STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

In the Matter of the Rehabilitation of:

Segregated Account of Ambac Assurance Corporation, Case No. 10-CV-1576

BRIEF OF AMBAC ASSURANCE CORPORATION IN OPPOSITION TO MHPI PROJECTS' MOTION FOR RECONSIDERATION

INTRODUCTION

The MHPI Projects continue to assume, incorrectly, that this is an adversary proceeding. This Court's role in a rehabilitation is not the same as in an adversary proceeding. Instead of adjudicating a dispute between litigants, here the Rehabilitator and the Court are charged with protecting "the interests of insureds, creditors, and the public generally." Wis. Stat. § 645.01(4). The MHPI Projects' refusal to acknowledge the unique nature of this proceeding, as well as the important public policy considerations implicated, blunts their effort to establish that this Court committed a manifest error of law when it entered the February 7 injunction (the "Injunction") to prevent them from further undermining the Rehabilitation Proceeding. That this Court issued the Injunction in the context of the Rehabilitation Proceeding renders the authority they cite inapposite.

The Rehabilitator determined, and this Court affirmed, over the MHPI Projects' objections, that Article 6.13 of the Second Amended Plan was needed to protect Ambac's contractual control rights and its claims-paying resources, including from specious arguments that the Rehabilitation of the Segregated Account triggered defaults with

respect to General Account policies. The Rehabilitator also determined, and this Court affirmed, that the MHPI Projects' misstatements in other courts about the nature of the Rehabilitation Proceeding and the orders issued by this Court during its pendency contravene Wisconsin's statutorily authorized use of a segregated account for rehabilitation.

Accordingly, the Court entered an Order which:

- Ruled that in connection with the Rehabilitation Proceeding, the Court did not enter an order of relief against Ambac, did not enter an order appointing a receiver for Ambac or a material portion of its property and did not enter an order authorizing a receiver to take possession of Ambac or a material portion of Ambac's property;
- Approved the cure provision in Article 6.13 of the Second Amended Plan; and
- Provided that "[a]ll interested parties and other parties subject to or affected by the Second Amended Plan or this Order are hereby directed to comply with the terms of this Order."

Order Granting Rehabilitator's Mot. To Further Am. Plan of Rehab. & Confirming Second Am. Plan of Rehab. ("Confirmation Order"), ¶¶ 4(i), 10, 13.

When the Court entered the Confirmation Order on January 22, it explained that its declaration, as set forth above, was tantamount to an injunction.[1] But it quickly became apparent that the MPHI Projects had no intention of complying with the Confirmation Order. So this Court entered the Injunction to enforce its Confirmation Order and to protect the Rehabilitation Proceeding from further baseless attacks.

[1] "[A] declaratory judgment action has been held by the United States Supreme Court ... to be the equivalent of an injunction, because those who are bound by the declaratory judgment are enjoined from acting contrary to it." 1/22/18 Hr'g Tr. at 57:16-20.

The Court had ample authority to enter the Injunction, which was an appropriate response to the MHPI Projects' repeated efforts to undermine the Rehabilitation Proceeding. *See* 2/15/18 Hr'g Tr. at 35:14-22. The Injunction neither tramples the MHPI Projects' constitutional rights nor dictates to other courts what effect they should give the Confirmation Order.

On March 13, 2018, the Court of Appeals issued an order staying both the Injunction and enforcement of Articles 6.8 and 6.13 against the MHPI Projects pending the outcome of their pending appeal. The stay order made clear that the Court of Appeals has "draw[n] no conclusions as to the ultimate merits of [the MHPI Projects'] appeal." 3/13/18 Order at 5. Because the instant motion addresses only the merits, Ambac does not consider the stay to affect this motion. However, the stay *does* moot the MHPI Projects' argument that they will suffer irreparable harm if the Injunction is not reconsidered. (MHPI Recons. Br. at 22-24.) The Injunction remains important to the Rehabilitation Proceeding and should stay in place so the Court of Appeals (or perhaps the Wisconsin Supreme Court) can affirm that it was an appropriate exercise of this Court's authority to protect the Second Amended Plan. If the Rehabilitator and Ambac prevail on appeal, the MHPI Projects—which have shown themselves unwilling to follow this Court's orders—will again be enjoined from undermining the Rehabilitation Proceeding. Just as the Injunction was necessary to protect the Confirmation Order in the first instance from attacks in other courts, the Injunction will protect against the MHPI Projects' post-appeal efforts to evade an affirmance of that Order.

For the reasons below, the Court should deny the motion for reconsideration.

LEGAL STANDARD

To prevail on a motion for reconsideration, the movant must either present newly discovered evidence or establish a manifest error of law or fact. A "manifest error" is not demonstrated by the disappointment of the losing party. It is the "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 44, 275 Wis. 2d 397, 685 N.W.2d 853 (internal citation omitted). Reconsideration may obviate the need for appeal or may aid appellate review by allowing the trial court to hone its analysis. *See Metro. Greyhound Mgmt. Corp. v. Wis. Racing Bd.*, 157 Wis. 2d 678, 698, 460 N.W.2d 802 (Ct. App. 1990).

