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Wisconsin's Premier Lawyers & Litigators

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June 22, 2010

DELIVERED VIA MESSENGER

Mr. Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 South Hamilton Street
Madison, Wisconsin 53703-3285

Re: *In the Matter of the Rehabilitation of:*
Segregated Account of Ambac Assurance Corporation
Dane County, Wisconsin, Circuit Court Case No. 10-CV-1576

Dear Mr. Esqueda:

Enclosed find for filing an original and one copy of Depfa Bank, plc's Notice of Motion and Motion to Intervene and To Modify March 24, 2010 Order for Temporary Injunctive Relief, plus supporting brief and materials. Please return the file-stamped copies to me via our messenger.

By copy of this letter, counsel for the State of Wisconsin Office of the Commissioner of Insurance is being served. We also are serving a courtesy copy of this filing upon Judge William D. Johnston, care of the Lafayette County Clerk of Circuit Court.

We thank you for your courtesies in this matter. If you have any questions, please contact Grant Killoran or Seth Dizard of this office, or me.

Sincerely,

Gregory W. Lyons

GCK/kas
Enclosures
c: Hon. William D. Johnston c/o Clerk of Lafayette County Circuit Court
(w/enc.) (via express delivery)
Michael B. Van Sicklen, Esq. (w/enc.) (via e-mail)

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

In the Matter of the Rehabilitation of:

Segregated Account of Ambac Assurance Corporation

Case No. 10-CV-1576

DEPFA BANK, PLC'S NOTICE OF MOTION AND MOTION TO INTERVENE AND TO MODIFY MARCH 24, 2010 ORDER FOR TEMPORARY INJUNCTIVE RELIEF

TO: Michael B. Van Sicklen, Esq.
David G. Walsh, Esq.
Matthew R. Lynch, Esq.
Foley & Lardner LLP
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Madison, Wisconsin 53701

Attorneys for State of Wisconsin
Office of the Commissioner of Insurance

PLEASE TAKE NOTICE that Depfa Bank, plc, as an interested party, by its attorneys O'Neil Cannon Hollman DeJong & Laing S.C., will move the Court, the Honorable William D. Johnston of Lafayette Circuit Court presiding by designation, pursuant to Paragraph 12 of the Court's March 24, 2010 Order for Temporary Injunctive Relief ("Temporary Injunction") and/or Wis. Stat. § 803.09(1) for an order to intervene into this action pursuant to, and to modify its Temporary Injunction and unwind the Segregated Account or, in the alternative, remove any Depfa-related policies from the Segregated Account, and prohibit any further placement of Depfa-related policies into the Segregated Account.

The grounds for this motion are set forth more fully in the accompanying brief in support and Affidavit of Nancy Henderson.

The hearing on this motion shall be set at a date and time to be determined by this Court.

Dated this 22nd day of June, 2010.

O'NEIL, CANNON, HOLLMAN, DeJONG & LAING S.C., Attorneys for Depfa Bank, plc

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STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

In the Matter of the Rehabilitation of:

Segregated Account of Ambac Assurance Corporation

Case No. 10-CV-1576

DEPFA BANK, PLC'S BRIEF IN SUPPORT OF MOTION TO INTERVENE AND TO MODIFY MARCH 24, 2010 ORDER FOR TEMPORARY INJUNCTIVE RELIEF

I. INTRODUCTION

Depfa Bank, plc ("Depfa") brings this motion to modify the Order for Temporary Injunctive Relief entered by this Court on March 24, 2010 ("Temporary Injunction") as a policyholder of Ambac Assurance Corporation ("Ambac"). Depfa is the owner of a variety of bonds and debt securities, the repayment of which is guaranteed under insurance policies issued or assumed by Ambac. Several of the Ambac policies protecting Depfa have been relegated to the Segregated Account, while others remain (at least for now) in Ambac. In short, Depfa has a foot in both worlds – the "Good Ambac" and the "Bad Ambac."

While Depfa recognizes the Commissioner is vested with statutory discretion to regulate the insurance industry, his authority derives from a legislative grant and is therefore limited to and by that legislative grant. Here, the Commissioner's creation of the Segregated Account, and the Temporary Injunction endorsing that action, violate the letter and spirit of the Wisconsin insurance rehabilitation statutes, as well as Federal and State constitutional protections and basic notions of fairness and equity. After two years of close collaboration, Ambac and the Commissioner created the Segregated Account, not as part of a good faith effort to rehabilitate an imperiled insurer to protect the singular class of Ambac's policyholders, but rather to give Ambac the ability to isolate policyholders deemed by Ambac to be toxic or "impaired" (those

policyholders with actual or anticipated claims entitled to payment) while preserving favored policies (those policies without any apparent risk or liability to Ambac).[1] At the same time, these actions maximize premium payments to Ambac (including payments from policyholders that have been relegated to the Segregated Account but which payments inure to the benefit of the policyholders in "Good Ambac"), while minimizing and potentially denying entirely any claim payments on policies issued to protect insureds who have faithfully paid premiums.

The conduct of Ambac and its agents in recent dealings with policyholders suggest that an underlying objective of the entire plan created by the Commissioner and Ambac is to provide Ambac with extraordinary coercive leverage in settlement and commutation negotiations with policyholders having claims or anticipated claims. The Commissioner has given Ambac the power to impale policyholders like Depfa with a "Morton's Fork" – either accept nominal or inadequate payments in full satisfaction of Ambac's policy obligations or have the policy unilaterally "assigned" to the Segregated Account to await payment, if any, under an as yet undisclosed "Rehabilitation Plan" or, potentially, liquidation proceedings. Such action exceeds the Commissioner's statutory authority and is unprecedented.

As shown herein, Ambac and the Commissioner's establishment of the Segregated Account and transfer of certain Depfa's policies to the Segregated Account violate state and federal law for a number of reasons, including but not limited to the following:

- Ambac and the Commissioner established the Segregated Account in an impermissible effort to protect favorable assets from insolvency proceedings and unjustly enhance claims paying resources for such favored policies. Fundamental

[1] It is important to note at the outset that the Commissioner has adopted a new term not previously used in the context of financial guaranty insurance – "Impaired Policies" – to describe the insurance policies under which policyholders are legally entitled to payment on an actual or anticipated claim. Ambac uses the term liberally to defend the propriety of its decision to breach its policy obligations by relegating all policies with claim liability to the Segregated Account. This term is an egregious misnomer – these polices are not "impaired" in any sense; the only "impairment" arises from Ambac's inability to meet its policy obligations as they come due.

insolvency and rehabilitation principles demonstrate that the creation of the Segregated Account is an improper use of the Wisconsin insolvency law.

- Ambac and the Commissioner established the Segregated Account not to rehabilitate an imperiled insurer, but to provide Ambac with improper leverage to force insureds to accept nominal settlements in satisfaction of policy rights.

- The Commissioner exceeded his authority by attempting a judicial rehabilitation of Ambac without formally placing Ambac into rehabilitation.

