33 East Main Street
Suite 500
Madison, WI 53703-3095
Mailing Address:
P.O. Box 2038
Madison, WI 53701-2038
Phone:
608.257.7181
Fax:
608.257.2508
www.murphydesmond.com

Stephen L. Morgan
Direct Line 608.268.5572
Facsimile 608.257.4333
smorgan@murphydesmond.com

MurphyDesmond S.C.
LAWYERS

29 November 2010

HAND-DELIVERED
Honorable William D. Johnston
Lafayette County Circuit Court
626 Main Street
P.O. Box 40
Darlington, WI 53530-0040

Re: In the Matter of the Rehabilitation of:
Segregated Account of Ambac Assurance Corporation
Dane County Case No. 10 CV 1576

Dear Judge Johnston:

Enclosed is a copy of the Post-Confirmation Hearing Brief of Wells Fargo Bank, National Association, as Trustee for the LVM Bondholders. The original is being filed this morning in the Dane County Circuit Court.

Sincerely,

Stephen L. Morgan

SLM:KMK:
100766
Johnston lt 112910
Enclosure
cc: All Counsel of Record

4836-2619-8024, v. 1

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

POST-CONFIRMATION HEARING BRIEF OF WELLS FARGO BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR THE LVM BONDHOLDERS

Dated: November 29, 2010

MURPHY DESMOND S.C.

Stephen L. Morgan, SBN 1015099
Brittany S. Ogden, SBN 1035853
33 East Main Street, Suite 500
Madison, Wisconsin 53703
Telephone: (608) 807-0262
Facsimile: (608) 257-2508

LOCKE LORD BISSELL & LIDDELL LLP

Steven T. Whitmer
Kevin A. Wisniewski
111 South Wacker Drive
Chicago, Illinois 60606
Telephone: (312) 443-1869
Facsimile: (312) 443-0336
Attorneys for Wells Fargo Bank, National Association, in its Capacity As Trustee for the LVM Bondholders

Wells Fargo Bank, National Association (the "Trustee"), as indenture trustee of the First Tier Las Vegas Monorail Project Revenue Bonds (the "LVM Bonds") supported by an insurance policy (the "LVM Bond Policy") issued by Ambac Assurance Corporation ("Ambac" or "AAC"), submits this post-confirmation hearing brief in support of its objections, filed November 9, 2010 (the "Objections"), to the motion dated October 8, 2010 (the "Motion")[1] by the Commissioner of Insurance of Wisconsin (the "Commissioner" or "OCI") seeking approval of its proposed plan of rehabilitation (the "Plan") for the Segregated Account. In further support of its Objections, the Trustee states as follows.

PRELIMINARY STATEMENT

In its November 9, 2010 Objections, the Trustee established that several provisions of the Plan depart from well-established legal standards and thus render the Plan unlawful. Specifically, the Trustee identified five deficiencies:

- The Plan improperly allocates the LVM Bond Policy to the Segregated Account while leaving most or all of Ambac's other municipal bond policies in the General Account;
- The Plan violates Wisconsin's well-established "made whole" doctrine by requiring the LVM Bondholders to assign their contractual rights under the LVM Bond Policy to Ambac upon the submission of a Policy Claim, without first requiring Ambac to make the LVM Bondholders "whole";
- The Plan unfairly discriminates against holders of long-dated claims by failing to ensure that they will be paid on equal terms with holders of short-dated claims;
- The Plan's release, injunction and immunity provisions are overly broad and purport to grant general releases to Ambac, its directors and officers, and other parties; and

[1] On November 9, 2010, The Trustee together with Eaton Vance Management, Nuveen Asset Management, Restoration Capital Management LLC, and Stone Lion Capital Partners L.P. (collectively the "LVM Bondholders") filed a joint objection to OCI's October 8, 2010 Motion seeking approval of the Plan. This brief supplements the Trustee's (1) November 9, 2010 brief, and (2) November 29, 2010 Proposed Findings of Fact and Conclusions of Law.