ARGUMENT

I. THIS COURT HAD AUTHORITY TO ISSUE THE INJUNCTION.

A. The Injunction Was Authorized by Statute and by Nickel.

Wisconsin law authorizes the Rehabilitator to apply for, and this Court to grant, injunctions as are "deemed necessary and proper to prevent":

- interference with the proceedings;
- waste of the insurer's assets;
- "[t]he institution or further prosecution of any actions or proceedings;"
- the obtaining of judgments against the insurer; and
- "[a]ny other threatened or contemplated action that might lessen the value of the insurer's assets or prejudice the rights of policyholders, creditors or shareholders or the administration of the proceeding."

Wis. Stat. § 645.05(1)(c), (d), (f), (g) & (k). Based on this statutory grant of authority, *Nickel* summarized that this Court "has broad powers to enter an injunction to prevent the

waste of Ambac's claims-paying resources." 2013 WI App 129, ¶ 145. *Nickel* also confirmed this Court's broad power to enjoin conduct that jeopardized or interfered with the Rehabilitation Proceeding, even where the injunction reached beyond those policies allocated to the Segregated Account. *Id.* at ¶ 103.

At the January 22 hearing, the Court explained in detail its reasons for entering the Confirmation Order. 1/22/18 Hr'g Tr. at 49:12-65:22. Among those reasons was protecting the Rehabilitation Proceeding from a further assault in other courts by the MHPI Projects on Ambac's contractual control rights, which are vital to the protection of its claims-paying resources. *Id.* at 54:2-55:2.[2] That assault is particularly problematic because in rehabilitation "a single management under the supervision of one court" is "essential." *Motlow v. S. Holding & Sec. Corp.*, 95 F.2d 721, 725 (8th Cir. 1938); *accord, e.g.*, *Blackhawk Heating & Plumbing Co., Inc. v. Geeslin*, 530 F.2d 154, 159 (7th Cir. 1976).

The Injunction became necessary when it became clear that the MHPI Projects were determined to continue evading this Court's orders, including the Confirmation Order. 2/15/18 Hr'g Tr. at 24:3-6 (MHPI Projects "have been engaged in a campaign to undermine this rehabilitation plan in Wisconsin and nationally"). At that point, the Court enjoined the MHPI Projects from further undermining the efficacy of the Second Amended Plan. 2/15/18 Hr'g Tr. at 21:12-37:5, 39:1-24. The Injunction was therefore

[2] Extensive testimony at the January 4 hearing emphasized the importance of control rights to Ambac going forward. *See* Hr'g Tr. at 161:19-162:13, 170:14-20, 171:22-172:2, 202:16-203:13, 204:9-13, 206:2-8, 210:3-19, 203:21-204:8, 204:14-205:20, 207:24-208:8, 209:6-210:2, 234:23-235:4. *See also* 1/4/18 Hr'g Ex. 10 (12/11/17 Barranco Aff., ¶¶ 11-12).

consistent with this Court's authority to prevent the waste of Ambac's assets, to protect Ambac's claims-paying resources for the benefit of insureds, creditors, and the public generally, and to secure the success of the Rehabilitation Proceeding.

B. The Court Has Inherent Authority To Enforce Its Orders.

It is beyond dispute that circuit courts have "inherent, implied and incidental powers. … These powers are those that are necessary to enable courts to accomplish their constitutionally and legislatively mandated functions." *State v. Henley*, 2010 WI 97, ¶ 73, 328 Wis. 2d 544, 787 N.W.2d 350 (internal citations omitted). A circuit court also has '"inherent power to protect itself against any action that would unreasonably curtail its powers or materially impair its efficiency'…. Among such powers is the power to preserve order, *command obedience to its orders*, and to punish for contempt." *State v. Cannon*, 196 Wis. 534, 221 N.W. 603, 604 (1928) (quoting *In re Court Room & Offices of Fifth Branch Circuit Court*, 148 Wis. 109, 212, 134 N.W. 490 (Ann. Cas. 1913B, 98)) (emphasis added). The Injunction did just that—command obedience to the Confirmation Order by prohibiting further efforts to undermine it.

C. The Court Had the Power To Enjoin the MHPI Projects Because It Had Personal Jurisdiction Over Them.

The Court also had the authority to enjoin the MHPI Projects because it had personal jurisdiction over them. The MHPI Projects voluntarily submitted to this Court's personal jurisdiction when they objected to the inclusion of Article 6.13 in the Second Amended Plan. Wisconsin courts have consistently held that "where an appearance is made and relief is sought on other matters, an objection of lack of personal jurisdiction is

waived." *Lees v. Dep't of Indus., Labor & Human Relations*, 49 Wis. 2d 491, 499, 182 N.W.2d 245 (1971); *see also Artis-Wergin v. Artis-Wergin*, 151 Wis. 2d 445, 452-53, 444 N.W.2d 750 (Ct. App. 1989). As a court of equity, the Rehabilitation Court has *in personam* authority over all those who appear before it, including the MHPI Projects.