- The Segregated Account encourages Ambac, while insolvent, to settle and commute its policies in the General Account, without notice to or supervision by this Court, and such transfers prefer certain creditors over others in violation of Wisconsin law.

- Establishment of the Segregated Account violates Wisconsin insurance statutes because the Segregated Account was established to the detriment of several classes of policyholders, and because the Segregated Account is inadequately capitalized.

- The transfer of policies into the Segregated Account is a taking without just compensation.

- The Commissioner's acts in relegating certain policies to the Segregated Account violate constitutional guarantees of equal protection by treating similarly-situated policyholders differently.

- The Commissioner has deprived Depfa of its due process rights by failing to provide notice or a hearing prior to transfer of policies to the Segregated Account and without fully disclosing the terms of the anticipated "Rehabilitation Plan" prior to attempting to cut off policyholders' right to challenge the creation of the Segregated Account.

As a policyholder of Ambac, or an "interested party," Depfa brings this Motion under Paragraph 12 of the Temporary Injunction, in which the Court ruled:

> This Order shall remain effective until further order of this Court. If any interested parties believe any portion of this Order is unwarranted by the facts or the law, such parties may seek modification or dissolution of part or all of this Order by filing a written motion with this Court no later than 90 days following the issuance of this Order. If one or more such timely motions are received, the Court may set a schedule for responsive briefing and a hearing regarding the modifications or dissolutions sought. The originals of any such motions shall be filed with the Dane County Circuit Court (with courtesy copies mailed to the undersigned, care of the Clerk of the Lafayette County Circuit Court) and served on counsel for the Commissioner.

Accordingly, because the Commissioner's actions are contrary to the law, Depfa requests that this Court modify the Temporary Injunction, including, but not limited to, Paragraphs 5, 9(c) and 10, and unwind the Segregated Account, or in the alternative, remove any Depfa-related policies from the Segregated Account, and prohibit, going forward, the placement of any other Depfa-related policies into the Segregated Account. More broadly, Depfa requests that the Court grant its request to intervene in this proceeding, consistent with Paragraph 12 of this Court's Temporary Injunction and Wis. Stat. § 803.09(1), and to modify the Temporary Injunction to require that Ambac and the Commissioner adopt transparent and equitable procedures for dealing with Ambac's claims liabilities that will afford all policyholders reasonable notice and an opportunity to be heard prior to any purported assignment of a policy to the Segregated Account.[2]

II. BACKGROUND INFORMATION

A. Depfa's Interests

Depfa is the owner of multiple bonds insured by Ambac. Depfa's ownership of the bonds generally arises from its agreement to provide liquidity support to bond issuers and remarketing agents pursuant to Standby Bond Purchase Agreements. *See* Affidavit of Nancy Henderson ("Henderson Aff."), filed herewith, ¶ 2. In short, Depfa was obligated to buy the bonds in the event they could not be sold or remarketed pursuant to their terms.

The financial crisis that commenced in 2008 began to trigger Depfa's obligations to purchase the bonds that it now owns. *Id.* Depfa's interest in this matter arises from its status as

[2] Depfa challenges the propriety of the Segregated Account and the Ambac rehabilitation process knowing that the success of its motion may change materially the treatment Depfa receives under policies that currently remain in Ambac. Nonetheless, the legal flaws, inequities and constitutional deprivations imbedded in the Commissioner's "durable solution" for Ambac are so significant and severe that the entire plan must be changed, and the Commissioner instructed to develop a plan for Ambac's policyholders that comports with Federal and State constitutional guarantees, Wisconsin law and equity.

bondholder of the following bonds and debt securities insured directly or indirectly by Ambac policies.

1. State Board of Regents of the State of Utah Student Loan Revenue Bonds

Depfa was the liquidity provider and continuing holder of bank bonds totaling approximately $356,000,000 initial notional amount issued by the State Board of Regents of the State of Utah. *Id.*, ¶ 3. Ambac is the insurer of these bonds under Ambac policy numbers 3002BE, 11802BE, 23539BE, 13623BE, and 12607BE ("Utah Policies"). *Id.* To date, there has been no default in the payment of these bonds, and Ambac has not been required to make payment under the Utah Policies. *Id.* The Utah Policies currently remain an obligation of Ambac payable from Ambac's General Account assets. *Id.* However, the Commissioner has designated the Utah Policies as subject to an "assessment process," the full details of which have not yet been disclosed, which places the Utah Policies in danger of being transferred to the Segregated Account at some unspecified future date. *See* Commissioner's 3/14/10 Verified Petition for Order of Rehabilitation ("Verified Petition"), ¶ 8(a), Ex. E.

2. Access to Loans for Learning Student Loan Corporation Revenue Bonds, Series V

Depfa also holds similarly structured student loan bonds issued as Series V by Access to Loans for Learning, LLC ("ALL" and the "ALL V Bonds") totaling approximately $190,000,000 initial notional amount. Henderson Aff., ¶ 4. Ambac insured these bonds under Ambac policy number 24368BE ("ALL V Policy"). *Id.* However, the ALL V Policy has been deemed "impaired" by Ambac and thus has been relegated to and currently resides in the Segregated

Account. This occurred without notice to or the consent of Depfa. *Id.*, ¶¶ 4, 7; Verified Petition, ¶ 8(a), Ex. D.[3]

3. Infrastructure Finance Units (United Kingdom)

Depfa also owns debt securities issued in connection with various infrastructure projects in the United Kingdom and other locations outside the United States that were insured by Ambac's UK affiliate, Ambac Assurance UK Limited ("Ambac UK" and the "IFU Policies"). Henderson Aff., ¶ 5. Ambac UK shifted the majority of the liability under the IFU Policies to Ambac under a 1997 reinsurance agreement ("1997 Reinsurance Agreement"). *Id.* Ambac has now assigned the 1997 Reinsurance Agreement to the Segregated Account. *Id.*; Verified Petition, ¶ 8(a), Ex. F (Item #8). That action appears to have rendered Ambac UK seriously impaired, if not insolvent, thus imperiling Depfa's rights against Ambac and under the IFU Policies. Henderson Aff., ¶ 5.

B. Ambac's Deteriorating Financial Condition

Ambac stopped writing new insurance policies in 2008 because of its deteriorating financial condition and credit rating. *See* Commissioner's 3/24/10 Brief in Support of Entry of Order for Rehabilitation ("Rehabilitation Brief") at 1-6. Ambac simultaneously experienced mounting liabilities as policyholder claims increased. *Id.* These conditions made it very likely that Ambac could not satisfy all claims made under its outstanding insurance policies. *Id.* Ambac subsequently began conferring with the Commissioner regarding its options. *Id.*

As publicly acknowledged by Ambac and the Commissioner, prior to establishing the Segregated Account, Ambac engaged in negotiations with many of its policyholders to try to reduce its outstanding liability by settlement. *See* Rehabilitation Brief at 2-3. Ambac and the

[3] Nothing in this motion shall be construed as Depfa's consent or acquiescence to such transfer. Ambac remains liable under the ALL V Policy, as well as the Utah Policies and the IFU Policies, and Depfa reserves all rights to enforce the terms of such policies against Ambac.

