

In the Matter of the Rehabilitation of:

Case No.: 10-CV-1576

Segregated Account of Ambac Assurance Corporation

OBJECTION OF WELLS FARGO BANK, N.A., IN ITS CAPACITY AS TRUSTEE AND IN SIMILAR CAPACITIES FOR CERTAIN RMBS TRUSTS AND AS INDENTURE TRUSTEE ON CERTAIN STUDENT LOAN BACKED SECURITIES TRANSACTIONS AND ON BEHALF OF THE CERTIFICATEHOLDERS AND NOTEHOLDERS FOR SUCH TRUSTS AND TRANSACTIONS, TO PLAN OF REHABILITATION

Wells Fargo Bank, N.A. (“Wells Fargo”), in its capacity (i) (a) as Trustee for certain residential mortgage-backed securities (“RMBS”) trusts, and (b) and in such other capacities under other RMBS trusts as obligate Wells Fargo to submit Policy claims to AMBAC, receive Policy claim payments from AMBAC and otherwise perform administrative functions under any Policies issued by and/or insurance agreements entered into with AMBAC or under any other documents related to such Policies and insurance agreements, and in either case on behalf of the RMBS trusts' holders, and (ii) as Indenture Trustee (Wells Fargo as Indenture Trustee and as Trustee, collectively, the “Wells Fargo Trustee”) for certain student loan backed securities (“SLS”) transactions and on behalf of the holders of the notes (such holders and the holders of the RMBS trusts, collectively, the “Holders”) issued under such transactions (such SLS transactions and the RMBS trusts, collectively, the “Trusts”), respectfully submits this Objection to

the Plan of Rehabilitation and requests that the Court deny the Rehabilitator's Motion for Confirmation of Plan.¹

As set forth below, the Wells Fargo Trustee objects to confirmation of the Plan of Rehabilitation (the "Plan") on several bases. The Wells Fargo Trustee objects to the Plan because it purports to permit Ambac Assurance Corporation ("Ambac") to satisfy policy claims through the delivery of Surplus Notes in lieu of cash, the consideration that the applicable policies uniformly require be delivered to policyholders. The Wells Fargo Trustee further objects to the Plan because the Commissioner has not demonstrated that policyholders would be better off under the Plan than in a liquidation, nor has he permitted policyholders to opt out of the Plan. The Wells Fargo Trustee also objects to the Plan because it contains a number of objectionable terms and fails to include certain terms necessary to protect the interests of policyholders. First, the Plan would, if confirmed, unreasonably allow Ambac to demand reimbursement (in respect of past paid claims) in cash where it paid the underlying claims in Surplus Notes, effectively allowing Ambac to compel policyholders to finance the Rehabilitation. Second, the Plan purports to allow Ambac an indefinite period of time to evaluate and pay claims, in contravention of policy terms that require that claims be paid within a finite period of time. Third, the Plan, if confirmed, would unfairly subordinate Surplus Note claims to current claims made on policies. Fourth, the Plan would convert the terms of the Order for Temporary Injunctive Relief, to which the Wells Fargo Trustee previously objected, into permanent

¹ Wells Fargo Bank has previously filed pleadings in its capacity as trustee for certain RMBS trusts. For purposes of this Objection, Wells Fargo Bank, N.A. is acting in its capacity as trustee for the RMBS trusts as well as indenture trustee for certain SLS transactions in respect of which Ambac Assurance Corporation has issued financial guaranty insurance policies.

restraints. Finally, the provisions of the Plan would unfairly prejudice the Wells Fargo Trustee, imposing burden and expense, and exposing it to potential liability, without any remuneration, exculpation or indemnification. The Court should therefore decline to confirm the Plan.

STATEMENT OF FACTS

The Wells Fargo Trustee

The Wells Fargo Trustee serves as trustee for certain Holders of securities in approximately 30 RMBS securitization transactions and 54 SLS transactions,² which Holders (the “Insured Certificateholders”) are the ultimate beneficiaries of financial guaranty insurance policies (collectively, the “Policies”) issued by and insurance agreements entered into by Ambac. (*See* Affidavit of Charles Brehm, sworn to November 5, 2010 (“Brehm Aff.”), at ¶ 3 and 4.) The Policies, which are held by the Wells Fargo Trustee for the benefit of the Insured Certificateholders, insure against certain losses incurred by, and/or allocated to, certificates and notes held by the Insured Certificateholders. (*Id.*) The Wells Fargo Trustee, on behalf of the Insured Certificateholders, has substantial current and projected future claims against the Segregated Account described below.

² In addition, the Wells Fargo Trustee serves in an administrative capacity other than trustee for approximately 20 RMBS transactions where it performs certain duties in respect of Ambac-issued policies. The RMBS transactions for which it serves as trustee or in such similar administrative capacity are referred to as, collectively, the “RMBS Transactions,” and each individually, an “RMBS Transaction.” The SLS transactions for which Wells Fargo serves as Indenture Trustee are referred to as, collectively, the “SLS Transactions,” and each individually, an “SLS Transaction.”