This Court's *in personam* authority over those who appear before it extends to orders that affect conduct outside the State. *See Mercury Records Prods., Inc. v. Econ. Consultants, Inc.*, 91 Wis. 2d 482, 501, 283 N.W.2d 613 (Ct. App. 1979). That authority allows the Court to "'restrain an act that is clearly contrary to equity and good conscience.'" *Id.* at 500 (quoting *Bartell Broad., Inc. v. Milwaukee Broad. Co.*, 13 Wis. 2d 165, 171, 108 N.W.2d 129 (1961)). The Injunction does precisely that by prohibiting the MHPI Projects from continuing to undermine the outcome of this equitable proceeding by misrepresenting the effect of this Court's orders.

As the MHPI Projects concede, Wisconsin law authorizes judges to issue antisuit injunctions in appropriate circumstances. One such circumstance is in connection with a rehabilitation proceeding. *See* Wis. Stat. § 654.05(1). "The general power of courts of equity whose jurisdiction has once attached, to restrain parties from commencing and prosecuting subsequent actions in other courts for the same object, is unquestioned." *Akerly v. Vilas*, 15 Wis. 401, 412 (1862). A court "may and will interfere [with the action of the courts of a foreign state] to prevent those who are amenable to its process from … carrying on suits in other states which will result in injury and fraud." *Chicago, Milwaukee & St. Paul Ry. Co. v. McGinley*, 175 Wis. 565, 185 N.W. 218, 221 (1921) (quoting High on Injunctions, § 106). "The sole inquiry is, whether the ends of justice

demand that the power [to enjoin proceedings in another state] should be exercised." *Akerly*, 15 Wis. at 412.

In *Mercury Records*, the circuit court issued a broad nationwide injunction that restrained the defendants from, among other acts, advertising, offering for sale, or selling unauthorized copies of recorded performances owned by members of the plaintiff class. 91 Wis. 2d at 488 & n.3. The Court of Appeals affirmed the circuit court's authority to "'restrain an act that is clearly contrary to equity and good conscience,'" even outside Wisconsin, explaining that the scope of an injunction "does not affect the jurisdiction of the court but [] should be considered in determining whether the court should exercise its discretionary equitable powers." *Id.* at 500-01 (quoting *Bartell Broad., Inc.*, 13 Wis. 2d at 171).[3]

Here, this Court had ample basis for exercising its equitable powers to enjoin the conduct of the MHPI Projects. The ink was hardly dry on the Confirmation Order before the Fort Bliss Project took action contrary to the Order. Bliss filed a brief in Texas just 2½ hours after this Court's Confirmation Order was entered, making no mention of the Order, but arguing that the Maryland summary judgment opinion entered earlier that same day ("Maryland Opinion") must be given preclusive effect. *See* 2/7/18 Spaniol Aff., ¶¶ 5-6 & Exs. A-B. As this Court has already recognized, counsel for Bliss also expressly misrepresented to the Texas court that the Confirmation Order was not yet final and

[3] *Mercury Records* also involved a separate antisuit injunction, issued by the circuit court in conjunction with its order dismissing the plaintiffs' claims. Upon reversing the dismissal order, the Supreme Court deemed the antisuit injunction "moot." *Mercury Record Prods., Inc. v. Econ. Consultants, Inc.*, 64 Wis. 2d 163, 172, 188, 218 N.W.2d 705 (1974).

binding. *See* 2/7/18 Spaniol Aff., Ex. F at 14:19-24; 2/15/18 Hr'g Tr. at 24:3-25:2 ("I think that MHPI and its national counsel, Kirkland & Ellis, have been engaged in a campaign to undermine this rehabilitation plan in Wisconsin and nationally. Their actions before the Honorable Judge Dominguez in El Paso are just the latest in this campaign in their attempt to thwart this Court's order…. Is it a final order? That's a yes-or-no question. Kirkland & Ellis said no. I don't think that's candor to the Court.").

The MHPI Projects go out of their way to assert that the Meade Project "did not argue that Ambac itself had been placed in rehabilitation, or misrepresent the nature of the Rehabilitation Proceedings in any way." (MHPI Recons. Br. at 7.) But that is not so. Meade alleged that "on March 24, 2010, *Ambac entered into rehabilitation proceedings in Wisconsin.*" 3/19/18 Farr Aff., Ex. A (3/10/17 Meade Am. Compl. at ¶ 29 (emphasis added)). This misrepresentation came *after* the 2016 hearing at which this Court admonished the identical misrepresentation made in the California case and *after* this Court entered the 2016 Clarification Order. *See* 10/10/16 Simmons Aff., Ex. A (Monterey Compl. ¶ 24); 10/11/16 Hr'g Tr. at 5:19-24, 15:2-6.[4] This misrepresentation was not inconsequential, as it served as the cornerstone of the Maryland court's erroneous opinion. *See* Md. Op. at 4-5.[5]

Yet, the MHPI Projects have shown themselves determined to continue spreading unfounded allegations aimed at "pull[ing] the thread of the fabric of this rehabilitation"

[4] The California misrepresentation still has not been corrected. 3/19/18 Farr Aff., ¶ 10.

