

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,

**LIMITED OBJECTION OF WELLS FARGO BANK, N.A., TRUSTEE,
DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE,
DEUTSCHE BANK TRUST COMPANY AMERICAS, TRUSTEE, AND
U.S. BANK NATIONAL ASSOCIATION, TRUSTEE
TO REHABILITATOR'S MOTION TO FURTHER
AMEND THE PLAN OF REHABILITATION**

Wells Fargo Bank, N.A. ("**Wells Fargo**"), solely in the capacities described in footnote 1 for certain **WF Trusts** (as defined in footnote 1)¹ (Wells Fargo, in such capacities, is referred to as "**WF Trustee**"), Deutsche Bank National Trust Company ("**DBNTC**"), solely in the capacities described in footnote 2 for certain **DBNTC Trusts** (as defined in footnote 2),² Deutsche Bank Trust Company Americas ("**DBTCA**"), solely in the capacities described in footnote 3 for certain **DBTCA Trusts** (as defined in footnote 3)³ (DBNTC and DBTCA, in such capacities, are referred to collectively as "**DB Trustee**"), and U.S. Bank National Association

¹ Wells Fargo files this Objection solely (a) in its capacity as trustee for certain residential mortgage-backed securities ("**RMBS**") trusts and (b) in such other capacities under other RMBS trusts that obligate it to submit Policy claims to the Segregated Account, receive Policy claim payments from Segregated Account, and otherwise perform administrative functions under any Policies issued by Ambac Assurance Corporation ("**AAC**"), insurance agreements entered into with AAC, or under any other documents related to such Policies and insurance agreements (collectively, the "**WF Trusts**").

² DBNTC files this Objection solely (a) in its capacity as trustee for certain RMBS trusts and (b) in such other capacities under other RMBS trusts that obligate it to submit Policy claims to Segregated Account, receive Policy claim payments from Segregated Account, and otherwise perform administrative functions under any Policies issued by AAC, insurance agreements entered into with AAC, or under any other documents related to such Policies and insurance agreements (collectively, the "**DBNTC Trusts**").

³ DBTCA files this Objection solely (a) in its capacity as trustee for certain RMBS trusts and (b) in such other capacities under other RMBS trusts that obligate it to submit Policy claims to Segregated Account, receive Policy claim payments from Segregated Account, and otherwise perform administrative functions under any Policies issued by AAC, insurance agreements entered into with AAC, or under any other documents related to such Policies and insurance agreements (collectively, the "**DBTCA Trusts**").

(“**U.S. Bank**”), solely in the capacities described in footnote 4 for certain **U.S. Bank Trusts** (as defined in footnote 4)⁴ hereby submit this Limited Objection to the Rehabilitator’s Motion to Further Amend the Plan of Rehabilitation. WF Trustee, DB Trustee, and U.S. Bank Trustee are referred to collectively as the “**Trustees.**”

1. BACKGROUND

1. On September 25, 2017, the Rehabilitator filed its *Motion to Further Amend The Plan of Rehabilitation*, together with its proposed *Second Amended Plan of Rehabilitation* (the “**Second Amended Plan**”), the *Amended Disclosure Statement Accompanying the Second Amended Plan of Rehabilitation* (the “**Disclosure Statement**”), and a supporting Brief and Affidavits. The Rehabilitator seeks approval of the Second Amended Plan to facilitate the exit of the Segregated Account from this Rehabilitation proceeding.

2. The Second Amended Plan generally provides (among other things) that:

[A]ll holders of Deferred Amounts arising on or prior to September 30, 2017 (the “Record Date”) will receive an effective consideration package of \$0.935, for each dollar of accreted value of Deferred Amounts; such consideration to be comprised of \$0.40 in cash, \$0.41 in a senior secured note (as described herein), and \$0.125 in currently outstanding GA SSNs (as described herein).