- The Plan improperly provides "Policy Claim" treatment for CDS claims in the Segregated Account, giving general creditors (CDS claims) treatment *pari passu* with that given to real insurance policyholders that have suffered actual losses.[2]

See Objections at 9-34.

On November 15-19, 2010, this Court presided over a five-day hearing on the Commissioner's Motion to confirm the Plan (the "Hearing"). In support of its Motion, the Commissioner called four fact witnesses: (1) Sean Dilweg, the Wisconsin Commissioner of Insurance and the Court-appointed Rehabilitator; (2) Roger A. Peterson, the Director of the Wisconsin Office of the Commissioner of Insurance, Bureau of Financial Analysis and Examination; (3) Cathleen J. Matanle, Ambac's Managing Director in Risk Management; and (4) David Barranco, Ambac's Managing Director in the Ambac Restructuring and Commutations Group.[3]

The testimony and evidence presented at the Hearing further highlight two of the deficiencies the Trustee addressed in its Objections: that (1) the Plan's assignment provision expressly violates the Wisconsin "made whole doctrine"; and (2) the Plan impermissibly discriminates against holders of long-dated claims because it fails to ensure that Ambac will

[2] At the Hearing, counsel for the LVM Bondholders pointed out that the Plan's definition of "Policy Claim" would include the claims of the CDS Banks that are parties to the CDS Settlement currently on appeal, in the event that Settlement is vacated. Counsel for the LVM Bondholders invited OCI's counsel to provide clarification if such claims were not intended to be included in the Plan's definition of "Policy Claim." OCI's counsel declined to provide the requested clarification. Consequently, it appears that the CDS claims that will receive treatment *pari passu* with policyholder claims under the Plan will include not only the unsettled CDS claims, which are relatively modest in amount, but also the vastly larger claims of the CDS Banks – which, by some estimates, may be as large as $16 billion – in the event the CDS Settlement is vacated as a result of the pending appeal.

[3] Additionally, the RMBS Policyholders and The Federal Home Loan Mortgage Corporation presented the expert testimony of Mr. James Schacht in support of their objections to the Plan.

maintain adequate claims-paying resources to pay their claims on par with holders of short-dated claims.[4] The Trustee presents this brief to further address these two issues.

THE TRUSTEE'S SUPPLEMENTAL OBJECTIONS

I. THE PLAN IMPERMISSIBLY REQUIRES POLICYHOLDERS TO ASSIGN CONTRACTUAL RIGHTS TO AAC

In its Objections, the Trustee established that the Plan's forced assignment of the LVM Bondholders' rights and recoveries against the Las Vegas Monorail Company ("LVMC")[5] to Ambac violates a bed-rock legal principle in Wisconsin: the "made whole" doctrine. Specifically, Sections 4.04(g)[6] and 4.04(h)[7] of the Plan require the LVM Bondholders to assign to Ambac all rights and recoveries under the LVM Bond Policy in exchange for a 25% cash distribution and 75% Surplus Notes – *before the time* that the LVM Bondholders are fully compensated by Ambac for their losses under the LVM Bond Policy.

In his November 12, 2010 Reply Brief, the Commissioner attempts to sweep aside thirty years of Wisconsin Supreme Court jurisprudence, arguing that the application of the "made

---

[4] During the Hearing, the Court established that any objection raised by one party stands as an objection raised on behalf of all parties. The Trustee therefore adopts and incorporates all objections and arguments raised by the other Objecting Parties, whether raised during the Hearing or in pre or post-Hearing briefs, to the extent those objections and arguments pertain to the five deficiencies identified by the Trustee.

[5] Under the terms of the 1st Tier Bonds issued by the State of Nevada, the LVM Bonds are to be repaid by the operator of the Monorail out of the Monorail's net revenues. LVMC is currently in bankruptcy, filing a voluntary Chapter 11 petition on January 13, 2010 in the United States District Court of Nevada.