[5] The MHPI Projects also misrepresent the arguments and evidence Ambac presented to the Maryland court. *See* 3/19/18 Farr Aff., Exs. A-I.

and thereby threatening to "unravel" important provisions in the Second Amended Plan. 10/11/16 Hr'g Tr. at 17:12-18. Dating back to the Clarification Order, this Court has endeavored to explain, with precision, the basis for the structure and capitalization of the Segregated Account, so that other courts can avoid decisions that will conflict with the decisions in this Court, frustrate the objectives of the Rehabilitation Proceeding, or impair Ambac's claims-paying resources. The Injunction appropriately prevents the MHPI Projects from undermining these endeavors.

D. The MHPI Projects' Arguments Do Not Negate this Court's Authority To Issue the Injunction under Controlling Wisconsin Precedent.

The MHPI Projects attempt to take the Injunction out from under the authority cited above, but those efforts are to no avail.

First, that the Court approved the exit from Rehabilitation of the Segregated Account, placing Ambac in a position to exercise control rights with respect to Segregated Account policies[6] that had temporarily been in the hands of the Rehabilitator makes no difference. The MHPI Projects cite no authority for limiting the Injunction based on the exit from Rehabilitation having been approved or consummated.[7] And doing so would run counter to the notion—codified in the Second Amended Plan and supported by ample precedent, including *Matter of Mutual Benefit Life Insurance Co*., 258 N.J. Super. 356, 609 A.2d 768, 773 (App. Div. 1992), and the FGIC rehabilitation

[6] These did not include policies issued by Ambac in transactions with the MHPI Projects, as those policies were not in the Segregated Account.

[7] The effective Date of the Second Amended Plan was February 12, 2018. *See* 3/19/18 Ksenak Aff., ¶¶ 5-6.

proceedings[8]—that protective injunctions that apply after the formal proceedings have concluded are integral to rehabilitation or reorganization plans.

Second, the MHPI Projects seek to distinguish *Nickel* as reliant on statutes granting the *Rehabilitator* "'full power to direct and manage … the property and business of the insurer' *during* the rehabilitation." (MHPI Recons. Br. at 21 (quoting *Nickel*, 2013 WI App 129, ¶ 141) (emphasis added).) By contrast, they argue, the Injunction was entered *after* the Segregated Account's exit from Rehabilitation had been approved (although they fail to acknowledge that the Effective Date of the exit was February 12, 2018) and gives *Ambac* "court-granted" power. This argument has no merit. Section 645.05 authorizes the Court to enter a permanent injunction to guard against interference with the proceedings, waste of the insurer's assets, the further prosecution of actions, the obtaining of judgments, or any "threatened or contemplated action that might lessen the value of the insurer's assets." Wis. Stat. § 645.05(1)(c), (d), (f), (g) & (k). That is what the Injunction here accomplishes. Moreover, *Nickel* recognized that "[t]he circuit court has the power to take action to prevent persons or entities from jeopardizing the success of the insurance rehabilitation." 2013 WI App 129, ¶ 103. There is nothing to indicate that this protection evaporates as soon as an order approving an exit plan has been entered.

Third, The MHPI Projects assert that *Nickel* was silent as to the status of policies in the General Account. (MHPI Recons. Br. at 19.) Again, the MHPI Projects read *Nickel* too narrowly. The appellants in *Nickel* argued the injunction at issue there was overly

[8] *See* 3/19/18 Slack Aff., Ex. B, Article 7.8.

broad because, in their view, "the commissioner ha[d] not demonstrated that extending the injunction protection provisions to Ambac's parent company and other Ambac affiliates is necessary and proper to effectuate a successful rehabilitation." *Nickel*, 2013 WI App 129, ¶ 102. In rejecting that argument, the Court of Appeals confirmed the Rehabilitation Court's broad power to enjoin conduct that jeopardized or interfered with the rehabilitation, even where the injunction was directed beyond policies allocated to the Segregated Account. *Id*. at ¶ 103. Just as the injunction approved in *Nickel* was not overbroad, notwithstanding that it reached beyond policies in the Segregated Account, so too with the Injunction at issue here.

Fourth, the MHPI Projects acknowledge *Nickel's* ruling that all Ambac assets remained in the General Account throughout the Rehabilitation Proceeding, but they assert that *Nickel* did not address the Rehabilitator's authority to access those assets. (MHPI Recons. Br. at 19-20.) This argument ignores that the Rehabilitator was neither appointed as a receiver for Ambac or Ambac's property nor ever authorized to take possession of Ambac's property. These are the two key aspects of the alleged Ambac Default. The Rehabilitator was authorized to "take possession of the assets of the Segregated Account" and to "manag[e] the affairs of the Segregated Account." 3/24/10 Rehabilitation Order, ¶ 6 (emphasis added). But the Rehabilitator had no authority to take possession of Ambac's assets at any time, and the MHPI Projects cannot point to any order granting that authority.