Disclosure Statement p. 2; *see* also Second Amended Plan § 2.2(a)(v). The Trustees, on behalf of the **Trusts**,⁵ are “Holders” as defined in the Second Amended Plan⁶ and are “holders of Deferred Amounts” to which the Second Amended Plan refers.

⁴ U.S. Bank files this Objection solely (a) in its capacity as trustee for certain RMBS trusts and (b) in such other capacities under other RMBS trusts that obligate it to submit Policy claims to Segregated Account, receive Policy claim payments from Segregated Account, and otherwise perform administrative functions under any Policies issued by AAC, insurance agreements entered into with AAC, or under any other documents related to such Policies and insurance agreements (collectively, the “**U.S. Bank Trusts**”).

⁵ “**Trusts**” refers collectively to the WF Trusts, the DBNTC Trusts, the DBTCA Trusts, and the U.S. Bank Trusts.

⁶ The Second Amended Plan defines (a) “**Trustee**” as “[a] Holder acting in its capacity as trustee and/or agent on behalf of and for the benefit of Beneficial Holders” (Second Amended Plan § 1.120, p. 27); (b) “**Holder**” as “[a]ny Entity (other than a Beneficial Holder) holding (i) a Claim, including, in the case of a Policy Claim, the named beneficiary of the related Policy, and including any trustee submitting claims in accordance with the Amended

3. More specifically, however, the Second Amended Plan provides that:

Holders acting in their capacity as Trustees shall permit, and provide any authorization or direction (but not indemnification) needed for AAC, any Paying Agent and/or DTC to make, process and/or accept any Distributions as contemplated by the Plan and the Amended Payment Guidelines. *For the avoidance of doubt, all Pre-Record Date Deferred Amount Consideration to be distributed pursuant to Section 2.2(a) of the Plan shall not be transferred to the applicable Trustees but shall be deemed to be transferred to such Trustees.*

Disclosure Statement at p. 18 (emphasis added); *see also* Second Amended Plan § 3.5.

4. The Second Amended Plan further provides that:

Each Holder of a Pre-Record Date Deferred Amount (other than AFG) and each Beneficial Holder of any Insured Obligation related to a Pre-Record Date Deferred Amount shall, after consummation of the Initial Exchange and the Exchange Offers, be required to accept the Pre-Record Date Deferred Amount Consideration issued to such Holder in accordance with this Plan, in lieu of any cash payments required to be made to such holders, in full and complete satisfaction of such cash payment obligation of the Segregated Account in respect of the Permitted Policy Claim allowed to such holders (which relates to the relevant Pre-Record Date Deferred Amount), regardless of the existence of any provision in any Policy, the 2011 Plan, the First Amended Plan, or any other underlying instrument(s) or contract(s) that would require, or that contemplates, the discharge of the obligations of the Segregated Account through the payment of Cash.

Second Amended Plan § 2.2(a)(i) (emphasis added).

5. The Second Amended Plan defines the Pre-Record Date Deferred Amount Consideration as the “Cash and Senior Secured Notes to be distributed to Holders of Pre-Record Date Deferred Amounts pursuant to Section 2.2 of this Plan.” Second Amended Plan §1.84. Section 2.2 of the Second Amended Plan provides (among other things) that:

Each Holder of a Pre-Record Date Deferred Amount (other than AFG) after consummation of the Initial Exchange and the Exchange Offers, shall be entitled

Payment Guidelines or the Payment Guidelines, (ii) a Deferred Amount, (iii) a Junior Deferred Amount, or (iv) a SA SSN” (Second Amended Plan § 1.52, p. 13); (c) “**Beneficial Holder**” as “[i]n respect of any Insured Obligation, the beneficial holder(s) of such Insured Obligation” (Second Amended Plan § 1.17, p. 5); and (d) “**Insured Obligation**” as “[i]n respect of any Policy Claim, an obligation guaranteed by the Segregated Account under or pursuant to the relevant Policy or Policies. A Policy may provide financial guaranty insurance in respect of more than one Insured Obligation, each Insured Obligation as identified by its CUSIP, if any.” (Second Amended Plan § 1.56, p. 14).

to receive, in full and final satisfaction of such Pre-Record Date Deferred Amount (x) Cash equal to 45.7% of such Pre-Record Date Deferred Amount, and (y) Senior Secured Notes in an amount equal to 46.9% of such Pre-Record Date Deferred Amount....”

