STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

In the Matter of the Rehabilitation of
Segregated Account of Ambac Assurance Corporation:

Monterey Bay Military Housing, LLC, 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,

Appellants,

v.

Dane County Case No. 10 CV 1576
Appeal No. 2018-AP-000425

Sean Dilweg, Office of the Commissioner of Insurance and Ambac Assurance Corporation,

Respondents.

APPELLANTS' MEMORANDUM IN SUPPORT OF MOTION FOR EX PARTE RELIEF PENDING APPEAL AND RELIEF PENDING APPEAL

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INTRODUCTION

Appellants seek an immediate ex parte stay pending appeal and a further stay during the entire pendency of the appeal from certain orders of the circuit court that prohibit them from asserting legal arguments that they are constitutionally entitled to make in cases pending in state courts outside of Wisconsin. Expedited relief is necessary because there are impending filing deadlines (including one currently set for March 14) before those out-of-state courts.

Specifically, Appellants seek a stay pending appeal of the enforcement and effect of the circuit court's February 7, 2018 injunction order ("February 7 Injunction"), as well as a stay pending appeal of the enforcement and effect of the circuit court's January 22, 2018 Confirmation Order ("Confirmation Order") to the extent the Confirmation Order enjoins the MHPI Projects through the injunctive relief set forth in Article 6.8 or the declaratory relief set forth in Article 6.13 of the Second Amended Plan of Rehabilitation from arguing full faith and credit in other state courts or responding to Ambac Assurance Corporation's ("Ambac") motion to reconsider the Amended Opinion and Order

signed by the Circuit Court for Anne Arundel County, Maryland on January 18, 2018.

A Motion for Stay Pending Appeal and a companion Motion for Expedited Hearing were filed in the circuit court in this case on March 6, 2018. On that same date, the circuit court ordered a briefing schedule that concludes with a final brief to be filed March 29, 2018 and stated that the circuit court will set a hearing after briefing is complete. If Appellants are required to wait that long for a decision on their Motion for Stay Pending Appeal, the relief sought will be moot, because the briefing and hearing dates in the circuit court in this case will not be completed until after the other impending deadlines in the out-of-state courts have passed. That will force Appellants into the Hobson's choice of forfeiting their constitutional rights in out-of-state cases or asserting arguments in those cases that could subject them to contempt here in Wisconsin.

Appellants previously petitioned this Court for a Supervisory Writ of Prohibition to achieve the relief sought here from the February 7 injunction. *State of Wis. ex rel.*

Carlisle/Picatinny Family Housing L.P. v. Cir. Ct. Dane Cnty., Appeal No. 2018AP264-W (Dane Cnty. Case No. 2010CV1576). This Court denied the Petition on the grounds that an "appeal with an accompanying motion for relief pending appeal (filed first in the circuit court)" is "an available alternate mechanism for seeking relief." (Ex. 29, 2/16/18 Wis. Ct. App. Decision, p. 4.)

Appellants subsequently filed their Notice of Appeal in the circuit court and sought an expedited stay pending the appeal. Expedited relief has been denied because of the circuit court's extended briefing and hearing schedule. That is why Appellants now seek an immediate ex parte stay pending appeal from this Court, as is fully explained and supported in this Memorandum. Deadlines in the out-of-state cases loom, and irreparable harm is very likely to result if the stay is not immediately granted.

For the reasons set forth more fully below, Appellants respectfully request that this Court enter an immediate stay of the circuit court's orders set forth in Appellant's Motion for Ex Part Relief Pending Appeal and Relief Pending Appeal pending

briefing on this application, and for a further stay pending the entire appeal.

The MHPI Projects Request Expedited Relief

The MHPI Projects face irreparable harm if immediate ex parte relief is not granted by this Court. The MHPI Projects moved for a stay from the circuit court. On March 6, 2018, in response to the MHPI Projects' motion for a stay pending appeal, the circuit court entered a briefing schedule that will not be completed until March 29 after which a hearing will be scheduled. (Ex. 1, 3/6/18 Order.) The MHPI Projects will suffer irreparable harm before the motion for a stay pending appeal will be heard and, as a result, the MHPI Projects have no choice but to seek expedited relief from this Court.

There are numerous upcoming deadlines that will come and go in out-of-state cases pending in six courts around the country between Ambac and the MHPI Projects ("Debt Service Reserve Fund Litigation" or "DSRF Litigation") before the circuit court in this case will address the motion for stay pending appeal filed below.

In the pending DSRF Litigation in Maryland state court between Ambac and Meade Communities LLC (the "Meade Project"), the Meade Project has a current deadline of March 14 to file its opposition to Ambac's motion to reconsider the Maryland court's Amended Opinion and Order signed by the court on January 18, 2018. Without a stay, the Meade Project cannot adequately respond to the motion to reconsider without risking contempt in the Wisconsin circuit court.