The Commencement of this Action and the Plan of Rehabilitation

On March 24, 2010, the Policies were transferred to the Segregated Account, which represented approximately \$67 billion in net par exposure on Ambac policies (*see* Disclosure Statement § III.A.1), approximately \$36 billion of which was RMBS-related exposure. (*See* Ambac Financial Group, Inc.’s Form 10-K, filed April 9, 2010 (copy attached as Exhibit A to the Affidavit of Bryan K. Nowicki in Support of Motion to Modify Order for Temporary Injunctive Relief Filed by Certain RMBS policyholders, sworn to April 30, 2010), at 4.) On that same date, the Commissioner of Insurance of the State of Wisconsin (the “Commissioner”) filed a Verified Petition for Order of Rehabilitation in the Circuit Court for Dane County, commencing this action (the “Rehabilitation”).

On October 8, 2010, the Commissioner filed his Plan for Ambac, along with a Motion for Confirmation of the Plan, a Disclosure Statement, and a Notice of Filing of the Motion, Disclosure Statement and Motion. On October 21, 2010, the Commissioner filed a Brief in Support of Motion for Confirmation of Plan of Rehabilitation, a proposed Order Confirming Plan of Rehabilitation with Findings of Fact and Conclusions of Law, and a Witness List for Hearing on Confirmation of Plan of Rehabilitation. The Court has scheduled a hearing on the Plan of Rehabilitation for the week of November 15, 2010.

According to the Commissioner, as of June 30, 2010, a total of 673 policies with an aggregate of \$46.8 billion in net par exposure have been allocated to the Segregated Account. (*See* Disclosure Statement § VIII.B.3.a.) As the Commissioner has acknowledged, “RMBS Policies represent the largest category of Segregated Account

exposures, accounting for 45% of all Policies and 63% of all net par outstanding allocated to the Segregated Account.” (*Id.*) In total, over 300 RMBS policies representing nearly \$30 billion in net par outstanding exposure are subject to Rehabilitation under the proposed Plan. (*Id.*)

ARGUMENT

I. THE PLAN SHOULD NOT BE CONFIRMED BECAUSE IT PURPORTS TO PERMIT AMBAC TO SATISFY POLICY CLAIMS THROUGH THE DELIVERY OF SURPLUS NOTES IN LIEU OF CASH

The Policies require Ambac to pay cash in respect of all valid claims submitted by the Wells Fargo Trustee. (*See, e.g.*, Certificate Guaranty Insurance Policy for Option One Mortgage Loan Trust 2007-FXD1 Asset-Backed Certificates, Series 2007-FXD1 Class A, copy attached as Exhibit B to Brehm Aff.) Insured Certificateholders thus made their investment with the expectation that all valid claims in respect of insured certificates and notes would be paid in cash. The Plan, however, would permit Ambac to deliver Surplus Notes, rather than cash, in respect of 75 cents on every dollar of claim under the Policies. (*See* Plan § 2.02.) Although the Surplus Notes could be sold to third parties for cash, the market value of the Surplus Notes is unknown, and it is fair to assume that they will trade at a discount from face value.³ The Wells Fargo Trustee objects to the unilateral substitution of one form of consideration for the consideration bargained for under the Policies.

³ The fact that the Commissioner can cause Ambac to refrain from making scheduled payments of interest and principal, standing alone, virtually assures that the Surplus Notes will trade at a substantial discount. (*See* Plan § 4.04(e).)

Not only is the delivery of Surplus Notes inconsistent with the Policies' requirement that Ambac pay all claims in cash, but the terms of the Plan and the Surplus Notes do not impose any meaningful requirement on Ambac to honor the Notes' payment terms. In fact, the Commissioner has retained absolute discretion whether to permit Ambac to pay any principal of or interest on the Surplus Notes, and it can seek leave of the Court at any time to adjust the ratio of cash to Surplus Notes delivered in respect of claims. (*See* Plan §§ 4.04(e) & 7.02.) In addition, Ambac's qualified payment obligations are unsecured. The Surplus Notes could thus potentially be worthless to the Insured Certificateholders to whom they will ultimately be delivered.

The prejudice to Insured Certificateholders is compounded by the limited amount of information disclosed by the Commissioner in support of the Plan and the compressed timeframe in which the Commissioner has insisted objections to the Plan be made and heard. The Plan fails to include sufficient information to permit interested persons to assess whether Ambac's financial condition requires that Surplus Notes be delivered in lieu of cash or whether the Commissioner has appropriately selected the ratio of cash to Surplus Notes. Moreover, the Plan also fails to provide sufficient information to allow policyholders and Insured Certificateholders to make an informed evaluation of the likelihood that Ambac will pay some or all of the amounts due under the Surplus Notes.