Second Amended Plan § 2.2(a)(i). Finally, the Second Amended Plan provides that:

Except as otherwise provided this Plan, after consummation of the Initial Exchange and the Exchange Offers, the Distribution of the Pre-Record Date Deferred Amount Consideration shall not cause any Holder of Pre-Record Date Deferred Amounts to receive an effective consideration package of more than (a) 40% Cash, (b) 41% Senior Secured Notes, (c) 12.5% GA SSNs, and (d) a 6.5% discount.

Second Amended Plan § 2.2(a)(v) (emphasis added). This Objection refers to clauses (b) and (c) in the excerpt of Section 2.2(a)(v) of the Second Amended Plan above as the “**Non-Cash Consideration**” and item (d) in the excerpt above as the “**Discount.**”

6. As explained in more detail below, these provisions will cause an adverse impact on the Beneficial Holders on whose behalf the Trustees act and on the Trustees. This adverse impact requires appropriate modifications to the Second Amended Plan. Accordingly, the Trustees file this Limited Objection.

2. OBJECTIONS

2.1. Subrogation and Reimbursement Rights

7. Under the terms of most Policies and related Operative Documents, AAC possesses certain rights of subrogation and reimbursement for claims previously paid. Affidavit of Charles Brehm sworn to November 22, 2017 (“**Brehm Aff.**”) ¶ 15, a copy of which is attached hereto as **Exhibit 1**. Although the precise terms vary from transaction to transaction, in a typical RMBS transaction, AAC enjoys a priority right of reimbursement *to the extent it paid a policy claim* on

an earlier payment date. *Id.* For example, the **AHMIT Indenture**⁷ requires that, on each Payment Date, certain collections on the Group V Loans be used to reimburse AAC in respect of claims previously paid by AAC under the relevant policy *before* any such amounts are paid to other Classes of Notes.⁸ *Id.* at Exhibit B, AHMIT Indenture §§ 3.05 and 3.06. Other Trusts have similar provisions. Brehm Aff. ¶ 15.

8. Assuming that the Court confirms the Second Amended Plan, AAC will only be obligated to pay 93.5 cents in Pre-Record Date Deferred Amount Consideration to Beneficial Holders, but on future payment dates (when and if sufficient cash proceeds are available for distribution) AAC will nevertheless receive cash reimbursement rights at 100 cents on the dollar. Second Amended Plan § 4.10.⁹ The Second Amended Plan would lighten AAC's burden by allowing it a Discount that deprives the Beneficial Holders of some the Deferred Amounts they have not received, while at the same time reserving full reimbursement rights for AAC, including accrued interest thereon, as if AAC had paid the Deferred Amounts in full. In short, AAC could enjoy a windfall of 6.5 cents for every dollar of Deferred Amount. Moreover, the Second Amended Plan's provisions granting AAC a 100% cash reimbursement right for paying only 93.5% consideration could harm holders of uninsured classes of securities. If a Trust has sufficient cash flow to reimburse AAC for the 6.5 cents on the dollar that it did not pay to the Trusts, less cash would be available to pay classes of uninsured securities below AAC's

⁷ Indenture dated as of June 22, 2005 by and between American Home Mortgage Investment Trust 2005-2 as Issuer, Wells Fargo Bank, N.A. as Securities Administrator, and Deutsche Bank National Trust Company as Indenture Trustee for the American Home Mortgage Investment Trust 2005-2 (the "**AHMIT Indenture**"), attached as Exhibit B to the Brehm Aff.

⁸ Capitalized terms in this sentence have the meaning assigned in the AHMIT Indenture.