Finally, the Court of Appeals' decision in *In re Ambac Assur. Corp.* ("*Assured*"), 2013 WI App 138, ¶ 16, undercuts, rather than supports, the MHPI Projects' argument

that this Court lacked authority to enjoin their continued efforts to undermine the rehabilitation because their policies are in the General Account. When Assured sought arbitration to determine the scope of its reinsurance obligations to Ambac, the Court of Appeals held this Court had authority over the reinsurance contracts in the General Account. This was because "the specific dispute Assured sought to have arbitrated in this case was the application of … its reinsurance contracts to [these Rehabilitation Proceedings]." *Id.* So, too, here. The Ambac Default issue does not turn upon which account contains the contracts or policies at issue. According to *Assured*, what matters is whether the events about which the MHPI Projects want to litigate are within this Court's jurisdiction. Here, as in *Assured*, they are, because they relate directly to the meaning of actions taken in the Rehabilitation Proceedings.

In sum, the MHPI Projects' efforts to undermine this Court's reliance on Chapter 645 and *Nickel*, and thus its authority to issue the Injunction, are unpersuasive. Chapter 645 and *Nickel* provided ample authority for the Injunction.

II. THE INJUNCTION DOES NOT VIOLATE THE FULL FAITH AND CREDIT CLAUSE.

As this Court has already recognized, there is no full-faith-and-credit issue here. *See* 2/15/18 Hr'g Tr. at 35:13-14. The MHPI Projects offer four arguments that the Injunction violates full-faith-and-credit principles. All of them fail, as explained below.

A. The MHPI Projects' Argument that Antisuit Injunctions Are Impermissible Does Not Accurately Reflect Wisconsin Law.

Against the settled authority that Wisconsin law authorizes antisuit injunctions, *see* Section I.D, above, the MHPI Projects offer only distinguishable cases. Some find

that the circumstances at hand do not justify injunctive relief.[9] Others do not address the authority of a court to issue such an injunction but opine on the distinct question of whether another court must honor such an injunction.[10] That question is not before this Court.

The bulk of the MHPI Projects' authority is inapposite because it involves determinations that an antisuit injunction cannot bind one who was not subject to personal jurisdiction in the court that issued the injunction. *See Hawthorne Savings F.S.B. v. Reliance Ins. Co. of Ill.*, 421 F.3d 835, 850 (9th Cir. 2005); *Love v. Frontier Ins. Co.*, 526 F. Supp. 2d 859, 861 (N.D. Ill. 2007); *Hare v. Starr Commonwealth Corp.*, 291 Mich. App. 206, 219, 813 N.W.2d 752 (2011); *Fuhrman v. United Am. Ins.*, 269 N.W.2d 842, 847 (Minn. 1978). Because the MHPI Projects voluntarily submitted to this Court's personal jurisdiction, these decisions shed no light on the issue.

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[9] The *McGinley* case, for example, holds that mere inconvenience does not justify an antisuit injunction. 185 N.W. at 223. But this is no prohibition against such injunctions, as the court allows: "Each case must be ruled by its own facts. If they show that it is necessary and equitable to exercise the power in the orderly administration of justice, the court should enjoin the party." *Id.* at 222 (quoting 14 R.C.L. § 15). Similarly, the *Nortoni* decision recognizes "settled law that, in a proper case, a court of equity having jurisdiction of the person may enjoin such person from prosecuting a suit in a foreign jurisdiction." *State ex rel. N.Y.C., Chicago & St. Louis R. Co. v. Nortoni,* 331 Mo. 764, 768, 55 S.W.2d 272 (1932).

[10] *See, e.g.*, *Union Pac. R. Co. v. Rule*, 155 Minn. 302, 193 N.W. 161 (1923). Another case on which the MHPI Projects rely, *James v. Grand Trunk Western Railroad Co.*, focuses primarily on whether a state court should honor an antisuit injunction issued by a court in a different state, but notably also expressly recognizes the authority for such injunctions. 14 Ill. 2d 356, 363, 152 N.E.2d 858 (1958) ("we quite agree with defendant's repeated assertion that a court of equity has power to restrain persons within its jurisdiction from instituting or proceeding with foreign actions").

B. The Injunction Rules Only on Questions of Wisconsin Law and Does Not Improperly Impose This Court's Conclusions on Other Courts.