In the Kansas DSRF Litigation between Ambac and Fort Leavenworth Frontier Heritage Communities II, LLC (the "Leavenworth Project"), the Leavenworth Project in that case currently has a motion for summary judgment due on April 10, 2018. Without a stay, the Leavenworth Project cannot move for summary judgment or defend against Ambac's anticipated summary judgment motion.

In the Texas DSRF Litigation between Ambac and Fort Bliss/White Sands Missile Range Housing LP (the "Bliss Project"), the court scheduled a hearing on the parties' motions for summary judgment for April 27, 2018, but if the circuit court's

orders in this case remain in effect, the Bliss Project will be unable to fully participate in that scheduled hearing (even to argue full faith and credit) in the Texas DSRF Litigation without subjecting itself to contempt.

In the Kansas DSRF Litigation against Riley Communities, LLC (the "Riley Project"), Ambac filed a supplemental brief arguing that the circuit court's Confirmation Order is entitled to full faith and credit and is thus dispositive of the parties' fully briefed summary judgment motions. The Riley Project in that case cannot respond to this motion and risks the Kansas court deciding the issue without giving the Riley Project an opportunity to be heard on that constitutional question.

BACKGROUND FACTS

A. The MHPI Projects

In 1996, as a result of the deteriorated condition of housing, Congress passed the Military Housing Privatization Initiative ("MHPI"), to develop, construct, and maintain housing at military bases around the country. (Ex. 2, Secretary of Defense, http://www.acq.osd.mil/housing.) The MHPI Projects are public-private joint ventures between the United States Army and

private developers, in which the Army has key consent rights. Each of the MHPI Project Appellants is a special purpose entity that was formed to develop, construct and manage military housing developments at one of twelve Army bases across the country. (Ex. 3, 9/30/16 MHPI's Resp. to Rehab. Mot. to Confirm at 1.)

B. Ambac and the MHPI Projects

To finance the large scale construction and development of housing at these military bases, each of the MHPI Projects secured a loan, often in the hundreds of millions of dollars. (*Id.* at 4.) Under the terms of the loan documents, the MHPI Projects purchased bond insurance and a surety bond from Ambac that guaranteed one year of principal and interest on the loans. (*Id*. at 4.) After the Rehabilitation of Ambac's Segregated Account was initiated, these MHPI Project policies and surety bonds remained at all times in Ambac's "General Account"; they were not placed in the Segregated Account subject to rehabilitation or the control of the Rehabilitator. (*See* Ex. 4, 7/15/16 Rehab. Mot. to Confirm, ¶ 17) (stating that the Rehabilitator's Motion "concerns policies allocated to the General Account"). Thus, the circuit court never

took jurisdiction over the policies in the General Account. (Ex. 5, 3/24/10 Rehab. Order, ¶ 2) ("This proceeding pertains solely to the Segregated Account . . . and does not pertain to the policies, contracts, assets, equity ownership interests, and liabilities remaining in Ambac's General Account.").

The terms of the loan documents for each project (the "MHPI Project Documents") state that Ambac, as the provider of the surety bond, must maintain specific credit ratings and that, upon notice of a credit downgrade, the MHPI Project must "either cause a replacement Reserve Account Contract to be issued . . . or replace such Reserve Account Contract with immediately available funds in the requisite amount." (*See, e.g.*, Ex. 3, 9/30/16 MHPI's Resp. to Rehab. Mot. to Confirm at Ex. 3, ¶ 4; *id*. at Exs. 4 and 5.) In 2008, Ambac's credit rating was downgraded, and ultimately its ratings were withdrawn. In addition, under the MHPI Project Documents, Ambac, as the entity providing insurance (known as "credit enhancement"), is allowed to enforce the rights of the lender, unless there has been an Ambac or Credit

Enhancer Default.[1] Such a Default exists when "(c) a court of competent jurisdiction or another competent regulatory authority enters a final and nonappealable order, judgment or decree (i) appointing a custodian, trustee, agent or receiver for Ambac or for all or any material portion of its property or (ii) authorizing the taking of possession by a custodian, trustee, agent or receiver of Ambac (or taking of possession of all or any material portion of Ambac's property)." (Ex. 6, 1/18/18 Meade Am. Order & Op. on Summ. J. at 5.)

Ambac did not take any action to enforce the rights of the lender, including to attempt to require the MHPI Projects to cash fund a debt service reserve, until 2015.

C. Initiation of Rehabilitation Proceedings Involving Ambac's Segregated Account

In March 2010, as a result of the continued deterioration of Ambac's financial condition, the Wisconsin Office of the Commissioner of Insurance (also the "Rehabilitator") initiated

[1] At some of the MHPI Projects, the relevant contractual term is a "Credit Enhancer Default" as opposed to an "Ambac Default." The definitions are substantively identical and, for clarity, this brief uses "Ambac Default" to encapsulate both.

