STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

In the Matter of the Rehabilitation of: Case No. 10-CV-1576

Segregated Account of Ambac Assurance Corporation

RESPONSE TO THE REHABILITATOR'S MOTION TO CONFIRM AND DECLARE THE NATURE OF THESE PROCEEDINGS

This opposition is filed on behalf of entities that own privatized housing on several military bases ("MHPI Owners")[1]—each of which is a public-private partnership between the United States Army and a private developer. Each MHPI Owner purchased bond insurance and a related surety bond from Ambac Assurance Corporation ("Ambac," also referred to as the "General Account") in connection with a loan to finance the construction and development of housing for military families. It is undisputed that ***all*** of the insurance policies and surety bonds at issue are in the General Account, not in the Segregated Account that is subject to the jurisdiction of this Court.

Through its July 15, 2016 "Motion to Confirm and Declare the Nature of these Proceedings," the Rehabilitator seeks an Order purportedly clarifying "the nature of these proceedings" and "certain determinations already made in the Rehabilitation Order, the Confirmation Order, or the decision of the Court of Appeals affirming the Confirmation Order." (Motion at 2, 8.) Entry of such an order would be highly unusual under any circumstances; and

[1] Carlisle/Picatinny Family Housing L.P.; Fort Bliss/White Sands Missile Range Housing L.P.; Fort Detrick/Walter Reed Army Medical Center Housing LLC; Stewart Hunter Housing LLC; Monterey Bay Land LLC; Monterey Bay Military Housing LLC; Bragg Communities LLC; Polk Communities LLC; Rucker Communities LLC; Meade Communities LLC; Riley Communities, LLC; Fort Lee Commonwealth Communities, LLC; and Fort Leavenworth Frontier Heritage Communities, II, LLC.

here, because there is no dispute about the Court's prior orders pending before this Court, the request for such an advisory opinion is also procedurally improper. *Constand v. Cosby*, ___ F.3d ___, No. 15-2797, 2016 WL 4268941, at *5 (3d Cir. Aug. 15, 2016) ("Given that Cosby expressly requests us to provide a basis ***to make an argument to other courts***, he also requests an advisory opinion." (emphasis added)).

Instead, the Rehabilitator seeks an unprecedented advisory order that can be used ***in other courts***, including the Superior Court of the State of California, County of Monterey, to tip the scales in favor of Ambac and against the MHPI Owners. While the Rehabilitator tells this Court that it is not asking this Court to decide whether an "Ambac Default" has occurred based on the General Account contracts at issue in those pending cases (Motion at 6 ("These issues are to be decided by the courts where the MHPI Cases are pending.")), counsel for Ambac (who works directly for the Rehabilitator) has told the Monterey Court precisely the opposite—stating that any order entered by this Court will be ***determinative*** of the default issue currently pending before the Monterey Court. (Ex. 1, 8/18/16 Hr'g Tr. at 9:10-14 ("[W]e will be arguing that the decision in Wisconsin about how to structure the rehabilitation of the segregated account is determinative of the issue.").) Thus, Ambac and the Rehabilitator are advancing contrary positions in different courts in order to gain an advantage over the MHPI Owners.[2]

Equally troubling, the requested Order seeks ***new*** factual findings—not found in any of this Court's prior orders—which are unsupported by any record facts. For example, the Rehabilitator asks the Court to find that "it would run counter to OCI's stated purpose in

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[2] The Monterey Court ordered limited discovery in large part given the contradictory positions taken by Ambac and the Rehabilitator on this issue. (Ex. 1, 8/18/16 Hr'g Tr. at 4: 15–18 ("THE COURT: . . . And before I read [Ambac's] pleadings, I didn't think that anything Wisconsin had, did, have anything to do with what this court is going to do in terms of looking at that contract."); 8:7–12 ("THE COURT: . . . If the Wisconsin court is going to make a decision that is going to be either binding or highly influential in the decision I make, then I think you are arguing their case. And I think you're arguing that that court should have as much information as possible before it decides this issue.").)

adopting this measured approach to rehabilitation if the existence of these Proceedings is nonetheless deemed to trigger contractual defaults linked to the commencement of a rehabilitation of Ambac, the entry of an order of relief against Ambac by this Court, or other measures adjunct to such a rehabilitation, ***such as the appointment of a rehabilitator for Ambac, the taking of possession of Ambac's assets***, and the appointment of an official to manage the affairs of Ambac." (Proposed Order at ¶ 10 (emphasis added).) The Rehabilitator cites ***no*** facts in support of this extremely broad if not ambiguous finding. That is not surprising, as the Rehabilitator testified to the contrary in convincing this Court to approve its Plan. (Ex. 2, 11/16/2010 Confirmation Hr'g Tr. at 71:13-21.) What's more, as Ambac admitted in deposition, such "clarifications" would be highly misleading given the actual facts that exist today in that nearly two-thirds of Ambac's policies have expired since the Plan was confirmed (as is made plain on Ambac's website).