Commissioner have also acknowledged that negotiations continue. *See, e.g.*, Commissioner's 6/11/10 Motion to Approve Commutation of Policy No. AB0960BE, at 3. Due to confidentiality agreements it has entered with certain parties, Depfa cannot currently disclose the substance or details of any such discussions in which it may have been involved. Henderson Aff., ¶ 6. As a result, Depfa is prejudiced in its ability to present a complete factual record in support of this motion and is, in particular, unable to present certain facts and events that are directly relevant to Depfa's legal arguments. *Id.* Accordingly, Depfa will promptly seek to submit under seal a detailed evidentiary record in support of its motion. *Id.*

In any event, Ambac, working hand-in-hand with the Commissioner, assigned the ALL V Policy and the 1997 Reinsurance Agreement to the Segregated Account, and placed the Utah Policies on what appears to be a precarious "assessment" status. *See* Verified Petition, Exs. C-F. Depfa learned that Ambac had transferred the ALL V Policy and the 1997 Reinsurance Agreement to the Segregated Account, and that the Utah Policies were subject to an "assessment" process, only after publication of the rehabilitation order and related court filings. Henderson Aff., ¶ 7.

C. Ambac's Post-Injunction Negotiations

The Commissioner petitioned the Court for an order to place the Segregated Account into rehabilitation just hours after Ambac established the Segregated Account. *See* Verified Petition. On the very same day, the Court granted the Commissioner's petition and placed the Segregated Account into rehabilitation pursuant to Wis. Stat. § 645.32. *See* 3/14/10 Order for Rehabilitation ("Rehabilitation Order"), ¶ 2. However, notwithstanding the fact that the ALL V Policy and the 1997 Reinsurance Agreement had been placed into rehabilitation under the control of the Commissioner (along with about 1,000 other "impaired" policies), Ambac has continued to engage in discussions with policyholders to attempt to commute policies within the Segregated

Account. *See, e.g.*, Commissioner's 6/11/10 Motion to Approve Commutation of Policy No. AB0960BE, at p. 3.

III. STANDARD OF REVIEW

The Commissioner's discretion to regulate the affairs of insurance companies is not an unlimited grant of authority. The Commissioner only may exercise the power and authority given to him by the Wisconsin legislature and found in the Wisconsin Insurance Code. *See Duel v. State Farm Mut. Auto. Ins. Co.*, 240 Wis. 161, 170, 1 N.W. 2d 887, 891 (1942) ("the insurance commissioner has only such powers as are conferred by statute and . . . these must be found within the four corners of the statute.") (citations omitted). The Commissioner's decisions and actions cannot be allowed if they (1) are outside the range delegated to the agency by law; (2) are inconsistent with an agency rule or prior agency practice; (3) deviate from agency practice or prior policy and are not adequately explained; or (4) violate a constitutional or statutory provision. *See, e.g., Nat'l Motorists Ass'n v. Office of the Comm'r of Ins.*, 2002 WI App 308 ¶ 22, 259 Wis. 2d 240, 655 N.W. 2d 179 (citing Wis. Stat. § 227.57(8)).

Because the Commissioner's actions violate these standards, and the Temporary Injunction infuses his actions with the force of law, the Temporary Injunction must be modified to unwind the Segregated Account and to require that the Commissioner adopt transparent and equitable procedures for dealing with Ambac's claims liabilities and all its policyholders.

IV. ARGUMENT[4]

A. Ambac And The Commissioner May Not Isolate Policyholders With Claims In The Segregated Account As An Artifice For Rehabilitation Or To Avoid Liquidation.

With approval from the Commissioner, Wisconsin insurers are allowed to create segregated accounts, provided the creation of the account is not contrary to the interests of any class of policyholders. Wis. Stat. § 611.24(2). The Commissioner is authorized to place such segregated accounts into rehabilitation proceedings whenever he believes the segregated account may be successfully rehabilitated without substantial increase in the risk of loss to creditors of the insurer or to the public. Wis. Stat. § 645.31. However, Depfa is unaware of any authority that empowers the Commissioner, in concert with an imperiled insurer, to isolate so-called "impaired policies" into a segregated account, immediately thereafter place the segregated account into rehabilitation, and then wield the segregated account and rehabilitation injunction as both a sword and shield to leverage below cost settlements with policyholders. The Commissioner and Ambac admit that this is precisely what they are doing. *See* Rehabilitation Brief at 3-4. While Wisconsin's insurance insolvency law does not directly address the propriety of the Commissioner's actions, an analysis of bankruptcy law demonstrates that the Commissioner's actions exceed his lawful authority.[5] Simply put, no bankruptcy court in the

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[4] Any claim by Ambac or the Commissioner that Depfa's motion or the merits of Depfa's arguments somehow already have been pre-judged by prior rulings by this Court is contrary to Paragraph 12 of the Court's Temporary Injunction giving parties like Depfa until June 22, 2010 to file motions for modification or dissolution of the Temporary Injunction. No reasonable reading of Paragraph 12, or any consideration of due process and fairness, would allow Ambac or the Commissioner to successfully argue that Depfa's motion somehow already has been decided. Similarly, any claim by Ambac or the Commissioner that Depfa does not have the right to bring this motion or the ability to seek the relief requested in it also is contrary to the language of Paragraph 12. Any such claims by Ambac or the Commissioner also would be inconsistent with the position taken by the Commissioner on page 3 of his March 24, 2010 Brief in Support of Motion for Temporary Injunctive Relief ("Temporary Injunction Brief") in which the Commissioner justifies his motion by stating that interested parties will have the ability to "file a motion seeking to dissolve or modify the temporary injunctive relief." *See also* Temporary Injunction Brief at p. 7, fn. 4.

United States would countenance a scheme like the one contrived between the Commissioner and Ambac, and neither should this Court.

The purpose of insurance rehabilitation, like a commercial bankruptcy, is to conserve and equitably administer the assets of the involved corporation in the interests of investors, the public, and others. *See* Rehabilitation Brief at 7; *see also Garamendi v. Executive Life Ins. Co.*, 21 Cal. Rptr. 2d 578, 584-85 (Cal. Ct. App. 1993). Some of the goals of insurance rehabilitation are to: (1) protect the interests of policyholders, creditors, other claimants and the public; (2) provide a comprehensive scheme for administering insurer receiverships; and (3) establish a system to equitably apportion any unavoidable loss. *See* 1 Plitt, Maldonado & Rogers, Couch on Insurance § 5:21 (3d ed. 2009); Rehabilitation Brief at 7. Bankruptcy reorganizations are similarly designed to facilitate the rehabilitation of a debtor's finances through the orderly and equitable disposition of assets in an effort to satisfy creditors in order of their respective statutory priorities. *See In re Little Creek Dev. Co.*, 779 F.2d 1068, 1071 (5th Cir. 1986).