Rehabilitation Proceedings; a Segregated Account was established and the Wisconsin court ordered that certain Ambac liabilities be placed into a Segregated Account, to be run by the Rehabilitator pursuant to court order. (Ex. 7, 3/24/10 Verified Pet. for Order of Rehab.; Ex. 5, 3/24/10 Rehab. Order, ¶ 3.) Ambac's performing assets, including the MHPI Project policies, remained with Ambac in what also is referred to as the "General Account." (Ex. 8, 10/08/10 List of Segregated Account Policies.)

The Wisconsin circuit court's March 24, 2010 Rehabilitation Order expressly authorized the Rehabilitator to "take possession of the assets of the Segregated Account" and to operate the Segregated Account in accordance with the Plan of Operation submitted with the Verified Petition. (Ex. 5, 3/24/10 Rehab. Order, ¶ 6.)

In its subsequent Order dated January 24, 2011, the circuit court held that the Segregated Account was capitalized by a combination of a $2 billion Secured Note and an Aggregate Excess-of-Loss Reinsurance Agreement (the "Reinsurance Agreement"), finding that both "can be drawn upon demand to

cover permitted Segregated Account claims as they arise pursuant to the Plan." (Ex. 9, 1/24/11 Decision and Final Order Confirming Rehabilitator's Plan of Rehab, ¶ 71.) The Secured Note provided the Rehabilitator with access to $2 billion in assets in the General Account, if needed, for use in paying claims against the Segregated Account. (Ex. 10, 3/24/10 Secured Note at 1.) The Court further approved capitalization of the Segregated Account with a Reinsurance Agreement, which provided the Rehabilitator with the authority to draw upon virtually all of the other assets in the General Account, subject to a cap of $100 million. (Ex. 11, 3/24/10 Aggregate Excess of Loss Reinsurance Ag.)

D. Ambac Initiates Litigation against the MHPI Projects

It was not until August 2015[2] that Ambac threatened to initiate litigation against the MHPI Projects if they did not cash

[2] The timing of Ambac's August 2015 demand is noteworthy. Ambac sat on the purported lender rights for over seven years, only seeking to require cash funding after purchasing approximately $73 million in D tranche military housing bonds from Freddie Mac. (Ex. 12, 2015 Ambac Annual Statement at Sch. D- Part 3, p. E13; Ex. 13, 1/4/18 Hr'g Tr. at 219:14-23.) Ambac purchased the bonds at a substantial discount; at the time of the purchase, the bonds had a value of approximately $121 million. (*Id.*) This transaction was so large it had to go through Ambac's investment exception approval process and get approval from OCI. (Ex. 13, 1/4/18 Hr'g Tr. at 56:7-

fund reserve accounts as a result of Ambac's 2008 credit downgrade—which rendered the surety bonds Ambac sold the MHPI Projects noncompliant with the terms of the MHPI Projects' Servicing and Lockbox Agreements. Ambac's demand would have required the MHPI Projects collectively to set aside over $200 million into accounts where the money could not be used over the life of the Projects (for upwards of 30 years depending on the project) to develop and construct housing as approved by the Army. When the MHPI Projects did not accede to this demand, Ambac initiated litigation in numerous states other than Wisconsin, asserting purported lender rights under the terms of the MHPI Project Policies in Ambac's General Account to require the MHPI Projects to contribute over $200 million to debt service reserve funds.

Ambac first sued the MHPI Project located at Fort Meade, Maryland (the "Meade Project"), which houses the National

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57:10.) It was only after Ambac bought over $73 million in military housing bonds relating to these and other Projects in 2015 that it demanded that the MHPI Projects cash fund and threatened suit. Ambac's apparent motive was to increase the value of the bonds it purchased, to the detriment of the MHPI Projects and the military families they serve.

Security Administration, in federal court. The Meade Project moved to dismiss the federal lawsuit for lack of federal jurisdiction and filed a Maryland state court action in order to secure the proper jurisdiction. Ambac later withdrew the federal lawsuit, and the lawsuit proceeded in Maryland state court. Ambac subsequently filed five additional lawsuits in various states against other MHPI Projects on this identical issue. Today, seven suits, all the result of Ambac's demand and its initiation of the Meade Project lawsuit, are pending around the country in six state courts.

In all of the cases, the MHPI Projects assert two primary defenses: (1) Ambac's demand for cash funding was barred by the applicable statutes of limitations; and (2) even if Ambac's claim was timely, it had no standing to bring such a claim, having lost its ability to enforce the rights of the lender because an "Ambac Default" had occurred by virtue of the structure and capitalization of Ambac's Segregated Account. These non-Wisconsin state courts were the first to acquire jurisdiction to rule on these issues and continue to have jurisdiction to rule on these issues.