Thus, the Rehabilitator, on Ambac's behalf, seeks to obtain new and inaccurate factual findings—without discovery or any evidentiary hearing—to use in unrelated cases involving policies in the General Account over which this Court has no jurisdiction. This end-run on the jurisdiction of other state courts that have jurisdiction to decide an Ambac Default is highly improper on many grounds. *Doe by Doe v. Roe*, 151 Wis.2d 366, 378 (Ct. App. 1989) (affirming where trial court declined to rule on substantive motion and "cit[ed] the lack of an adequate record on which to make a finding and the need for discovery on the question.").

Factual Background

In 1996, Congress established the Military Housing Privatization Initiative ("MHPI") to help improve the condition of the housing provided to soldiers and their families. (Ex. 3, *Monterey Bay Military Housing LLC, and Monterey Bay Land LLC v. Ambac Assurance Corp.*, Pls.' Compl. at ¶ 1 ("Monterey Compl.").) Private entities entered into partnerships with the

Army in order to develop, construct and maintain housing at military bases around the country; for example, at the Presidio of Monterey, Monterey Bay Military Housing LLC and Monterey Bay Land LLC are the MHPI Owners, in which the Army is a 49% member and an affiliate of Clark Realty Capital LLC is the 51% member. (*Id.* at ¶ 17.) The MHPI Owners at each base took out loans to finance the large scale construction and development of housing. (*Id.* at ¶ 2.) At 13 Army bases, including Monterey, the MHPI Owners purchased bond insurance and a surety bond that guarantees one year of principal and interest on the loan from Ambac. It is undisputed that these policies and surety bonds remain in the General Account. (Mot. at ¶ 17 (the Rehabilitator's Motion "concerns policies allocated to the General Account").)

Under the terms of the loan documents for each of these projects ("MHPI Loan Documents"), the surety bond was required to be issued by an entity that maintained specific credit ratings. (*E.g.,* Ex. 3, Monterey Compl. at ¶ 4; Ex. 4, 10/1/03 Monterey Serv. and Lockbox Agmt. at § 4.17.)[3] As this Court is well aware, Ambac's credit ratings were downgraded in 2008, causing the surety bonds that Ambac sold to the MHPI Owners to fall below the required ratings. (Ex. 3, Monterey Compl. at ¶ 4.) Ambac now claims that as a result of its own credit downgrade, it has the right to force the MHPI Owners to replace the surety bond or to cash fund an account in the amount of the surety bond. (*Id.* at ¶ 5.) At Monterey alone, this would result in placing $27.6 million into an account to benefit Ambac, as the bond insurer, depriving the Monterey project of those funds to construct and maintain housing for the remaining 37 year life of the project. (*Id.* at ¶¶ 5–6.) In total, Ambac seeks to force the MHPI Owners at over a dozen projects to cash fund over $200 million—which would then be dead money, unable to be used

[3] Citations to MHPI Project Documents are to the governing documents for the Presidio of Monterey Project ("Monterey Project"). Unless otherwise noted, the Project Documents for the other MHPI Projects that are in litigation with Ambac contain either identical or substantially identical provisions.

for soldiers' housing. Ambac is demanding this cash funding because it separately has purchased MHPI bonds relating to these projects and hopes to directly profit from requiring the projects to cash fund a reserve account, on the theory that the bonds will then be more highly rated and will increase in value. In short, Ambac hopes to profit from its own financial failure. (*E.g.*, Ex. 3, Monterey Compl. at ¶¶ 3, 7.)