To protect the integrity of bankruptcy proceedings from those whose petitions seek to hinder creditors by improperly shielding favored assets, bankruptcy courts examine pre-petition conduct to determine if the proceeding is brought in good faith. *Id.* at 1071-73. Individuals who transfer toxic assets (or in this case, "impaired policies") into an entity created for the sole purpose of filing for bankruptcy – as Ambac and the Commissioner did here – can be denied protection under the Bankruptcy Code under a doctrine termed the "new debtor syndrome."

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[5] Courts may draw on bankruptcy law for instructive or illustrative analysis of insurance insolvency law. *See, e.g., Webster v. Superior Court*, 758 P.2d 596, 602-03 (Cal. 1988) (applying bankruptcy principles to construe insurance insolvency statute). Indeed, Ambac itself has compared the substantive effect of insolvency proceedings to those in bankruptcy. *See* Ambac's 6/11/10 Brief in Opposition to Wells Fargo's Motion to Modify Temporary Injunctive Order and Intervene at 9 (equating the creation of the Segregated Account to the estate created in bankruptcy proceedings).

New debtor syndrome arises when an individual or corporation, on the verge of insolvency, creates a separate entity and transfers encumbered or otherwise toxic assets to that entity in order to protect remaining assets from creditors. *Id.* at 1073. In these instances, bankruptcy courts consistently hold that the petition serves only to hinder and defraud creditors and dismiss the petition as an abuse of the bankruptcy process. *See, e.g., In re N.R. Guaranteed Retirement, Inc.*, 112 B.R. 263 (Bankr. N.D. Ill. 1990) (dismissing bankruptcy petition where individual created corporate entity for the sole purpose of protecting other assets from creditors).

The bankruptcy petition brought in *N.R.* presents a classic case of new debtor syndrome. There, an individual owned a parcel of commercial real estate through a complex scheme of interrelated corporations all under his control. *Id.* at 265. The property was encumbered by two mortgages, both in default well in advance of the bankruptcy filing. *Id.* Three weeks before the filing of the bankruptcy petition, the petitioner created a new corporation and transferred ownership of the property to the newly-created entity. *Id.* The new entity had no assets or substantial business purpose other than holding title to the property. *Id.* The petitioner stipulated that the entity was formed in contemplation of filing the bankruptcy petition, and that the ownership interest was transferred from a corporation that had other assets that did not require Chapter 11 protection. *Id.* at 266.

The creditors objected to the bankruptcy petition, citing the transfer of property to the newly-created single asset corporation, as an abuse of the bankruptcy process. *Id.* at 273. The court held that the transfer of assets to new debtors on the eve of insolvency posed a significant threat to the balance between the protection of the debtor and the rights of the creditors that underpins bankruptcy proceedings. *Id.* at 274. The court reasoned that new debtor syndrome often constitutes "an abuse of the bankruptcy process . . . offensive to the integrity of the

bankruptcy system, as well as an infringement of the non-bankruptcy rights of creditors." *Id.* (internal citations and quotations omitted). More specifically, the court recognized that new debtor syndrome upsets the balance between the parties in bankruptcy by allowing the transferor to get the benefit of bankruptcy (the imposition of the automatic stay, restructuring of debt, etc.) without bearing the burdens of bankruptcy (disclosure of financial information, legal/accounting expenses, potential loss of control, etc.). *Id.* Additionally, the court found that new debtor syndrome deprives creditors of rights in the assets and business operations that they would have had in the event the transferor had filed bankruptcy. *Id.* (citing *In re Eden Assocs.*, 13 B.R. 578, 584-85 (Bankr. S.D.N.Y. 1981) (dismissal of bankruptcy appropriate where debtor was formed to shield the assets of more profitable entity from jurisdiction of the bankruptcy court)).

The *N.R.* court then dismissed the bankruptcy petition, holding that the creation of a new entity for the express purposes of insolvency proceedings, with the effect of depriving creditors of their non-bankruptcy rights without subjecting the transferor to the burdens of bankruptcy, constituted a clear case of new debtor syndrome. *Id.* at 279.[6]

The creation of the Segregated Account in this case is the insurance insolvency equivalent of new debtor syndrome. Here, as acknowledged and thoroughly detailed in the Affidavit of Roger A. Peterson dated May 19, 2010 ("May 19th Peterson Aff."), Ambac and the Commissioner collaborated for two years and thousands of hours prior to creating the Segregated

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[6] The core equitable principles applied in these cases – the good faith use of judicial insolvency proceedings – has been applied by bankruptcy courts across the nation in a variety of factual circumstances to prevent abuse and subversion of insolvency laws. *See, e.g., In re Trident Assocs. Ltd. P'ship*, 52 F.3d 127 (6th Cir. 1995) (affirming rejection of petition of one-asset debtor created on eve of foreclosure for purpose of avoiding debt collection); *In re Laguna Assocs. Ltd. P'ship*, 30 F.3d 734, 738 (6th Cir. 1994) (upholding lift of automatic stay where debtor formed at 11th-hour for purpose of filing for bankruptcy); *Carolin Corp. v. Miller*, 886 F.2d 693, 704-05 (4th Cir. 1989) (upholding dismissal of bankruptcy petition where debtor formed to access bankruptcy protections for purpose of risk-free speculation); *In re Mildevco, Inc.*, 40 B.R. 191, 193-94 (S.D. Fl. 1984) (upholding dismissal of bankruptcy petition where dormant corporations brought to life for purpose of misusing bankruptcy protections). The mere fact that Ambac is an insurance company is not a principled basis for the Commissioner or this Court to simply disregard the fundamental requirement of good faith.

Account, then immediately placed it into rehabilitation in order to try to shield Ambac's non-toxic assets from the policyholders relegated to the Segregated Account. *See* May 19th Peterson Aff. at 2-7; Rehabilitation Brief at 2-5. The Commissioner and Ambac will defend their actions and will attempt to distinguish these authorities by noting that Congress delegated to the states authority over insurance company insolvencies under the McCarran-Ferguson Act (15 U.S.C. §§1011-1015) and Bankruptcy Code section 109(b). This delegation was clearly not an invitation to jettison equity and good faith. The Court should give great weight to the fact that the scheme adopted by the Commissioner and Ambac would not be countenanced by any bankruptcy judge in the nation.

B. The Commissioner's Enabling of Ambac's Attempts to Strong-Arm Policyholders Into Accepting Nominal Settlement Offers Is An Abuse of Discretion

Ambac and the Commissioner created the Segregated Account for the dual purposes of leveraging disfavored policyholders into accepting nominal settlement offers and protecting Ambac's General Account without having to place all of Ambac's assets under the Court's jurisdiction by instituting formal rehabilitation proceedings. Both of these actions are contrary to the purpose of Wisconsin insolvency statutes. Accordingly, the Court should modify the Temporary Injunction to unwind the Segregated Account or, at minimum, remove the ALL V Policy and the 1997 Reinsurance Agreement from the Segregated Account, and prohibit Ambac (or the Commissioner) from placing the Utah Policies into the Segregated Account unless and until the Commissioner and Ambac can formulate a transparent and constitutional process.

