

In the Matter of the Rehabilitation of:

SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION

Case No. 10 CV 1576

NOTICE OF MOTION AND MOTION BY DEUTSCHE BANK NATIONAL TRUST COMPANY AND DEUTSCHE BANK TRUST COMPANY AMERICAS, EACH ACTING SOLELY IN ITS CAPACITY AS TRUSTEE FOR CERTAIN SECURITIZATION TRUSTS, TO INTERVENE IN THESE PROCEEDINGS AND PARTIALLY JOIN IN THE EMERGENCY MOTION TO MODIFY THE ORDER FOR TEMPORARY INJUNCTIVE RELIEF FILED BY THE INVESTOR GROUP

TO:

Mr. Sean Dilweg
Commissioner of Insurance, State of Wisconsin
c/o Michael B. Van Sicklen
David G. Walsh
Matthew R. Lynch
Foley & Lardner LLP
150 East Gilman Street
P.O. Box 1497
Madison, Wisconsin 53701-1497

PLEASE TAKE NOTICE that Deutsche Bank National Trust Company and Deutsche Bank Trust Company Americas (hereinafter, "Trustees"), each acting solely in its capacity as trustee for certain residential mortgage-backed securities ("RMBS"), other asset-backed securities, collateralized loan obligation and/or collateralized debt obligation trusts (the "Trusts"), on behalf of the Trusts and the Trusts' beneficiaries (the "Certificate Holders," as further defined herein), by their attorneys, Paul E. Benson, Paul A. Lucey and Nathan L. Moenck, hereby respectfully:

1. Move the Court to intervene in these proceedings pursuant to Paragraph 12 of the Court's March 24, 2010 Order for Temporary Injunctive Relief as an interested party, yet reserving all rights to challenge jurisdiction;
2. Partially join in the Emergency Motion to Modify Order for Temporary Injunctive Relief filed on April 30, 2010 by Aurelius Capital Management, LP, Fir Tree, Inc., King Street Capital, L.P., King Street Capital Master Fund, Ltd., Monarch Alternative Capital L.P., and Stonehill Capital Management LLC (hereinafter, the "Investor Group"), as set forth further herein; and
3. Request to be heard regarding this relief at the emergency hearing scheduled by this Court for May 25, 2010.

The Certificate Holders are holders of certain certificates issued by the Trusts ("Insured Certificates") that are insured by Ambac Assurance Corporation and/or its affiliates ("Ambac"). As of March 25, 2010, the aggregate outstanding principal balance of the Insured Certificates represented over \$ 4 billion face amount of the policies designated by the Commissioner of Insurance of the State of Wisconsin (the "Commissioner") as being allocated to the Segregated Account (the "Policies").¹ Upon information and belief, the Policies, including those held by the Trusts, represent a substantial portion of projected future claims against the Segregated Account and/or Ambac.

On April 30, 2010, the Investor Group, a group of investors who identified themselves as holders of certain RMBS and/or managers of funds that hold certain RMBS insured by Ambac, filed an emergency motion seeking immediate modification of the Order for Temporary

¹ On or about March 25, 2010, counsel for the Commissioner provided the Trustee with a schedule of transactions allocated to the Segregated Account and subject to these proceedings ("Notice Schedule") for which the Trustee, "according to the books and records of Ambac Assurance Corporation," served as a transaction party. Accordingly, the aggregate outstanding principal balance set forth above encompasses only those transactions listed on the Notice Schedule. Upon information and belief, no additional transactions for which the Trustee served as a transaction party have been transferred to the Segregated Account. To the extent that any additional transactions are allocated to the Segregated Account subsequent to this filing, all objections raised herein with respect to the transactions appearing on the Notice Schedule shall apply with equal force to any later-transferred transactions.