E. The Second Amended Plan of Rehabilitation

During the course of the Rehabilitation proceedings, while the state court actions between Ambac and the MHPI Projects were pending, the circuit court repeatedly stated that it had no intent to interfere with the jurisdiction of other state courts. (Ex. 14, 10/11/16 Hr'g Tr. at 23:12-20) (The Court: "I'm not assuming any jurisdiction over any issue that involves Ambac[.]"); (*Id.* at 23:21-23) (The Court: "Sure, if I were going to start ordering Ambac around at this point, you bet I would have issues with jurisdiction. I probably wouldn't do it."); (*Id.* at 24:10-18) (The Court: "[I]t isn't a fact that I am looking to go to seven other courts and tell those courts what to do with parties in those actions . . . I'm not telling them what to do and I'm not ordering them what to do."). The Rehabilitator agreed, stating that it was "not asking this Court to . . . adjudicate whether there has been an 'Ambac Default' or a 'Credit Enhancer Default' within the meaning of these agreements. These issues are to be decided by the courts where the MHPI Cases are pending." (Ex. 4, 7/15/16 Rehab. Mot. to Confirm, ¶ 12); (*Id.* at n.6.) ("[T]he Rehabilitator's position is that . . . disputes concerning these Projects fall outside

the jurisdiction of this Court and are beyond the reach of this Court's Injunction Order.").

In entering the October 24, 2016 "Clarification Order" in response to the Rehabilitator's motion for clarity of the purpose of the Rehabilitation, the circuit court stated that "[t]his Court does not seek to decide the merits of disputes involving the General Account that are pending in other courts." (Ex. 15, Clarification Order at 1.) In affirming the circuit court's decision, this Court noted that "[t]he circuit court's order expressly declines to address the ultimate legal question in controversy in other jurisdictions-namely, whether the rehabilitation plan for Ambac's segregated account triggered 'credit enhancer default[s]' under the language of various MHPI projects' policy and surety documents." (Ex. 16, 12/14/17 Wis. Appeals Op., ¶ 14.)

Despite these statements and decisions, in September 2017, the Rehabilitator submitted a Second Amended Plan of Rehabilitation ("Plan") that sought to decide the Ambac Default issue, which had been pending in out-of-state cases initiated by Ambac against the MHPI Projects for nearly two years.

Specifically, the Rehabilitator included Article 6.13 in the Plan, which states that "[a]s of the Effective Date, any default or event of default, actual or alleged, relating to the Segregated Account, AAC or any subsidiary thereof, under any agreement will be deemed not to have occurred or existed[.]" (Ex. 17, 1/22/18 Confirmation Order, ¶ 10.) It further states that "[t]o the extent such a default relating to AAC or any subsidiary thereof has been or is declared by any court or other entity, such default is and will be deemed to be cured." (*Id.*)

The MHPI Projects filed objections to Article 6.13. (Ex. 18, 11/27/17 MHPI's Objs. to the Rehab.'s Proposed Second Am. Plan.) In considering (and eventually denying) the Projects' objections, the circuit court noted that these Rehabilitation proceedings were not adversarial in nature, and that the court was to defer to the Rehabilitator, even on legal issues. (Ex. 19, 1/22/18 Hr'g Tr. at 51:15-20) (stating Rehabilitator is entitled "to great-weight deference to his conclusions as to what the law is in areas that have not been decided by the Court of Appeals").

F. The Maryland Court Grants Summary Judgment, Finding that an Ambac Default Occurred

On January 18, 2018, prior to the final hearing on, or entry of, the Confirmation Order, the Circuit Court of Anne Arundel County, Maryland (the "Maryland court") issued an order on summary judgment, finding that, under Maryland law, an Ambac Default had occurred under the terms of the MHPI Project policies. (Ex. 6, 1/18/18 Meade Am. Order & Op. on Summ. J.)[3] This order was entered after two years of litigation, full fact and expert discovery, briefing by both Ambac and the Meade Project on cross motions, and a full hearing on the merits. The Wisconsin circuit court's 2016 Clarification Order was part of the record before the Maryland Court and, during argument, Ambac argued that the 2016 Clarification Order was entitled to full faith and credit, must be deferred to by the Maryland court out of comity, and was dispositive of the MHPI Projects' Ambac Default affirmative defense. (Ex. 20, 4/28/17 Ambac Mot. Summ. J. at 24-30.) The Maryland court rejected Ambac's arguments and

[3] This Maryland Order was signed on January 18, 2018, but was not entered on the docket until January 22, 2018.

entered summary judgment in the Meade Project's favor. Under Maryland law, the January 18, 2018 Maryland order, which resolved all claims between the parties, is a final judgment for purposes of collateral estoppel. *Campbell v. Lake Hallowell Homeowners Ass'n,* 157 Md. App. 504, 524, 852 A.2d 1029, 1040 (2004) ("[T]he pendency of an appeal should not suspend the operation of a judgment for purposes of res judicata or collateral estoppel.").