As detailed in the Rehabilitation Brief and the May 19th Peterson Affidavit, Ambac and the Commissioner have worked closely and in concert over the past two years on Ambac's mounting financial difficulties. As part of this process, Ambac has, in concert with the Commissioner, made overtures to various policyholders to accept nominal payment in return for

commutation of Ambac policies without transparency and judicial accountability. Indeed, Ambac did not cease attempting to negotiate such commutations of policies in the Segregated Account even after the Commissioner initiated the rehabilitation and supposedly assumed control over the Segregated Account. *See* Commissioner's 6/11/10 Motion to Approve Commutation of Policy No. AB0960BE, at p. 3. Ambac's ongoing efforts to settle policies in the Segregated Account makes little sense when the Commissioner is allegedly engaged in the development of a rehabilitation plan.

In rehabilitation, the Commissioner takes control of the imperiled insurer, and is empowered to reform and revitalize it. Wis. Stat. § 645.33(2). The officers and managers of the insurer ordinarily are suspended. *Id.* Thus, under the traditional and standard course of a rehabilitation proceeding, an imperiled insurer has little interest in or control over the policies assigned to the Segregated Account. Here, however, Ambac remains actively involved in the maintenance and operation of the Segregated Account. Ambac's continued involvement points to one conclusion: the Commissioner and Ambac are working together to create and exercise leverage for settlement, and to protect the Ambac General Account from claims of policyholders without placing Ambac as a whole in rehabilitation or liquidation. Such a result is untenable and a clear abuse of the Commissioner's authority and fiduciary responsibilities.

In effect, the Commissioner has established a non-judicial receivership over both the Segregated Account and Ambac. The Commissioner and Ambac benefit from the Temporary Injunction restraining all actions by policyholders in the Segregated Account from challenging Ambac's furtive establishment of the Segregated Account. Ambac also benefits from the Rehabilitation Order allowing the Commissioner to transfer additional policies into the Segregated Account anytime a claim arises or a low-ball settlement offer is rejected. *See*

Rehabilitation Order at 1-4; Verified Petition at ¶ 8, Ex. E (list of policies under review and subject to placement in the Segregated Account). Such an exercise of power by the Commissioner is unheard of, and is abuse of discretion. The Commissioner cannot use the insurance statutes to achieve an end not permitted by law. *See, e.g., In re Jacobs,* 149 B.R. 983, 992-93 (Bankr. N.D. Okla. 1993) (insurance commissioner cannot use regulatory authority to extort payment or punish nonpayment of a debt discharged in bankruptcy proceedings); *State ex rel. Time Ins. Co. v. Smith*, 184 Wis. 455, 481, 200 N.W. 65 (1924) (commissioner may not hold insurance license renewals hostage to effectuate reinterpretation of policy requirements).

The Commissioner's actions impose deleterious effects upon policyholders such as Depfa. In a rehabilitation of Ambac as a whole, Depfa would be able to assert claims against all of Ambac's assets. However, under the scheme created by the Commissioner and Ambac, Depfa may assert claims only against a limited subset of Ambac's assets assigned to the Segregated Account, and then only in the event that Ambac's reserves do not fall below certain specified minimums. Verified Petition, Tab 1 at 3-4. Under this framework, Depfa now is faced with the real probability that its recovery on the ALL V Policy and the IFU Policies (due to the impairment of the 1997 Reinsurance Agreement) will be diminished or delayed by events outside the confines of the Segregated Account, or events over which Depfa has no control. As a result, the Commissioner has bestowed upon Ambac extraordinary and unjustified leverage over Depfa to attempt to force Depfa to relinquish its rights for an amount possibly inferior to what Depfa could receive in liquidation proceedings of Ambac as a whole, in parity with all other policyholders.

Depfa additionally faces the prospect that the Utah Policies will be moved to the Segregated Account. Verified Petition, ¶ 8, Ex. E. Depfa fears Ambac and the Commissioner,

after receiving the benefit of premiums paid as the Temporary Injunction requires, will transfer the Utah Policies to the Segregated Account at the first sign of potential liability.

Through the Segregated Account Rehabilitation Order, the Court effectively has established jurisdiction over policies in the Ambac General Account without providing policyholders the benefits of a statutorily-authorized and regulated rehabilitation proceeding. This "shadow" rehabilitation violates the letter and spirit of Wisconsin rehabilitation law. *See* Wis. Stat. § 645.32; *see also Grode v. Mut. Fire, Marine & Inland Ins. Co.*, 572 A.2d 798, 804 (Pa. Commw. Ct. 1990), *aff'd, in part, sub nom.*, *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 614 A.2d 1086 (Pa. 1992) (rehabilitator's ability to make decisions is circumscribed by the court's mandate to act as a check on potential discretionary abuse and to insure equitable apportionment of loss). Having taken actions clearly outside his delegated regulatory authority, the Commissioner has abused his discretion and violated his duties to Depfa and all of Ambac's policyholders. The Temporary Injunction should be modified to undo his improper actions.

C. Creation Of The Segregated Account Improperly Increases Ambac's Leverage In Settling Policies In The General Account And Gives Rise To Claim For Avoidable Preferences And Transfers

In establishing the Segregated Account, the Commissioner bestowed upon Ambac enhanced, and improper, leverage over policyholders who remain in the General Account. These policyholders, including Depfa with respect to the Utah Policies, face increased pressure from Ambac to commute policies or face relegation to the Segregated Account. This is precisely what happened to Depfa with respect to the ALL V Policy.[7] As shown below, Ambac's exercise of its new-found settlement power is contrary to Wisconsin law.

[7] As noted above, Depfa is compromised in its ability to demonstrate the exact nature and use of this improper leverage due to confidentiality restrictions. Henderson Aff., ¶ 6.

Because Ambac as a whole (including the allegedly "impaired" policies placed into the Segregated Account) is insolvent, any settlement effected by Ambac is a preference under Wisconsin law giving rise to a claim by other creditors to avoid the improper transfer. Wis. Stat. § 128.07(a) provides:

> (1)(a) A person shall be considered to have given a preference if, being insolvent, the person has made a transfer of any of his or her property [. . .] and the effect of the transfer will be to enable any creditor to obtain a greater percentage of his or her debt than any other creditor of the same class [in liquidation].
>
> ***
>
> (2) If the debtor has given a preference within 4 months before the filing of a petition [for appointment of a receiver . . .] the [preference] shall be voidable by the receiver [. . .] and the receiver may recover the property or its value from the recipient.