Injunctive Relief to preserve the status quo of the General Account for all policyholders affected by the creation of the Segregated Account and related rehabilitation proceedings by enjoining Ambac from: (i) finalizing a Statement of Intent with certain undisclosed settling counterparties (as defined in the Order for Temporary Injunctive Relief), (ii) commuting any policies, (iii) entering into any other transaction outside the ordinary course of business, or (iv) acting in any other way that may divest assets from the General Account, pending this Court's ruling on their emergency motion, any further motion they file before June 22, 2010, or, in the alternative, the Court's fashioning of final equitable relief regarding a plan of rehabilitation. The Investor Group further requested an emergency hearing regarding this relief, which this Court has scheduled for May 25, 2010.

The Trustees agree that the immediate emergency relief requested in the Investor Group's motion is necessary to prevent Ambac from taking irreversible steps that could irreparably harm the rights of the Trusts, the Certificate Holders and other similarly-situated entities and/or frustrating this Court's fashioning of fair and equitable relief to all Ambac policyholders. Accordingly, the Trustees, each acting solely in its capacity as trustee for the Trusts, on behalf of the Trusts and the Certificate Holders, partially join in the Investor Group's motion, specifically Request Nos. 1² and 2, as well as Request No. 3, to the extent that it seeks expedited discovery regarding the formation of the Segregated Account, the adequacy of its capitalization – including the sufficiency of the General Account to support the Segregated Account through the secured note and reinsurance agreement – and the impact that the Statement of Intent and the transactions

² The Trustees respectfully ask that the requested Order be entered pending the Court's fashioning of final equitable relief regarding a plan of rehabilitation, or, in the alternative, this Court's ruling on the emergency motion and/or any further motion filed by the *Trustee* before June 22, 2010.

contemplated therein would have on the adequacy of the General Account to fund an equitable rehabilitation of the Segregated Account.

The Trustees further adopt and incorporate those portions of the Investor Group's supporting memorandum related to this relief. The Trustees take no position at this time regarding the creation or composition of the Segregated Account (discussed in pages 22-28 of the Investor Group's memorandum) and expressly reserve the right, on behalf of themselves, the Trusts and the Certificate Holders, to seek additional relief related to the Segregated Account, Order for Temporary Injunctive Relief and/or forthcoming rehabilitation plan. Nothing contained herein should be deemed to prejudice such rights.

Respectfully submitted,

DEUTSCHE BANK NATIONAL TRUST
COMPANY, solely in its capacity as Trustee, AND
DEUTSCHE BANK TRUST COMPANY
AMERICAS, solely in its capacity as Trustee
By Their Attorneys,

MICHAEL BEST & FRIEDRICH LLP



Paul E. Benson, SBN 1001457
Paul A. Lucey, SBN 1009833
Nathan L. Moenck, SBN 1066208
100 East Wisconsin Avenue, Suite 3300
Milwaukee, WI 53202-4108
Telephone: (414) 271-6560
Facsimile: (414) 277-0656

John M. Rosenthal
Kristine Bailey
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Street Tower
San Francisco, CA 94105
Telephone: (415) 442-1000
Facsimile: (415) 442-1001

Dated: May 21, 2010

In the Matter of the Rehabilitation of:

SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION

Case No. 10 CV 1576

**NOTICE OF MOTION AND MOTION BY DEUTSCHE BANK NATIONAL TRUST
COMPANY AND DEUTSCHE BANK TRUST COMPANY AMERICAS, EACH ACTING
SOLELY IN ITS CAPACITY AS TRUSTEE FOR CERTAIN SECURITIZATION
TRUSTS, TO INTERVENE AND MODIFY ORDER FOR TEMPORARY INJUNCTIVE
RELIEF**

TO:

Mr. Sean Dilweg
Commissioner of Insurance, State of Wisconsin
c/o Michael B. Van Sicklen
David G. Walsh
Matthew R. Lynch
Foley & Lardner LLP
150 East Gilman Street
P.O. Box 1497
Madison, Wisconsin 53701-1497

