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

MONTEREY BAY MILITARY HOUSING, LLC AND MONTEREY BAY LAND, LLC'S OPPOSITION TO REHABILITATOR'S MOTION TO QUASH

On November 2, 2016, the Superior Court of Monterey County, California issued a subpoena directed at the Wisconsin Commissioner of Insurance (the "Commissioner") for the taking of discovery by plaintiffs in *Monterey Bay Military Housing, LLC, et al. v. Ambac Assurance Corp.*, Case No. 15CV000599, pending in the Superior Court of Monterey County, California (the "*Monterey* action"). Thereafter, pursuant to the Wisconsin Uniform Interstate Depositions and Discovery Act, Wis. Stat. § 887.24 ("UIDDA"), plaintiffs in the *Monterey* action submitted the validly issued California subpoena to the Clerk of the Dane County Circuit Court for issuance of a Wisconsin subpoena commanding compliance with the California subpoena. The Wisconsin Clerk of Court issued the *Monterey* subpoena, and it was served on the Commissioner.

The Commissioner now moves to quash the subpoena on three separate grounds, all unsupported. First, the Commissioner appeals to this Court's authority to avoid potential prejudice to the administration of the Rehabilitation Proceeding. Yet the Commissioner has pointed to no actual harm that would result from the taking of discovery in the *Monterey* action, nor can he. Second, the Commissioner contends that discovery in the *Monterey* action is barred by this Court's April 5, 2016 Order; however, that Order, by its own unambiguous terms, requires a party to seek leave before initiating discovery "in this proceeding." Plaintiffs in the

Monterey action have not served discovery "in this proceeding"; the discovery, on its face, has been issued out of the Superior Court in Monterey County, California, and served for purposes of the *Monterey* action. Third, the Commissioner invokes privilege concerning his regulatory decision-making as a shield against the entirety of the discovery served. The Commissioner's argument ignores the substance of the subpoena requests, several of which target third-party communications and basic facts that do not require disclosure of the Commissioner's mental impressions or decision-making processes. In addition, the assertion of privilege is not grounds to quash the subpoena, but can be asserted as needed to avoid production of privileged materials in response to the requests. *See, e.g., State ex rel. Dudek v. Circuit Court for Milwaukee Cty.*, 34 Wis. 2d 559, 579 (1967) (noting "narrow ambit" of communications protected by attorney-client privilege).

The *Monterey* plaintiffs are seeking discovery in a separate action under the jurisdiction of a California court. While the *Monterey* plaintiffs respect this Court's jurisdiction over the matters before it, they do not seek to have the Commissioner take any action or to have this Court enter any order that would affect the Segregated Account or the administration of this Rehabilitation Proceeding in any way. There is no proper basis to quash the subpoena or to award the Commissioner costs.

ARGUMENT

I. THIS COURT MAY NOT REGULATE DISCOVERY IN THE SEPARATE MONTEREY ACTION.

First, as this Court has previously recognized, its jurisdiction is limited to the Rehabilitation Proceeding and does not extend to the *Monterey* action, a foreign action outside this Court's jurisdiction involving litigation among non-parties to the Rehabilitation Proceeding. (Ex. 1, Tr. 24:10-15 ("And it isn't a fact that I am looking to go to seven other courts and tell

those courts what to do with parties in those actions. . . . I'm not telling them what to do and I'm not ordering them what to do.").) This Court's jurisdiction likewise does not extend to regulating the taking of discovery in the *Monterey* action.

Discovery in the *Monterey* action is governed by the Monterey Superior Court and California procedural rules. *See Johnson v. Superior Court*, 80 Cal. App. 4th 1050, 1061 (2000) ("Management of discovery lies within the sound discretion of the trial court."). Discovery for use in California legal proceedings may be served on Wisconsin entities pursuant to the UIDDA. Wis. Stat. § 887.24; Cal. Civ. Proc. Code § 2029.100, *et seq*.

Though the Commissioner has filed his motion in the Rehabilitation Proceeding, which is not bound by many of the rules of Wisconsin civil procedure, the subpoena at issue is simply a domesticated California subpoena for an action outside the Rehabilitation Proceeding. Thus, this Court must resolve the motion by resort to Wisconsin's statutory standard, which provides that a subpoena may be quashed "if it is unreasonable and oppressive." Wis. Stat. § 805.07(3). The Commissioner does not address this standard (which requires a case-by-case examination of the substance of a subpoena), instead relying on a purported blanket prohibition of discovery. This is improper as a matter of Wisconsin law. *Id.*

The Commissioner claims that the propounded discovery in an action related to the General Account "would have a substantial negative impact on the administration of this proceeding." (Commissioner's Motion at 6.) But the Commissioner does not identify or make any showing at all of what "substantial negative impact" would result from the taking of this discovery. Indeed, there would be none. The taking of a deposition or production of documents does not affect the rights of any party with regard to this Rehabilitation Proceeding. The

Commissioner has failed to meet his burden to show the subpoena is "unreasonable and oppressive," and his unsubstantiated argument should be rejected.