It is undeniable that Ambac, as a whole, is insolvent. *See* May 19th Peterson Aff., ¶ 9; Verified Petition, ¶ 8 and attachments cited therein. Ambac's inability to pay its liabilities in full (thus requiring the commutations) and the creation of the Segregated Account to avoid a company-wide rehabilitation or even liquidation, patently demonstrate Ambac's precarious financial position. *Id.* It also is undeniable that Ambac has engaged in repeated settlement discussions, finalized billions of dollars in settlements with certain classes of policyholders, and undoubtedly will continue such negotiations and settlements with policyholders whose policies are in the General Account or are currently in limbo between the General Account and the Segregated Account.

Ambac's settlement agreements also refute the repeated claims by Ambac and the Commissioner that all of Ambac's assets remain available to policyholders in the Segregated Account. *See, e.g.,* Ambac's 6/11/10 Brief in Opposition to Wells Fargo's Motion to Amend Temporary Injunction at 2 (arguing Segregated Account is adequately capitalized because it is "backed by all but $100 million of the assets of the General Account"). Whatever assets remain

in the General Account are quickly flying out of Ambac and into the hands of the various settling parties. *See, e.g.*, Rehabilitator's 6/10/10 Report Regarding Closing of the Bank Group Settlement. Moreover, Segregated Account policyholders are restrained from challenging such actions by the Temporary Injunction, and the Court has dismissed challenges to these settlements in summary fashion. *See* 5/27/10 Findings of Fact and Conclusions of Law on Motions of Certain RMBS Policyholders and Certain LVM Bondholders (rejecting challenges to the "Bank Group Settlement" totaling $2.6 billion cash and $2 billion in notes).

The creation of the Segregated Account violates Wisconsin law because it encourages and allows Ambac to make preferential settlement payments to creditors despite and during Ambac's insolvency. That preferential settlement and/or payments have now been made means that the Commissioner has actually created avoidance claims against the recipients. On top of being counterproductive, it is a clear and unequivocal abuse of discretion for the Commissioner to use his rehabilitation and/or regulatory authority to facilitate preferential payments that subvert the equitable and ratable distribution of Ambac's assets. *See, e.g.*, Wis. Stat. § 645.01(4).

D. The Commissioner Did Not Properly Establish the Segregated Account

Under Wisconsin law, insurers may establish segregated accounts pursuant to provisions of Wis. Stat. § 611.24(2). Segregated accounts can be established only with the approval of the Commissioner, and such approval may be given only where creation of the account would not be contrary to law or to the interests of any class of insureds. *Id.* The corporation creating the account is required to have and maintain an adequate amount of capital and surplus in the segregated account. Wis. Stat. § 611.24(3)(a). Here, Ambac and the Commissioner have disregarded these requirements in creating the Segregated Account.

Hence, the Commissioner violated Wis. Stat. § 611.24(2) by giving his approval to Ambac where such approval works to the detriment of certain classes of policyholders. Before March 24, 2010, all policyholders shared an unrestricted right to payment on their policies from all assets owned and controlled by Ambac. After creation of the Segregated Account, affected policyholders like Depfa must pursue any claims against a $2 billion note dependent upon assets and surplus underlying the Ambac General Account. Verified Petition, Tab 1 at 3-4. This result demonstrates a clear intent by the Commissioner to favor certain policyholders over others. Indeed, the Commissioner chose to relegate into the Segregated Account almost exclusively policies related to credit default swaps, residential mortgage backed securities and student loan revenue bonds while protecting "approximately 14,000 policies for performing deals" in the General Account. *See* Verified Petition, Tab 1 at 2; May 19th Peterson Aff., ¶¶ 9(a)(vi), 9(b).

Even if the Court ignores the Commissioner's improper discrimination against classes of policyholders, the Segregated Account is not sufficiently capitalized to cover the account's liabilities in accordance with Wis. Stat. § 611.24(3)(a). Despite the Commissioner's assertion that there is adequate capital and surplus in the Segregated Account, it is clear from the immediately-instituted and ongoing rehabilitation proceedings that the Segregated Account was inadequately capitalized when it was created, and remains so today.[8] While it is possible that an insurer in a traditional rehabilitation might have assets sufficient to cover liabilities, the Segregated Account is in no such condition. The Verified Petition reveals that this is not a traditional rehabilitation, but rather is a liquidation proceeding artificially created to wash out disfavored assets and policyholders by assigning them to the Segregated Account without notice

[8] Indeed, the Commissioner's position seems out of place in a petition for rehabilitation. The rehabilitation is based on the premise that the Segregated Account is "in such condition that the further transaction of business without rehabilitation would be hazardous, financially or otherwise, to its policyholders, its creditors or the public." Verified Petition at 8.

or consent. *See* Verified Petition at 7 (stating rehabilitation plan includes an "orderly run-off of the Segregated Account").

E. The Commissioner's Conduct With Respect To The Segregated Account Violates Both The United States And Wisconsin Constitutions

In transferring the ALL V Policy and the 1997 Reinsurance Agreement into the Segregated Account, the Commissioner violated both the constitutions of the United States and Wisconsin. As shown below, the transfer (1) constitutes an unconstitutional taking of property without just compensation; (2) impermissibly differentiates between Depfa and similarly-situated policyholders in violation of the Equal Protection Clause of both constitutions; and (3) violates the Due Process Clause because it occurred without notice and an opportunity to be heard.[9]

1. The Commissioner's Actions Effectuated An Unconstitutional Taking Of Property

The Commissioner may not take private property for public use without providing just compensation. *See* U.S. Const. Amend. V, cl. 5 (private property shall not "be taken for public use, without just compensation"); Wis. Const. Art. I, § 13 ("The property of no person shall be taken for public use without just compensation therefore").

Depfa's insurance contracts with Ambac create constitutionally-protected property interests in the recovery of the payment of moneys as required by those contracts. *See e.g., Lynch v. United States*, 292 U.S. 571, 577, 579 (1934) (recognizing property interest in insurance contract protected by Fifth Amendment); *Association of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 558-59, 544 N.W. 2d 888, 891-92 (1996) (citing *State Teachers' Ret. Bd. v.*

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[9] Depfa reserves its right to pursue all of its remedies arising from the Commissioner's violation of Depfa's constitutional rights in federal court at the appropriate time. While Depfa acknowledges this Court's primary *in rem* jurisdiction over the assets of the Segregated Account and is well aware of Paragraph 10 of the Court's March 24, 2010 Order for Temporary Injunction Relief, it is clear that state insurance insolvency courts may not in all circumstances enjoin parties from resort to the federal courts to vindicate federal civil rights violated by state officers acting under color of law. *See, e.g., Murff v. Professional Medical Ins. Co.*, 97 F.3d 289 (8th Cir. 1996).

Giessel, 12 Wis. 2d 5, 9-10, 106 N.W. 2d 301, 304-05 (1960) (contractual rights are protectable property interests)).

