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

BRIEF IN SUPPORT OF THE MHPI PROJECTS' MOTION FOR STAY PENDING APPEAL

INTRODUCTION

The MHPI Projects[1] respectfully seek a stay pending appeal[2] of the enforcement and effect of this Court's February 7, 2018 injunction order ("February 7 Injunction"), as well as a stay pending appeal of the enforcement and effect of the January 22, 2018 Confirmation Order to the extent it enjoins the MHPI Projects through the injunctive relief set forth in Article 6.8 ("Article 6.8 Injunction") or the declaratory relief set forth in Article 6.13 of the Second Amended Plan of Rehabilitation ("Plan") from arguing full faith and credit in other state courts or responding to Ambac's motion to reconsider the Maryland court's order. A stay is warranted during the pendency of the MHPI Projects' appeal pursuant to Wis. Stats. §§ 808.07 and 809.12, which permit a trial court or an appellate court during the pendency of an appeal to "[s]tay execution or enforcement of a judgment or order" or "[s]uspend, modify, restore or grant an

[1] The "MHPI Projects" (MHPI being the Military Housing Privatization Initiative) are joint ventures between the US Army and a private developer and are responsible for the construction and maintenance of on-base housing for soldiers and their families at Army bases around the United States. The MHPI Projects include: Monterey Bay Military Housing, LLC and Monterey Bay Land, LLC, Carlisle/Picatinny Family Housing LP, Fort Bliss/White Sands Missile Range Housing LP, Meade Communities LLC, Riley Communities, LLC, Fort Lee Commonwealth Communities, Fort Leavenworth Frontier Heritage Communities, II, LLC; Bragg Communities LLC; Fort Detrick/Walter Reed Army Medical Center Housing LLC; Polk Communities LLC; Rucker Communities LLC; and Stewart Hunter Housing LLC.

[2] The MHPI Projects' filed a Notice of Appeal of the February 7 Injunction and January 22 Confirmation Order confirming the Second Amended Plan of Rehabilitation on March 2, 2018. (Dkt. No. 1615.)

injunction[.]" As discussed below, the MHPI Projects have a likelihood of success on the merits of their appeals and face irreparable harm if the injunctions are not stayed.

The MHPI Projects are likely to succeed on their appeal because the orders infringe on the MHPI Projects' constitutional right to argue full faith and credit, as well as the MHPI Projects' due process and First Amendment rights. The Full Faith and Credit Clause "is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation." *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948). One state court is prohibited from dictating the extraterritorial effect of its orders in another state because to "vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 272 (1980). The February 7 Injunction enjoins the MHPI Projects from arguing the extraterritorial effects of this Court's and the Maryland court's orders in pending out-of-state cases in which sister state courts have jurisdiction to determine the merits of the disputes between the MHPI Projects and Ambac. This is constitutionally invalid. Further, to the extent Articles 6.8 and 6.13 prohibit the MHPI Projects from arguing full faith and credit, they are impermissibly vague under Wisconsin law and infringe on the constitutional rights of the MHPI Projects in the same manner as the February 7 Injunction.

The MHPI Projects face imminent irreparable harm without a stay. This Court's orders prohibit the MHPI Projects from asserting legal arguments that they are constitutionally entitled to make in cases pending in other states. Specifically, the orders prohibit the MHPI Projects from arguing whether, and to what extent, Ambac's consent rights are precluded by application of the

Full Faith and Credit Clause of the United States Constitution to the Maryland court's order (and the impact of full faith and credit on this Court's orders) in pending cases in other states. An out-of-state court's decision to give orders of its sister courts full faith and credit is a matter of constitutional law. To subject a party to contempt sanctions for arguing about how a court should apply that constitutional law would undermine the purpose of the doctrine. As a matter of law, irreparable harm is presumed where an injunction bars the assertion of a constitutional right. *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (citing *ACLU of Ky. v. McCreary Cnty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003).) Enjoining any party from advancing a legitimate constitutional argument is harmful in and of itself, but it is especially harmful in this case, as it prohibits the Projects from arguing and defending against Ambac's claims in pending out-of-state litigation in which Ambac seeks to require the MHPI Projects to set aside $200 million from base housing scope (the "DSRF Litigation"). If that happens because the Projects are enjoined from asserting their constitutional rights, the harm will be irreparable.

Further, on January 18, 2018 the Circuit Court for Anne Arundel County Maryland issued its final decision granting summary judgment in favor of the Meade Project against Ambac. Ambac moved to reconsider the Maryland decision on January 26, 2018 based in part on this Court's orders. The Meade Project has a deadline of March 14 to respond to Ambac's motion to reconsider, but due to the injunctions issued by this Court, cannot do so without risking contempt of court. If the Meade Project is not permitted to respond at all to Ambac's motion to reconsider, it will suffer irreparable harm.[3]

[3] The MHPI Projects are seeking stays pending appeal only of the February 7 Injunction and the January 22, 2018 Confirmation Order to the extent it enjoins the MHPI Projects from arguing the issue of full faith and credit in other state courts through Article 6.8 or Article 6.13 of the Plan or from arguing in opposition to Ambac's motion for reconsideration of the Maryland court's order. The MHPI Projects are not seeking a stay of the entire Confirmation Order or Plan.

BACKGROUND FACTS

A. The January 22 Confirmation Hearing and the Confirmation Order.

At the January 22, 2018 final hearing, the Court found that there has been no default caused by the creation of the segregated account or in the manner by which it was funded, and to the extent other courts disagree, the default was cured. (Dkt. No. 1575, 1/22/18 Hr'g Tr., 65:12-17.) Based on statements on the record, the MHPI Projects believes that there was no injunction in the Confirmation Order or the Plan enjoining the MHPI Projects from asserting their defenses in the DSRF Litigation in sister courts in other states. (Id., 4:25-5:8.) ("THE COURT: And you seek a cure but not an injunction against raising the alleged default arising out of the claim that the segregated account and related transactions constitutes a default. You don't seek an injunction against parties raising that as an affirmative defense in litigation? [Rehabilitator's counsel]: I think that would complicate the question of the court's jurisdiction and comity and issues like that."). More importantly, there was no indication that the MHPI Projects would be enjoined from arguing full faith and credit or comity related to this Court's or the Maryland court's orders in the pending DSRF Litigation. As discussed in the MHPI Projects' Motion for Reconsideration and in this motion, an injunction prohibiting such arguments is invalid.