In 2015, after waiting nearly ***7 years*** to enforce its alleged rights, Ambac demanded that the MHPI Owners immediately cash fund and threatened suit. (*E.g.*, Ex. 3, Monterey Compl. at ¶¶ 33–37.) The resulting MHPI Litigation—which includes seven pending lawsuits including the suit in Monterey[4]—directly involves, among other determinative issues, whether an "Ambac Default"[5] has occurred under the terms of the MHPI Loan Documents. If an Ambac Default has occurred, Ambac loses certain consent rights, as well as any right to seek to enforce a right to cash fund or replace the surety bond.[6] Ambac does not lose any premiums or other income and is not required to make any bond payments due to an Ambac Default under the MHPI Loan Documents. Thus, the MHPI Owners have only asserted an Ambac Default in ***direct response*** to Ambac's threats, made in order to force cash funding of the debt reserve accounts so that Ambac

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4 *Monterey Bay Military Housing LLC and Monterey Bay Land LLC v. Ambac Assurance Corp.*, No. 15CV000599, Superior Court of the State of California, County of Monterey; *Ambac Assurance Corp. v. Carlisle/Picatinny Family Housing Limited Partnership*, No. 2015-6348, In the Court of Common Pleas Cumberland County, Pennsylvania; *Ambac Assurance Corp. v. Fort Bliss/White Sands Missile Range Housing LP*, No. 2016DCV0094, In the District Court of El Paso County Texas, 205th Judicial District; *Meade Communities LLC v. Ambac Assurance Corp.*, No. C-02-CV-15-003745, In the Circuit Court for Anne Arundel County, Maryland; *Ambac Assurance Corp. v. Riley Communities, LLC*, No. 2016-CV-000026, In the District Court of Shawnee County, Kansas; *Ambac Assurance Corp. v. Fort Lee Commonwealth Communities, LLC*, No. CL16000072-00, In the Circuit Court for the City of Roanoke, Virginia; *Ambac Assurance Corp. v. Fort Leavenworth Frontier Heritage Communities, II, LLC*, No. 2:15-cv-9596-DDC-JPO, United States District Court for the District of Kansas.

5 At Monterey, the defined term is "Ambac Default." Provisions in loan documents at some other projects use the defined term "Credit Enhancer Default." For simplicity, this response refers to an "Ambac Default" because the definition of both terms is virtually identical.

6 The MHPI Owners have also pled that Ambac's right to force cash funding or replacement of the surety is barred by (among other arguments) the respective state statute of limitations and the equitable doctrine of laches. (*E.g.*, Ex. 3, Monterey Compl. at ¶ 9.) Those issues are not relevant to the pending Motion.

can execute its scheme to separately profit on MHPI bond holdings it has recently purchased. (*E.g.*, Ex. 3, Monterey Compl. at ¶¶ 3, 7.)

The MHPI Ambac Default triggers, carefully negotiated by the parties, are unique and more easily met than Ambac's typical default trigger. Sections (c)(i) and (c)(ii) of the default language triggers an Ambac Default if:

> "(c) a court of competent jurisdiction or another competent regulatory authority enters a final and nonappealable order, judgment or decree (i) ***appointing a custodian, trustee, agent or receiver for Ambac or for all or any material portion of its property*** or (ii) ***authorizing the taking of possession by a custodian, trustee, agent or receiver of Ambac (or taking possession of all or any material portion of Ambac's property)***." (Ex. 5, Monterey Grantor Trust Agmt. at 2 (emphasis added).)

Ambac argues that the Rehabilitation Proceedings have not caused an Ambac Default because the entire company was not placed into rehabilitation, but rather the rehabilitation proceedings before this Court involve only the Segregated Account. (*E.g.*, Ex. 6, 3/11/16 Ambac's Resp. to Pls.' Special Interrog. at 2-4 (providing Ambac's position that "the [Rehabilitation] Order did not authorize the taking of a material portion of Ambac's property").) But it has failed to explain—as has the Rehabilitator—why an Ambac Default has not occurred under the specific (c)(i) and (c)(ii) trigger language in the MHPI Loan Documents. This issue is currently pending before the Monterey Court and the other courts in which the MHPI Litigation is pending; this issue is not pending before this Court.

Thus, by design and in order to save triggers on a myriad of other policies, the Rehabilitator's Plan that was approved by this Court depends on this Court having no jurisdiction over the policies at issue in the pending cases. Somewhat remarkably, in an unprecedented effort to skirt the jurisdiction of the California, Maryland, Pennsylvania, Texas, Virginia, and Kansas state courts deciding this issue, Ambac now would have the Court improperly attempt to influence other state courts on issues where it admittedly and by design has no jurisdiction.

