SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Rehabilitation of FINANCIAL GUARANTY INSURANCE COMPANY.	Index No. 401265/2012 Doris Ling-Cohan, J. Motion Sequence #04

JAN 22 2012
GARY T. HOLTZER

AMENDED LIMITED OBJECTION OF CHILDRENS HEALTH PARTNERSHIP HOLDINGS PTY LTD AS TRUSTEE OF THE CHP HOLDINGS UNIT TRUST TO PLAN OF REHABILITATION FOR FINANCIAL GUARANTY INSURANCE COMPANY

Childrens Health Partnership Holdings Pty Ltd (ACN 127 920 496),[1] in its capacity as trustee of the CHP Holdings Unit Trust ("**CHP Holdings**") for itself and on behalf of Childrens Health Partnership Pty Ltd (ACN 119 703 445) in its capacity as trustee of the CHP Unit Trust ("**CHP**") and Ancora (RCH) Pty Ltd (ACN 127 920 754) ("**Ancora RCH**") (each, an "**Obligor**" and, together, the "**Obligors**") as parties to certain finance documentation under which financial accommodations including bonds, swaps and facilities are guaranteed by Financial Guarantee Insurance Company ("**FGIC**"), respectfully submits this amended limited objection (the "**Amended Objection**")[2] to the September 27, 2012 Plan of Rehabilitation (the

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1 The ACN, or Australian Company Number, is a unique nine-digit number issued by the Australian Securities and Investments Commission (ASIC) to every company registered under the Commonwealth Corporations Act 2001, and must be quoted on official documentation issued by the company.

2 This Amended Objection is filed pursuant to the Court's December 20, 2012 Order directing objectors to submit Amended Objections stating their remaining objections to the Plan. The Court ordered on the record on December 18, 2012 and January 15, 2013, however, that the objectors would not be permitted to address the new arguments and facts raised by the Rehabilitator in its reply brief. Therefore, this Amended Objection does not address the new legal arguments presented by the Rehabilitator in its December 12, 2012 Omnibus Reply Memorandum of Law in Further Support of First Amended Plan of Rehabilitation For Financial Guaranty Insurance Company or the new factual information submitted in the December 12, 2012 affidavits of John S. Dubel and Michael W. Miller. CHP Holdings maintains and reserves its right to submit further briefing in response to the new factual and legal arguments presented by the Rehabilitator. See TIG Ins. Co. v. Pellegrini, 258 A.D.2d 658, 658, 685 N.Y.S.2d 777, 777 (2d Dep't 1999) ("'The

"**Plan**") filed by the Superintendent of Financial Services of the State of New York, as Rehabilitator of FGIC.

PRELIMINARY STATEMENT

CHP Holdings, for itself and on behalf of the other Obligors, files this Amended Objection to the Plan in order to ensure that they receive fair and equitable treatment in the course of this rehabilitation, which they will not if the proposed Plan is confirmed. Pursuant to an agreement the Obligors entered into with FGIC long before this rehabilitation was initiated, the Obligors have the right to terminate their respective obligations owed to FGIC in the event FGIC is no longer rated AA- (by S&P) or Aa3 (by Moody's) (the "**Termination Rights**"). The Plan would outright prohibit the Obligors from exercising these bargained-for Termination Rights at any time in the future. Furthermore, under the Plan as it is currently proposed, the Obligors would be forced to pay to FGIC significant premiums for more than the next 23 years, and are currently paying almost A$3 million[3] per year, despite the fact that the Beneficiaries (as defined below) of those FGIC policies have no present claim against FGIC and, in the event that they ever do have a claim against FGIC, such claim would only be entitled to a distribution that is projected to be approximately 25% (the "**Partial Recovery**").