PLEASE TAKE NOTICE that Deutsche Bank National Trust Company and Deutsche Bank Trust Company Americas (hereinafter, "Trustees"), each acting solely in its capacity as trustee for certain residential mortgage-backed securities ("RMBS"), other asset-backed securities, collateralized loan obligation and/or collateralized debt obligation trusts (the "Trusts"), on behalf of the Trusts and the Trusts' beneficiaries (the "Certificate Holders"),¹ by their attorneys, Paul E. Benson, Paul A. Lucey and Nathan L. Moenck, at a time and place to be set by the Court, will move and do hereby move the Court as follows:

¹ The Certificate Holders are holders of certain certificates issued by the Trusts that are insured by Ambac Assurance Corporation and/or its affiliates.

1. To intervene in these proceedings pursuant to Paragraph 12 of the Court's March 24, 2010 Order for Temporary Injunctive Relief ("Temporary Order") as an interested party, yet reserving all rights to challenge jurisdiction; and
2. For an Order modifying the Temporary Order allowing the Trusts to remit earned premiums and other payments for insurance policies allocated to the Segregated Account into deal-specific escrow accounts pending the Court's review of the validity of these proceedings, without any resulting prejudice to their coverage rights.

As discussed in the accompanying memorandum, without such modification, the Temporary Order may have the inequitable and unintended effect of causing permanent, irreparable harm to the Trusts' rights. The Trustees expressly reserve the right, on behalf of themselves, the Trusts and the Certificate Holders, to seek additional relief related to the Segregated Account, Temporary Order and/or forthcoming rehabilitation plan. Nothing contained herein should be deemed to prejudice such rights.

Respectfully submitted,

DEUTSCHE BANK NATIONAL TRUST
COMPANY, solely in its capacity as Trustee, AND
DEUTSCHE BANK TRUST COMPANY
AMERICAS, solely in its capacity as Trustee
By Their Attorneys,

MICHAEL BEST & FRIEDRICH LLP



Paul E. Benson, SBN 1001457

Paul A. Lucey, SBN 1009833

Nathan L. Moenck, SBN 1066208

100 East Wisconsin Avenue, Suite 3300

Milwaukee, WI 53202-4108

Telephone: (414) 271-6560

Facsimile: (414) 277-0656

John M. Rosenthal

Kristine Bailey

MORGAN, LEWIS & BOCKIUS LLP

One Market, Spear Street Tower

San Francisco, CA 94105

Telephone: (415) 442-1000

Facsimile: (415) 442-1001

Dated: May 21, 2010

In the Matter of the Rehabilitation of:

SEGREGATED ACCOUNT OF
AMBAC ASSURANCE CORPORATION

Case No. 10 CV 1576

**MEMORANDUM OF LAW IN SUPPORT OF MOTION BY DEUTSCHE BANK
NATIONAL TRUST COMPANY AND DEUTSCHE BANK TRUST COMPANY
AMERICAS, EACH ACTING SOLELY IN ITS CAPACITY AS TRUSTEE FOR
CERTAIN SECURITIZATION TRUSTS, TO INTERVENE AND MODIFY ORDER FOR
TEMPORARY INJUNCTIVE RELIEF**

I. INTRODUCTION

Deutsche Bank National Trust Company and Deutsche Bank Trust Company Americas (hereinafter, the "Trustees"), each acting solely in its capacity as trustee for certain residential mortgage-backed securities ("RMBS"), other asset-backed securities, collateralized loan obligation and/or collateralized debt obligation trusts (the "Trusts") insured by Ambac Assurance Corporation and/or its affiliates ("Ambac") whose insurance policies unilaterally have been transferred to the Segregated Account in rehabilitation, on behalf of the Trusts and the Certificate Holders (defined herein), submit this memorandum in support of their motion seeking to intervene in these proceedings and to modify this Court's March 24, 2010 Order for Temporary Injunctive Relief (the "Temporary Order") to allow the Trusts to remit earned premiums and other payments for policies allocated to the Segregated Account into deal-specific escrow accounts pending this Court's review of the validity of these proceedings, without any resulting prejudice to coverage rights. As discussed herein, without such modification, the Temporary Order may have the inequitable and unintended effect of causing permanent, irreparable harm to the Trusts' rights.