⁹ Because the Governing Documents generally provide that AAC is reimbursed its payments under the Policies with interest, AAC will actually receive more than 100 cents on the dollar. *See, e.g.*, Amended and Restated Pooling and Servicing Agreement dated as of January 1, 2010 by and between Sand Canyon Acceptance Corporation (formerly known as Option One Mortgage Acceptance Corporation as Depositor, Specialized Loan Servicing LLC as Servicer, and Wells Fargo Bank, N.A. as Trustee for the Option One Mortgage Loan Trust 2007-FXD1 (attached as Ex. A to the Brehm Aff.) ("**Option One PSA**"), § 1.01, Definition of "Reimbursement Amount."

reimbursement right in the waterfall. In short, as drafted the Second Amended Plan could force holders of uninsured securities – which holders have no relationship with Ambac – to help fund AAC’s emergence from rehabilitation.

9. The amounts that AAC will ultimately pay on the Deferred Amounts are, of course, impossible to predict. Even if AAC pays the Pre-Record Date Deferred Amount Consideration in full, however, the 6.5% Discount means that AAC will never pay the Deferred Amounts in full.

10. While the ultimate value of the Non-Cash Consideration is uncertain, the Trustees note that the Senior Secured Notes “will be secured by all assets of the Senior Secured Notes Issuer, including the AAC Note (described below) and a collateral account into which proceeds received from the AAC Note (as defined below) shall be deposited.” Disclosure Statement p. 38.

11. The Trustees also observe that the AAC Note:

will be secured by a pledge of (i) AAC’s right, title and interest *in the cash and non-cash proceeds received by*, or on behalf of, AAC pursuant to the RMBS Litigations (as defined and further described below), pursuant to any final and non-appealable judgment, settlement or other arrangement, minus all amounts paid or payable to reimburse reinsurers for the amounts paid by reinsurers in connection with the receipt of such proceeds (but not the amount of any cost or fee (including legal fees) incurred in connection with the RMBS Litigation) in an amount up to, but not in excess of \$1.4 billion (the “RMBS Proceeds”), (ii) RMBS securities having a market value of not less than \$350 million on the date that is not more than 5 business days prior to the Effective Date, and (iii) a collateral account into which the proceeds and securities referred to in clauses (i) and (ii), shall be deposited (clauses (i), (ii) and (iii), together, the “Ambac Note Collateral”)

Disclosure Statement pp. 38-39 (emphasis added).

12. The Trustees further note that the pledge of the “cash and non-cash proceeds” of the RMBS Litigation is limited just to such “proceeds” – AAC does not pledge the claims or the cause of action that are the basis for the RMBS Litigation. In the event of future AAC insolvency proceedings or if AAC defaults on the Ambac Note, the “pledge” of “proceeds” may

be insufficient to secure the interests of the holders of the Senior Secured Notes (*i.e.*, the Beneficial Holders) because they have no rights in the RMBS Litigation Claims themselves. Such “proceeds” may not even exist in the event of such an insolvency or default. The Trustees question whether AAC can grant a security interest in as-yet-nonexistent “proceeds.” This concern is compounded by the fact that the Second Amended Plan does not provide for an opinion of counsel addressed to the Trustees and the Beneficial Holders by competent counsel in the appropriate jurisdictions that such pledge of the “proceeds” is sufficient to create a duly perfected, first priority lien against such proceeds.

13. Consequently, the Second Amended Plan, if implemented, could result in AAC delivering, in part, Non-Cash Consideration (i) of uncertain value – but without doubt, less than 100 cents on the dollar – in respect of Pre-Record Date Deferred Amounts, and (ii) with a pledge of collateral that may not be sufficient to protect the Beneficial Holders. In exchange, the Trusts would be forced to reimburse AAC on later payment dates in cash at 100 cents on the dollar as if AAC had paid 100 cents on the dollar for the Deferred Amounts.

