

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
Hon. Richard G. Niess**

**REHABILITATOR'S MOTION FOR CONTEMPT AGAINST THE MHPI PROJECTS
FOR VIOLATING THE COURT'S DISCOVERY ORDERS**

TO: **VIA MESSENGER**

Hon. Richard G. Niess
Dane County Circuit Courthouse
Courtroom 5109
215 S. Hamilton Street
Madison, WI 53703

**VIA ELECTRONIC FILING &
ELECTRONIC MAIL**

Counsel of Record

NOTICE

PLEASE TAKE NOTICE that on December 14, 2017, or as soon thereafter as counsel may be heard, the Commissioner of Insurance of the State of Wisconsin (the “**Rehabilitator**”) of the Segregated Account (the “**Segregated Account**”) of Ambac Assurance Corporation (“**AAC**”), will appear before Branch 9 of the Dane County Circuit Court, the Hon. Richard B. Niess presiding, located at 215 S. Hamilton Street, Madison, Wisconsin, Room 5109, to be heard on its Motion for Contempt against the MHPI Projects.

MOTION

PURSUANT TO WIS. STAT. CH. 785, SECTION 645.05(1)(k), and prior orders of this Court, the Rehabilitator hereby moves the Court for an Order granting its Motion for Contempt against the MHPI Projects, and for sanctions. In support thereof, the Rehabilitator states as follows:

INTRODUCTION

This Court has made clear that “interested parties may not seek to take discovery of any type in this proceeding without leave of this Court.” *See* April 5, 2016 Order (stating further that “the Rehabilitator . . . shall not respond to a request for leave to take discovery unless ordered to do so by the Court.”); *see also* November 23, 2016 Order (quashing subpoena and directing party to pay fees and costs incurred in defending against the subpoena); January 20, 2017 Order (affirming November 23, 2016 Order and award of fees).¹

With total disregard for these Orders, the MHPI Projects issued a new request for information and other documents from the Rehabilitator. A copy is attached for reference. Their discovery requests were not preceded by a motion to the Court for leave,² but rather were served directly upon the Rehabilitator; the MHPI parties demanded a response by December 21, 2017. The requests are contrary to this Court’s directives to the parties, and specifically the prior Order that involved the MHPI Projects. Following the Court’s January 20, 2017 Order, the MHPI Projects paid nearly \$15,000 in legal fees and costs.

Clearly, a stronger sanction is now required. This Court should issue a contempt order, award monetary sanctions that include the fees and costs incurred by the Segregated Account in connection with this motion, disqualify counsel’s *pro hac vice* admissions, and quash the discovery request.³

¹ The April 5, 2016 and January 20, 2017 Orders are attached hereto for reference.

² In fact, the discovery requests “reserve the right to seek leave to take formal discovery,” thus acknowledging the requirement of seeking Court approval prior to initiating discovery. This further adds to their willful disregard of the Court’s restrictions imposed upon the MHPI Projects.

³ The Rehabilitator requests that the sanctions ordered be against the MHPI Projects and their counsel, Kirkland & Ellis LLP, which represented MHPI previously when it was sanctioned for serving discovery. The Rehabilitator does not seek sanctions against the newly-appointed local Counsel for the MHPI Projects due to their recent involvement.

BACKGROUND

This is not the first time the MHPI Projects have violated this Court's Orders and sought discovery from the Rehabilitator. Notably, this Court quashed a subpoena issued by the MHPI Projects to the Rehabilitator approximately one year ago.⁴ (See November 23, 2016 Order.) The Court directed the MHPI Projects to pay the Rehabilitator's fees and costs in defending against the request. (*Id.*) MHPI Projects sought reconsideration of that Order and on January 20, 2017 the Court denied the motion for reconsideration. (See January 20, 2017 Order.) The Court clarified the following with respect to discovery in this proceeding:

- a. Any interested party, or other person or entity, seeking to obtain discovery relating to these Rehabilitation Proceedings **must first comply with this Court's April 5, 2016 Order and then further demonstrate that the proposed discovery is not contrary to *Nickel v. Wells Fargo Bank, et al.*** and is not oppressive or unreasonable;
- b. Any subpoena for discovery from OCI or the Rehabilitator relating to these Rehabilitation Proceedings presented to the clerk of circuit court shall be processed in the normal course and then forwarded to this Rehabilitation Court, as the court with exclusive jurisdiction over these Rehabilitation Proceedings, where it shall be immediately quashed;
- c. Any interested party, or other person or entity, that has had a subpoena quashed may request a hearing;
- d. Any discovery that does not comply with this Court's April 5, 2016 Order and/or *Nickel v. Wells Fargo Barth, et al.*, may, by further Order of the Court, be subject to **contempt, sanctions, or an award of fees and costs.**

(See January 20, 2017 Order) (emphasis added). The MHPI Projects ignored both the April 5, 2016 and the January 20, 2017 Orders of this Court.

