfere with the Rehabilitator's and OCI's regulation of the Segregated Account and Ambac to further their own agenda. The CarVal Holders did not bother to ask the Commissioner to waive the privilege as to those topics and the Commissioner has no intention of doing so.

10. The CarVal Holders have no excuse for ignoring the law discussed above. Representatives of the CarVal Holders have been present at many rehabilitation court hearings during the past several years. The two law firms representing the CarVal Holders have both appeared in these proceedings on behalf of multiple clients since 2010. Indeed both of those firms, and some of the individual attorneys whose names appear on the Notice, are specifically identified as counsel of record in the published version of the Wisconsin Court of Appeals decision that controls this motion to quash, *Nickel v. Wells Fargo Bank*, 2013 WI App 129, 351 Wis. 2d 539, 841 N.W.2d 482, a copy of which is attached to the affidavit of Jeffrey A. Simmons filed with this motion for the Court's convenience. The CarVal Holders' attempt to take a corporate deposition of Ambac is either pure gamesmanship intended to harass the Rehabilitator as part of their effort to force an increase in the Interim Payment Percentage, or is intended to gain access to

Ambac's and the Rehabilitator's confidential business information for other improper purposes.

11. Section 645.06, Wis. Stats., gives this Court the authority to award the Commissioner "such costs and other expenses of litigation . . . as justice may require, without regard to other limitations otherwise prescribed by law." It would not be inappropriate to award the Commissioner, as Rehabilitator, the attorney fees and costs he has incurred in bringing this motion and appearing at any related hearing. The CarVal Holders know, or have no excuse for not knowing, that their Notice is not permitted under the rulings of this Court and the Court of Appeals. And their motive for serving the Notice is a transparent effort to interfere with the Rehabilitator's work to serve their own interests. Nevertheless, the Rehabilitator is not seeking an award of his attorney fees and costs relating to this motion at this time. Instead, the Rehabilitator requests only that the Court admonish the CarVal Holders that any further improper actions may result in such an award.

CONCLUSION

For the reasons stated above, the Rehabilitator respectfully requests that the Court grant this motion to quash the Notice of Deposition of Ambac Assurance Corporation served by the CarVal Holders.

Dated: March 2, 2016

FOLEY & LARDNER LLP

By: _____

Jeffrey A. Simmons, SBN 1036747
Matthew R. Lynch, SBN 1066370

150 East Gilman Street
Post Office Box 1497
Madison, Wisconsin 53701
Telephone: (608) 257-5035
Facsimile: (608) 258-4258

Attorneys for Commissioner of Insurance of the State of Wisconsin as Rehabilitator of the Segregated Account of Ambac Assurance Corporation