This Court's actions are fully consistent with full faith and credit. In language the MHPI Projects themselves quote, the Supreme Court has explained that full faith and credit does not "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. Emp'rs Ins. Co. v. Indus. Accident Comm'n of Cal.*, 306 U.S. 493, 504-05 (1939) (quoted at MHPI Recons. Br. at 12, 15). Applied here, *Pacific Employers* means that a court in another state cannot preclude this Court from prescribing the legal consequences of what took place in Wisconsin. As this Court has repeatedly said, it does not seek to decide the outcome of lawsuits in other courts. *See, e.g.*, 2/15 Hr'g Tr. at 30:6-14, 35:8-12. But it does assert the right, consistent with full faith and credit, to determine "the legal consequences of acts within [this Court]." *Pac. Emp'rs Ins. Co.*, 306 U.S. at 505.

Notably, the essence of the MHPI Projects' arguments to other courts is that this Court has issued one or more orders that accomplish the elements of an Ambac Default enumerated in the various MPHI Projects' transaction documents.[11] Thus, to prevail in

[11] Those documents define an Ambac Default, in pertinent part, as: "**[T]he occurrence of any of the following events**… **(c) a court of competent jurisdiction** … **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)." 12/29/17 Ksenak Aff., Ex. A (Meade Grantor Trust Agreement), Section 1.01 (emphases added); *see also* 12/29/17 Ksenak Aff., ¶ 3 ("The Meade Grantor Trust Agreement is representative of and substantially similar to the grantor trust agreements involved in the other out-of-state cases.").

those courts, they must rely on orders from this Court. This Court's attention to how its orders are characterized is therefore particularly appropriate. Those orders—from the confirmation of the initial plan in 2011 to the Confirmation Order approving the exit plan this past January, and from the Clarification Order in 2016 to the Injunction last month—apply Wisconsin law to determine the meaning and import of events in the Wisconsin Rehabilitation Proceedings. Other courts get to decide what consequences follow from the Rehabilitation in the cases before them. But it is beyond dispute that the predicate question of what actually happened here, in the Rehabilitation Proceeding, is one properly answered by this Court.

C. The MHPI Projects' Remaining Full-Faith-and-Credit Arguments Are Nothing More than Alternative Articulations of Their First Amendment Arguments.

The MHPI Projects insist that the Injunction violates full-faith-and-credit principles by constraining their arguments in other courts. That is just another way of asserting their free-speech argument. The question is whether other states, in considering the issue of Ambac Default, should start anew or look to guidance from this Court and/or the Maryland Opinion. The Injunction does not address that question. To the extent the MHPI Projects complain that the Injunction leaves them no room to make certain arguments, their complaint is not that it limits full faith and credit—which deals with actions of a court, not arguments by private litigants—but that it curtails their freedom of speech.[12] The next Section explains why the MHPI Projects' free speech arguments fail.

[12] This encompasses the arguments in sections I.A.1 ("the MHPI Projects should not be enjoined from making arguments to other state courts") and I.A.2 ("[t]he MHPI Projects must be

III. THE INJUNCTION DOES NOT IMPLICATE FIRST AMENDMENT RIGHTS.

There is no free speech issue here.[13] The MHPI Projects strain to paint the Injunction as a prior restraint. It is not. As a general matter, "the First Amendment clearly does not protect speech which interferes with the fair and unhindered administration of justice." *Laker Airways Ltd. v. Pan Am. World Airways, Inc.*, 604 F. Supp. 280, 288 (D.D.C. 1984). The First Amendment, therefore, "does not protect against a so-called antisuit injunction." *Id.* That alone sinks the MHPI Projects' free speech objections.

The MHPI Projects' position is particularly weak in the rehabilitation context. Analogous federal bankruptcy precedents highlight this in two ways.[14]

First, there is no First Amendment defense to the automatic stay that prevents creditors from taking action outside the bankruptcy court to collect on pre-petition debts. This is true even though the automatic stay "may at times incidentally impact free speech." *In re Collier*, 410 B.R. 464, 474 (Bankr. E.D. Tex. 2009). *Collier* recognized that there are "components of speech involved in virtually every expression offered about

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allowed to argue that the Maryland court's judgment was correct") of the MHPI Projects' Reconsideration Brief.

[13] The MHPI Projects suggest that the Injunction "requir[es] them to advocate for a certain position." (MHPI Recons. Br. at 18.) This argument is moot. They complied with the requirement that they file the Confirmation Order and Injunction with the MHPI Litigations courts and cannot now overturn the Injunction based on this already-fulfilled mandate. *See, e.g.*, *PRN Assocs. LLC v. State, Dep't of Admin.*, 2009 WI 53, ¶ 29, 317 Wis. 2d 656, 766 N.W.2d 559 ("a moot question is one which circumstances have rendered purely academic"). Even if had been timely pursued and fully developed, the argument would fail. The Injunction left room for the MHPI Projects to express their views, as shown by their submissions, which leave no doubt that they disagree with the Injunction. *See* 2/12/18 Farr Aff., Exs. A-E.