II. BACKGROUND

The Trusts have issued certain certificates (the "Insured Certificates") to investors (the "Certificate Holders") that, as of March 25, 2010, have an aggregate outstanding principal balance of over \$4 billion face amount of the policies designated by the Commissioner of Insurance of the State of Wisconsin (the "Commissioner") as being allocated to the Segregated Account (the "Policies").¹ Upon information and belief, the Policies, including those held by the Trusts, represent a substantial portion of projected future claims for the Segregated Account and/or Ambac.

The Trusts made substantial premium payments to Ambac with the understanding that Ambac, in return, would make claims payments to the Trusts if the certain payment deficiencies arose with respect to the Insured Certificates. Yet recently, without the Trusts' knowledge or consent, the Commissioner, with the express approval and support of Ambac, unilaterally transferred these insurance policies from Ambac's General Account, capitalized with \$8.5 billion in assets, to a Segregated Account of questionable capitalization from which policy claims may not be paid dollar-for-dollar, but rather in the form of a cash/note split, without offering any

¹ On or about March 25, 2010, counsel for the Commissioner provided the Trustees with a schedule of transactions allocated to the Segregated Account and subject to these proceedings ("Notice Schedule") for which the Trustee, "according to the books and records of Ambac Assurance Corporation," served as a transaction party. Accordingly, the aggregate outstanding principal balance set forth above encompasses only those transactions listed on the Notice Schedule. Upon information and belief, no additional transactions for which the Trustees served as a transaction party have been transferred to the Segregated Account. To the extent that any additional transactions are allocated to the Segregated Account subsequent to this filing, the Trustees respectfully ask that all relief requested herein with respect to the transactions appearing on the Notice Schedule apply with equal force to any later-transferred transactions.

consideration for this disadvantageous transfer. Thereafter, the present rehabilitation proceedings were commenced and the Temporary Order was issued.

Among other restraints, the Temporary Order enjoins all entities "from withholding or failing to pay or setting-off premiums or other payments (including without limitation recoveries, reimbursements, interest, deferred interest, and default interest) owed . . . to the Segregated Account . . . or the Ambac General Account under or in connection with policies or contracts allocated to the Segregated Account," notwithstanding the temporary moratorium on claims payments. Temporary Order at ¶ 7. Moreover, "[a] party's withholding or set-off of premiums or payments owed under or in connection with any of the aforementioned documents" carries the heavy sanction of possible "future disallowance or decrease of such party's claims." *Id.* It is this provision for which the Trustees presently move for modification.

The Court has invited any interested party who "believes any portion of this Order is unwarranted by the facts or the law" to "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," thereby setting a June 22, 2010 deadline. While the extant submission relates only to paragraph 7 of the Temporary Order, the Trustees, each acting solely in its capacity as trustee for the Trusts, on behalf of the Trusts and the Certificate Holders, seek leave to intervene in these proceedings, generally and expressly reserve the right to seek additional relief, on behalf of themselves, the Trusts and the Certificate Holders, related to the Segregated Account, Temporary Order and/or forthcoming rehabilitation plan. Nothing contained herein should be deemed to prejudice such rights.

III. ARGUMENT

As discussed in Section II, *supra*, the Temporary Order compels the Trusts to remit earned premium and "other payments" – including recoveries, reimbursements, interests, deferred interest and default interest – "owed . . . to the Segregated Account . . . or the Ambac General Account" in full, without any setoff for amounts owed by Ambac in order to avoid "future disallowance or decrease of such party's claims." Temporary Injunction Order at ¶ 7. The Trustees respectfully submit that this *temporary* order may have the unintended and highly prejudicial effect of *permanently* impairing, if not destroying the Trusts' lawful right to setoff.