G. The Wisconsin Circuit Court Holds the Final Confirmation Hearing and Issues Its Confirmation Order

On January 4, 2018, the circuit court in the present case conducted an evidentiary hearing on approval of the Plan. (Ex. 13, 1/4/18 Hr'g Tr. at 236:10-15.) On January 22, 2018, the circuit court held the final confirmation hearing for the Plan. The circuit court reiterated that it did not intend to interfere with the litigation pending before several sister courts. (Ex. 19, 1/22/18 Hr'g Tr. at 52:14-18) (". . . 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) (". . . I'm not telling them what to do.").

The circuit court also recognized the jurisdiction of the sister courts, stating that it did not have exclusive jurisdiction over the issue of an Ambac Default under the terms of the MHPI Project policies in the General Account. (*Id*. at 61:1-4.) ("It is true that this court does not have exclusive jurisdiction over those issues, the issue of the credit-enhancer defaults as a -- whether or not they occurred[.]")

The circuit court clarified that it only intended to decide the issues properly before it, and that it was within the purview of its sister states to determine the effect of its orders and their weight: "[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 17:13-16; 52:19-24.) The Rehabilitator agreed: "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.)

Both the circuit court and the Rehabilitator also initially acknowledged 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*. at 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? MR. FINERTY: I think that would complicate the question of the court's jurisdiction and comity and issues like that."). There was no indication that the MHPI Projects would be enjoined from arguing full faith and credit or comity related to the circuit court's or the Maryland court's orders in the pending DSRF Litigation.[4]

At the end of the proceedings, the Rehabilitator changed its position and requested additional time to further amend the Plan in order to add injunctive relief related to Article 6.13. (*Id.* at 65:25-66:8.) 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

[4] It was the MHPI Projects counsel who presented the Maryland Order to the circuit court at the January 22 hearing.

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 opportunity to object to the proposed injunctive relief. (*Id*., 66:13-20.)

The following day, the Rehabilitator expressed its position for the first time that Article 6.8 of the Second Amended Plan was intended to enjoin the MHPI Projects, and was sufficient to prohibit the Projects from asserting that an Ambac Default had occurred as an affirmative defense in out-of-state litigation. (Ex. 21, 1/23/18 Rehab. Ltr. to Ct.) The MHPI Projects sought clarification from the circuit court -- given the prior statements on the record that there was no injunction against the MHPI Projects and the Projects' genuine belief that the plain language did not provide for such an injunction. (Ex. 22, 1/25/18 MHPI Ltr. to Ct.) In response, rather than explain its position on the merits, the Rehabilitator claimed the MHPI Projects had waived their objections to the Rehabilitator's interpretation of the Plan, which was articulated for the first time on January 23. (Ex. 23, 1/26/18 Rehabilitator Ltr. to Ct.) 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 Article 6.8. (Ex. 24, 2/7/18 Order re: Article 6.8.)

H. The February 7 Injunction

On February 7, 2018, the Rehabilitator filed a Motion for Injunction against the MHPI Projects and a Motion for Contempt against the Bliss Project based on arguments made in the Texas DSRF litigation. (Ex. 25, 2/7/18 Rehabilitator's Notice of Mot. and Br. in Supp. of Mot.) In less than an hour, without allowing the MHPI Projects to respond or be heard, the circuit court granted the Rehabilitator's Motion and signed the Rehabilitator's Proposed Order issuing the Injunction. (Ex. 26, 2/7/18 Injunction Order.) The Injunction is a mandatory, permanent injunction, forever enjoining and restraining 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." (*Id.*, ¶ 1.)

In Section 2, the Injunction goes further and requires mandatory action on the part of the MHPI Projects, affirmatively requiring them to argue Ambac's case. Section 2 states: "Furthermore, the MHPI Projects are hereby required to take the following actions:

> a. The MHPI Projects shall immediately send a copy of this Order and the Confirmation Order ***and further advise all other courts*** in which one or more of them are parties to a case where an Ambac Default and/or a Credit Enhancer Default issue is pending that a finding of an Ambac Default or a Credit Enhancer Default on the basis of the Rehabilitation of the Segregated Account is contrary to Wisconsin law, the Confirmation Order, and the policy of the Office of the Commissioner of Insurance; and
>
> b. The MHPI Projects shall immediately ***advise all other such courts*** 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.*, ¶ 2.) (Emphasis Added.)

The February 7 Injunction not only prohibits the MHPI Projects from making any arguments related to the Ambac Default issue, or arguing that the Maryland court's order was not cured, but the circuit court later confirmed 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 the circuit court's orders or to the order entered by the Maryland court. (*See* Ex. 27, 2/15/18 Hr'g Tr. at 39:1-24.) As a result, the February 7 Injunction infringes on the MHPI Projects' constitutional rights to argue full faith and credit, as well as the MHPI Projects' due process and First Amendment rights.