(Ex. 1, 8/18/16 Hr'g Tr. at 7:1–3 ("And what we then say to this court is this court should follow what the Wisconsin court did.").) The Rehabilitator's Proposed Order includes factual findings regarding two key issues: (1) whether the Rehabilitator and this Court considered the ***specific trigger language*** in the MHPI Loan Documents in structuring the rehabilitation (*see* Proposed Order at ¶ 10 ("[I]t would run counter to OCI's stated purpose in adopting this measured approach to rehabilitation if the existence of these Proceedings is nonetheless deemed to trigger contractual defaults linked to … other measures adjunct to such a rehabilitation, such as the appointment of a rehabilitator for Ambac, the taking of possession of Ambac's assets, and the appointment of an official to manage the affairs of Ambac.")); and (2) whether a finding of an Ambac Default under the specific language of the MHPI Loan Documents would result in "***collateral damage***" to Ambac because it would trigger defaults under other policies with similar language. (*See* Proposed Order at ¶¶ 6–7 ("OCI concluded that a full rehabilitation of all of Ambac 'could have triggered costly defaults' in many of these contracts, which would cause 'substantial losses' that have been referred to as 'collateral damage' in these Proceedings. . . . Thus, OCI sought an approach that could address Ambac's acute financial challenges 'in a manner that would not trigger covenants and cause defaults in thousands of Ambac policies.'").)

Ambac wants such an order because it intends to intimidate these courts into believing that a finding of a defined Ambac Default under the MHPI Loan Documents will result in a catastrophic financial risk to Ambac. (Ex. 1, 8/18/16 Hr'g Tr. at 6:13-22 ("Ambac will argue to the [Monterey] court . . . that all it needs to do to decide [the Ambac Default issue] is to see that the court in Wisconsin was very concerned about the possibility that provisions like these default provisions here in any contract could destroy the company as a whole, could cause all kinds of ripple damages . . . .").)

Even if this were based in fact (and it is not), it is wholly irrelevant to whether an Ambac Default has occurred under the plain terms of the MHPI Loan Documents. The issue of whether there has been an Ambac Default is a straightforward question of contractual interpretation. What OCI hoped to achieve through the rehabilitation proceedings is irrelevant to this inquiry. *E.g.*, *People v. Int'l Fid. Ins. Co.*, 185 Cal. App. 4th 1391, 1396 (2010) ("The basic goal of contract interpretation is to give effect to the ***parties' mutual intent at the time of contracting***." (emphasis added)).

What's more, as discussed below, there is nothing in the factual record before this Court that could support finding either that the specific (c)(i) or (c)(ii) trigger language at issue was considered at the time the rehabilitation was structured or confirmed, or that any analysis was done regarding the risk of collateral damage (including for example how many other policies contain such language, and what the consequences of default were under any such policies). (*E.g.*, Ex. 7, 1/24/11 Final Order Confirm. Rehab. at ¶ 52 (discussing other specific triggers without any discussion of MHPI Loan Document default triggers).) The Rehabilitator and the Court instead recognized that even as structured to avoid a full rehabilitation, they could not "craft [an injunction] that would affect and enjoin all of those covenants and triggers." (Ex. 2, 11/16/2010 Confirmation Hr'g Tr. at 71:13-21.)

The MHPI Owners requested discovery, or alternatively answers to written questions, on these discrete issues from the Commissioner, but the Commissioner refused. (Ex. 8, 7/25/16 D. Welch Ltr. to J. Simmons; Ex. 9, 8/1/16 J. Simmons Ltr. to D. Welch ("The Rehabilitator does not agree to the taking of such discovery as he does not believe any discovery is necessary or relevant for the Court to resolve the pending motion.").) Thus, in order to determine whether there was any factual support for the findings sought, the MHPI Owners sought the deposition of

a corporate representative of Ambac related to the effect a default under the MHPI Loan Documents would have on Ambac. Ambac likewise refused discovery on this issue and claimed a privileged shield over any analysis done of whether there were policies with similar (c)(i) and (c)(ii) triggers and whether a default under such policies would cause "collateral damage." (Ex. 10, 8/12/16 Ambac Resp. to Not. of P.M.K. Dep. and Request for Documents.) The Monterey Court granted the Plaintiffs' motion to compel after Ambac conceded that it intended to use any order entered by this Court to influence the outcome in the Monterey proceedings. (Ex. 1, 8/18/16 Hr'g Tr. at 6:13-22.)