Although the Disclosure Statement and accompanying exhibits purport to provide information that an interested person would need to assess the Plan and the Surplus Notes, the summary disclosures merely supply high level summaries and assumptions, with little raw data that could be used to objectively test the Commissioner's conclusions,

assumptions and methodologies. For example, the “Discussion of the Rehabilitator’s Projections, Assumptions and Methodologies,” filed with the Disclosure Statement, consists of just over three pages of narrative that purport to describe the Commissioner’s treatment of Ambac’s Statement of Operations, Balance Sheet and Statement of Cash Flows. These three pages of text omit critical information associated with the Commissioner’s analysis. In many instances, projections and assumptions are simply ascribed to Ambac or the Commissioner’s financial consultant with no explanation as to how those projections and assumptions were actually determined. Critical information about projected income and expenses, loss reserves, and anticipated liabilities has simply been omitted. The Commissioner’s refusal to make meaningful disclosure deprives policyholders and Insured Certificateholders of the information they need to make an informed decision about whether the Plan’s Surplus Note scheme is a necessary and appropriate means of addressing Ambac’s financial crisis.

While the Commissioner touts that the Segregated Account is capitalized through the Secured Note and the Reinsurance Agreement with the General Account (*see* Disclosure Statement §§ III.A.2 & VIII), it has failed to make detailed disclosures that would allow policyholders and Insured Certificateholders to project whether the General Account will be able to satisfy its obligations under those instruments. In fact, interested persons are expected to assess the creditworthiness of the General Account based on a mere seven pages of summary financial information appearing in the Disclosure Statement, with no raw data or analysis. (*See id.* § VIII.A & B.) Policyholders and Insured Certificateholders thus have only very limited information with which to assess

the prospect of receiving payment of principal upon the Surplus Notes' 2020 maturity. Indeed, the vast discretion vested in the Commissioner to modify or eliminate Ambac's obligation to pay on the Surplus Notes, at a minimum, strongly suggests that the amount is insufficient for the purpose described. What is clear to any observer, however, is that the Insured Certificateholders will not get what they were promised – full and timely cash payment on claims.

The Commissioner has also failed to disclose any methodology or framework for exercising the unfettered discretion it seeks in respect of payments of interest and principal on Surplus Notes. (*See* Plan § 4.04(e) & Disclosure Statement § VI.C.) The Commissioner has likewise declined to disclose how it will determine whether and when to seek permission to adjust the ratio of cash to Surplus Notes delivered in respect of claims. (*See* Plan § 7.02 & Disclosure Statement § V.C.5.) The uncertainty associated with the Surplus Notes unfairly forces policyholders and other interested parties to assess the Plan's compensation terms in an informational vacuum.

II. THE PLAN SHOULD NOT BE CONFIRMED BECAUSE THE COMMISSIONER HAS NOT DEMONSTRATED THAT POLICYHOLDERS WOULD RECOVER MORE UNDER THE PLAN THAN IN A LIQUIDATION, NOR HAS HE PERMITTED POLICYHOLDERS TO OPT OUT OF THE PLAN

The Court should not confirm the Plan because the Commissioner has not demonstrated that policyholders would be better off under the Plan than in a liquidation, nor has he permitted policyholders to opt out of the Plan. For its argument in support of this point, the Wells Fargo Trustee joins in and incorporates by reference the arguments made at Point II.B.1 of the Objections of Deutsche Bank National Trust Company,

Deutsche Bank Trust Company Americas, and U.S. Bank National Association, each acting solely in its capacity as trustee for certain securitization trusts, to the Plan of Rehabilitation.

III. THE PLAN SHOULD NOT BE CONFIRMED BECAUSE IT CONTAINS SEVERAL OBJECTIONABLE TERMS AND OMITTS TERMS REQUIRED TO PROTECT THE INTERESTS OF POLICYHOLDERS

The Court should not confirm the Plan in its current form because it omits terms needed to protect policyholders' interests and contains a number of terms that would have a prejudicial impact, including a provision, described in the following section, that essentially allows Ambac to use Wells Fargo's Trusts as a supplemental credit facility.

A. The Plan Would Unreasonably Allow Ambac to Demand Reimbursement in Cash Where It Has Paid Underlying Claims in Surplus Notes

Under the terms of most Policies and related Operative Documents,⁴ Ambac enjoys certain rights of subrogation and reimbursement rights for claims previously paid. Although the precise terms vary from transaction to transaction, in a typical RMBS Transaction, Ambac enjoys a priority right of reimbursement for claims previously paid on a given Distribution Date, to the extent it was required to pay a policy claim on an earlier Distribution Date. For example, the Option One Mortgage Loan Trust 2007-FXD1 Pooling and Servicing Agreement (the "Option One PSA") requires that, on each Distribution Date, Interest Collections be used to pay Reimbursement Amounts to Ambac in respect of claims previously paid by Ambac in respect of Insured Certificates before

⁴ The Operative Documents can include a pooling and servicing agreement, servicing agreements, a sale and servicing agreement, a trust agreement and/or an indenture and other related documents. (*See Brehm Aff.* ¶ 5.) RMBS and SLS transactions usually also incorporate an insurance agreement, which further delineates the rights and responsibilities of the parties to the transaction vis-à-vis the insurance policy (together with the Operative Documents, the "Governing Documents"). (*Id.*)

any such amounts are paid to holders of Class M and Class B junior certificates. (*See* Option One PSA § 5.01(a)(iv) (Brehm Aff. Ex. A).)