Despite their disagreement with the Injunction, the MHPI Projects complied with its terms. On February 11 and 12, the MHPI Projects 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. (*See* Ex. 28, Compiled Notices to State Cts.) The MHPI Projects have taken great care to avoid running afoul of the February 7 Injunction, forbearing certain relevant

discovery and seeking stays of proceedings which would require them, in essence, to assert their constitutional rights at the risk of being held in contempt in the circuit court in this case. The Projects, however, cannot be guaranteed that these sister courts will continue to stay proceedings in these actions, which have been pending for over two years.

On February 12, the MHPI Projects filed a petition for supervisory writ in response to the February 7 Injunction. On February 16, this Court denied the MHPI Projects' petition for supervisory writ and motion for a temporary stay on the grounds that an "appeal with an accompanying motion for relief pending appeal (filed first in the circuit court)" is "an available alternate mechanism for seeking relief." (Ex. 29, 2/16/18 Order at 4.) On February 26, the MHPI Projects filed a Motion for Reconsideration of the February 7 Injunction and a Motion for Expedited Hearing. (Ex. 30, 2/26/18 Motion for Reconsideration.) 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. (*Id*.) The court denied the Motion for Expedited Hearing and set a briefing schedule on the Motion for Reconsideration through the end of March. (Ex. 31 2/26/18 Note from Ct.) The court indicated that it would set a hearing on the Motion for Reconsideration after briefing is completed on March 29, so it will not be heard until April, 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.

On March 2, 2018, the MHPI Projects filed a Notice of Appeal of the February 7 Injunction and January 22 Confirmation Order confirming the Plan. (Ex. 32, 3/2/18 Notice of Appeal.) On March 6, 2018, the MHPI Projects moved the circuit court for a stay pending appeal[5] of the enforcement and effect of the February 7 Injunction, as well as a stay pending appeal of the enforcement and effect of the January 22, 2018 Confirmation

[5] 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.)

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 Plan, from arguing full faith and credit in other state courts or responding to Ambac's motion to reconsider the Maryland court's order. (Ex. 33, 3/6/18 Motion to Stay.)

The MHPI Projects requested an expedited hearing on the motion to stay in the circuit court. In response, the circuit court set the same briefing schedule (through the end of March) as it set for the Projects' motion for reconsideration, and further indicated that it would not set a hearing on the motion to stay until briefing was completed. The MHPI Projects have a strong likelihood of success on the merits of their appeal, because the circuit court's orders infringe on their constitutional rights to argue full faith and credit, as well as their due process and First Amendment rights. They face irreparable harm without an immediate stay, because critical deadlines in the out-of-state cases will pass before the issue is adjudicated in Wisconsin.

LEGAL STANDARD

Pursuant to Wis. Stat. § 808.07, during the pendency of an appeal, a trial court or an appellate court may "[s]tay execution or enforcement of a judgment or order" or "[s]uspend, modify, restore or grant an injunction[.]" Wis. Stat. § 808.07(2). "A party seeking relief under s. 808.07 shall file a motion in the trial court unless it is impractical to seek relief in the trial court." Wis. Stat. § 809.12. A motion to the Court of Appeals "must show why it was impractical to seek relief in the trial court or, if a motion had been filed in the trial court, the reasons given by the trial court for its action." *Id.* Here, the MHPI Projects filed a motion for stay and motion for expedited hearing in the circuit court, and the circuit court denied the motion for expedited hearing and set a lengthy briefing schedule. The MHPI Projects seek relief from this Court in order to avoid irreparable harm in the interim period.

"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. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225, 229 (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 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). By prohibiting the MHPI Projects

from using the Maryland court's Order as collateral estoppel and/or arguing that the circuit 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 the Circuit 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 the circuit 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 v. Wash. Gas Light Co.*, 448 U.S. 261, 270 (1980) (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 the Circuit Court's January 22 Confirmation Order, the Maryland court issued a final judgment, after full briefing and a contested hearing. (Ex. 6, 1/18/18 Meade Am. Order & Op. on Summ. J.) Under Maryland law, this is a final judgment for purposes of collateral estoppel and res judicata. *Campbell,* 852 A.2d 1029 at 1040 ("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 other state courts should accord this judgment the same preclusive effect as 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

[6] Similarly, Ambac is entitled to argue that other state courts should not accord the Maryland court order the same preclusive effect it has in Maryland and that the Maryland court's order is not entitled to full faith and credit. Ambac has already made this argument in several out-of-state cases.

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 the circuit court to decide. There is no legal principle or precedent that allows the circuit court to dictate the extraterritorial effect that other courts, which all had and continue to have prior jurisdiction over the Ambac Default issue, must give to the Wisconsin or Maryland orders. *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).

2. Even if the circuit 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 the circuit court in this case believed it was

better situated to decide the issue or whether it believes the Maryland court's judgement 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.

The Circuit Court has stated it believes the Meade Project misled the Maryland court regarding the structure of the Rehabilitation. The record demonstrates that is not the case.