[6] Section 4.04(g) provides, in relevant part, that notwithstanding "the satisfaction of Permitted Policy Claims with Surplus Notes in lieu of Cash, AAC shall be entitled to recover the full amount of all recoveries, reimbursements and other payments ...." Ex. 26, at 19-20.

[7] Section 4.04(h) provides, in relevant part, that "upon receipt of payment with respect to a Permitted Policy Claim, each such Holder shall be deemed to have assigned its rights relating to payment under the underlying instrument(s) or contract(s) to AAC." Ex. 26, at 20.

whole" doctrine is "not warranted" in these proceedings.[8] Additionally, the Commissioner argues that, even if the made whole doctrine applies, the Plan does make all policyholders whole "in the form of cash and surplus notes."[9] As explained below, the Commissioner is wrong on both points.

A. The Made Whole Doctrine Is Applicable in This Proceeding

Wisconsin's "made whole" doctrine undoubtedly applies in this proceeding and expressly prohibits the Commissioner from assigning the LVM Bondholders' rights and recoveries under the LVM Bond Policy to Ambac *before* they are fully compensated.

Under the Plan, once the LVM Bondholders submit a Policy Claim to the Segregated Account, they receive a distribution of 25% in cash and 75% in Surplus Notes. Upon receipt of this 25% Cash and 75% Surplus Note split, the Plan requires the LVM Bondholders to immediately assign their rights and recoveries against the LVMC to Ambac. Ambac may then exercise its assumed subrogation rights and seek recovery against the LVMC.

According to the Wisconsin Supreme Court, the "made whole" doctrine mandates that "a party claiming subrogation rights may *not recover until the insured is fully compensated for his or her losses*." *Ruckel v. Grassner*, 2002 WI 67, ¶ 17, 253 Wis. 2d 280, 287, 646 N.W.2d 11, 15 (2002) (emphasis added); *Rimes v. State Farm Mut. Auto. Ins. Co.*, 106 Wis. 26 263, 272, 316 N.W.2d 348, 353 (1982) ("It appears clear that under Wisconsin law ... one who claims subrogation rights ... is barred from any recovery unless the insured is made whole."). Under the doctrine, "*an insured must be made whole before the insurer may exercise subrogation rights*

---

[8] *See* Ex. 64, Rehabilitator's Reply Brief In Support Of Motion For Confirmation Of The Plan Of Rehabilitation (OCI's Reply Brief), at 18-19 (Nov. 12, 2010).

[9] *Id.*

against its insured, even when unambiguous language in the insurance contract states otherwise." *Id.*, 2002 WI at ¶ 4, 253 Wis. 2d at 283, 646 N.W. 2d at 13 (emphasis added).

The Commissioner maintains that the made whole doctrine is not applicable to these proceedings.[10] Specifically, relying on *Muller v. Society Ins.*, 2008 WI 50 ¶ 46, 309 Wis. 2d 410, 433, 750 N.W.2d 1, 12 (2008), the Commissioner argues that the "equitable considerations in this case" do not warrant application of the made whole doctrine because: (1) permitting the LVM Bondholders to both recover under the LVM Bond Policy and pursue a claim against the LVMC would constitute an "inequitable double recovery"; and (2) the LVM Bondholders and Ambac are "not competing for a limited pool of funds."[11] The Commissioner's attempt to vitiate the "made whole" doctrine fails for three reasons.

First, the Commissioner's reliance on *Muller* is misplaced. In *Muller*, the court held that the made whole doctrine was not applicable *to the specific facts of that case*, where: (1) the insurer had fully satisfied its obligation to the insured by paying the full limit of the insurance policy at issue in cash (even though the policy did not cover the full the extent of the insured's loss); (2) the insured had the opportunity (after receiving payment from its insurer) to seek full recovery for its loss against the alleged tortfeasor and the tortfeasor's insurer; (3) the pool of funds available to make the insured whole (by way of the insured's policy, the tortfeasor and the tortfeasor's insurer) *exceeded* the total claims of both the insured and insurer; and (4) the insured elected to *settle* its claim against the tortfeasor for an amount less than the insured's total loss. 2008 WI at ¶ 4, 309 Wis. 2d at 416-17, 750 N.W.2d at 3-4.