14. It is one thing to fundamentally change the Policies by allowing AAC to “underperform” its contractual obligations by delivering Non-Cash Consideration and imposing a Discount, but it is quite another thing to then allow AAC to enjoy all its reimbursement rights as if it had fully performed its obligations in full by paying 100% of the Deferred Amounts in cash. *Cf. In re Delta Air Lines, Inc.*, 608 F.3d 139, 149 (2d Cir. 2010) (holding that bankruptcy discharge could not be treated as satisfaction in full of underlying contract claim). This attempt to force the Trusts to finance the Segregated Account’s emergence from Rehabilitation is manifestly unjust.

15. There is an equitable alternative that would protect AAC’s reimbursement rights in the Trusts. The Court could simply require AAC to account to the Trustees for all cash distributions

made under the Second Amended Plan, at the time it makes such distributions, in order to be eligible for “reimbursement” from the Trusts. This alternative reimburses AAC for its performance without forcing the Trusts to pay AAC for something it did not do.

16. These provisions of the Second Amended Plan violate the basic principles of equity underlying the “made whole” doctrine. This doctrine provides that a party claiming subrogation rights may not recover until the insured is fully compensated for his or her losses. As the Wisconsin Supreme Court has held, “[t]he burden of loss should rest on the party paid to assume the risk, and not on an inadequately compensated insured.” *Ruckel v. Gassner*, 2002 WI 67, ¶ 17, 253 Wis. 2d 280, 287, 646 N.W.2d 11, 15 (quoting *Couch on Insurance*, §§ 223:133, 223:136 (3d ed. 2000)). The Supreme Court has further held that the “made whole” doctrine is inviolate and parties may not override the principle by contract. *Ruckel*, 2002 WI 67, ¶ 28, 253 Wis. 2d 280, 291, 646 N.W.2d 11, 17. While one could distinguish AAC’s reimbursement right from subrogation,¹⁰ the “made whole” doctrine’s central tenet that an insurer should be made whole only after the insured has received payment of the insured claim in full unquestionably applies to AAC’s relationship to Insured Certificateholders. AAC will be unjustly enriched if the Second Amended Plan effectively forces Insured Certificateholders to reimburse AAC in cash when for only partial cash payment of the underlying claims.

2.2. Administrative Burdens Imposed by the Non-Cash Distributions

17. Each of the Trusts issued residential mortgage-backed securities. The Operative Documents¹¹ governing the Trusts require all payments on the securities issued by the Trusts to

¹⁰ Subrogation entails the substitution of one party (the insurer) for another party (the insured) in the assertion of rights against a third party, whereas Ambac has a direct right of reimbursement from the primary obligor under most Governing Documents.

¹¹ **Operative Documents**” can include a pooling and servicing agreement, servicing agreements, a sale and servicing agreement, a trust agreement and/or an indenture and other related documents. *See* Affidavit of Charles Brehm sworn to November 22, 2017 Brehm Aff. ¶ 4. RMBS transactions usually also incorporate an insurance

be made in cash. Brehm Aff. ¶ 9. The Trustees (and other transaction parties) understood that the Beneficial Holders would only ever receive cash as consideration for their investment in the Trust securities; the Operative Documents do not contemplate any other form of consideration. *Id.* Accordingly, the processes, procedures, and protocols that the Trustees use to administer the Trusts are designed only to handle cash distributions; they are not designed to distribute other forms of consideration such as securities. *Id.* Further, the Trusts use individual payment calculation tools¹² to account for the inflows and outflows of funds. *Id.* Similarly, these payment calculations tools are designed only to account for cash, not other forms of consideration. *Id.* The Second Amended Plan provides for distribution of Non-Cash Consideration directly to Beneficial Holders, which presents a number of difficulties for, and burdens on, the Trustees.

18. The Second Amended Plan requires the Trustees to assist AAC with distributing Non-Cash Consideration directly to Beneficial Holders and to transmit the Non-Cash Consideration to Beneficial Holders in the event that it comes into a Trustee's possession. The Trustees, however, are in no better position than AAC to identify the Beneficial Holders and effect the distribution. They should not, therefore, be forced to assume the burdens associated with doing so.