[14] This Court "may look to federal bankruptcy law for guidance" where appropriate. *Nickel*, 2013 WI App 129, ¶ 133. Here, the similar public policy purposes at stake make these precedents applicable.

the filing of a bankruptcy case." *Id.* But "the automatic stay and the restrictions contained therein focus not upon speech but rather upon the restraint of actions—actions that threaten the core objectives of the Bankruptcy Code." *Id.* It follows that the automatic stay's "intrusions" upon the free speech rights of creditors and debtors "are justified in order to accomplish the significant governmental interest in providing uniform bankruptcy laws and an effective means by which to implement them." *Id.*

Second, the bankruptcy court's authority extends after the completion of the bankruptcy proceeding. Such proceedings end with a discharge order (analogous to the Second Amended Plan here), which "operates as an injunction against the commencement or continuation of any action … or an act, to collect, recover or offset any such debt as a personal liability of the debtor." *In re Andrus*, 184 B.R. 311, 315 (Bankr. N.D. Ill.), *aff'd*, 189 B.R. 413 (N.D. Ill. 1995) (quoting 11 U.S.C. § 524(a)(2)). When a creditor ignored this injunction and erected public signs to embarrass the debtor into paying debts that had been discharged by the court, the *Andrus* court held that the signs "were not protected speech under the First Amendment" but "continuing attempts … to collect the discharged debt in violation of" the discharge injunction. *Id.* The court specifically noted that the speech was not protected because it was "intended to frustrate the process of the court." *Id.* at 316 (citing *In re Stonegate Sec. Servs., Ltd.*, 56 B.R. 1014, 1020 n.3 (N.D. Ill. 1986)).

The principles discussed in *Collier* and *Andrus* apply here. To the extent that effectuating the significant governmental interest in successful rehabilitation for "the protection of the interests of insureds, creditors, and the public generally," Wis. Stat. §

645.01(4), might require "isolated intrusions" on free speech, that poses no First Amendment problem. *In re Collier*, 410 B.R. at 474. And, even after the Rehabilitation has concluded, an injunction prohibiting efforts by a counterparty "to frustrate the process of the court" is similarly within constitutional bounds. *In re Andrus*, 184 B.R. at 316. Here, the Injunction enforces the Confirmation Order, which serves to protect Ambac's claims-paying resources for the protection of all involved, including the MHPI Projects. *See* 1/22/18 Hr'g Tr. at 60:1-9. Unlike in bankruptcy court, where by statute an injunction is always included in the discharge order, the Injunction here would not have been entered but for the MHPI Projects' deliberate and continuing actions "to frustrate the process of the court." Having taken deliberate actions that necessitated the Injunction, the MHPI Projects cannot complain about it as a matter of fairness, and the *Collier* and *Andrus* cases show that they cannot use the First Amendment to evade its reach.[15]

[15] Other analogies provide additional support. For example, ruling *in limine*, which restricts the scope of permissible argument, does not infringe free speech. *See Zal v. Steppe*, 968 F.2d 924, 929 (9th Cir. 1992) (affirming lower court's denial of *habeas* petition premised on theory that contempt citation for violating trial court's orders excluding certain defenses violated First Amendment; "Zealous counsel cannot flout [judicial] authority behind the shield of the First Amendment."); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) ("It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal."). The same is true of a partial summary judgment ruling or a partial judgment as a matter of law ruling that would preclude a party from raising certain issues before the jury.

Nor does a court's power to limit speech end at the courtroom door. A court can prohibit speech outside the courtroom to protect the proceedings inside. "Although litigants do not surrender their First Amendment rights at the courthouse door, those rights may be subordinated to other interests that arise in this setting. … In the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33 n.18 (1984) (internal quotation marks and citations omitted); *accord Gentile*, 501 U.S. at 1074 (precedents "plainly indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding

Thus, the MHPI Projects are wrong to say that the Injunction "*improperly* seeks to prevent argument" about the Maryland Opinion. (MHPI Recons. Br. at 12 (emphasis added).)[16] This Court, burned one too many times by the MHPI Projects' disingenuous conduct, has ordered them to stop misrepresenting what occurred here.[17] The Injunction seems unusual only because courts rarely need to take such steps to secure reasonably honest and candid compliance with its orders by litigants. But this step is well within the Court's equitable discretion. *See, e.g.*, *Welytok v. Ziolkowski*, 2008 WI App 67, ¶¶ 39-40, 312 Wis. 2d 435, 752 N.W.2d 359 (quoting *State v. Seigel*, 163 Wis. 2d 871, 890, 472 N.W.2d 584 (Ct. App. 1991)) (affirming broad injunction based on Ziolkowski's repeated conduct and noting that circuit court had "tailored" injunction, including requirement that

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standard than that established for regulation of the press"). Similarly, where a court has deemed speech defamatory, it can prohibit further similar speech. *See, e.g.*, *Balboa Island Vill. Inn, Inc. v. Lemen*, 40 Cal. 4th 1141, 1148, 156 P.3d 339 (2007) ("Defendant in the present case objects to the imposition of an injunction prohibiting her from repeating statements the trial court determined were slanderous, asserting the injunction constitutes an impermissible prior restraint. We disagree.").