[10] Ex. 64, OCI's Reply Brief, at 18-19.

[11] *See* Ex. 64, OCI's Reply Brief, at 18-19.

Here, in stark contrast to the facts in *Muller*, (1) Ambac has not satisfied its payment obligations to the LVM Bondholders under the LVM Bond Policy; (2) the LVM Bondholders are forced to assign their rights and recoveries against the LVMC to Ambac; (3) the pool of funds available to compensate the LVM Bondholders are *considerably less* than their total losses; and (4) the LVM Bondholders never settled their claims against the LVMC. Under these circumstances, *Muller* is inapposite.

Second, permitting the LVM Bondholders to submit Policy Claims under the Plan *and* maintain their right to recoveries against the LVMC merely provides the LVM Bondholders the benefit of the bargain they struck with Ambac and cannot reasonably be characterized as an "inequitable double recovery."[12] Indeed, the very reason why the LVM Bondholders obtained the LVM Bond Policy was to obtain an *additional* source of recovery in the event that LVMC defaulted on its payment obligations.

Third, contrary to the Commissioner's assertion, there is no actual risk of "double recovery" here. As the Commissioner has acknowledged, the most the LVM Bondholders can hope to recover in the LVMC bankruptcy proceeding is "minimal recover[y]."[13] Similarly, the LVM Bondholders will receive only a 25% cash distribution under the Plan plus, as discussed below, Surplus Notes worth "cents on the dollar."[14] Under any light, the Commissioner's purported concern about "inequitable double recovery" is misplaced, and his statement that the LVM Bondholders and Ambac are "not competing for a limited pool of funds" is inaccurate.

---

[12] Ex. 64, OCI's Reply Brief, at 19.

[13] Ex. 27, Disclosure Statement Accompanying Plan Of Rehabilitation ("Disclosure Statement"), at 12.

[14] Confirmation Tr. III, at 61 (Nov. 17, 2010) (emphasis added).

The Rehabilitator cannot modify or overrule the "made whole" doctrine, pursuant to Chapter 645 or otherwise. While the Rehabilitator is empowered to deal with the property and business of the *insurer* (*see* Wis. Stat. § 645.33(2)), the statute does not authorize the Rehabilitator to exercise control over the personal property or contract rights of individual policyholders. Rights under the LVM Bonds are inherently personal to the LVM Bondholders, as they reflect a separately enforceable contract directly between the LVM Bondholders (represented by the Trustee) and LVMC. There is no basis under the Wisconsin rehabilitation statute to seize those rights for the benefit of Ambac.

Even if Chapter 645 could be read to authorize the forced assignment of the LVM Bondholders' rights against LVMC (and it cannot), this result would constitute a taking of the LVM Bondholders' property in violation of the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article 1, § 13, of the Wisconsin Constitution. This court must construe the statute to avoid such an unconstitutional result. *See Milwaukee Journal Sentinel v. Wis. Dep't of Admin.*, 2009 WI 79, ¶ 41, 319 Wis. 2d 439, 469, 768 N.W.2d 700, 715 (2009).

Because Section 4.04 violates the "made whole" doctrine, the Plan exceeds the Rehabilitator's authority under Wisconsin's rehabilitation statute.[15] Accordingly, Section 4.04 must be amended to comply with controlling Wisconsin law.