Ambac's representative, Cathleen Matanle, testified on September 23, 2016. She was not able to provide a single fact in support of the findings described above. First, she could not point to ***any*** specific policies that would result in "collateral damage" if a court found that Ambac was in default under the (c)(i) or (c)(ii) triggers in the MHPI Loan Documents. (Ex. 11, 9/23/16 Dep. Tr. at 88:8–90:9.) She further testified that Ambac had not "ever done an analysis of the damage to Ambac potentially if there was a (c)(i) or (c)(ii) default." (*Id.* at 93:6–10.) Nor did Ambac take any steps to track or categorize the types of default language that is found in various insurance policies or which policies containing such language if any others were still operative. (*Id.* at 28:3–10.) And, to the extent that Ambac has performed any such analysis at any time, Ambac continued to assert that such analysis is privileged. (*Id.* at 66:1–66:23.) In fact, Matanle admitted that since the 2011 Plan confirmation, nearly two-thirds of the policies in the General Account have since expired. (*Id.* at 19:24–20:3 ("Q: So the number of insurance policies has run down something like two thirds since March of 2010? A: Yes.").)

Argument

A. The Proposed Order Sought By The Rehabilitator Is Unprecedented and Procedurally Improper.

The instant motion is procedurally improper for three independent reasons. First, it seeks an improper advisory opinion as there is no dispute pending before this Court. Second, it seeks an order relating to policies that are outside the jurisdiction of this Court, which Ambac concedes it intends to use to try to interfere with the jurisdiction of six other state courts. Finally, it seeks factual findings that are unsupported by the factual record before the Court, which are false as of today, all without any evidentiary hearing.

1. The Motion Seeks An Improper Advisory Opinion.

The Rehabilitator does not—and cannot—suggest that there is any dispute pending before this Court that requires adjudication. This alone mandates denial of the Motion. Wisconsin law is in accord with other jurisdictions in uniformly recognizing that courts cannot provide guidance to parties in the absence of a ripe dispute. *Am. Med. Servs., Inc. v. Mut. Fed. Sav. & Loan Ass'n*, 52 Wis. 2d 198, 203 (1971) ("Advisory opinions should not be given under the guise of a declaration of rights."); *Constand*, 2016 WL 4268941, at *5 ("Given that Cosby expressly requests us to provide a basis ***to make an argument to other courts***, he also requests an advisory opinion." (emphasis added)); *Miller v. F.C.C.*, 66 F.3d 1140, 1145 (11th Cir. 1995) ("By asking this court to decide what another court should do in a future case, petitioners are posing a hypothetical question, the answer to which would be an advisory opinion."); *Deep v. Boies*, 493 F. Supp. 2d 88, 90 n.2 (D. Me. 2007) ("Rendering an opinion on the effect of my order on a proceeding before a New York state court would be an impermissible advisory opinion."); *Amgen Inc. v. Sandoz Inc.*, No. CV161276SRCCLW, 2016 WL 3965192, at *6 (D.N.J. July 22, 2016) ("Amgen's cites to pending cases in other courts indicate that it is seeking

expansive relief from this Court that would in effect amount to an advisory opinion. The Court declines to engage in such a practice.").

Nor are Wisconsin Courts willing to provide "clarification" of prior orders when there is no ripe dispute before the court. *Commerce Bluff One Condo. Ass'n, Inc. v. Dixon*, 332 Wis. 2d 357, 378 (Ct. App. 2011) (rejecting request to clarify trial court's order in a manner that would determine potential future disputes because "[w]e do not give advisory opinions" and clarification would not decide any issue then before the court). *See also Estate of Mapes v. Moore*, No. CIV. A. 95-2294-GTV, 1997 WL 49145, at *1 (D. Kan. Jan. 24, 1997) ("What plaintiffs essentially seek is an advisory opinion of how the court will treat plaintiffs' future pleadings. The court will address such matters only when confronted with a matter ripe for adjudication."). The relief sought here is inconsistent with settled Wisconsin law and is procedurally improper.

Any order purporting to affect policies in the General Account further would run counter to the Court of Appeals' prior rulings in this matter. In *In re Ambac Assur. Corp.*, 351 Wis. 2d 681 (Ct. App. 2013), when a reinsurer under a policy allocated to the Segregated Account sought to exercise certain contractual rights, the court ruled that the Injunction Order could restrict these rights because the policy was in the Segregated Account. But the court also ruled that these rehabilitation proceedings ***do not*** affect contractual rights in policies allocated to the General Account: "If [the reinsurer] were seeking a ruling on its obligations under the reinsurance contracts to reimburse Ambac for claims arising from policies ***other*** than those in the segregated account, we would agree that there was nothing in the arbitration exclusion clauses, the injunction, or the rehabilitation statutes that would bar arbitration of the dispute in New York." *Id.* (emphasis added). Despite this clear ruling, the Rehabilitator now seeks an order expanding

the scope of these proceedings in order to affect litigation related to policies in the General Account.