If the Court confirms the Plan, Ambac would effectively be able to invoke such reimbursement rights to drain RMBS Transactions of cash notwithstanding the fact that they did not pay claims with 100% cash. Under the terms of the Plan, Ambac would pay 25 cents of every dollar of approved claim in cash from the Segregated Account and deliver Surplus Notes in respect of the remaining 75 cents. Notwithstanding the fact that Ambac would be paying only 25% of each claim in cash, the Commissioner claims that Ambac should be entitled to recoup 100% of the value of such claims in cash. Section 4.04(g) of the Plan 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 . . . under the applicable Policy.” (Plan § 4.04(g).) That the Commissioner expects Ambac to receive cash, and not some other form of consideration, from the transactions is confirmed by the Disclosure Statement, which provides (in bold font) that “**Ambac’s right to recover the full Cash amount of all recoveries reimbursements and other payments . . . entitles AAC⁵ to recover from the primary obligor on the relevant Ambac-insured instrument or contract 100% of the *cash* amount such obligor was contractually obligated to pay but failed to pay, *even if the Holder of a Permitted Policy Claim receives less than . . . 100% in Cash on account of such Permitted Policy Claim under the Plan.*” (Disclosure Statement § V.F. (italics added, bold in original).)**

⁵ The Disclosure Statement defines the term “Ambac” as Ambac Assurance Corporation (“AAC”) and its subsidiaries. (*See* Disclosure Statement § I.B.)

The situation for SLS Transactions is even more complicated – and potentially more troubling. In these Transactions, Ambac's right to reimbursement for payments on claims for principal generally does not require that it be reimbursed in cash, but rather that it receive the insured note, or an interest in a portion thereof in an amount equal to the reimbursement amount. (*See* Brehm Aff. ¶ 15.) For example, the Indenture for the South Carolina Student Loan Corporation Student Loan Backed Notes provides in relevant part that “should [Noteholders] be entitled to receive full payment of principal from Ambac Assurance, they must surrender their Notes (along with an appropriate instrument of assignment in form satisfactory to the Insurance Trustee to permit ownership of such Notes to be registered in the name of Ambac Assurance) for payment to the Insurance Trustee, and not the Trustee or Paying Agent, if any, and [] that should they be entitled to receive partial payment of principal from Ambac Assurance, they must surrender their Notes for payment thereon first to the Trustee or Paying Agent, if any, who shall note on such Notes the portion of the principal paid by the Trustee or Paying Agent, if any, and then, along with an appropriate instrument of assignment in form satisfactory to the Insurance Trustee, to the Insurance Trustee, which will then pay the unpaid portion of principal.” (*Id.*, Ex. C.) Thus under the Governing Documents, because the SLS Notes would have matured by the point in time at which a claim for full payment of principal has been made, the SLS Noteholders are giving up their right to enforce (or direct the Indenture Trustee to enforce on their behalf) the SLS Note obligation against the issuer of the SLS Note (the “SLS Issuer”) in exchange for Ambac’s payment under the Policy for the full amount of principal on the SLS Note. Ambac then

maintains the right (as owner of the transferred SLS Note) to pursue remedies against the SLS Issuer for the full principal amount of the SLS Note.

If Section 4.04(g) of the Plan is implemented, Ambac would pay the SLS Noteholders 25 cents in cash and 75 cents in Surplus Notes for every dollar the SLS Noteholders are owed on their SLS Notes by the SLS Issuer. In exchange, the SLS Noteholders would lose the right to pursue remedies against the SLS Issuer for the full principal amount of the SLS Note, and would instead hold Surplus Notes that give the SLS Noteholders contingent rights to future payment on such Surplus Notes from Ambac. Ambac, meanwhile, would hold the right to pursue reimbursement from the SLS Issuer for the full amount of principal it was deemed to have paid the SLS Noteholders on the Policy claim. The sad irony is that the SLS Noteholders would have been forced to exchange one note for another, when the SLS Noteholders very well may have preferred to seek repayment of the principal amount of the SLS Note from an entity with the creditworthiness of the SLS Issuer, rather than an entity with the creditworthiness of Ambac.