B. The Evidence Presented at the Hearing Clearly Demonstrates that the LVM Bondholders Will Not be Made Whole Under the Plan

The Commissioner argues that, even if the made whole doctrine applies, the Plan makes all policyholders whole by ensuring that "every policyholder's claims will be paid in full" in the

[15] The Rehabilitator "derives his . . . authority from the statute and cannot act against or beyond the statute." *Selcke v. Hartford Fire Ins. Co. (In re Rehabilitation of Centaur Ins. Co.)*, 606 N.E.2d 291, 295 (Ill. App. Ct. 1992), *aff'd* 632 N.E.2d 1015 (Ill. 1994) (citation omitted). Chapter 645 of the Wisconsin Statutes establishes the position of the rehabilitator, identifies the property over which a rehabilitator exercises authority, and outlines the manner in which that authority may be exercised.

form of a 25% cash distribution plus 75% in Surplus Notes.[16] The Hearing testimony of OCI's Director of Financial Analysis and Examination, Roger Peterson, belies the Commissioner's assertion.

Mr. Peterson's Hearing testimony confirmed that the cash and Surplus Notes to be paid under the Plan will not make policyholders "whole," because the Surplus Notes are worth close to nothing. According to Mr. Peterson, the surplus notes that Ambac recently issued to the Bank Settlement Group are currently trading "***for cents on the dollar***."[17] As explained by Mr. Peterson, there is "no material difference" between (1) the surplus notes that Ambac issued to the Bank Settlement Group, and (2) the surplus notes that Ambac will be issuing to Segregated Account policyholders under the Plan.[18] Indeed, both sets of notes share the same maturity date and interest rate, and the payment of the principal and interest on both notes are subject to the Commissioner's approval.[19] In light of Mr. Peterson's testimony, OCI cannot reasonably continue to contend that policyholders will be "made whole" or "paid in full" by the Surplus Notes.[20]

OCI's own projections – which OCI prepared for "illustrative purposes to show the ultimate recovery that may be possible on the surplus notes"[21] – further underscore that policyholders will not be "made whole" under the Plan. While the Commissioner testified that

---

[16] Ex. 64, OCI's Reply Brief, at 19.

[17] Confirmation Tr. III, at 61 (Nov. 17, 2010) (emphasis added).

[18] Confirmation Tr. II, at 184 – 85 (Nov. 16, 2010) ("There's no material difference between the General and Segregated Account notes.").

[19] *Id.* at 185; Ex. 41, Rehabilitator's Supplementations to October 8, 2010 Disclosure Statement in Support of Confirmation of the Rehabilitator's Plan of Reorganization (Written Responses to Written Questions), at 10 (Nov. 12, 2010).

[20] Ex. 64, OCI's Reply Brief, at 19.

[21] Confirmation Tr. II, at 205-06 (Nov. 16, 2010) (R. Peterson).

OCI's "goal" is to have the Surplus Notes paid out "by 2020,"[22] the projections OCI presented to the Court assume that no payments will be made until 2050.[23] OCI acknowledges that, in 2050 – that is, forty years from now – full payment of principal and interest on the Surplus Notes is only *possible* under OCI Scenario One, which is OCI's "best case" of its four scenarios.[24] As OCI explains, the three "other scenarios incorporated into the Disclosure Statement do not contemplate that surplus note interest and principal will be paid in full."[25]

In sum, the LVM Bondholders are simply not being "made whole" through a 25% cash payment and Surplus Notes worth "cents on the dollar" that are not projected to be paid until 2050. Thus, under the Wisconsin Supreme Court's clear guidance with respect to the "made whole" doctrine, the Plan must be amended to ensure that no rights are assigned to AAC until LVM Bondholders have been "fully compensated for [their] losses." *Ruckel*, 2002 WI at ¶ 17, 253 Wis. 2d at 287, 646 N.W.2d at 15.

[22] Confirmation Tr. I, at 216 – 17 (Nov. 15, 2010) (Testimony of Sean A. Dilweg).

[23] *See also* Ex. 27, Disclosure Statement, at Exs. D – G (Oct. 8, 2010); Ex. 31 Amendment No. 1 to Disclosure Statement (Oct. 21, 2010); Confirmation Tr. III, at 69 (Nov. 17, 2010) (R. Peterson).