The Loan Documents for the MHPI Projects have unique Ambac Default provisions that are met if there is a court order: (i) appointing a custodian, trustee, agent or receiver for the Credit Enhancer or for all or any material portion of its property; or (ii) authorizing the taking of' possession by a custodian, trustee,

agent or receiver of 'the Credit Enhancer (or taking possession of' all or any material portion of' the Credit Enhancer's property).

In other words, under the unique contracts at issue, there is an Ambac Default even if no trustee is appointed for "Ambac;" it is enough that some party be *authorized* to take possession of Ambac's property.

The MHPI Projects fully and accurately described the segregated account structure to the Maryland court and to other state courts. This included a full disclosure of the General and Segregated Accounts and the economic consequences of this structure and capitalization of the Segregated Account to the Maryland court. (Ex. 34, Meade Mot. for Summ. J.; Ex. 35, Meade Interrog. Resp. (containing expert report of B. Deal) at 2) ("[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. 36, Meade Interrog. Resp. (containing expert report of E. Csiszar)). Even Ambac's expert

testified that the Circuit Court's 2010 confirmation order triggered in substance an Ambac Default under the unique (c)(i) and (c)(ii) triggers associated with the MHPI project loan documents. When asked whether "the [C]ourt's [O]rder ***authorized*** the [R]ehabilitator to ***take possession*** of the $1.9 billion that was transferred from the [G]eneral [A]ccount to the [S]egregated [A]ccount pursuant to the terms of the [R]einsurance [A]greement," Ambac's expert, Daniel Jones, answered with an unambiguous "Yes." (Ex. 37, 4/8/17 D. Jones Tr. at 151:12-18; *id*. at 151:4-11) ("Q: The court's order authorized the rehabilitator to take possession of that cash that was transferred in the amount of $2 billion from the general account to the segregated account under the secured note? A: I believe I said yes to that, so I will say yes again.").) There were no misrepresentations made to the Meade court. The MHPI Projects presented fact evidence after over two years of discovery in Maryland that was not allowed to be presented in the Rehabilitation Court. The Maryland Court entered judgment prior to the declaration of the Rehabilitation Court that all

defaults were cured. *Dilweg v. Carlisle/Picatinny Family Hous. L.P.*, 2018 WI App 8, ¶ 17 ("The circuit court did not make any finding or proffer any opinion . . . [as to] whether the structure of the rehabilitation plan triggers any specific default language in a policy in the general account.")

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 the Circuit 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. The Circuit 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 the Circuit Court's Confirmation Order to the sister courts, and Ambac has and will continue to use the Circuit Court's statements on the record and orders in the DSRF Litigation. But the Circuit 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 the Circuit Court's rulings.

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. *James*, 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.*, 55 S.W.2d at 275. 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 Circuit 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 Circuit Court in New York); *Hare v. Starr Commonwealth Corp.*, 291 Mich. App. 206, 218-19, 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). Despite acknowledging that the state courts have jurisdiction over the issues pending before them, the February 7 Injunction forbids the MHPI Projects from even asking other courts to ***consider*** the issue of full faith and credit, and determines how the issue must be decided in sister courts, which is not permitted.

5. The February 7 Injunction violates fundamental principles of comity by interfering with other state courts who assumed jurisdiction over the matter first.

Wisconsin courts have long recognized the comity principle whereby "court ***may not enjoin or otherwise interfere*** with proceedings of a judicial nature in another court of coordinate jurisdiction." 1 Wis. Pl. & Pr. Forms § 2:71 (5th ed.) (citing *In re Clark*, 135 Wis. 437 (1908) (emphasis added); *Frederickson v. Schaumburger*, 210 Wis. 127 (1932); *Orient Ins. Co. v. Sloan*, 70 Wis. 611 (1888)). "[I]nterference by one circuit court with the judgment and exercise of power by another circuit court cannot be approved." *In Interest of Tiffany W.*, 192 Wis. 2d 407, 423, 532 N.W.2d 135, 141 (Ct. App. 1995) (quoting *Kusick v. Kusick*, 243 Wis. 135, 138, 9 N.W.2d 607, 608 (1943)). The principle is only further highlighted when the intruding court assumed jurisdiction over an issue after the other court. *See Syver v. Hahn*, 6 Wis. 2d 154, 159–60 (1959) ("Where two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power

being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the whole controversy, and no court of coordinate power is at liberty to interfere with its action.").

Here, the January 22, 2018 Confirmation Order contains findings on the occurrence of an Ambac Default without any party—even the Rehabilitator—having placed the issue before the Circuit Court. And the February 7 Injunction effectively prohibits any further litigation of the issue. However, other state courts presiding over the DSRF Litigation had assumed jurisdiction over the Ambac Default issue for more than two years. The Circuit Court's injunction reaches into the DSRF Litigation and plucks the issue of Ambac Default from the courts who have properly assumed jurisdiction over it. Thus, the Injunction violates Wisconsin's well-settled principles of judicial comity.