At the conclusion of the hearing, the Rehabilitator reversed course and requested additional time to further amend the Plan in order to add injunctive relief related to Article 6.13. (Id. at 65:25-66:5.) Specifically, the Rehabilitator's counsel noted that his intention would be to "lift the language from the original order for injunctive relief from 2010," because he wanted to avoid creating another appeal issue. (Id. at 66:8-12.) The Rehabilitator's counsel also stated that to the extent the proposed injunction affected the MHPI Projects, the MHPI Projects would have an objection to the proposed injunctive relief. (Id., 66:13-20.)

The following day, the Rehabilitator submitted a letter to the Court stating for the first time that an additional injunction was not necessary because Article 6.8 (a provision no party discussed during the hearing) was sufficient to prohibit the MHPI Projects from asserting an Ambac Default as an affirmative defense. (Dkt. No. 1566, 1/23/18 Rehab. Ltr. to Ct.) The MHPI Projects promptly objected to the Rehabilitator's new interpretation of Article 6.8 on several grounds. (Dkt. No. 1569, 1/25/18 MHPI Ltr. to Ct.) The MHPI Projects objected that (1) the plain language of Article 6.8 makes clear that the injunction was intended to bind only those parties that received Distributions as part of the Plan; (2) the Court and the Rehabilitator acknowledged on the record that the Plan did not contain an injunction prohibiting the MHPI Projects from asserting defenses in the pending DSRF Litigation; (3) an antisuit injunction is an extreme remedy that should only be issued by the Court, if at all, after full briefing and a hearing; (4) even if the Article 6.8 Injunction applied to the MHPI Projects, its language and the Rehabilitator's interpretation of its scope was overbroad and insufficiently definite under Wisconsin law. (Id.)

In response, the Rehabilitator did not address these objections on the merits and instead claimed the MHPI Projects waived their objections to this new interpretation. (Dkt. Nos. 1570-1571.) On February 7, 2018, the Court entered the Rehabilitator's proposed order denying the MHPI Projects' request for a conference and briefing schedule on this issue and overruled any objection to the Article 6.8. (Dkt. No. 1585.)

B. This Court's February 7 Injunction.

On February 7, 2018, the Rehabilitator moved for an injunction against the MHPI Projects. The Court entered the order that same day without a hearing, expressly prohibiting the MHPI Projects from, *inter alia*, "asserting or continuing to assert, in any court or otherwise, that an Ambac Default or Credit Enhancer Default occurred as a result of or in connection with the

proceedings in this Court" or "asserting that any Ambac Default or Credit Enhancer Default that was or is ruled to have occurred by any other court or other tribunal was not cured by the Confirmation Order." (Dkt. No. 1586, 2/7/18 Injunction Order.) The Court further ordered the MHPI Projects to advise all the state courts in the DSRF Litigation "that, pursuant to Wisconsin law, the Confirmation Order, and the Plan, any alleged Ambac Default or Credit Enhancer Default has not occurred based on the Rehabilitation of the Segregated Account or, in the event a court has made a finding of such a default, such default is deemed cured." (Id.)

The Court confirmed at the February 15 hearing that it intended the February 7 Injunction to bar the MHPI Projects from arguing to other state courts whether, and to what extent, they must give full faith and credit to this Court's orders or to the order entered by the Maryland court. (*See* Dkt. No. 1599, 2/15/18 Hr'g Tr. at 39:1-24.) On February 11 and 12, the MHPI Projects complied with the mandatory terms of the February 7 Injunction and filed with each of the respective state courts a copy of the February 7 Injunction as well as a copy of the Court's Confirmation Order. (Ex. 1, Compiled Notices to State Cts.) On February 12, the MHPI Projects filed a petition for supervisory writ in response to the February 7 Injunction. On February 16, the Wisconsin Court of Appeals denied the MHPI Projects' petition for supervisory writ and motion for a temporary stay "on the grounds that an appeal is an available alternate mechanism for seeking relief." (Ex. 2, 2/16/18 Order, p. 4.)

The Court of Appeals stated that "an appeal with an accompanying motion for relief pending appeal (filed first in the circuit court)" was the procedure the MHPI Projects should follow. (Id.) On February 26, the MHPI Projects filed a Motion for Reconsideration of the February 7 Injunction and a Motion for Expedited Hearing. (Dkt. Nos. 1610-1612.) The MHPI Projects requested that the Court reconsider the February 7 Injunction on the grounds that it

violates constitutional full faith and credit, and by its terms violates due process and the First Amendment rights of the MHPI Projects. (Dkt. No. 1611.) The Court denied the Motion for Expedited Hearing and set a briefing schedule on the Motion for Reconsideration. (Dkt. No. 1614.) A hearing on the Motion for Reconsideration will be scheduled after briefing is completed on March 29, so it will not be heard until April 2018, at the earliest. (Id.) The hearing on that motion will be the first opportunity for the Court to consider the MHPI Projects legal arguments in conjunction with its February 7 Injunction.