Consequently, the effect of Section 4.04(g) of the Plan, if implemented, could be to permit Ambac to plunder the Trusts by delivering Surplus Notes of questionable value in respect of policy claims but then forcing the Trusts to pay cash amounts back to Ambac by way of reimbursements on later Distribution Dates.⁶ This aspect of the Plan goes well beyond the Commissioner's disclosed effort to preserve Segregated Account

⁶ Ambac might even demand interest on the reimbursement amount, because the Operating Documents generally provide that Ambac is entitled to interest when amounts paid in respect of claims are reimbursed to it. (*See, e.g.*, Option One PSA § 1.01 at 42 (Definition of "Reimbursement Amount"), copy attached as Ex. A to Brehm Aff.)

assets by limiting cash outflows through the delivery of Surplus Notes in lieu of cash in respect of policy claims, allowing Ambac to fill the Segregated Account's coffers by forcing Trusts to deliver 100 cents in cash reimbursements for every 25 cents in cash paid by the Segregated Account on policy claims. It is one thing to fundamentally change the contract by allowing Ambac to "underperform" its contractual obligations by delivering non-cash assets worth less than par (*i.e.*, the Surplus Notes), but it is quite another thing to then allow Ambac to enjoy all its reimbursement rights as if it had performed its obligations in full by paying 100% in cash. *Cf. Mutual Life Ins. Co. v. Delta Airlines, Inc.*, 608 F.3d 109, 149 (2d Cir. 2010) (holding that bankruptcy discharge could not be treated as satisfaction in full of underlying contract claim). This attempt to force the Trusts to finance Ambac's Rehabilitation is manifestly unjust and finds no precedent in the rehabilitation of any other insurance company.

There is, of course, an equitable alternative that would have protected Ambac's reimbursement rights in the Trusts while ensuring that investors were not unfairly forced to fund Ambac's Rehabilitation. The simple solution would have been to require that, to the extent cash becomes available for reimbursement of policy claims, (1) Ambac be reimbursed in cash only to the extent it previously paid claims in cash, (2) the remaining cash available for reimbursement be paid to the holders of the Insured certificates and notes (either directly or by Ambac after delivery of the reimbursement amount to Ambac), and (3) the corresponding amount of Surplus Notes (taking into account interest owed on such Surplus Notes) previously delivered to the holders be cancelled, extinguishing Ambac's liability on such obligations. That the Commissioner chose not to

pursue such a straightforward and equitable approach to reimbursements and instead attempted to use Ambac's reimbursement rights as a means of funding a controversial rehabilitation effort raises a significant question as to whether the Plan has been promulgated in good faith in furtherance of its mandate under the Wisconsin Statutes. *See Wis. Stat. § 645.01(4)* ("The purpose of this chapter is the protection of the interests of insureds, creditors, and the public generally").

Ambac's reimbursement scheme violates the basic principles of equity underlying the "made whole" doctrine, which provides that a party claiming subrogation rights may not recover until the insured is fully compensated for his or her losses. As the Wisconsin Supreme Court has held, "[t]he burden of loss should rest on the party paid to assume the risk, and not on an inadequately compensated insured." *Ruckel v. Gassner*, 2002 WI 67, ¶ 17, 253 Wis. 2d 280, ¶ 17, 646 N.W.2d 11, ¶ 17 (quoting *Couch on Insurance*, §§ 223:133, 223:136 (3d ed. 2000)). It has further held that the "made whole" doctrine is inviolate and may not be overridden by contract. *Ruckel*, 2002 WI 67, ¶ 43, 253 Wis.2d 280, ¶ 43, 646 N.W.2d 11, ¶ 43. While Ambac's reimbursement right could be distinguished from subrogation,⁷ the "made whole" doctrine's central tenet that an insurer should be made whole only after the insured has received payment in full of the insured claim clearly applies to Ambac's relationship to Insured Certificateholders here. If Insured Certificateholders are effectively made to reimburse Ambac in cash before they

⁷ Subrogation entails the substitution of one party (the insurer) for another party (the insured) in the assertion of rights against a third party, whereas Ambac has a direct right of reimbursement from the primary obligor under most Governing Documents.

receive full cash payment for the underlying claims, Ambac will be unjustly enriched if the Surplus Notes are not paid in full with interest.

Ambac never bargained for the right to deliver Surplus Notes (or anything other than cash) in respect of policy claims, much less the right to receive 100% cash reimbursements in respect of claims paid 75% in Surplus Notes. There is thus no justification for forcing holders of insured certificates and notes to accept and hold Surplus Notes that were never contemplated when they made their investments after the transaction has generated sufficient cash to permit them to be made whole through the delivery of cash and cancellation of Surplus Notes.

B. The Plan Purports to Allow Ambac an Indefinite Period of Time to Evaluate and Pay Claims, in Contravention of the Policies' Terms

The Governing Documents require that Ambac pay all timely submitted claims within a finite period of time. This requirement ensures that the party charged with responsibility for making distributions to Insured Certificateholders is able to pay, on the date scheduled for distributions for a given period (the "Distribution Date"), all amounts owed to Insured Certificateholders, including amounts that are the responsibility of Ambac under the terms of the Policies. (*See* Brehm Aff. ¶ 7.) For example, the Policy for the Option One Mortgage Loan Trust 2007-FXD1 transaction obligates Ambac to pay claims on the later of "(a) one (1) Business Day following notification to Ambac of Nonpayment or (b) the Business Day on which the Insured Amounts are Due for Payment." (*See id.* ¶ 7.)