ARGUMENT

Pursuant to the Court's January 20, 2017 Order, MHPI's actions are subject to "contempt, sanctions, or an award of fees and costs." MHPI's counsel is responsible for knowing the docket

⁴ OCI incorporates its previous arguments asserted in its November 21, 2016 motion herein.

and complying with the Court's multiple prior orders regarding discovery. *See e.g. Tensfeldt v. Haberman*, 2009 WI 77, ¶ 40, 319 Wis. 2d 329, 768 N.W.2d 641 (“[A] court order or judgment must be complied with even if the party—or his attorney—disagrees with the order.”) A finding of contempt and issuance of sanctions are clearly warranted here where counsel ignored multiple court orders regarding discovery, including ones directed at it within the last year. *See* WIS. STAT. § 785.01; *See also Stewart v. Cova Transp., Inc.*, 162 Wis. 2d 633, 471 N.W.2d 319 (Ct. App. 1991) (“A contempt remedy is therefore available any time a person or other entity disobeys a court order.”)

As appellate courts reviewing this Rehabilitation have clearly indicated, “the rules of civil procedure ‘govern procedure and practice in circuit courts . . . except where different procedure is prescribed by statute or rule.’ The rules of civil procedure, including the rules pertaining to discovery, do not apply to rehabilitation proceedings.” *Nickel v. Wells Fargo*, 2013 WI App 129, ¶ 113, 351 Wis. 2d 539, 841 N.W.2d 482. As a result “interested parties are not entitled to discovery in this rehabilitation proceeding.” *Id.* This fundamental concept has been adopted by this Court time and time again, as noted above through the Court's standing Orders on discovery.

The Court has discretion with respect to sanctions for violation of its discovery Orders; however, drastic sanctions are often imposed where the non-complying party's conduct is without clear and justifiable excuse and such noncompliance was egregious or in bad faith. *Brandon Apparel Group, Inc. v. Pearson Props., Ltd.*, 2001 WI App 205, ¶ 11 n. 5, 247 Wis. 2d 521, 634 N.W.2d 544 (granting default judgment where party's conduct ran counter to discovery statutes and court order.) A court may conclude a party operated in bad faith when the party has “intentionally or deliberately delayed, obstructed or refused the requesting party's discovery

demand.” *Id.* (citation omitted). “A circuit court is not required to analyze a specific set of factors . . . instead, it should focus on the ‘degree to which the party’s conduct offends the standards of trial practice.’” *Id.*

Therefore, the Rehabilitator requests that this Court issue a contempt order that includes: (a) monetary sanctions against the MHPI Projects, and their attorneys, for their willful disregard of the Court’s standing Orders in an amount no less than 2 times the actual attorneys’ fees incurred in bringing this Motion; (b) ordering that the discovery is not allowed; and (c) revocation of the *pro hac vice* admission of the Kirkland & Ellis attorneys representing the MHPI Projects.

As indicated, this Court is entitled to discretion in finding a party in contempt and awarding sanctions. In this case, the MHPI Projects have already been sanctioned for their improper discovery requests. Despite those recent sanctions against it, they chose to serve the Rehabilitator with further discovery requests, without prior court approval to do so.

CONCLUSION

The Rehabilitator respectfully requests this Court grant its Motion and hold the MHPI Projects in contempt and (a) issue monetary sanctions (including a multiplier) against the MHPI Projects and their attorneys, jointly and severally; (b) order that the discovery is not allowed; and (c) revoke the Kirkland & Ellis LLP attorney’s *pro hac vice* admissions as counsel for the MHPI Projects.

Dated at Milwaukee, Wisconsin this 11th day of December, 2017.

MICHAEL BEST & FRIEDRICH LLP

Electronically signed by John D. Finerty, Jr.

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