C. Upcoming Deadlines in the Pending DSRF Litigation That Are Directly Affected By the Injunctions.

As noted in the Motion for Reconsideration of this Court's February 7 Injunction, and above with respect to the deadline to respond to Ambac's motion for reconsideration in Maryland, there are numerous upcoming deadlines in the pending DSRF Litigation matters that are directly impacted by the injunctions,[4] some of which will occur before the Court hears the Motion for Reconsideration under the current schedule. In Maryland, Ambac's motion for reconsideration of that court's summary judgment order is pending, and the Meade Project's response is due on March 14. The injunctions prevent the Meade Project from filing a substantive response or otherwise participating in the resolution of that motion, and require the Meade Project to stand silent on that motion under a threat of contempt in this Court. (Ex. 3, S. Oberg Aff.) Similarly, the Texas Court has scheduled a hearing on the parties' motions for summary judgment for April 27, 2018, but if the injunctions remain in effect, the Bliss Project will be unable to fully participate in that scheduled hearing (even to argue full faith and credit) without subjecting itself to contempt. (Ex. 4, M. Osborn Aff.)

[4] While the MHPI Projects maintain that the injunction in Article 6.8 was not intended to enjoin the MHPI Projects from making arguments in the DSRF Litigation, for ease of reference here, this motion references the February 7 Injunction and Article 6.8 Injunction collectively as "the injunctions."

In the Riley Project litigation, Ambac filed a supplemental brief arguing that this Court's Confirmation Order is entitled to full faith and credit and is thus dispositive of the parties' fully briefed summary judgment motions. (Ex. 5, P. Riordan Aff.) Under the February 7 Injunction, the Riley Project cannot respond to this motion and risks the Court deciding the issue without giving the Riley Project an opportunity to be heard on that constitutional question. (Id.) Finally, the Leavenworth Project currently has a motion for summary judgment due on April 10, 2018.[5] With the February 7 Injunction in place, the Leavenworth Project cannot move for summary judgment or defend against Ambac's anticipated summary judgment motion on this issue. (Id.)

The injunctions prohibit the MHPI Projects from defending themselves against claims initiated by Ambac, including their constitutional right to explain their position and be heard on whether other state courts are required to give this Court's orders or the Maryland order full faith and credit. For the reasons stated in the Motion for Reconsideration and in this motion, this Court cannot determine for other state courts how they must rule. Nor may it enter an order directed at the MHPI Projects that has that same effect. The MHPI Projects respectfully seek a stay pending appeal of the enforcement and effect of the injunctions (and Article 6.13 to the extent is has the same effect) until those legal issues are decided on appeal.

LEGAL STANDARD

"A stay pending appeal is appropriate where the moving party: (1) makes a strong showing that it is likely to succeed on the merits of the appeal; (2) shows that, unless a stay is granted, it will suffer irreparable injury; (3) shows that no substantial harm will come to other interested parties; and (4) shows that a stay will do no harm to the public interest." *State v.*

[5] Counsel for Ambac and the Leavenworth Project have proposed and tentatively agreed to seek a stipulation and extension of deadlines in the Leavenworth Project litigation by 30-45 days, but no date has been set or ordered by the Kansas court. But even with an extension of summary judgment until the end of May, a stay of the injunctions pending appeal would still be necessary as the MHPI Projects' now-pending appeal of this Court's orders is highly unlikely to be resolved by then.

Gudenschwager, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995) (citation omitted). "These factors are not prerequisites but rather are interrelated considerations that must be balanced together." *Id*. Under this approach, "the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the plaintiff will suffer absent the stay. In other words, more of one factor excuses less of the other." *Id*. at 441.

ARGUMENT

I. THE MHPI PROJECTS HAVE A STRONG LIKELIHOOD OF SUCCESS ON APPEAL OF THE FEBRUARY 7 INJUNCTION.

The MHPI Projects respectfully state that they are likely to succeed on the merits of their appeal of the February 7 Injunction because it impermissibly treads into the jurisdiction of other courts and violates constitutional principles including full faith and credit. *See Magnolia Petroleum v. Hunt,* 320 U.S. 430, 439-442 (1943) (holding state courts may not ignore the commands of full faith and credit); *James v. Grand Trunk W.R. Co.*, 14 Ill.2d 356, 372, 152 N.E. 2d 858, 867 (1958). As stated in the Motion for Reconsideration, by prohibiting the MHPI Projects from using the Maryland court's Order as collateral estoppel and/or arguing that this Court's orders are not entitled to full faith and credit in other jurisdictions, the February 7 Injunction improperly interferes with the jurisdiction of other courts. Such a result is contrary to settled law. *See Milliken v. Meyer*, 311 U.S. 457, 462 (1940). The February 7 Injunction is further likely to be reversed because the MHPI Projects did not have an opportunity to be heard before it was entered, and because it infringes on the MHPI Projects' First Amendment rights by preemptively restricting their speech before other courts.

A. The February 7 Injunction Improperly Determines The Extraterritorial Effect Of This Court's Orders In Violation Of The Full Faith And Credit Clause Of The United States Constitution.

1. The February 7 Injunction improperly enjoins the MHPI Projects from making arguments regarding the operation of this Court's orders and the orders of sister courts in pending out-of-state litigation.

The United State Supreme Court has held that "by virtue of the full faith and credit obligations of the several States, a State is permitted to determine the extraterritorial effect of its judgment; ***but it may only do so indirectly, by prescribing the effect of its judgments within the State***." *Thomas*, 448 U.S. at 270 (emphasis added). "To vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." *Id*. at 272. "Full faith and credit does not here enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it." *Pac. Empl'rs. Ins. Co. v. Indus. Accident Comm'n of State of Cal.*, 306 U.S. 493, 504–05 (1939).