In addition, under the voting mechanisms contained in the finance documents, the purported effect of the Plan would be to reinstate FGIC as the "Controlling Party" for the

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function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion"'(quoting, Dannasch v. Bifulco, 184 A.D.2d 415, 417, 585 N.Y.S.2d 360, 362 (1st Dep't 1992)); see also Hoffman v. Kessler, 28 A.D.3d 718, 719, 816 N.Y.S.2d 481, 482 (2d Dep't 2006) (holding that the court had properly considered an affidavit first submitted by plaintiffs in reply papers because the defendants had an opportunity to respond and submit papers in sur-reply); Guarneri v. St. John, 18 A.D.3d 813, 813-14, 795 N.Y.S.2d 462, 462 (2d Dep't 2005) ("[T]he court properly considered affidavits submitted by the plaintiffs in reply papers because the defendant submitted a response thereto"); Hayden v. Cnty. of Nassau, 16 A.D.3d 415, 416, 790 N.Y.S.2d 404, 404 (2d Dep't 2005) ("We have considered the new matter raised in the reply papers submitted by the petitioner because the appellants had an opportunity to respond and submitted a sur-reply.").

[3] As of the date of this submission, one Australian Dollar is equal to 1.05687 United States Dollars.

purposes of administering key consents, waivers, and amendments under the finance documents (including, for example, in relation to matters as serious as release of Beneficiaries' collateral over the Project), to the exclusion of the Beneficiaries, even though the Partial Recovery is remarkably low.

The Rehabilitator has not provided any justification for this disparate and fundamentally inequitable outcome, which deprives the Obligors (and, as a result, the Beneficiaries) of their heavily negotiated contractual rights. For these reasons, as well as the others set forth herein, approval of the Plan should be denied insofar as it relates to the Obligors' Termination Rights, the related policies issued in favor of the Beneficiaries and the finance documents entered into by the parties. Alternatively, the Plan should be amended in order to ensure that the Obligors are permitted to exercise their Termination Rights which, if exercised, would also relieve FGIC from contingent liability of greater than A$1.4 billion arising from claims that could be asserted by the Beneficiaries during the Run-Off Period.

STATEMENT OF FACTS

The Obligors are, among others, parties to a series of transaction documents under which financing has been provided to enable the design, construction and operation of a public-private partnership project in Victoria, Australia, known as the new Royal Children's Hospital Project (the "**Project**").

Among the financing documents related to the Project are a series of policies (known as financial guarantees) issued by FGIC (the "**Financial Guarantees**"), reimbursement agreements, and related fee letters, the details of which are set forth in Schedule 1. (See Exhibit A to the Affirmation of Kate Z. Machan (the "**Affirmation**"), filed herewith). The Financial Guarantees were issued to various beneficiaries (or to guarantee trustees on their behalf) (the "**Beneficiaries**") identified in the Financial Guarantees in support of financial accommodation

provided by those Beneficiaries to the Obligors, among others. Under the associated reimbursement agreements (the "**Reimbursement Agreements**"), the relevant Obligor covenants to indemnify and reimburse FGIC for sums equal to amounts paid by FGIC under the related Financial Guarantee. The related fee letters contain obligations on CHP and, in the case of the Financial Guarantee No. 07080062 issued in connection with the Preference Units, Ancora (RCH2) Pty Ltd (ACN 128 245 250) ("**Ancora RCH2**"), to pay fees to FGIC in connection with the issuance by FGIC of the relevant Financial Guarantees. (A brief outline approximating the fees payable is provided in Schedule 2. (See Exhibit B to the Affirmation)). The aggregate fees paid by CHP and Ancora RCH2 to FGIC under the fee letters as of the date hereof are currently in excess of A$14 million. The aggregate fees paid by CHP and Ancora RCH2 to FGIC in the financial year ending June 30, 2012 alone are just under A$3 million.

The Obligors are additionally parties to a letter agreement with FGIC, dated April 11, 2008 (the "**Side Letter**"), governed by Australian law, under which the Obligors have the right to terminate obligations they owe to FGIC under the Reimbursement Agreements. The Obligors' Termination Rights arise upon FGIC's financial strength or financial enhancement rating no longer being rated at least AA- (by S&P) and Aa3 (by Moody's) and subject to the Obligors' fulfillment of certain conditions set out in the Side Letter. As of the date of this submission, FGIC is no longer rated by S&P or Moody's, which gives the Obligors the right to exercise the Termination Rights. The Side Letter expressly provides that, should the Obligors exercise such rights to terminate their obligations in the manner contemplated in the Side Letter, no Obligor will be obligated to pay any fee or margin to FGIC from the termination date in connection with the Financial Guarantees and FGIC would likewise be relieved of its obligations under the Financial Guarantees.