Under the Plan, Ambac (as the Management Services Provider) would have an indefinite period of time in which to evaluate each Policy claim. (*See* Plan § 4.04(b).) In

those instances where Ambac decided to treat a claim as a Permitted Policy Claim, the Plan provides that the cash and Surplus Note consideration will be delivered “on the Payment Date that next follows the Determination Date on which such Claim was determined to be a Permitted Policy Claim.” (*See id.* § 4.04(c) & (d).) Claims would not necessarily be paid on the Distribution Date for the corresponding transactions, because “Payment Date” is defined as the first day after the date on which a claim is determined to be a Permitted Policy Claim that falls on the 20th day of the month. (*See id.* § 1.40.)

If the Plan were confirmed, the deferral of payments on claims would present the Wells Fargo Trustee with difficult operational issues and Insured Certificateholders could be prejudiced. (*See Brehm Aff.* ¶ 8.) For example, if Ambac did not pay a claim until after the Distribution Date that Ambac is required to pay such claim under the Governing Documents, the Wells Fargo Trustee would have to decide which “record date” Insured Certificateholders should be paid the Policy claim belatedly delivered by Ambac. The Governing Documents generally require that on any Distribution Date, holders of record as of the end of the immediately prior month are entitled to distributions. If Ambac delayed payment of claims, it would be very difficult for the Wells Fargo Trustee to identify the Insured Certificateholders as of a record date one or more months in the past in order to make a distribution of a paid Policy claim to such Holders. If the Wells Fargo Trustee instead chose to deliver the late-paid Ambac Policy claim amount to Insured Certificateholders of record as of a different date, the prior record date Insured Certificateholders might argue that they have been prejudiced because, under the

Governing Documents, the claims should have been paid on the earlier Distribution Date when the claim was made to Ambac. (*See id.* ¶ 9.)

Additionally, if Ambac did not pay a claim until after the Distribution Date corresponding to the submission of the claim, the timing delay would create significant administrative difficulties and economic expense for the Wells Fargo Trustee. For example, the Wells Fargo Trustee might have to restate any reports made as of the earlier Distribution Date, which would be a complicated and time-consuming process that would impose new burdens on the Wells Fargo Trustee. The Wells Fargo Trustee might also have to devote resources to explaining payment delays, reporting discrepancies and other matters to individual investors. These extra expenses and administrative duties are unexpected, unplanned for, and were not contracted for when Wells Fargo assumed its role under the Trusts. (*See id.* ¶ 10.)

In short, the Plan's deferred claims resolution process would force the Wells Fargo Trustee to make a Hobson's choice as to which record date Insured Certificateholders to pay, and require that it devote valuable resources and incur significant expense to develop new procedures to accommodate Ambac's unexplained desire to take more time to evaluate claims. The Commissioner and Ambac should not be permitted to put trustees in this position or prejudice Insured Certificateholders, particularly where no showing has been made that a delay in claims resolution is necessary to the success of the Rehabilitation. At the time it issued the Policies, Ambac agreed to pay claims in a finite period of time. There is nothing about Ambac's Rehabilitation that prevents it from honoring this commitment, nor has the Commissioner

shown that allowing Ambac to take additional time to determine claims will somehow improve its financial condition. The Plan should not be confirmed because Ambac should be required to abide by the Policies' deadlines for paying claims.

C. The Plan Would Unfairly Subordinate Surplus Note Claims

Under the Plan, the claims of policyholders and Insured Certificateholders on the Surplus Notes would be subordinated to the claims of various other Ambac creditors, including policyholders with current claims on Ambac policies. The Disclosure Statement provides in relevant part that “[t]he payment of principal of and interest on the Surplus Notes will be expressly subordinate in right of payment to the prior payment in full of all . . . Policy Claims.” (Disclosure Statement § VI.D; *see also* Form of Surplus Note (Ex. B to Plan), Form of Reverse § 10.)⁸ The Disclosure Statement further provides that “[p]ursuant to section 645.68 of the Wisconsin Statutes, upon any distribution to creditors of claims in any rehabilitation . . . or similar proceeding relating to the Segregated Account . . . the Holders of Policy Claims . . . will first be entitled to receive payment in full of all amounts due . . . before the holders of the Surplus Notes will be entitled to receive any payment.” (Disclosure Statement § VI.D.) The claims of policyholders on Surplus Notes would thus be subordinate to current claims of policyholders on Ambac-issued policies.