[24] *See* Disclosure Statement at Ex. D (Oct. 8, 2010).

[25] Ex. 41, Rehabilitator's Supplementations to October 8, 2010 Disclosure Statement in Support of Confirmation of the Rehabilitator's Plan of Reorganization (Written Responses to Written Questions), at 10 (Nov. 12, 2010).

II. THE PLAN IS NOT FAIR AND EQUITABLE TO, AND IMPERMISSIBLY DISCRIMINATES AGAINST, HOLDERS OF LONG-DATED CLAIMS

The Commissioner is bound by statute to ensure that the Plan provides "equitable treatment for all policyholders."[26] As explained by the Commissioner, in order to ensure that all policyholders are treated equitably, the Plan must ensure that holders of long-dated claims receive the same treatment as short-dated claims.[27]

To strike the proper balance between long-dated and short-dated claimants, the Plan must set the initial Cash Percentage at a level low enough to ensure that (1) the General and Segregated Accounts have adequate claims-paying resources throughout the life of the Plan, and (2) the probability that long-dated claimants will receive a 25% cash distribution on their claims is the same as holders of short-dated claimants. The Commissioner underscored this point in his submissions to the Court:

> Consistent with its duty of treating all Holders of Policy Claims equitably, the Rehabilitator determined that the Cash Percentage cannot favor Holders of short-dated Policy Claims over Holders of long-dated Policy Claims. More specifically, *if the Cash Percentage were set too high such that claims-paying resources were exhausted before long-dated Policy Claims matured, Holders of short-dated Policy Claims would receive more favorable treatment under the Plan than Holders of long-dated Policy Claims*.[28]

---

[26] Rehabilitator's Brief In Support Of Motion For Confirmation Of The Plan Of Rehabilitation ("OCI Brief in Support of Plan"), at 3 (Oct. 21, 2010); Confirmation Tr. I at 150 (Nov. 15, 2010) (S. Dilweg) ("I'm bound by statute to make sure that the interests of the policyholders are protected and the public and that all policyholders are treated fairly".)

[27] OCI Brief in Support of Plan, at 3; Confirmation Tr. I at 141 – 43 (Nov. 15, 2010) (S. Dilweg).

[28] Ex. 27, Disclosure Statement at 68 (emphasis added). *See also* OCI Brief in Support of Plan, at 3: "[T]he best way to reasonably ensure equitable treatment for all policyholders is to set the initial cash percentage at a level the Segregated Account should be able to continue to pay throughout the life of the exposures allocated to the Segregated Account. If the Segregated Account were unable to continue paying the initial cash percentage at some point during the administration of the Plan, holders of long-dated policy claims might be treated less favorably than holders of short-dated policy claims."

As explained by Mr. Peterson, as the Cash Percentage increases, there is a corresponding increase in risk that short-dated claimants will receive better treatment under the Plan than long-dated claimants.[29] For example, "[w]hile a higher Cash Percentage (such as 30%) would allow for greater distribution of Cash to Holders of short-dated Policy Claims, a lower Cash Percentage (such as 20%) would reduce the rate of diminution of claims-paying resources and better protect Holders of long-dated Policy Claims."[30]

Considering these factors, the Commissioner purports to strike the proper balance between long-dated and short-dated claimants by setting the initial Cash Percentage at 25%.[31] That decision was based on the Commissioner's analysis of Ambac's loss exposure and revenue projections, which form the "basis for the four [Financial Projection] scenarios that are presented in the Disclosure Statement."[32] There are three reasons why OCI's approach presents substantial risk to the LVM Bondholders.

First, there is no dispute that the Financial Projections OCI submitted to the Court – which provide the basis for the Commissioner's representation to the Court that the 25% Cash Percentage is sustainable over the life of the Segregated Account[33] – are "inherently uncertain," "inherent unpredictable" and are in no way "indicative of the future financial position or results

---

[29] Confirmation Tr. IV, at 32 (Nov. 18, 2010) (R. Peterson) ("increasing the cash percentage increases the risk that adverse loss development will negatively impact long-tail policyholders").