Here, prior to this Court's January 22 Confirmation Order, the Maryland court issued its final judgment, after full briefing and a contested hearing. (Ex. 6, 1/18/18 Am. Op. & Order on Summ. J.) Under Maryland law, this is a final judgment for purposes of collateral estoppel and res judicata. *Campbell v. Lake Hallowell Homeowners Assoc.*, 157 Md. App. 504, 524, 852 A.2d 1029, 1040 (2004) ("Nonetheless, a broad consensus has emerged that the pendency of an appeal should not suspend the operation of a judgment for purposes of res judicata or collateral estoppel."). Therefore, under Maryland law, this decision may be used for defensive non-mutual collateral estoppel. *Pat Perusse Realty Co. v. Lingo*, 249 Md. 33, 45, 238 A.2d 100, 107 (1968) ("It would seem to this court that as long as the party against whom the judgment was

sought to be used had a full and fair opportunity to be heard on the issue there would be no constitutional impediment to the application of the doctrine of collateral estoppel where there was no mutuality."). The MHPI Projects are entitled to argue that this order should not be reconsidered by the Maryland Court and that other state courts should accord this judgment the same preclusive effect it has under Maryland law.[6] *See Durfee v. Duke*, 375 U.S. 106, 109 (1963) (holding that the Full Faith and Credit Clause of United States Constitution requires a state enforcing foreign judgment to apply rendering state's law if more preclusive than that of enforcing state).

Whether, and to what extent, the Maryland court order is entitled to collateral estoppel in courts in Kansas or Texas or elsewhere is not for this Court to decide. Nor is this Court permitted to determine whether or not the Maryland order should be reconsidered by that court or to prevent the Maryland Court from considering the Meade Project's response to Ambac's motion to reconsider. In short, there is no legal principle or precedent that allows this Court to dictate the extraterritorial effect that other courts, who all had and continue to have prior jurisdiction over the Ambac Default issue, must give to the Maryland or the Wisconsin order. *State ex rel. N.Y., C. & St. L. R. Co. v. Nortoni*, 331 Mo. 764, 771, 55 S.W.2d 272, 275 (1932) ("It is familiar law that, where the jurisdiction of a court and the right of a party to prosecute the proceedings therein have once attached, that right cannot be arrested or taken away by proceedings in another court.") (citation omitted).

[6] Similarly, Ambac is entitled to argue that the Maryland court should reconsider its decision based on this Court's orders and that other state courts should not accord the Maryland court order full faith and credit. Ambac has already made this argument in several out-of-state cases.

2. Even if this Court disagrees with the Maryland court's order, the MHPI Projects must be allowed to argue that it is entitled to full faith and credit.

The MHPI Projects must be allowed to argue that the Maryland court's judgment is entitled to full faith and credit, regardless of whether this Court believes it is better situated to decide the issue or whether it believes the Maryland court's judgment is wrong. The full faith and credit command is "exacting, if not inexorable," *Estin v. Estin*, 334 U.S. 541, 546 (1948), and "precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the [other state's] judgment is based." *Milliken*, 311 U.S. at 462. A state court is not "free to ignore rights and obligations . . . established by the judicial proceedings of others," and instead must treat another state's judgments as "conclusive." *Magnolia Petroleum*, 320 U.S. at 439.

This Court has stated it believes the Meade Project misled the Maryland court regarding the structure of the Rehabilitation, but that is not the case and Ambac forcefully argued its position through its experts and experienced, reputable counsel. But, again, the issue of the quality and value of the evidence before the Maryland court is not for this Court. Ambac has raised full faith and credit of this Court's orders on motion for reconsideration, and its reconsideration motion includes reconsideration of the issue of finding an Ambac Default based on this Court's orders. The MHPI Projects suggest that it is appropriate and not contemptuous to argue that the Maryland court's order is entitled to full faith and credit in other courts and to respond to Ambac's motion to reconsider on the merits, and support the Maryland court's decision under Maryland law.[7]

[7] Such arguments would include the constitutional argument that Maryland is not required to adopt this Court's orders under the principles of full faith and credit or comity and that the Maryland Court had the benefit of a fully developed record and full argument, that the Meade Project, through its retained expert witnesses and in all briefing, accurately described the structure of the Rehabilitation, including the General and Segregated Accounts and the economic consequences of this structure. (Ex. 7, Meade Mot. for Summ. J.); (Ex. 8, Meade Interrog. Resp., at 2)

3. The February 7 Injunction impermissibly imposes legal conclusions on other state courts.

By enjoining the MHPI Projects from arguing (and thus other state courts from fully considering) whether full faith and credit should be given to the Wisconsin and Maryland orders, the February 7 Injunction imposes this Court's rulings upon numerous other state courts which are deciding issues under contracts explicitly governed by their own state laws. This is contrary to established constitutional principles. *Pac. Emp'rs. Ins. Co.*, 306 U.S. at 503-505 (holding that one state may not "legislate for [another]" or "project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it"). To the best of counsel's knowledge and after diligent research, no court in U.S. jurisprudence has ever previously issued such an order, enjoining a party in another case from arguing whether the Constitution's Full Faith and Credit Clause applied to a court order from another state. This Court, in its February 7 Injunction, ordered the MHPI Projects to advise other state courts that Wisconsin law controls the outcomes of cases initiated by Ambac in those other state courts where the dispute is governed by laws of those states and not Wisconsin law.

The MHPI Projects delivered this Court's Confirmation Order to the sister courts, and Ambac has and will continue to use this Court's statements on the record and orders in the DSRF Litigation. But this Court cannot take the further step of prohibiting the MHPI Projects from responding to Ambac by enjoining them from even arguing to those other courts that they are not required under full faith and credit to automatically adopt this Court's rulings.

("[I]t is Mr. Deal's opinion that from an economic perspective, the Rehabilitator has been *appointed custodian for* or *authorized to take possession of a material portion* of all of Ambac's property across many independent measures [including the Secured Note and Reinsurance Agreement]"); (Ex. 9, Meade Interrog. Resp.) (containing expert report of E. Csiszar).

4. The February 7 Injunction is an impermissible antisuit injunction.

Wisconsin recognizes that the circumstances justifying entry of an antisuit injunction enjoining someone from conducting litigation in another forum is a rare and drastic remedy. *Chi., M. & St. P. Ry. Co. v. McGinley*, 175 Wis. 565, 185 N.W. 218, 220 (1921) (holding purpose of antisuit Injunction is to "to regulate the conduct of its own citizens over whom it has jurisdiction, in such a way as to prevent hardship, oppression, or fraud."). "[T]he power of one state to interfere with a litigant who is in due course pursuing his rights and remedies in the courts of another state ought to be sparingly exercised." *Id.* at 223. "Each case must be ruled by its own facts." *Id.* at 222 (citation omitted).