In addition to any rights arising as a matter of contract pursuant to certain of the policies allocated to the Segregated Account, New York statutory and common law confers on the Trusts a right of setoff that permits downward adjustment of their premium obligations by outstanding payments owed by Ambac.² *See, e.g., Siegel v. State*, 28 N.Y.S.2d 958 (N.Y. App. Div. 1941). This right of setoff allows entities – such as the Trusts and Ambac – "that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.'" *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995) (quoting *Studley v. Boylston Nat'l Bank*, 229 U.S. 523, 528 (1913)).

New York courts have long recognized the right of setoff in insolvency proceedings, generally – *see Canale v. N.Y. State Dep't of Taxation & Fin.*, 378 N.Y.S.2d 566, 570 (N.Y. Ct. Cl. 1975) ("it is usually true that where two persons have mutual claims against each other and

² The subject insurance policies include choice of law provisions in favor of New York law that govern this motion notwithstanding the purported commencement of rehabilitation proceedings in this state, given the Trusts' and the Certificate Holders' intention to challenge the validity of these proceedings in a subsequent filing within the Court's deadline. As such, any argument that the Wisconsin Insurance Statutes, including § 645.56(2)(d), govern this motion ignores the critical fact that these proceedings and the related temporary injunctive orders are subject to modification or dissolution, which may render Wisconsin law wholly irrelevant to the parties' respective rights and obligations.

one becomes insolvent, the other may set off any debt due him from the insolvent and account for the balance only") – as well as in the specific context of insurance. The facts presented in *Van Schaick v. Astor*, 277 N.Y.S. 394 (N.Y. App. Div. 1935), are analogous to those at issue here. In *Astor*, the Superintendent of Insurance for the State of New York, in his capacity as conservator of the property and assets of Union Indemnity Company, sued to recover premiums on two policies issued by Union to Astor, "based on the ground that [Astor] was not entitled to offset the demands pleaded" by Astor's demands against Union. *Id.* at 395. The court disagreed, concluding that Astor was entitled to setoff his premium obligations against Union's outstanding claims payments, citing Article 11, Section 420 of the New York Insurance Law (now § 7427)³ in support, which, like the common law provides: "In all cases of mutual debts or mutual credits between the insurer and another person, such credits and debts shall be set off and the balance only shall be allowed or paid." *Id.* at 395, 397. A subsequent opinion rendered by New York's highest court, the Court of Appeals, similarly held that a policyholder "may set off against the amount of premiums due the sums which it has been obliged to pay" for insured claims due and owing by the insurer. *Pink v. Isle Theatrical Corp.*, 3 N.E.2d 521, 521 (N.Y. 1936).

The Court of Appeals recently reaffirmed its position in the *Matter of the Liquidation of Midland Insurance Co.*, 590 N.E.2d 1186 (N.Y. 1992). Specifically at issue in *Midland* was a reinsurer's right to setoff claims payments against outstanding premium obligations of the reinsured. At the time *Midland* was placed into liquidation, "Kemper Re owed *Midland*

³ Now-governing Insurance Law Section 7427(a) is materially identical to its predecessor Section 420 in that it provides: "In all cases of mutual debts or mutual credits between the insurer and another person in connection with any action or proceeding, such credits and debts shall be set off and the balance only shall be allowed or paid." The Court of Appeals of New York has regarded both liquidation and rehabilitation proceedings as falling under the ambit of this statute. *In the Matter of the Liquidation of Midland Ins. Co.*, 590 N.E.2d 1186, 1189 (N.Y. 1992), further discussed, *infra*.

approximately three quarters of a million dollars in reinsurance proceeds for underwriting losses . . . while Midland owed Kemper Re unpaid premiums allegedly exceeding that amount under the [reinsurance] treaty." *Id.* at 1188. In holding that Kemper Re was entitled to offset amounts it owed to Midland against Midland's outstanding premium payments, the Court of Appeals concluded that "[t]he general rule, recognized by courts and commentators alike, hold[ing] that mutual debts and credits between parties may be set off" applies "even in cases involving insolvent insurance companies." *Id.* at 1190 n.2. Thus, in addition to a statutory right to setoff afforded by the now-governing Section 7427 of the New York Insurance Law, New York recognizes the common law tenet that "[c]ontracting principals, who are debtors and creditors of each other by virtue of entry into a contract or contracts, have the same legal capacity and may set off debts against each other." *Id.* at 1192.