[30] Ex. 27, Disclosure Statement, at 70.

[31] Ex. 27, Disclosure Statement, at 68 – 69 ("... the Rehabilitator determined that an initial Cash Percentage of 25% appropriately balances the Rehabilitator's need to preserve claims-paying resources for Holders of long-dated Policy Claims ...").

[32] Confirmation Tr. II, at 186 (Nov. 16, 2010) (R. Peterson); Confirmation Tr. II, at 209 (Nov. 16, 2010) (R. Peterson).

[33] *See* Confirmation Tr. II, at 205-06 (Nov. 16, 2010) (R. Peterson).

of operations of the Segregated Account."[34] Here is how OCI describes the uncertainties of its own projections:

- "The estimates and assumptions incorporated in the Rehabilitator's Financial Projections may not be realized and are *inherently subject to significant business, economic, and competitive uncertainties* and contingencies, many of which are beyond the Rehabilitator's control."[35]

- "*No representations can be or are made as to whether the actual results will be within the range set forth in the Rehabilitator's Financial Projections.*"[36]

- "[T]he actual results of operations achieved during the projection period will vary from projected results. *These variations may be material.* Some assumptions will not materialize and events and circumstances occurring subsequent to the date on which the Rehabilitator's Financial Projections were prepared may be different from those assumed or may be anticipated, and therefore *may affect financial results in a material and possibly adverse manner.*[37]

- "[D]ue to the *inherent unpredictable* nature of such projections, no representation can be or is being made with respect to the accuracy of the Rehabilitator's Financial Projections, and the Rehabilitator's Financial Projections, therefore, may not be relied on as a guarantee or other assurance of the actual results that will occur."[38]

According to the Commissioner, the ultimate losses in the General Account – which, under the Plan, will be providing the claims-paying resources for the Segregated Account – may "materially" exceed OCI's projected General Account Stress Case Loss Estimates (the so-called "worst-case" scenario).[39] In fact, according to Mr. Peterson, *all* of the scenarios set forth in the Financial Projections may be "materially understated."[40]

---

[34] Ex. 27, Disclosure Statement, at 47 and 64.

[35] *Id.* at 64 (emphasis added).

[36] *Id.* (emphasis added).

[37] *Id.* (emphasis added).

[38] *Id.* (emphasis added).

[39] Ex. 27, Disclosure Statement, at 59.

In light of these admitted uncertainties, the Commissioner's Financial Projections provide this Court with *no* assurances that the Segregated Account will be able to maintain the 25% Cash Percentage throughout the life of the Segregated Account.

Second, we now know that the Commissioner did not conduct available alternative analyses when establishing the 25% Cash Percentage. For example, Mr. Peterson explained that the economic conditions underlying the Commissioner's Stress Case Estimates were based upon the previously-undisclosed Moody's Analytics "S3" or "Scenario 3".[41] Moody's Analytics, however, offers at least five or six different economic scenarios (ranging from the most optimistic economic conditions ("S1") to the most dire economic conditions ("S6")).[42] Of these five or six scenarios, Mr. Peterson admits that OCI modeled its Stress Case Estimates (its "worst-case" scenario) on S3, but inexplicably did not analyze those projections against the conditions set forth in the S4, S5 or S6 models – all of which project more dire economic conditions than the S3 model that OCI selected.[43] This provides further support for OCI's statement that its Financial Projections are not "indicative of the future financial position or results of operations of the Segregated Account."[44]

Third, and perhaps most troubling, the Commissioner has refused to provide policyholders with data underlying its Financial Projections. This has prevented policyholders from conducting an independent review of those Projections. Although the Commissioner's

---

[40] Confirmation Tr. IV, at 41 (Nov. 18, 2010).

[41] Confirmation Tr. IV, at 32 (Nov. 18, 2010).

[42] *Id.* at 33.