While allowed under extraordinary circumstances, such injunctions are rare and not without limit. "[T]he courts of the several states are without authority or jurisdiction to curtail or prohibit in any form the exercise of rights and privileges conferred by [other states]." *Union Pac. R. Co. v. Rule*, 155 Minn. 302, 305 193 N.W. 161, 162 (1923). Where the intended effect of an antisuit injunction, though in name only applicable to parties, is to interfere with the jurisdiction of another state court, it is improper on its face. *Grand Trunk W. R. Co.*, 152 N.E.2d at 865 ("[T]he intended effect of the Michigan injunction, though directed at the parties and not at this court, is to prevent the Illinois court from adjudicating a cause of action of which it had proper jurisdiction."). "It is familiar law that, where the jurisdiction of a court and the right of a party to prosecute the proceedings therein have once attached, that right cannot be arrested or taken away by proceedings in another court." *State ex rel. N.Y., C. & St. L. R. Co. v. Nortoni*, 331 Mo. 764, 771, 55 S.W.2d 272, 275 (1932). That is the case even where, as here, one court thinks another court is wrong. An antisuit injunction "[cannot] be properly based upon any theory that this court knows better how to do justice than the court of [another state]; that it can weigh evidence better or more justly apply to the facts any general principle of law or of equity, nor upon the ground

that this court recognizes different rules of law or of equity . . .” *McGinley*, 175 Wis. 565, 185 N.W. at 223 (citation omitted).

The proper place for the issue of full faith and credit to be decided is the court in which it is asserted, by either side, which is why courts routinely decline to afford full faith and credit to anti-suit injunctions. *Hawthorne Savings F.S.B. v. Reliance Ins. Co. of Ill.*, 421 F.3d 835 (9th Cir. 2005) (refusing to abstain, grant full faith and credit, or pay comity to a Pennsylvania rehabilitation court’s stay of all litigation against insurer, even after finding that Pennsylvania would qualify as a reciprocal state under California law); *Love v. Frontier Ins. Co.*, 526 F. Supp. 2d 859 (N.D. Ill. 2007) (holding that direct action against insurer in Illinois was not precluded by an antisuit injunction issued by a rehabilitation court in New York); *Hare v. Starr Commonwealth Corp.*, 813 N.W.2d 752, 760 (Mich. Ct. App. 2011) (“[T]he Full Faith and Credit Clause did not require the circuit court to recognize or enforce that portion of the New York order of rehabilitation [that] … effectively operated as an antisuit injunction [because] it fell ‘outside the full faith and credit ambit.’”); *Mahan v. Gunther*, 278 Ill. App. 3d 1108, 663 N.E.2d 1139 (1996) (similar); *Fuhrman v. United Am. Insurers*, 269 N.W.2d 842, 847 (Minn. 1978) (similar). The February 7 Injunction forbids the MHPI Projects from even asking other courts to consider the issue of full faith and credit, which is not permitted.

B. The Injunctions Operates As An Unconstitutional Restraint On The MHPI Project’s First Amendment Rights.

The U.S. Supreme Court has held that injunctions involving speech are subject to “rigorous” constitutional scrutiny. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994). They must satisfy “general principles” of the First Amendment as well as “the general rule, quite apart from First Amendment considerations,” that an injunction should be “no broader than necessary to achieve its desired goals.” *Id.*

By barring the MHPI Projects from making arguments they are constitutionally entitled to make, and by requiring them to endorse Ambac's arguments in other state courts, the February 7 Injunction is overbroad. An Injunction which prohibits speech, including based on the Full Faith and Credit Clause of the Constitution, violates the longstanding First Amendment principle that the government may not require a party "to express a message [it] disagrees with." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005); *see also W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

The term "prior restraint" describes "judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis in original) (quoting M. Nimmer, Nimmer on Freedom of Speech § 4.03, p. 4–14 (1984)). And "[a]ny prior restraint on expression" carries "a 'heavy presumption' against its constitutional validity." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Because the February 7 Injunction forbids the MPHI Projects from advancing legal arguments in the future, in litigation pending in other courts, it becomes an "order[] that actually forbid[s] speech activities," which is a "classic example[] of [a] prior restraint[]." *Alexander*, 509 U.S. at 550; *see also McCarthy v. Fuller*, 810 F.3d 456, 464 (7th Cir. 2015). The February 7 Injunction is an unconstitutional prior restraint because it enjoins the MHPI Projects from arguing going forward that this Court's orders should not be given full faith and credit.

The purpose of the February 7 Injunction was accomplished when the MHPI Projects were required to, and then did, inform other state courts of this Court's Confirmation Order. Every court now knows exactly what this Court found and why. Ambac and its counsel can use that to argue that this Court's orders should be given full faith and credit. But to the extent this

Court enjoined the MHPI Projects from responding to those arguments, the February 7 Injunction is an impermissible restraint under the First Amendment.

C. The Court Of Appeals' Prior Decision in *Nickel* Does Not Decide The Full Faith And Credit Issue In Out-Of-State Courts.

The Wisconsin Court of Appeals' decision in *Nickel* did not address or decide the issue of whether an injunction barring parties from arguing full faith and credit is permissible. *In re Ambac Assur Corp*., 2013 WI App. 129, 351 Wis. 539, 841 N.W.2d 482 ("*Nickel*"). Nothing in *Nickel* prevents that or prevents the MHPI Projects from arguing full faith and credit to other state courts, which the February 7 Injunction does. While the *Nickel* court approved an injunction over certain policies in the Segregated Account, it did not make any specific findings regarding the status of General Account policies. *Id*. The Court of Appeals held it was proper to enjoin future action with respect to those policies in the Segregated Account and under the Commissioner's ***exclusive jurisdiction***—because the reserved control rights were being placed under the control of the Commissioner, not Ambac itself. *Id.*, ¶ 141.