Here, the fundamental principles are similar. This Court considered the MHPI Projects' extensive arguments and repeatedly reiterated—in the Clarification Order, the Confirmation Order, and several oral rulings accompanying those orders—precisely what occurred in the Rehabilitation Proceedings. The Injunction this Court entered to enforce its rulings and to protect Ambac's claims-paying resources is no more an unlawful prior restraint than the orders above.

[16] The MHPI Projects classify this as a full-faith-and-credit argument, but, as noted earlier, it is better understood as a complaint about the Injunction's effect on their speech.

[17] *See* 2/15/18 Hr'g Tr. at 39:14-24:

> THE COURT: That's exactly the subterfuge that they're doing throughout this. It's not allowed.
>
> MR. FINERTY: That was exactly my point. They're arguing with the Maryland decision what they've been precluded from doing directly.
>
> THE COURT: I agree with that. There's no direct or indirect argument to be made to any court that there is a default by Ambac or has the effect of finding a default by Ambac in any other court.

Ziolkowski provide copies of injunctive order to other governmental decision-makers in certain circumstances, to "the necessities of the particular case"). The Injunction does not infringe constitutionally protected speech. It prohibits only the MHPI Projects from advocating, in particular cases, specific legal positions contrary to settled law about the nature of the Segregated Account Rehabilitation Proceeding—including decisions of this Court, *Nickel*'s holding that recognizes the propriety of orders to protect the Rehabilitation Proceedings and effectuate the purpose of those Proceedings as set forth in Wis. Stat. § 645.01(4), and the Court of Appeals' affirmance of the Clarification Order, 2018 WI App 8 (unpublished) (per curiam).

IV. THE ARGUMENT THAT THIS COURT DENIED THE MHPI PROJECTS DUE PROCESS IS MERITLESS, AND, IN ANY EVENT, WILL SOON BE MOOT.

The MHPI Projects have not been denied due process. The MHPI Projects had an appropriate opportunity to be heard before the Injunction was entered, and they will have yet another opportunity to address the Injunction at the hearing the Court has scheduled on this motion.

The Court easily could have entered the Injunction on January 22, after hearing the MHPI Projects' objections to the Plan. Indeed, the Court asserted and expounded upon its authority to do so. *See* 1/22/18 Hr'g Tr. at 57:8-15. The Injunction was also discussed at the February 15, 2018 hearing, although that hearing was scheduled to deal with the Rehabilitator's related contempt motion. *See* 2/15/18 Hr'g Tr. at 22:18-40:15. These hearings provided due process.

To the extent there remains any process due issue, *Nickel* is again instructive. The Court of Appeals rejected arguments by certain appellants that they were denied due process because they did not receive notice and an opportunity to be heard *before* OCI approved the Segregated Account and initiated the Rehabilitation Proceeding, noting that they had sufficient opportunity to be heard *afterward*. *Nickel*, 2013 WI App 129, ¶ 181.

The same logic applies here. Impairment of Ambac's control rights presented a risk to Ambac's claims-paying ability.[18] The MHPI Projects' ongoing efforts to obtain erroneous decisions from other courts by evading the Confirmation Order and misrepresenting what had occurred in the Rehabilitation Proceeding amplified that risk. For that reason, this Court entered the Injunction promptly and without an additional hearing. *See* 2/15/18 Hr'g Tr. at 31:4-15, 35:6-7.

Though Ambac contends the MHPI Projects have already had sufficient opportunity to be heard on whether they needed to follow the Confirmation Order, they will have yet another opportunity when this Court hears this motion. "[T]here is no denial of due process in refusing to grant a full adversary hearing before taking away property or liberty, so long as such a hearing is provided later (as it was here) and there is justification for the delay." *Schramek v. Bohren*, 145 Wis. 2d 695, 707, 429 N.W.2d 501 (Ct. App. 1988) (quoting *Lossman v. Pekarske*, 707 F.2d 288, 291 (7th Cir. 1983)); *see also Nickel*, 2013 WI App 129, ¶¶ 181-83. Once that hearing occurs, the MHPI Projects' due process argument, to the extent it has any merit, will be moot.

[18] This Court has already reached that conclusion on the record. *See* 1/22/18 Hr'g Tr. at 54:18-55:16, 57:23-58:6, 59:16-25, 64:9-14.

CONCLUSION

The Court was correct to issue the Injunction to ensure compliance with the Confirmation Order and to protect the fruits of the Rehabilitation Proceeding. For the reasons stated, the Court should deny the MHPI Projects' Motion for Reconsideration.

Respectfully submitted March 19, 2018.

STAFFORD ROSENBAUM LLP
Electronically signed by Barbara A. Neider

Barbara A. Neider Bar No. 1006157
Jeffrey A. Mandell Bar No. 1100406

222 West Washington Ave., Suite 900
Madison, WI 53701
Telephone: 608.256.0226
Facsimile: 608.259.2600
Email: bneider@staffordlaw.com