The subordination of Surplus Note claims to current policy claims would improperly prioritize current policy claims over stale policy claims. As shown in Point I above, the Policies entitle Insured Certificateholders to payment of claims in cash. The

⁸ “Policy Claims” are defined as “all existing or future claims of policyowners, beneficiaries and insureds arising from . . . any and all existing or future policies.” (*Id.*)

delivery of Surplus Notes would not satisfy Ambac's payment obligation but rather simply defers that obligation until at least 2020, the earliest date when Ambac could be required to pay the Notes' principal balance. The Commissioner himself has acknowledged that the Surplus Notes are simply a mechanism by which Ambac's cash claims payment obligations would be "slowed." (*See* Disclosure Statement § II.C.2 (recognizing that the Rehabilitation has had and the Surplus Note scheme will have the effect of "slowing claims payments").) Given the economic reality that Surplus Notes would not constitute true satisfaction of policy claims but simply operate to buy Ambac time, there is no rational basis upon which to subordinate Surplus Note payment obligations. Payments in respect of old policy claims (*i.e.*, Surplus Note payment obligations) should be treated no differently than payments in respect of current policy claims, and the claims of holders of Surplus Notes should rank *pari passu* with current policy claims.

D. The Plan Would Convert Objectionable Terms of the Order for Temporary Injunctive Relief Into Permanent Restraints

The Plan would convert all terms of the Order for Temporary Injunctive Relief, entered by the Court on March 24, 2009 (the "Order"), into a permanent injunction. (*See* Plan § 10.02.) On June 22, 2010, Wells Fargo Bank, N.A., in its capacity as trustee for certain RMBS trusts and on behalf of the trusts' holders, objected to and moved to modify certain provisions of the Order, which motion the Court denied by Decision dated October 25, 2010. The Wells Fargo Trustee objects to the Plan to the extent that it would extend all terms of the Order on a permanent basis, and incorporates herein by reference the arguments made in its June 22, 2010 Brief in Support of Motion to Modify Order for

Temporary Injunctive Relief and its September 1, 2010 Reply Brief in Further Support of Its Motion to Modify the Court's Order for Temporary Injunctive Relief.

E. The Plan Would Prejudice the Wells Fargo Trustee

1. The Surplus Note Scheme Would Force the Wells Fargo Trustee to Undertake New Responsibilities and Incur Additional Out-of-Pocket Expense Without Remuneration or Reimbursement

The delivery of Surplus Notes to the Wells Fargo Trustee for the benefit of the Insured Certificateholders who are the ultimate Policy beneficiaries will present difficult operational issues. The Plan contemplates that trustees could be required to facilitate the issuance of book-entry Surplus Notes through The Depository Trust Company ("DTC") to participant holders of record at DTC. (*See* Plan § 4.04(d).) When it agreed to serve as trustee for the Trusts, the Wells Fargo Trustee (and other participants in the transactions) understood that the only consideration that would ever be delivered to investors was cash. (*See* Brehm Aff. ¶ 11.) The Wells Fargo Trustee's procedures and protocols have thus been designed to handle distribution of cash consideration. If Ambac were permitted to deliver Surplus Notes instead of cash, the Wells Fargo Trustee would have to build a new operational process to handle the new consideration, which would be time-consuming and would impose additional burden. To deliver the Surplus Notes, the Wells Fargo Trustee would be required to purchase a securities position report from DTC and then contact individual investors to plan for the electronic delivery of the Surplus Notes. In addition, new reporting, reconciliation, oversight, quality control, staffing, documentation, compliance and audit procedures would have to be developed, tested, implemented and managed. These operational and procedural challenges would be

exacerbated by the fact that the Surplus Note delivery process would entail significant manual effort on the part of individual employees, thereby increasing the chance for human error. (*Id.* ¶ 11.)

These new processes and procedures would necessarily impose significant burden and expense on the Wells Fargo Trustee. While it is difficult to quantify the expense associated with the devotion of additional human and information technology resources to the trust administration process for affected Trusts, the burden would be significant and necessitate the reallocation of valuable institutional resources. The Wells Fargo Trustee also anticipates incurring a number of hard, out-of-pocket expenses, including professional services fees (attorneys, accountants and consultants) and costs imposed by DTC. For example, for each delivery of Surplus Notes for a particular RMBS or SLS Transaction, the Wells Fargo Trustee would be required to purchase from DTC a securities position report identifying the holders of record of a class of insured certificates. The cost of obtaining this report on a regular basis is expected to be significant. (*Id.* ¶ 12.)

The imposition of additional duties, burden and expense on the Wells Fargo Trustee runs afoul of the terms of the Operative Documents and well-settled law. The Operative Documents generally provide that the trustee's duties are limited to those expressly set forth therein. (*See, e.g.*, Option One PSA § 8.01 (Brehm Aff. Ex. A).) It is also well-settled under New York law, the law generally applicable to the Operative Documents, that prior to the occurrence of an event of default (as defined in the Operative Documents), an indenture trustee's responsibilities are strictly limited to those