[43] *Id.* at 36.

[44] Ex. 27, Disclosure Statement, at 47 and 64.

stated goal of this proceeding is to ensure "transparency" and provide policyholders with an "avenue to understand what's happening to them,"[45] the Commissioner has unfortunately provided this Court – and the policyholders directly affected by the Commissioner's actions – with virtually none of the underlying financial data to support its assertion that the General and Segregated Accounts have sufficient claims-paying resources to ensure that the holders of long-dated claims receive the same treatment as short-dated claims.

For these reasons, the LVM Bondholders, holders of long-dated claims, have reasonable cause for concern that they will be paid out on par with other Segregated Account policyholders. Specifically, while the Commissioner intends to begin paying short-dated claimants 25% in cash in the coming months, due to the uncertainties discussed above, the LVM Bondholders have no assurances that they will receive at least their 25% fair share when their post-2030 claims accrue.

The Trustee, Wells Fargo, has presented the Court with a practical and reasonable modification to the Plan that would minimize these uncertainties. Specifically, the Trustee has requested that the Commissioner, at minimum, set aside 25% in cash – through a reserve, trust account or another similar vehicle – for claims he already has reason to believe will come due under the LVM Bond Policy, including the more than $1 billion in expected claims testified to by Ambac.[46] During the hearing, OCI's witnesses notably did *not* testify that the Trustee's request was impracticable or would be difficult to implement. Instead, OCI's witnesses summarily dismissed the Trustee's request because it would purportedly add "no particular value" and would merely be "duplicative" of the payment protections provided by OCI's

[45] Confirmation Tr. I, at 165 (Nov. 15, 2010) (S. Dilweg).

[46] *See* Trustee's November 9, 2010 brief at Ex. B to Parrett Aff. (Declaration of Scott Zuchorski of Ambac, dated Jan. 13, 2010 at ¶ 13.)

Financial Projections.[47] Respectfully, OCI lacks a valid basis to make these assertions, as demonstrated by OCI's ubiquitous admissions that its Financial Projections are "inherently uncertain," "inherent unpredictable" and in no way "indicative of the future financial position or results of operations of the Segregated Account." Accordingly, the Court should require OCI to set aside funds specifically designated for the payment of the LVM Bondholders' long-dated Policy Claims. *See, e.g., In re Western Asbestos Co.*, 313 B.R. 832, 842-43 (Bankr. N.D. Cal. 2003) (in order to ensure that reorganization plan treated holders of long-dated claims (unliquidated claims) on par with holders of short-dated claims (liquidated claims), the court required the plan to "reserve a sufficient amount from any distribution made to liquidated claims so that an equivalent percentage payment may be made to any claims liquidated in the future").

[47] Confirmation Tr. II, at 208 (Nov. 16, 2010) (R. Peterson).

CONCLUSION

For the reasons set forth above, the reasons set forth in the Trustee's November 9, 2010 Objection to the Rehabilitator's Proposed Plan of Rehabilitation, and the reasons presented by all other Objectors in this proceeding (to the extent their objections are applicable to the Trustee's Objections), the Trustee respectfully requests that (1) the Court deny the Commissioner's Motion to confirm the Plan, and (2) order the Commissioner to revise the Plan to address the material deficiencies identified by the Trustee.

Dated: November 29, 2010

MURPHY DESMOND S.C.
Attorneys for Wells Fargo Bank, National Association, in its Capacity As Trustee for the LVM Bondholders

By: _____
Stephen L. Morgan
WI State Bar ID No. 1015099
Brittany S. Ogden
WI State Bar ID No. 1035853
Madison, Wisconsin 53703
Telephone: (608) 807-0262
Facsimile: (608) 257-2508

Of Counsel

Steven T. Whitmer
Kevin A. Wisniewski
LOCKE LORD BISSELL & LIDDELL LLP
111 South Wacker Drive
Chicago, Illinois 60606
Telephone: (312) 443-1869
Facsimile: (312) 443-0336