The *Nickel* court also addressed arguments made by several Segregated Account policyholders that the rehabilitation impermissibly transferred assets to the Segregated Account, and ruled that, upon the commencement of the Rehabilitation, "all assets remain in the general account because transferring the assets to the segregated account would have triggered acceleration and early termination provisions." *Id.* at ¶ 82. However, the holding did not specifically address the court-appointed Rehabilitator's ability or authorization to take assets as part of administering the Segregated Account, which is what the MHPI Projects have argued and the Maryland court found under the (c)(i) and (c)(ii) triggers.[8]

[8] The MHPI Parties have never misrepresented the *Nickel* holding and have not urged any courts to reject it. In fact, Ambac has never even urged application of *Nickel* in any of the DSRF Litigation courts.

II. THE MHPI PROJECTS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR APPEAL OF THE CONFIRMATION ORDER.

The plain language of Article 6.8 indicates that its injunction does not apply to the MHPI Projects. If read to apply to the MHPI Projects (or as the Article 6.8 Injunction reads "All Entities"), not only is it impermissible for all the same above reasons, but it is also overly broad and impermissibly vague, which independently renders it void under Wisconsin law.

A. The Plain Language Of The Article 6.8 Injunction Does Not Apply To The MHPI Projects.

The plain language of Article 6.8 binds parties receiving Distributions under the Plan. The MHPI Projects have not and will not receive any Distributions under the Plan, as their policies were never within the Segregated Account. The Rehabilitator's January 23, 2018 letter claiming that Article 6.8 would sufficiently enjoin the MHPI Projects from arguing in support of their Ambac Default defense ignores the very first sentence of the Article, which provides its context and limiting principle. (Dkt. No. 1566.) The single sentence of Article 6.8 that the Rehabilitator set forth in his January 23, 2018 letter cannot be read in a vacuum. Article 6.8 is entitled "**Discharge and Release Injunction.**" The first sentence of the Article states:

> Except as may otherwise be provided herein or in the Definitive Documents, **the Distributions…made under this plan shall be in complete exchange for and in full and unconditional settlement, satisfaction, discharge and release** of all Claims, Deferred Amounts, obligations, rights, Causes of Action or liabilities of the Segregated Account and AAC, and shall effect a full and complete discharge and termination of any and all Liens, or other claims, interests, or encumbrances upon the Segregated Account and AAC with respect to such Claims, Deferred Amounts, obligations, rights Causes of Action or liabilities.

(Second Am. Plan, Art. 6.8.) (Emphasis added.)

The injunctive language that follows enjoins all claims relating to the Rehabilitation Proceedings or the specific events leading up to these proceedings and applies only to those

parties receiving Distributions in exchange for the full settlement of their claims and liens against Ambac. (Id.) The limited applicability of Article 6.8 to parties that have received Distributions is further dictated by the broad definition of "Entities." (Id., Art. 1.43.) If Article 6.8 applies to every "individual, person, corporation, partnership, limited liability company, association, joint stock company, estate, trust, unincorporated organization, government or any political subdivision thereof, or any other entity," whether or not they received Distributions under the Plan, then it is overbroad and unenforceable. *Welytok v. Ziolkowski*, 2008 WI App 67, ¶ 24, 312 Wis. 2d 435, 452, 752 N.W.2d 359, 367 ("Injunctions, of course, must be specific as to the prohibited acts and conduct in order for the person being enjoined to know what conduct must be avoided.").

The MHPI Projects' policies with Ambac were never in the Segregated Account, and the MHPI Projects received no Distributions arising out of the Plan. Article 6.8 thus cannot be used as an injunction preventing the MHPI Projects from arguing full faith and credit in pending state court litigation. Nor would this type of an antisuit injunction be entitled to full faith and credit in any sister court, especially given the MHPI Projects were not full parties to these quasi-administrative proceedings. *See Mahan*, 278 Ill. App. 3d 1108 (refusing to afford full faith and credit or comity to Indiana rehabilitation court's anti-suit injunction); *Fuhrman*, 269 N.W.2d at 847 (Minnesota court was not required to pay full faith and credit to an anti-suit injunction issued by an Iowa court in insurance liquidation proceedings.).

B. Both The Rehabilitator And This Court Indicated That Article 6.8 Did Not Apply To The MHPI Projects At The Time This Court Confirmed The Plan.

As discussed above, during the January 22 hearing, the Rehabilitator suggested that there was no injunction in the Confirmation Order or the Plan enjoining the MHPI Projects from asserting their defenses in the pending DSRF Litigation. (Dkt. No. 1575, 1/22/18 Hr'g Tr., 4:25-

5:14.) In response to questioning from the Court, the Rehabilitator made clear as to why he was not seeking an injunction related to the default provision in Article 6.13:

> The COURT: And you seek a cure but not an injunction against raising the alleged default arising out of the claim that the segregated account and related transactions constitutes a default. You don't seek an injunction against parties raising that as an affirmative defense in litigation?
>
> [Counsel for the Rehabilitator]: ***I think that would complicate the question of the court's jurisdiction and comity and issues like that. That is certainly something we've talked about and we've proposed.***
>
> And for purposes of today, frankly, Your Honor, we would hope to leave court today with a confirmation order so that the transaction can be closed and an order that does, in fact, say any defaults are cured.