19. The Second Amended Plan provides:

Trustees shall permit, and provide any authorization or direction (but not indemnification) needed for AAC, any Paying Agent and/or DTC to make, process and/or accept any Distributions as contemplated by this Plan and the Amended Payment Guidelines. For the avoidance of doubt, all Pre-Record Date Deferred Amount Consideration to be distributed pursuant to Section 2.2(a) of this Plan shall not be transferred to the applicable Trustees but shall be deemed to be transferred to such Trustees.

agreement, which further delineates the rights and responsibilities of the parties to the transaction vis-à-vis the insurance policy (together with the Operative Documents, the “**Governing Documents**”). *Id.*

¹² A “payment calculation tool” is computer software that enables a trustee or paying agent to perform the complex calculations required to make payments on RMBS securities.

Second Amended Plan § 3.5 (emphasis added). Further, in the event that a Trustee receives any Pre-Record Date Deferred Amount Consideration (which necessarily includes Non-Cash Consideration), it:

shall promptly be transferred by such Trustee to the Beneficial Holders for whom it is acting as trustee. Notwithstanding the generality of the foregoing, any such Trustee may allocate, distribute or disburse the Pre-Record Date Deferred Amount Consideration issued in accordance with this Plan by allocating, distributing or disbursing such Pre-Record Date Deferred Amount Consideration (or any beneficial interest therein) to the Beneficial Holders of such underlying financial instrument(s) through the relevant custodians holding the positions on behalf of the Beneficial Holders, and such custodians shall be required to accept and distribute such Pre- Record Date Deferred Amount Consideration to the Beneficial Holders.

Second Amended Plan § 3.6 (emphasis added). As drafted, Section 3.6 thus permits AAC effectively to outsource to the Trustees the task of identifying and locating Beneficial Holders, by authorizing AAC simply to direct consideration to the Trustees rather than the Beneficial Holders.

20. The Trustees are not in a position to meaningfully assist AAC in identifying the Beneficial Holders, nor are they in a position to ensure effective distribution of the Non-Cash Consideration directly to Beneficial Holders. The Trustees, like AAC, have access (for a fee) to DTC's participant list for the securities of each Trust as of a particular date. Brehm Aff. ¶ 11. The participants on that list, however, are not all Beneficial Holders, nor does this list include all (or even most) of the Beneficial Holders. *Id.* Many participants simply hold the securities in "street name" and have a duty not to disclose the identity of the actual Beneficial Holder. *Id.* The Trustees have no greater ability than AAC to ensure distribution of the Non-Cash Consideration to Beneficial Holders. At best, the Trustees could identify and make distributions only to those entities on the participant list.

21. Regardless of whether the Trustees take possession of Non-Cash Consideration, the Second Amended Plan's substitution of Non-Cash Consideration for the cash consideration contemplated by all parties to these transactions when they closed would impose significant burden and uncertainty on the Trustees. The Trustees would need to undertake substantial effort and potential expense to modify the payment calculation tools they use to administer the Trusts. Such modifications are necessary to reflect that Deferred Amounts have been paid in full on the books and records of the Trust even though (i) the actual distribution of value did not pass through the Trustee, (ii) the distribution included non-cash consideration, and (iii) the amount of value distributed was not, in reality, payment in full. *Brehm Aff.* ¶ 10. Further, the Trustees will have additional burdens associated with addressing communications or other actions from Beneficial Holders who question or object to receiving securities instead of cash. *Id.* at ¶ 12. The Second Amended Plan makes no provision to compensate the Trustees for these burdens.