set forth in such documents. *See, e.g., Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66 (2d Cir. 1988) (holding that it is “well-established under state common law that the duties of an indenture trustee are strictly defined and limited to the terms of the indenture” and that “we have consistently rejected the imposition of additional duties on the trustee.”); *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 866 N.Y.S.2d 578, 583 (N.Y. 2008) (reviewing authorities and concluding that an indenture trustee shall not be liable except for the performance of such duties as are specifically set out in the applicable indenture). The prospect of the Commissioner of Insurance for the State of Wisconsin imposing additional duties upon parties to contracts expressly made under the laws of the State of New York, which contracts explicitly create and limit the duties of the contracting parties, and importantly, provides for compensation for the performance of those defined duties, boggles the mind with its implications. Simply stated, nothing in the Wisconsin Statutes or otherwise under Wisconsin law gives, nor could give, the Commissioner the right to impose duties and costs upon an entities not subject to its regulatory mandate. Because the Plan would alter the responsibilities of and burdens upon the Wells Fargo Trustee with no remuneration or reimbursement, it should not be confirmed.

2. The Plan Purports to Impose Duties on Some RMBS and SLS Trustees that Were Delegated to Other Entities Under the Operative Documents

If approved by the Court, the Plan would purport to impose certain duties on “trustees” that, in some Trusts, are not the responsibility of trustees under the relevant Operative Documents. Conversely, in some instances, the Plan would fail to task the

appropriate entities with functions that have been assigned to the “trustee.” For example, Section 4.04 requires that “to the extent received by a Holder acting in its capacity as *trustee*, [Surplus Notes] shall be transferred by such Holder to the beneficial holders for whom it is acting as *trustee*.” (Plan § 4.04(d) (emphasis added).) It goes on to provide that “any such Holder or beneficiary acting as a *trustee* may allocate, distribute or disburse Surplus Notes issued in accordance with the Plan by allocating, distributing or disbursing such Surplus Notes . . . to the beneficial holders.” (*Id.* (emphasis added).)

In certain transactions, however, the trustees are not responsible for making distributions to beneficial certificateholders. For example, the Option One PSA mentioned above contemplates that the paying agent, not the “trustee,” could have responsibility for delivering distributions to certificateholders.⁹ (*See* Option One PSA § 5.05.) If the Plan were confirmed, distributions could include Surplus Notes or beneficial interests therein. Section 4.04(d) would inappropriately require the “trustee” to deliver Surplus Notes to investors in the Option One Mortgage Loan Trust 2007-FXD1 transaction, when the Option One PSA charges the paying agent with responsibility for making distributions. Other provisions of the Plan similarly fail to account for the limited role played by the RMBS and SLS trustees in certain transactions.

Because the Plan would improperly impose duties on trustees that run afoul of the Operative Documents’ allocations of responsibilities, it should not be confirmed.

⁹ While the paying agent can be, and currently is, the same entity as the trustee, that will not always be the case in the Option One transaction, nor will it necessarily be the case in all transactions that the Governing Documents assign the Wells Fargo Trustee responsibility for making distributions. (*See* Brehm Aff. ¶ 6.)

3. The Plan Fails to Provide Adequate Protection to the Wells Fargo Trustee and Others That Would Be Required to Facilitate the Plan's Implementation

The Court should not confirm the Plan also because it fails adequately to protect the Wells Fargo Trustee and others against claims and liabilities that could result from their mandated role in the Plan's implementation. If confirmed, the Plan would compel the Wells Fargo Trustee and others to take certain actions to facilitate its implementation, as described above. The Plan does not, however, provide the Wells Fargo Trustee, individuals acting on its behalf, or similarly situated entities and persons any protection against claims that might be made against them by beneficial holders of Insured Certificates or others who might bear the economic brunt of the Plan, including claims arising from Ambac's failure to pay principal of and interest on Surplus Notes and claims, where relevant, relating to the potential failure of a Trust to qualify as a real estate mortgage investment conduit ("REMIC") for federal income tax purposes due to the Wells Fargo Trustee's acceptance of the Surplus Notes.

In contrast, however, the Commissioner has seen fit to exculpate itself, Ambac, and certain related persons and entities from any liability for claims made in respect of the Plan. Pursuant to Article 9 of the Plan, the Commissioner, Ambac, the Segregated Account, and the various individuals acting on their behalves "shall have official immunity and shall be immune from suit or liability . . . for any act or omission made in connection with, or arising out of . . . this Plan . . . [or] the consummation of this Plan." (Plan § 9.02.) If any such suit were commenced against the exculpated parties, the Segregated Account would be required to indemnify them for legal expenses and

damages awards. (*Id.*) The Plan and Disclosure Statement give no explanation for the Commissioner's decision to grant himself, his colleagues, and Ambac sweeping protection against claims and liabilities, but refusal to extend protection to other entities and persons that would be compelled to facilitate the Plan's implementation.

Because the Plan would not shield the Wells Fargo Trustee from liability that could result from its role in implementation of the Plan, the Plan should not be confirmed.

CONCLUSION

For the foregoing reasons, the Wells Fargo Trustee objects to the Plan and respectfully requests that the Court deny the Commissioner's Motion for Confirmation of Plan.

Dated this 8th day of November, 2010.


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