(Id. at 4:25-5:14.) (Emphasis added.)[9]

This Court has repeatedly stated that it does not intend to interfere with the litigation pending before several sister courts. (Dkt. No. 1575, 1/22/18 Hr'g Tr. at 17:13-16) ("[My declaration] would just be declaring what is, in fact, the case in the state of Wisconsin, whether or not these are, in fact, defaults, and those courts can do what they should do under their law."); (Id. at 18:14-18) ("I have no right to go in to that court and tell them what to do. I agree with that. But I do have every right to declare what is going on in rehabilitation, especially in light of the motions that are brought to me. I have to do that."); (Id. at 52:14-18) ("I note the rule of law that has been provided by Mr. Kravit from *In re Clark* that I'm not supposed to essentially stick my nose into other courts' business, and that is not what the orders that are being requested from either party are suggesting here."); (Id. at 68:8-11) ("And as I say, I'm not doing anything that I am inserting myself into those courts. I am making an order that I believe the rules of comity require be honored, but I'm not telling them what to do."). The Court also acknowledged that it

[9] The Rehabilitator now states that this only referred to the Confirmation Order and not the Plan itself, but the transcript is clear that the Court and the Rehabilitator's counsel were discussing Article 6.13 and its inclusion in the Plan through approval of the Confirmation Order.

does not have exclusive jurisdiction over the issue of an Ambac Default and thus would have no basis to do so. (Id. at 61:1-4.) The Rehabilitator agreed with this Court's assessment: "As Your Honor points out, they [the sister courts] can do with it then what they see fit to do with it, but I think it's important that the word come from this court first and now." (Id. at 45:8-11.) To interpret Article 6.8 as prohibiting the MHPI Projects from asserting full faith and credit and comity arguments in sister courts related to this Court's orders and the order entered by the Maryland court is inconsistent with these prior statements.

C. If Article 6.8 Is Read To Prohibit The MHPI Projects From Arguing Full Faith and Credit, It Is Unnecessarily Broad And Impermissibly Vague.

"Injunctions, of course, must be specific as to the prohibited acts and conduct in order for the person being enjoined to know what conduct must be avoided." *Welytok* 2008 WI App 67, ¶ 24. Here, Article 6.8 states in part:

> All Entities will be permanently barred and enjoined from asserting against the Ambac Parties, or their respective successors or property . . . any and all Claims . . . Causes of Action or liabilities, based upon any act, omission, transaction, or other activity of any kind or nature in connection with the Segregated Account, the Proceeding, and the Proceeding Circumstances, other than as expressly provided for in this Plan.

(Second Am. Plan, Art. 6.8.) Given that the Plan defines "Entity" as "[a]n individual, person, corporation, partnership, limited liability company, association, joint stock company, estate, trust, unincorporated organization, government or any political subdivision thereof, or any other entity", if not limited to those receiving Distributions under the Plan, it would literally apply to every person, company government, and organization in the world. (Id. at § 1.43.) Based on the Rehabilitator's interpretation of Article 6.8, this provision enjoins all such "Entities" from asserting defenses against Ambac (even in pending litigation) and could be read to enjoin those

"Entities" from arguing full faith and credit or comity related to this Court's or any other court's orders no matter how or when they were entered.

Such an interpretation is overbroad and void under Wisconsin law as it is much broader than necessary to ensure Ambac's successful exit from Rehabilitation. *City of Milwaukee v. Burnette*, 2001 WI App 258, ¶¶ 17-18, 248 Wis. 2d 820, 840, 637 N.W.2d 447, 457 (reversing entry of a portion of injunction "on vagueness grounds" because injunction was "susceptible to [an] interpretation" that was "broader than necessary"); *Hunter v. Hunter*, 44 Wis. 2d 618, 622, 172 N.W.2d 167, 169 (1969) (holding that order was not an injunction capable of being enforced through contempt because "it did not specifically order or adjudge" the specific conduct in question); *State v. Dickson*, 53 Wis. 2d 532, 547, 193 N.W.2d 17, 25–26 (1972) (similar). Thus, the MHPI Projects have a reasonable likelihood of success on the merits of their appeal related to the application and scope of the Article 6.8 Injunction.

III. THE MHPI PROJECTS WILL SUFFER IRREPARABLE HARM IF THE COURT'S ORDERS ARE NOT STAYED.

The MHPI Projects face imminent irreparable harm if the February 7 Injunction remains in place or the Article 6.8 Injunction (or declaratory relief in Article 6.13) is read to prohibit them from responding to Ambac's motion for reconsideration of the Maryland order or from arguing in other state courts that the Maryland Order should be given full faith and credit. As detailed above, the Meade Project has already sought one extension, over Ambac's objection, and now has its opposition to Ambac's motion to reconsider the Maryland court's summary judgment order due March 14. (Ex. 3, S. Oberg Aff.) The Bliss Project secured, over Ambac's objection, a temporary abatement of the hearing on the parties' summary judgment motions, which are now scheduled to be heard on April 27, 2017. (Ex. 4, M. Osborn Aff.) Without risk of contempt, the Riley Project is unable to substantively respond to Ambac's supplemental brief

which argues that the Kansas court must afford full faith and credit to the January 22 Confirmation Order and likewise that the Court must ignore the Maryland court's summary judgment order. (Ex. 5, P. Riordan Aff.) Finally, under the current schedule in its case, the Leavenworth Project has its summary judgment brief due April 10, 2018. (Id.) While this date may be extended, it would still fall well before any resolution on the merits of this case by the Court of Appeals. This is an injury that cannot be addressed with monetary damages and thus constitutes irreparable harm. *See, e.g.*, *Am. Mut. Liab. Ins. Co. v. Fisher*, 58 Wis. 2d 299, 305, 206 N.W.2d 152, 156 (1973).

The MHPI Projects' First Amendment rights and the constitutional imperative of the Full Faith and Credit Clause are directly implicated by this Court's orders. Being unable to argue against reconsideration of the Maryland Order and to defend against Ambac's claims by making any argument as to collateral estoppel and full faith and credit, injures the MHPI Projects irreparably. "When constitutional rights are threatened or impaired, irreparable injury is presumed." *Obama for Am.*, 697 F.3d at 436 (citing *ACLU of Ky.*, 354 F.3d at 445.) "The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate, and injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006); *see also Citizens for a Better Env't v. City of Park Ridge*, 567 F.2d 689, 691 (7th Cir. 1975) ("[E]ven the temporary deprivation of First Amendment rights constitutes irreparable harm in the context of a suit for an injunction."); *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury.").