22. The Second Amended Plan's imposition of additional duties, burdens, and expense on the Trustees runs afoul of the terms of the Operative Documents and well settled law. The Operative Documents generally provide that a trustee's duties are limited to those expressly set forth therein. *See, e.g., Brehm Aff. Exhibit B, AHMIT Indenture, § 8.01.*

23. It is also well settled under New York law (the law generally applicable to the Operative Documents) that an indenture trustee's responsibilities are strictly limited to those set forth in such documents. *See, e.g., Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 71 (2d Cir. 1988) (holding that it is "well-established under state common law that the duties of an indenture trustee are strictly defined and limited to the terms of the indenture" and that "we have consistently rejected the imposition of additional duties on the trustee."); *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 11 N.Y.3d 146, 156, 896 N.E.2d 61, 66

(2008) (reviewing authorities and concluding that an indenture trustee shall not be liable except for the performance of such duties as are specifically set out in the applicable indenture).

24. The Commissioner of Insurance for the State of Wisconsin should not impose additional duties upon parties to contracts (i) that are expressly made under the laws of the State of New York,¹³ (ii) which explicitly create and limit the duties of the contracting parties,¹⁴ and importantly, (iii) provide for expressly defined compensation for the performance of those defined duties.¹⁵

2.3. No Advance Notice of the “Deemed” Distribution Date

25. The Second Amended Plan further provides that:

Any Distribution on the Effective Date, pursuant to this Plan and the Amended Payment Guidelines, *will be deemed to have been received by Beneficial Holders on the next scheduled Bond Distribution Date applicable to the relevant Insured Obligation or underlying Transaction Documents* that give rise to such Claims, notwithstanding the date when the Cash or Pre-Record Date Deferred Amount Consideration was actually received by such Beneficial Holders.

Second Amended Plan § 3.7 (emphasis added). If the next scheduled Bond Distribution Date occurs shortly after any Distribution on the Effective Date, then it will be either difficult or impossible for the Trustees to reflect the distribution of cash, the Non-Cash Consideration, and the Discount as payment in full of the Deferred Amount on the books and records of the Trusts for such next scheduled Bond Distribution Date unless they receive sufficient advance notice of when a Distribution on the Effective Date will occur. Nothing in the Second Amended Plan obligates AAC to give the Trustees sufficient advance notice that could mitigate this problem.

¹³ See e.g., Brehm Aff. Exhibit A, Option One PSA, § 11.04.

¹⁴ *Id.* at § 8.01.

¹⁵ *Id.* at § 8.05; § 1.01, Definition of “Trustee Fee.”

2.4. REMIC Matters

26. The Second Amended Plan fails to protect the Beneficial Holders of the Trusts from the possible adverse tax effects of the Non-Cash Distribution. While ACC will receive certain opinions regarding tax matters, including REMIC Matters,¹⁶ there are no provisions that give similar comfort to the Trustees or the Beneficial Holders of Trusts that are structured for tax purposes as Real Estate Mortgage Investment Conduits (“**REMICs**”). Unless the contemplated opinions are addressed to the Trustees, they and the Beneficial Holders will have no assurance that the Non-Cash Distribution will not compromise a REMIC’s tax status. If that status is compromised, there could be significant penalties and taxes assessed against the Trusts and the holders of the Trust-issued securities issued, including both the Beneficial Holders and holders of uninured classes of securities.

2.5. Summary

27. In summary, the Second Amended Plan imposes additional burdens on the Trustees and unilaterally seeks to modify the Operative Documents of the Trusts in a manner that imposes costs and risks on the Trustees and the Beneficial Holders of those Trusts, without (i) following the applicable provisions of the Operative Documents required to amend their terms and conditions; (ii) providing any direction and indemnity from Beneficial Holders and AAC, or (iii) providing a release in favor of the Trustees for complying with the Second Amended Plan (while providing releases to other parties, see Second Amended Plan at § 6.6 and § 1.98).

3. CONCLUSION

For the foregoing reasons, the Trustees request that the Court sustain their Limited Objection to the Second Amended Plan.

¹⁶ See Second Amended Plan § 5.2(e).

Dated this 22nd day of November, 2017.

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