The foregoing precedent demonstrates the Trusts' right to setoff earned premium and other payments against amounts owed by Ambac. Paragraph 7 of the Temporary Order, however, expressly proscribes the Trusts from exercising such rights, going so far as to condition future payment of claims on a party's compliance. Yet, as a matter of substantive law, once the Trusts remit premium and other payments as specified, they will no longer have viable setoff rights to exercise in the event that an opposition to the validity of these proceedings is sustained. The Trustees respectfully submit that the Court did not intend such permanent injury to result from compliance with a temporary injunctive order, which, by this Court's invitation, is subject to challenge. Accordingly, the Trustees, each acting solely in its capacity as trustee for the Trusts, on behalf of the Trusts and the Certificate Holders, seek modification of paragraph 7 of the Temporary Order that preserves the Trusts' setoff rights without any resulting risk of prejudice to their coverage rights.

Specifically, the Trustees respectfully move this Court to modify paragraph 7 of the Temporary Order to permit the Trusts to remit earned premium and other payments into deal-specific, escrow accounts pending the Court's review of the validity of these proceedings. In recognition of the Temporary Order, the premium and other payments allegedly due and owing for policies allocated to the Segregated Account presently reside in such accounts, over which the Trustees, on behalf of the Trusts, serve as the controlling party. The Trustees respectfully request modification of paragraph 7 to authorize this payment practice, either retaining the Trustees as controlling party, or transferring such responsibility to Ambac, without any attendant impairment of coverage rights. Such modification is necessary in order to avoid the very real possibility of the Trusts' permanent loss of setoff rights.

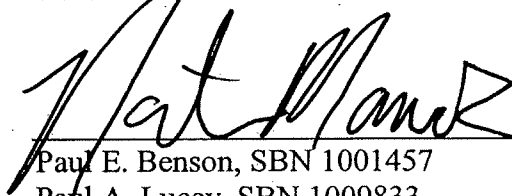
IV. CONCLUSION

For the foregoing reasons, the Trustees, each acting solely in its capacity as trustee for the Trusts, on behalf of the Trusts and the Certificate Holders, seek leave to intervene in these proceedings and respectfully move this Court to modify its March 24, 2010 Order for Temporary Injunctive Relief as detailed above. The Trustees expressly reserve the right, on behalf of themselves, the Trust and the Certificate Holders, to seek additional relief related to this Order, the Segregated Account, and/or forthcoming rehabilitation plan. Nothing contained herein should be deemed to prejudice such rights.

Respectfully submitted,

DEUTSCHE BANK NATIONAL TRUST
COMPANY, solely in its capacity as Trustee, AND
DEUTSCHE BANK TRUST COMPANY
AMERICAS, solely in its capacity as Trustee
By Their Attorneys,

MICHAEL BEST & FRIEDRICH LLP



Paul E. Benson, SBN 1001457

Paul A. Lucey, SBN 1009833

Nathan L. Moenck, SBN 1066208

100 East Wisconsin Avenue, Suite 3300

Milwaukee, WI 53202-4108

Telephone: (414) 271-6560

Facsimile: (414) 277-0656

John M. Rosenthal

Kristine Bailey

MORGAN, LEWIS & BOCKIUS LLP

One Market, Spear Street Tower

San Francisco, CA 94105

Telephone: (415) 442-1000

Facsimile: (415) 442-1001

Dated: May 21, 2010

Q:\CLIENT\034062\1957\B2309090.1