2. The Proposed Order Will Be Used In An Attempt To Interfere With the Jurisdiction of Other Courts.

The Rehabilitator concedes that this Court does not have jurisdiction to interpret the meaning of the MHPI Loan Documents or to determine if an "Ambac Default" has occurred under the specific trigger language in those documents: "To be clear, the Rehabilitator is not asking this Court to construe this contractual language or to adjudicate whether there has been an 'Ambac Default' or a 'Credit Enhancer Default' within the meaning of these agreements. ***These issues are to be decided by the courts where the MHPI Cases are pending.***" (Mot. at ¶ 12 (emphasis added).) Nonetheless, the Motion seeks "clarification" that is intended to influence the proceedings in the MHPI cases: "As set forth in the Motion, the Rehabilitator has requested this declaration to provide such clarification in connection with certain litigation pending in other jurisdictions . . . ." (Proposed Order at 1; Ex. 1, 8/18/16 Hr'g Tr. at 6:13–22.)

According to the Rehabilitator, clarification by this Court is needed because it "could be difficult for parties unfamiliar with these Proceedings to parse the voluminous record in order to understand what OCI sought to achieve." (Motion at 8.) The other six state courts are perfectly capable of determining whether the Rehabilitation triggers a (c)(i) or (c)(ii) default—the Rehabilitation and its structure are spelled out in exacting detail at the time of the Plan and continuing with regular reports. (*See e.g.*, Ex. 7, 1/24/11 Final Order Confirming Rehab; Ex. 12, 6/1/16 Annual Report.) As a result, there is no basis for the Court to enter an order that Ambac will use to try to influence the outcome in other jurisdictions. *E.g.*, *Al-Ansi v. Obama*, 647 F. Supp. 2d 1, 13 (D.D.C.), *on reconsideration in part sub nom. Al-Ansi v. Obama*, 671 F. Supp. 2d 139 (D.D.C. 2009) ("It would be inappropriate for this Court to issue any order which could

affect or interfere with another judge's handling of a case on his or her docket."); *Santillan v. Ashcroft*, No. C 04-2686 MHP, 2004 WL 2297990, at *4 (N.D. Cal. Oct. 12, 2004) (noting that courts should shape proceedings to "avoid[] interference with other courts").

Such an Order would also be inconsistent with this Court's prior statements that the Rehabilitation Proceedings pertain only to the Segregated Account. (Ex. 13, 3/24/10 Order for Rehab. at ¶ 2 ("This proceeding pertains solely to the Segregated Account and to the policies, contracts, rights, assets, equity ownership and liabilities allocated to it in accordance with Wis. Stat. § 611.24, and does not pertain to the policies, contracts, assets, equity ownership interests, and liabilities remaining in Ambac's General Account."); *see also* Ex. 14, 3/24/10 Order for Temp. Inj. Relief at 1 ("Please note that, as explained in the Commissioner's Motion, the injunctive relief granted below does not apply to policies or other contracts which remain in the Ambac General Account.").)

Nor is there any precedent in the 6 years of proceedings before this Court for such an extraordinary order. Only once has this court issued an order clarifying a prior order in connection with these proceedings. In that instance, certain counterparties to policies that were in the ***Segregated Account*** were arguing that Ambac was in default under those policies by virtue of the Rehabilitation Proceedings; the Court accordingly reiterated that the effect of the Injunction, including "prohibit[ing] the counterparties . . . from taking any actions: (i) to prevent or to attempt to prevent Ambac and/or the Segregated Account from exercising or enforcing or attempting to enforce particular rights, interest, and/or claims . . . due to the existence of the [Rehabilitation] Proceedings . . ." (Ex. 15, 9/12/12 Order.) The Rehabilitator concedes that order is distinguishable from the relief sought here: "A major difference between the instant

Motion and the earlier Motion to Confirm Scope is that the instant Motion concerns policies allocated to the General Account, which are not subject to the Injunction Order." (Mot. at ¶ 17.)