Any claim by the Commissioner that Depfa's property interest in its insurance contracts with Ambac somehow is contingent upon his right to approve a Segregated Account would be meritless. As previously discussed herein, the Commissioner's powers are not unlimited. *See supra*, Section III. & IV.A. & B.; *see also*, *Kentucky Central Life Ins. Co. v. Stephens*, 897 S.W. 2d 583 (Ky. 1995) (recognizing limits on use of police power); *Carpenter v. Pacific Mut. Life Ins. Co. of Cal.*, 74 P.2d 761 (Cal. 1937) (police power cannot be arbitrarily or improperly discriminatory). The Commissioner's extra-statutory act of creating an illusory rehabilitation through approval of the Segregated Account, instead of rehabilitating Ambac as a whole, has resulted in a "taking" of Depfa's property interests, protected by the Fifth Amendment. *See Zinn v. State,* 112 Wis. 2d 417, 426-27, 334 N.W. 2d 67, 71-72 (1983) (unconstitutional taking where owner deprived of value). The Commissioner unconditionally substituted Depfa's right to recover against Ambac as a whole, and against all of Ambac's assets, leaving Depfa only with a "right" to recover from the Segregated Account.[10]

By so acting, the Commissioner took Depfa's valid property interest for public use. *See* Rehabilitation Brief at 1, 20 (noting use of the Segregated Account to protect the public). Accordingly, Depfa either must be paid for this unconstitutional taking, or alternatively be restored to Ambac's General Account. *See, e.g., Lynch*, 292 U.S. at 577-79; *Zinn*, 112 Wis. 2d. at 429, 334 N.W. 2d at 73 (requiring compensation for temporary unconstitutional taking).

[10] The viability of this substituted "right" is questionable at best. The Segregated Account is drastically underfunded and, as was its purpose, is filled with numerous liabilities that are likely to consume the limited available resources assigned to the Segregated Account.

2. The Commissioner's Relegation Of The ALL V Policy To The Segregated Account Impermissibly Differentiated Between Similarly Situated Policyholders In Violation Of The Equal Protection Clause

The Commissioner's differentiation between the ALL V Policy and similarly-situated policyholders is not rationally based on any legitimate governmental purpose. *See Phillips v. Wisconsin Pers. Comm'n*, 167 Wis. 2d, 205, 224, 482 N.W. 2d 121, 128 (Ct. App. 1992) (Wisconsin constitution implies same protections as the United States Constitution). Despite the rationales the Commissioner may offer to try to justify his actions in regard to the Segregated Account, there are no legitimate material differences between the ALL V Policy and the Utah Policies held by Depfa. Henderson Aff., ¶¶ 3 & 4. Despite this fact, Ambac and the Commissioner relegated the ALL V Policy to the Segregated Account, while the Utah Policies remain in the General Account. Of course, relegating the Utah Policies to the Segregated Account now would not cure this unlawful differential treatment. On the contrary, it would transparently compound the violation.

In effect, the Commissioner is benefiting and protecting favored policyholders, while punishing "impaired" policyholders who would otherwise choose to enforce their rights in a true liquidation proceeding of Ambac. This is not constitutionally permissible. *See, e.g., Ferdon v. Wisconsin Patients Comp. Fund*, 2005 WI 125 ¶¶ 102-05, 284 Wis. 2d 573, 701 N.W. 2d 440 (2005) (cap on non-economic damages violates equal protection by attempting to repair tort system by punishing the victim; no rational relationship between cap and objective of compensating victim).

3. The Commissioner Failed To Provide Depfa Pre-Deprivation Notice Or Hearing In Violation Of Due Process Guarantees

The Commissioner's transfer of the ALL V Policy and the 1997 Reinsurance Agreement into the Segregated Account without prior notice to Depfa or an opportunity to be heard violates

Procedural Due Process. *See* U.S. Const. Amend. XIV, § 1; Wis. Const. Art. I, §1; *see also State ex rel Sonneborn v. Sylvester*, 26 Wis. 2d 43, 132 N.W. 249 (1965) (Federal and Wisconsin constitutions provide identical procedural due process protections).

As previously discussed, Depfa has a protectable property interest in its ALL V Policy and IFU Policies. *See Lynch*, 292 U.S. at 577, 579; *Association of State Prosecutors*, 199 Wis. 2d at 558-59, 544 N.W. 2d at 891-92. This interest was taken by the Commissioner when he, without providing notice or an opportunity to be heard, relegated the ALL V Policy and the 1997 Reinsurance Agreement to the Segregated Account. *See Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (right to notice and opportunity to be heard "must be granted at a meaningful time and in a meaningful manner") (citations omitted). Depfa first knew that the ALL V Policy and the 1997 Reinsurance Agreement were in the Segregated Account when it read the various March 24, 2010 rehabilitation filings. Henderson Aff., ¶ 7.

This post-deprivation notice is constitutionally deficient and cannot be cured simply by a post-deprivation hearing. *See Fuentes*, 407 U.S. at 81 ("If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented"); *see also Weinberg v. Whatcom County*, 241 F.3d 746, 754-55 (9th Cir. 2001) (citing *Zinermon v. Burch*, 494 U.S. 113, 136-37 (1990) for the proposition that discretionary actions of state official in context of established procedure require pre-deprivation notice and hearing). Accordingly, the Court should modify the Temporary Injunction to unwind the Segregated Account or, at minimum, return the ALL V Policy and the 1997 Reinsurance Agreement to Ambac's General Account.

F. Depfa Should Be Allowed To Intervene In The Rehabilitation Proceeding To Protect Its Rights

Depfa moves to intervene in this action pursuant to the invitation of this Court in Paragraph 12 of the Temporary Injunction. As set forth herein, Depfa is an interested party and seeks modification of the Temporary Injunction. Thus, it is not necessary for this Court to undergo an analysis under Wisconsin's intervention statute. However, out of an abundance of caution, Depfa submits the following analysis regarding its motion to intervene, but specifically reserves its right to challenge jurisdiction.

Wis. Stat. § 803.09(1) permits intervention as a matter of right where a movant claims an interest relating to the property or transaction which is the subject of the action, the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties. Wis. Stat. § 803.09(1).

As detailed above and as demonstrated by the Verified Petition, Depfa unquestionably has significant interests that are among the subjects of this proceeding, namely, the ALL V Policy, the Utah Policies, and the IFU Policies. *See* Henderson Aff., ¶¶ 3-5; Verified Petition, ¶ 8 & Exs. C-F. Also unquestionably, Depfa's interests will be impaired by the disposition of this proceeding, and in particular, by the rehabilitation or liquidation of the Segregated Account and the actions of the Commissioner and Ambac with respect to the Ambac General Account. *See, e.g.*, Verified Petition, Tab 1 and attachments. Equally as clear is the fact that neither Ambac nor the Commissioner is adequately representing Depfa's interests. On the contrary, the placement of the ALL V Policy and the 1997 Reinsurance Agreement into the Segregated Account, the placement of the Utah Policies on the "assessment" list, and the draconian terms of the Temporary Injunction that purport to prohibit Depfa from taking action to protect its interests

against Ambac establish that the Commissioner and Ambac are not, and have no intention of, adequately representing Depfa's interests.