The MHPI Projects must be allowed to exercise their constitutionally protected rights to argue in other state courts that the Maryland court's order is entitled to full faith and credit.

Ambac's continued exercise of its lender consent rights have threatened to cause harm to the MHPI Projects' commercial reputation and good will, another recognized form of irreparable harm. *See, e.g., Praefke Auto Elec. & Battery Co. v. Tecumseh Prod. Co.*, 123 F. Supp. 2d 470, 479 (E.D. Wis. 2000) ("[T]he loss of goodwill [is] an irreparable harm."). For example, at the Meade Project, Ambac used its consent rights to hold up the Meade Project's Out-Year Development plan – fully approved by the Army as necessary for the Meade Project – forcing the Meade Project to sue Ambac for breach of contract and seek specific performance. (Ex. 10, Meade Am. Compl. at ¶¶ 84-92) (stating count for breach of contract based upon Ambac's refusal to consent to Out-Year Development Plan). Ambac's refusal to consent to an increase in the value of its collateral thus has threatened the good will and competitive position of the Meade Project – without additional development it would have difficult competing in the long-term with off-base housing which continues to grow. (Id. at ¶ 1.) This is the claim that could not be resolved on statute of limitations grounds and thus required the Maryland court to decide on the merits the issue of Ambac Default. (Ex. 6, 1/18/18 Maryland Am. Order & Op. on Summ. J.) Without a stay, the MHPI Projects are constrained in arguing the effect of this Court's orders or the Maryland court order in pending out-of-state litigation, while Ambac is free to continue to exercise its rights to make those same arguments. As a result, the MHPI Projects face irreparable harm without a stay.

IV. A STAY WILL NOT CAUSE SUBSTANTIAL HARM TO ANY OTHER PARTIES.

"In evaluating this harm, the circuit court should consider [1] the substantiality of the harm asserted, [2] the likelihood of its occurrence, [3] the adequacy of the proof provided and [4] whether it truly is a harm that cannot be remedied by the later collection of the judgment plus interest." *Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶ 22, 237 Wis. 2d 498, 515,

614 N.W.2d 565, 574. Here, the MHPI Projects will suffer irreparable harm in the form of potential final judgments being rendered while they are unable to assert a constitutional full faith and credit argument, which likely could not be remedied later if final judgments are entered against them in the pending cases.

At the same time, Ambac is free to argue that the sister courts should give this Court's orders full faith and credit and comity, and in fact, Ambac is doing exactly that in each of the pending cases. Ambac is likewise free to continue to argue the merits as to why it believes no Ambac Default has occurred. If the Court's orders are not stayed as requested in this Motion, then Ambac could force the MHPI Projects to waive their constitutional arguments on full faith and credit and entire defense or face charges of contempt. There is a real risk that the Projects will be unable to defend against the claims being pursued by Ambac in the DSRF Litigation and that sister courts will have no alternative but to rule in Ambac's favor in other courts.

V. THE PUBLIC INTEREST FAVORS A STAY.

The last factor this Court must consider is whether a stay will "do harm to the public interest." The Court of Appeals has said that in many cases this "is not a relevant consideration and will not weigh either in favor of or against a stay" such as when a case involves private litigants, as opposed to invalidating a statute or government regulation. *Scullion*, 2000 WI App 120, ¶ 23. To the extent this factor is relevant, it weighs in favor of a stay pending appeal. *See Christian Legal Soc'y*, 453 F.3d at 859 ("[I]njunctions protecting First Amendment freedoms are always in the public interest.").

A stay of the February 7 Injunction will not affect the actual Rehabilitation or its administration, as the Injunction only applies to the MHPI Projects themselves as private litigants proceeding in litigation initiated by Ambac to which the Rehabilitator is not a party. Likewise, a stay of the Article 6.8 Injunction is sought only to the extent it applies to the MHPI

Projects; the Projects do not seek a stay of the Plan itself. But if the stay is not granted, the public interest will be harmed, as the MHPI Projects—in which the U.S. Army is a member—will be placed in an untenable position where they are forbidden from arguing the full faith and credit of the Maryland court's order or they will be held in contempt. A stay allows, the proceedings (initiated by Ambac) to continue to proceed as they have for years, but a denial of the stay will upend those cases and unfairly tilt them in Ambac's favor. This distortion of legal proceedings is against the public interest.

If the Court's orders are eventually upheld, the cure provision in Article 6.13 will be asserted by Ambac to reverse any judgment rendered on any issue in favor of the MHPI Projects, making any threatened harm to the Rehabilitator or Ambac minimal. Similarly, if the out-of-state courts give this Court's orders full faith and credit, which Ambac is free to continue to argue, then the Rehabilitator and Ambac do not suffer any actual harm.

CONCLUSION

For the foregoing reasons, the MHPI Projects request the Court stay enforcement of the February 7, 2018 Injunction and the January 22, 2018 Confirmation Order to the extent it enjoins the MHPI Projects from arguing the issue of full faith and credit or against reconsideration of the Maryland decision in other state courts. The MHPI Projects have a strong likelihood of success on the merits of their appeal and will suffer irreparable harm in the ongoing litigation initiated against them by Ambac if the stay is not granted.

Dated this 6th day of March, 2018.

KRAVIT, HOVEL & KRAWCZYK S.C.

/s/ Stephen E. Kravit

Stephen E. Kravit (State Bar No. 1016306)
Benjamin R. Prinsen (State Bar No. 1074311)
Leila Nadim Sahar (State Bar No. 1090093)
825 North Jefferson - Fifth Floor
Milwaukee, WI 53202
(414) 271-7100 - Telephone
(414) 271-8135 - Facsimile
kravit@kravitlaw.com
brp@kravitlaw.com
lns@kravitlaw.com

Attorneys for MHPI Projects