B. The Injunction Operates as an Unconstitutional Restraint on the MHPI Projects' 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. U.S.*, 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). As a result, the February 7 Injunction is an unconstitutional prior restraint because it enjoins the MHPI Projects from arguing going forward that the Circuit Court's legal conclusions should not be given full faith and credit.

C. The Court of Appeals' Prior Decision in *Nickel* Does Not Decide the Full Faith and Credit Issue in Out-of-State Courts.

This Court's 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.[7]

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

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

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. (Ex. 21, 1/23/18 Rehab. Ltr. to Ct.) 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.

(Ex. 38, 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*.) This 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 or responding to Ambac's motion to reconsider the Maryland court's order. 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 Circuit 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 the Circuit Court Indicated on the Record that Article 6.8 Did Not Apply to the MHPI Projects at the Time the Circuit Court Confirmed the Plan.

As discussed above, during the January 22 hearing, the Rehabilitator stated that the Plan, as written, did not contain an injunction prohibiting the MHPI Projects from asserting an Ambac Default as an affirmative defense. (Ex. 19, 1/22/18 Hr'g Tr. at 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.)[8]

The Circuit Court has repeatedly stated that it does not intend to interfere with the litigation pending before several sister courts. (Ex. 19, 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

[8] The Rehabilitator now states that this only referred to the Confirmation Order and not the Second Amended 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 Second Amended Plan through approval of the Confirmation Order.

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 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 the Circuit 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.

(Ex. 38, Second Am. Plan, Art. 6.8.) Given how 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.*, Art. 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 the Circuit 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 INJUNCTIONS 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 arguing in support of the Maryland Court's Order and that the Maryland Order should be given full faith and credit. 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. 39, 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. 40, M. Osborn Aff.) Without risk of contempt, the Riley Project is at present 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. 41, 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 the Circuit Court's orders. Being unable to argue against reconsideration of the Maryland court's 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. 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) ("[I]f it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.")).

"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 Environment 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") (citation omitted).

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."); *Precision Dynamics Corp. v. Typenex Med., L.L.C.*, No. 13-CV-860, 2014 WL 4851542, at *6 (E.D. Wis. Aug. 25, 2014) ("The plaintiff has sufficiently demonstrated that, absent a preliminary injunction, it will suffer irreparable harm in the form of price erosion, loss of market share, loss of goodwill, and loss of business opportunities."). 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. 6, Meade Am. Compl. at

¶¶ 84-92) (stating count for breach of contract based upon Ambac's refusal to consent to Out-Year Development Plan). 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.)

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 and it will continue to suffer irreparable competitive harm absent a stay. (Id. at ¶ 1.) (See Ex. 42, 8/16/17 R. Lewis Tr. 50:12-51:10) ("There is a constant barrage outside of the gate of competition. . . . If we are no longer the best value to them because our product is not what the product looks like off-post . . . [y]ou have to drop your price, right? So that's why we have seen a steady decline in the average rent for a home in Fort Meade."); (*id.* at 151:9-20) ("The project has waited for years to commence with reinvestment in the asset,

which is the bank's collateral. . . . While we are waiting, the competition outside of the gate is not."). 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, 516, 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.

Ambac is free to argue that the sister courts should give the Circuit 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. Furthermore, Ambac will suffer no special harm if the stay is granted for the additional reason that Ambac will not be required to pay any additional funds, even if Ambac loses in the DSRF Litigation, and the Plan remains durable upon existing the Rehabilitation, with no state of Wisconsin funds involved, and a monetary cushion in the event of unpredictable or unexpected losses. If the Court's orders are not stayed, then Ambac could force the MHPI Projects to waive their constitutional arguments on full faith and credit and entire defense in the face charges of contempt.

V. THE PUBLIC INTEREST FAVORS A STAY.

The last factor the Circuit Court must consider is whether a stay will "do harm to the public interest."

Here, the public interest strongly favors a stay. If the Circuit Court's injunctions are allowed to continue to intrude on the constitutional rights of the MHPI Projects, and interfere with

the jurisdiction of sister court's that have previously acquired and still maintain jurisdiction over the issue of an Ambac Default, notions of comity among states will have been undermined significantly. The MHPI Projects suggest it is bad policy and not in the interest of the state of Wisconsin to interfere so directly in the jurisdiction of sister states. As the Texas court stated in granting the motion to abate to allow the Rehabilitation Court to sort through the MHPI objections, at some point that court may have to act to protect its jurisdiction. (See Ex. 43, 2/1/18 Bliss Hr'g Tr. at 27:6-9 ("[W]e will -- want to be as respectful as we can to other jurisdictions and other courts to do their business, but at some point, you know, I've got to take care of what's before me.").

A stay of the February 7 Injunction will not affect the actual Rehabilitation or its administration, because 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.

CONCLUSION

For the foregoing reasons, the MHPI Projects ask the Court to 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 Order 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.

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