As a matter of comity, other courts hearing matters concerning policies in the Segregated Account may consider this Court's orders over those policies, particularly given this Court's exclusive and continuing jurisdiction over the Injunction and its effect. *E.g.*, *AXA Belgium, S.A. v. Century Indem. Co.*, No. 09 CIV. 9703 (CM), 2010 WL 199709, at *3 (S.D.N.Y. Jan. 11, 2010) ("This is a simple matter of comity. This Court is simply not prepared to enter any order that might impact a sister court's ability to enforce its own judgment."). (*See also* Ex. 15, 9/12/12 Order ("This Court has exclusive jurisdiction over any challenges regarding the content, scope, meaning or legal effect of the Injunction and this Order.").) Here, the other courts are deciding a contractual issue over which this Court has no jurisdiction.

3. The Proposed Order Seeks Factual Findings That Are Contrary to the Factual Record.

The Motion is also procedurally improper because it seeks factual findings that are contrary to the record, with no evidentiary hearing. *Doe by Doe v. Roe*, 444 N.W.2d 437, 443 (Wis. Ct. App. 1989) (affirming where trial court declined to rule on substantive motion and "cit[ed] the lack of an adequate record on which to make a finding and the need for discovery on the question."); *State v. Thomas*, 352 Wis. 2d 247, at *5 (Ct. App. 2013) (unpublished) ("We have held repeatedly, in many contexts, that a fact-finder may not base its findings on speculation or conjecture. Rather, a fact-finder must rely on evidence in the record.").[7] As discussed above, the proposed Order in essence requires this Court to hold that an Ambac Default should not be found under the (c)(i) and (c)(ii) triggers in the MHPI Loan Documents because the Rehabilitator and this Court considered the ***specific trigger language*** in the MHPI

[7] A copy of *State v. Thomas* is attached as Exhibit 19.

Loan Documents in structuring the rehabilitation, and concluded that a finding of Ambac Default under the specific language of the MHPI Loan Documents would result in "***collateral damage***" to Ambac because it would trigger defaults under other policies with similar language. (*E.g.*, Proposed Order at ¶ 6, 10.) In attempting to avoid discovery on those very facts, Ambac represented to the Monterey Court that: "[T]he reason the Rehabilitator adopted this approach – which was affirmed and confirmed by the Wisconsin Court – was to avoid the very damage Plaintiffs are trying to inflict upon Ambac in this case[.]" (Ex. 16, 8/18/16 Ambac Opp'n to Pls.' *Ex Parte* Mot. at 4 (emphasis added).) Such factual findings were not, and could not have been made, based on the record that existed when the Rehabilitation was structured in 2010 or at the time of the Confirmation Order in 2011.

To the contrary, although the Rehabilitator sought to avoid defaults caused by placing Ambac into a "full" rehabilitation, the Rehabilitator and the Court were aware that structuring the proceedings to place only a portion of the company into Rehabilitation would not avoid all defaults. Sean Dilweg, then the Wisconsin Commissioner of Insurance and Rehabilitator, specifically testified that "[e]ach policyholder, 13,000 now policyholders, has a different covenant, different trigger. And, you know, it's something that I know the company could discuss, Kathy Matanle or Dave Barranco. But it became clear to me that it would be difficult to craft [an injunction] that would affect and adjoin all of those covenants and triggers." (Ex. 2, 11/16/10 Confirm. Hr'g Trans. at 71:13-21.) And on that factual record the Court expressly recognized that "***it may not have been possible to effectively enjoin the exercise of all such triggers***." (Ex. 7, 1/24/11 Order Confirm. Rehab. at ¶ 52 (emphasis added).)

There is no testimony supporting a finding that the Court or Rehabilitator specifically considered the MHPI Loan Documents, let alone the unique trigger provisions found in sections

(c)(i) and (c)(ii). The record nowhere discusses the MHPI Loan Documents at all. Rather, the Court identified other specific classes of policies that had been considered in the Rehabilitation Proceedings—namely, collateralized loan obligations and commercial asset backed securities—all of which were placed in the Segregated Account subject to this Court's Injunction. (*Id.*) In short, neither Ambac nor the Rehabilitator has put forth *any* evidence concerning the number of policies that existed in 2010 with default provisions similar to the (c)(i) or (c)(ii) default triggers, or any evidence about the "collateral damage" that would result if an Ambac Default was found under such provisions.