Accordingly, Depfa should be permitted to intervene as an "interested party" pursuant to paragraph 12 of the Temporary Injunction and Wis. Stat. § 803.09(1).

V. CONCLUSION

The Commissioner's purported objectives regarding Ambac cannot justify the means to achieve them granted to him by this Court in its March 24, 2010 Order for Temporary Injunctive Relief. The Commissioner's authority and discretion regarding the handling of insolvent insurers is wide, but it is not boundless. Here, the Court's Order must be modified as requested by Depfa as a matter of law.

For the above reasons, Depfa respectfully requests that the Court modify the Temporary Injunction, and order that the Segregated Account be unwound and that the Commissioner proceed with a plan for Ambac that is consistent with Wisconsin law and basic constitutional principles. In the alternative, Depfa requests that the Court modify the Temporary Injunction and order that the ALL V Policy and the 1997 Reinsurance Agreement be removed from the Segregated Account and that Ambac be prohibited from relegating the Utah Policies to the Segregated Account.[11]

Dated this 22nd day of June, 2010.

[11] As recognized by the Commissioner on page 5 of the Temporary Injunction Brief, Wis. Stat. Chap. 645 "authorizes a wide spectrum of injunctive relief in rehabilitation actions." (citations omitted). And as recognized by the Commissioner on page 7 of the Temporary Injunction Brief, "this Court has broad discretion to grant and enforce the injunctions the Commissioner seeks." As such, this Court has broad discretion to modify its Temporary Injunction for the various factual, legal and equitable reasons set forth herein by Depfa.

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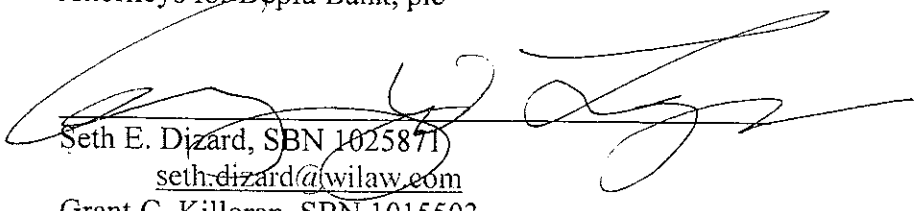

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STATE OF WISCONSIN DANE COUNTY CIRCUIT COURT

In the Matter of the Rehabilitation of:

Case No. 10-CV-1576

Segregated Account of Ambac Assurance Corporation

AFFIDAVIT OF NANCY HENDERSON IN SUPPORT OF DEPFA BANK, PLC'S MOTION TO INTERVENE AND TO MODIFY MARCH 24, 2010 ORDER FOR TEMPORARY INJUNCTIVE RELIEF

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

Nancy Henderson, being first duly sworn on oath deposes and states as follows:

1. I am over 21 years of age and am competent to testify. The testimony contained herein is based upon my own personal knowledge as the Head of Municipal Products for Depfa Bank, plc ("Depfa"), and pertains to Ambac Assurance Corporation ("Ambac") and the All V Policy, the Utah Policies, the IFU Policies, and the 1997 Reinsurance Agreement, as defined and described more completely below. If called as a witness, I would testify consistently with this Declaration.

2. Pursuant to Standby Bond Purchase Agreements, which were triggered after the financial crisis in 2008, Depfa is the liquidity provider and bondholder for two student loan revenue bond issues: (1) the State Board of Regents of the State of Utah Student Loan Revenue Bonds; and (2) the Access to Loans for Learning Student Loan Corporation Revenue Bonds, Series V. Each of these bond issuances are insured by Ambac.

3. Depfa is the continuing bondholder for bank bonds issued by the State Board of Regents of the State of Utah with an initial notional amount of approximately $356,000,000. These bonds are insured by financial guaranty insurance policies issued by

Ambac, policy numbers 3002BE, 11802BE, 23539BE, 13623BE, and 12607BE ("Utah Policies"), all of which are currently allocated to the Ambac General Account. Pursuant to the Utah Policies, Ambac provides guarantees on the timely payment of principal and interest on the student loan bonds in the event that the underlying borrowers default on the payments due under terms of their loans. To date, Depfa has not submitted any liability claims to Ambac under the Utah Policies, as there has not been an event of default relating to the payment of these bonds. Further, Depfa does not anticipate an event of default to occur in the near future.

4. Depfa is the continuing bondholder for bank bonds issued by Access to Loans for Learning Student Loan Corporation Revenue Bonds, Series V, with an initial notional amount of approximately $190,000,000. These bonds are insured by Ambac policy number 24368BE ("All V Policy"). Pursuant to the All V Policy, Ambac provides guarantees on the timely payment of principal and interest on the student loan bonds in the event that the underlying borrowers default on the payments due under terms of their loans. The All V Policy is currently allocated to the Segregated Account. To date, Depfa has not submitted any liability claims to Ambac under the All V Policy, as there has not been an event of default relating to the payment of these bonds. Further, Depfa does not anticipate an event of default to occur in the near future.

5. Depfa also owns debt instruments that were issued in connection with various infrastructure projects in the United Kingdom and other locations outside the United States. These securities were insured by Ambac's UK affiliate, Ambac Assurance UK Limited ("Ambac UK" and the "IFU Policies"). Ambac UK shifted the majority of the liability under the IFU Policies to Ambac under a 1997 reinsurance agreement ("1997 Reinsurance Agreement").

Ambac has assigned the 1997 Reinsurance Agreement to the Segregated Account, which seriously impairs Depfa's rights against Ambac and under the IFU Policies.

6. As the Office of the Commissioner of Insurance ("Commissioner") has publicly stated, Ambac has been and continues to be in discussions with numerous parties regarding Ambac policies and Ambac's potential liabilities related to such policies. Due to confidentiality agreements it has entered with certain parties, Depfa cannot currently disclose the substance or details of any such discussions in which it may have been involved. As a result, Depfa is prejudiced in its ability to present a complete factual record in support of this motion and is, in particular, unable to present certain facts and events that are directly relevant to Depfa's legal arguments. Accordingly, Depfa will promptly seek to submit under seal a detailed evidentiary record in support of its motion.

7. I first learned that the All V Policy and the 1997 Reinsurance Agreement had been relegated to the Segregated Account on or about March 25, 2010, after publication of the Rehabilitation Order and related court filings. To my knowledge, neither the Commissioner nor Ambac provided prior notice of that event to anyone else at Depfa.

I declare under penalty of perjury that the foregoing is true and correct.

Nancy Henderson

Subscribed and sworn to before me
this 21st day of June, 2010.

Notary Public, State of _____
My Commission: _____

MICHAEL S. MCBRIDE
Notary Public, State of New York
No. 02MC6119919
Qualified in New York County
Commission Expires December 6, 2012