II. THIS COURT'S APRIL 5, 2016 ORDER DOES NOT BAR THE *MONTEREY* SUBPOENA.

Second, the Commissioner's argument as to the effect of this Court's April 5, 2016 order ignores both the context and the plain meaning of the order. The order was entered in disposition of motions by holders of claims against Ambac policies and contracts allocated to the Segregated Account. Such claimants moved this Court to order the Commissioner to show cause why the Interim Payment Percentage under the Rehabilitation Plan should not be increased; in connection with the motion, these claimants also noticed the deposition of an Ambac corporate representative, which the Commissioner then moved to quash. (*See* CarVal Holders' February 11, 2016 Motion For Order to Show Cause and Commissioner's March 2, 2016 Motion to Quash.) The facts that gave rise to the order—interested parties seeking discovery in the Rehabilitation Proceeding and in support of a motion expressly intended to force the Commissioner to take action affecting the Segregated Account—are wholly distinct from the discovery at issue here. The *Monterey* plaintiffs are parties to a foreign action related to the General Account and do not seek to force the Commissioner to take any action related to the Segregated Account.

Moreover, this Court's order states plainly, "[I]nterested parties may not seek to take discovery of any type ***in this proceeding*** without leave of this Court." (April 5, 2016 Order ¶ 3 (emphasis added).) The Commissioner omitted this critical language from both his pre-motion letter to plaintiffs and now his motion to quash. The Commissioner's argument invoking the order is refuted by the order itself.

III. THE COMMISSIONER MAY NOT INVOKE HIS REGULATORY PRIVILEGE TO AVOID DISCLOSURE IN THE *MONTEREY* ACTION.

Finally, the Commissioner's invocation of his regulatory privilege is improper and overly broad. This privilege is limited to "[t]estimony, reports, records and information that are obtained, produced or created in the course of an inquiry under s. 601.42." Wis. Stat. § 601.465(b). But that privilege is not unlimited. Plaintiffs' discovery, for example, requests certain communications between the Commissioner and third parties. (*See* Request Nos. 2, 9.) Nowhere in the statute establishing the Commissioner's privilege does it provide for a blanket privilege over the Commissioner's third-party communications. Additionally, the discovery seeks documents "sufficient to show" certain facts, such as the number of Ambac policies or contracts containing default language found in agreements at issue in the *Monterey* action and whether those policies or contracts are in the Segregated or General Account. (*See* Request Nos. 4-7.) Such requests do not delve into the Commissioner's decision-making or regulatory processes; they are aimed at establishing non-controversial facts relevant to the *Monterey* action. The Commissioner's blanket assertion of the privilege in this instance is not supported by the facts or the law and should be rejected.

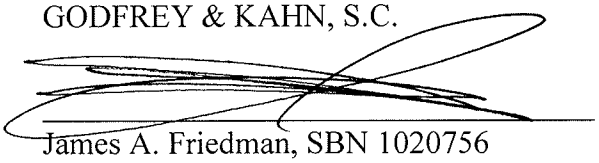
CONCLUSION

For the foregoing reasons, the Commissioner's motion should be denied.

Dated: November 23, 2016.

Respectfully submitted,

GODFREY & KAHN, S.C.

By: 

James A. Friedman, SBN 1020756
Dustin B. Brown, SBN 1086277
One E. Main St., Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Phone: 608-257-3911
Fax: 608-257-0609
jfriedman@gklaw.com

Jeffrey L. Willian, P.C. (*pro hac vice*)
Donna M. Welch, P.C. (*pro hac vice*)
Kirkland & Ellis LLP
300 N. LaSalle Drive
Chicago, IL 60654
(312) 862-2000
(312) 862-2200 (fax)
jwillian@kirkland.com
dwelch@kirkland.com

Attorneys for Monterey Bay Military Housing, LLC and Monterey Bay Land, LLC

16452044.1

EXHIBIT 1

STATE OF WISCONSIN CIRCUIT COURT Branch 9 DANE COUNTY

SEAN DILWEG, et al.,

Plaintiffs,

vs. Case No. 10 CV 1576

WELLS FARGO BANK/TRUSTEE OF BONDHOLDERS, et al.,

Defendants.