B. The Proposed Order Would Be Misleading Given Current Facts.

In addition to its significant procedural defects, the Proposed Order contains findings of fact that are completely unsupportable and misleading based on the facts today. There is no proof in the 2010 or 2011 record that any "collateral damage" would have occurred if an Ambac Default had been found under the (c)(i) and (c)(ii) trigger language in the MHPI Loan Documents. And the facts today—not presented in the Rehabilitator's Motion—demonstrate that no such "collateral damage" could result today, given the markedly different facts that exist.

In testimony seven days ago, Ambac's corporate representative, Cathleen Mantanle, who is head of their Risk Department that oversees such policies, was unable to provide even an estimate of the number of policies that contain substantially similar default provisions. (Ex. 11, Dep. Tr. at 33:19–34:3 ("Q: How many policies fall within that fourth bucket, which is a transfer of assets? . . . A: I don't know. Q: Do you have an estimate? A: No.").) She was unable to identify a ***single specific*** policy in effect today with a default trigger similar to (c)(i) or (c)(ii) and was further unable to identify a ***single specific*** policy that would result in collateral damage if such a (c)(i) or (c)(ii) default occurred. (*Id.* at 88:8–90:9.) In fact, Ms. Matanle conceded that Ambac does not even have a systematic way to review the default language in its numerous

policies. (Ex. 11, 9/23/16 Dep. Tr. 28:17–22 ("Q: So the only way that you or your department could figure out what insurer event of default provisions remained live is to go look at each policy? A: If that's what we wanted to do, that's correct, yes.").) Nor could she provide any evidence of collateral damage that would result from a finding of default under the language of (c)(i) or (c)(ii) of the MHPI Loan Documents. (*Id.* at 89:2–6 ("Q: Have you quantified the amount of such collateral damage? . . . A: No."); *id.* at 90:5–9 ("Q: Do you know there would be [substantial losses] or you are just not sure? . . . A: It is very fact based. It depends on the facts that occur."); *id.* at 93:7–10 ("Q: Have you ever done an analysis of the damage to Ambac potentially if there was a (c)(i) or (c)(ii) default? A: No.").)

And although Ambac has made clear it intends to affirmatively use such findings if the Proposed Order is entered by this Court, Ambac has asserted privilege over any analysis that could support such findings. (Ex. 11, 9/23/16 Dep. Tr. at 65:6–66:9 ("Q: And just so I am clear, so Dewey Ballantine analyzed whether the rehabilitation in their opinion would cause a (c)(i) and/or (c)(ii) default and those conclusions were communicated to you? A: Correct. . . . Q: I assume that you are asserting a privilege as to the legal advice that was provided? Mr. Farr [counsel for Ambac]: Correct.").)

Ambac's inability to identify any risk of collateral damage is borne out by the documents that Ambac produced in response to the Monterey Court's Order. Ambac was required to produce "any such policies or contracts [with substantially similar default trigger language to that found in the Monterey project documents] that Ambac is aware of, or documents sufficient to show the existence and extent of such policies or contracts and samples of such policies or contracts." (Ex. 17, 8/22/16 Order After Hr'g.)[8] In response, Ambac produced documents

[8] Ambac was required to produce all such policies as it produced nothing that was "sufficient to show the existence and extent of such policies or contracts." (Ex. 17, 8/22/16 Order After Hr'g.)

related to approximately 75 policies. (Ex. 18, 9/30/16 B. Deal Decl. at ¶ 4.) But the overwhelming majority of the policies produced by Ambac in support of its "collateral damage" argument ***have expired***; indeed, only 8 policies have been confirmed as still active, one of which is in the Segregated Account. (*Id.* at ¶ 5.) These 7 remaining policies that Ambac relies on to show "collateral damage" on make up a "tiny fraction"—less than 1/600th—of the approximately 4,600 policies active in the General Account. (*Id.* at ¶ 4.)[9]

If the Proposed Order were to be entered today, it thus has the potential to greatly mislead the courts with jurisdiction to determine whether an Ambac Default has occurred under the MHPI Loan Documents, into believing that a finding of default would result in significant or catastrophic financial harm to Ambac.

CONCLUSION

For these reasons, the MHPI Owners respectfully request that the Rehabilitator's Motion be denied.

Dated: September 30, 2016.

Respectfully submitted,

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[9] Given that Ms. Matanle further testified that Ambac possessed most of its policies in searchable, electronic form, identifying and producing additional policies with similar language, if they exist, would not have been burdensome for Ambac. (Ex. 11, 9/23/16 Dep. Tr. at 44:19–45:14.)

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