PROCEEDINGS: Motion Hearing

BEFORE: HONORABLE RICHARD G. NIESS

DATE: October 11, 2016

TIME: 1:26 p.m.

APPEARANCES: JEFFREY A. SIMMONS,
Attorney at Law,
Madison, Wisconsin,
appearing on behalf
of the rehabilitator.

JAMES D. FRIEDMAN,
Attorney at Law,
Milwaukee, Wisconsin,
appearing on behalf
of the MHPI owners.

JEFFREY L. WILLIAN and
DONNA M. WELCH,
Attorneys at Law,
Chicago, Illinois,
appearing on behalf
of the MHPI owners.

APPEARANCES:
(cont'd)

P. SABIN WILLETT,
Attorney at Law,
Boston, Massachusetts,
appearing telephonically on
behalf of the CarVal Holders.

* * * * * * * * * * * * * * * * * * *

(Whereupon, the following proceedings were duly had:)

THE CLERK: Sean Dilweg, et al. vs. Wells Fargo Bank/Trustee of Bondholders, et al., 10 CV 1576.

Appearances, please.

MR. SIMMONS: Jeffrey Simmons of Foley & Lardner on behalf of the rehabilitator, Your Honor.

MR. FRIEDMAN: James Friedman of Godfrey & Kahn on behalf of the MHPI owners.

MR. WILLIAN: Jeff Willian of Kirkland & Ellis on behalf of the MHPI owners.

Judge Johnston adopted them verbatim, or nearly verbatim.

It's a little bit unusual to say, well, they're not clear. They could have made them more clear then and they can go to those seven other courts and say, you know, what? Here's what we meant by this. That's entirely appropriate. But I don't think it's appropriate for the Court now to come back and tell the other courts what it meant.

THE COURT: Well, I think there's a disconnect between what you think I'm going to do and what I think I'm going to do. I'm not assuming any jurisdiction over any issue that involves Ambac that -- I'm not ordering any action. All I am doing and what I understand the request to be is to simply state clearly and in a concise Cliff Notes-type fashion what has been -- what has happened, what the orders of this Court have been. Not expand them. Not make any -- not assume jurisdiction over Ambac to order different things.

Sure, if I were going to start ordering Ambac around at this point, you bet I would have issues with jurisdiction. I probably wouldn't do it. It's simply clarifying what has already been done in this Court over which I clearly have jurisdiction.

Number two, I'm not advising anybody anything. I am simply clarifying orders. This happens all the time -- not all the time, thankfully not all the time, but it happens enough where rulings by this Court or other courts are unclear or somebody has not contemplated or predicted what the course of events would be such that a further clarification would be necessary. It's not anything that is advisory of anything. It is a clarification of what has already happened. And it isn't a fact that I am looking to go to seven other courts and tell those courts what to do with parties in those actions. It is simply, this is what happened here. Use it for whatever you want to use it for. I'm not telling them what to do and I'm not ordering them what to do. And I'm not even contending that it's particularly material with what they've got before them because I don't know. If, in fact, there is anything that's before this court that needs to be clarified that may be helpful to the other courts, I can't see a downside to doing it, frankly, other than eliminating -- you know, I can't see a downside to it.

So let's see if we can find something -- I mean, what you did ask for, Mr. Simmons, you know,

is -- in the motion is pretty much undisputed. I mean, in the first two things you say you want an order indicating that they are limited -- the rehabilitation proceedings are limited to the segregated account, which they are. I can make that order right now. They're not a rehabilitation of Ambac, which they are not. And that there's been -- there have been no assets transferred from Ambac general account to the segregated account. I think that's clear from the --

I do agree with the MHPI folks that that seems to be clear. It may not be all in one page, but it's pretty clear what the Court of Appeals did with that.

MR. SIMMONS: I don't disagree, Your Honor. Yeah.

THE COURT: So why do we need -- I mean, 17 seems to me is simply a statement of historical fact and whether or not it has any bearing on what's going on with MHPI out in California, who knows. I'm not telling that court whether it does or it doesn't. It's simply stating a historical fact that this is what the OCI's stated purpose was back at that time. If that's supported by the record, I don't see any reason not to do it. The question is really with

STATE OF WISCONSIN)
) SS
COUNTY OF DANE)

I, TARA L. MONTHIE, Official Court Reporter for Dane County Circuit Court, Branch 9, do hereby certify that I took in shorthand the above-entitled proceedings held on the 11th day of October, 2016, I reduced the same to a written transcript, and that it is a true and correct transcript of my notes and the whole thereof.

Dated this 14th day of October, 2016.

Electronically signed by Tara L. Monthie

Tara L. Monthie, RPR, CRR
Official Court Reporter

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.