Pursuant to the Order of Rehabilitation entered by this Court on June 28, 2012, the Obligors are purportedly prohibited from exercising their Termination Rights and would continue to be prohibited from doing so if the Plan were to be confirmed.

ARGUMENT

I. THE PLAN IS FUNDAMENTALLY UNFAIR IN ITS TREATMENT OF THE OBLIGORS

A primary purpose of Article 74 of the New York Insurance Law, the statutory basis for this Rehabilitation Proceeding, is to ensure equitable treatment for all creditors. In order to effectuate this goal, the Rehabilitator is granted broad discretion in the Rehabilitation Proceeding, however that discretion is not unfettered -- the Rehabilitator must not act arbitrarily or capriciously, and must not abuse that discretion in crafting the rehabilitation plan. See Mills v. Florida Asset Fin. Corp., 31 A.D.3d 849, 850, 818 N.Y.S.2d 333, 334 (3d Dep't 2006).

Under the Rehabilitator's Plan, the Obligors would suffer inequitable treatment because they are disadvantaged by the Plan in four important respects:

First, the Plan would unfairly deprive the Obligors of important contractual rights. Long before this rehabilitation was initiated, and pursuant to the mutually agreed-upon Side Letter, FGIC granted the Obligors the Termination Rights in the event FGIC was no longer rated AA- by S&P or Aa3 by Moody's. Both an AA- and an Aa3 rating are indicative of an entity's strong financial health and low credit risk,[4] thus the Obligors were given the right to terminate their policies even in situations where FGIC was in strong financial health. The Obligors' Termination Rights were therefore triggered and arose (and continue to exist now) long before FGIC fell into the financial circumstances that triggered this rehabilitation.

[4] An AA- rating by S&P is defined as "very strong capacity to meet financial obligations;" an Aa3 by Moody's is "of high quality . . . subject to very low credit risk."

Nevertheless, the Obligors would, unjustly, be permanently prohibited from exercising their Termination Rights by the Plan because any ratings downgrade would be treated as a cured default under the Plan and, under the Plan's injunctive provisions, the Obligors would be permanently prohibited from exercising their Termination Rights and being relieved of the obligation to pay premiums to FGIC. Section 3.5 of the Plan provides for an extraordinarily broad cure of FGIC defaults, including by declaring that any ratings downgrade "shall be deemed not to have occurred." Section 7.8 of the Plan, which provides for permanent injunctive relief, is similarly expansive, permanently enjoining any party from, in essence, exercising any rights whatsoever with respect to any agreement with FGIC. It is impermissible for the Obligors' Termination Rights, which can be triggered by a ratings downgrade unrelated to the circumstances of the rehabilitation, to be eliminated under these provisions of the Plan. Indeed, the Rehabilitator has not demonstrated that the scope of these provisions – which together necessarily deprive the Obligors of their fundamental contractual and property rights -- is necessary for this Plan to be effective. The Plan should therefore be amended to narrow the scope of defaults that are deemed not to have occurred, and to limit the effect of the injunctive provisions of Section 7.8, eliminating any ratings downgrade from the enumerated categories of defaults which are cured or "deemed not to have occurred" under the Plan and permitting the Obligors' exercise of the Termination Rights.

Second, the Obligors are disadvantaged because the Plan permits the Rehabilitator, who stands in the shoes of FGIC for the purposes of the Rehabilitation, to cherry-pick the benefits of the bargain it struck with the Obligors without having to abide by its burdens, including the Termination Rights specifically negotiated by the parties. See Bohlinger v. Zanger, 306 N.Y. 228, 234, 117 N.E.2d 338, 341 (1954) ("In liquidation, the liquidator for all practical

purposes takes the place of the insolvent insurer."). Here, the Rehabilitator is attempting to use the Plan to illegitimately enhance FGIC's contract rights in several respects. Under the Plan, the Obligors would be required to continue to pay, in full, premiums to FGIC each year, in consideration for which the Beneficiaries would receive no more than the Partial Recovery should they ever have a claim against FGIC. Indeed, as set out in Schedules 1 and 2, the Obligors could also be required to honor an increase in their premium obligations as a result of a change in the Project's credit rating, while the Plan purportedly absolves FGIC of its obligation to honor the Termination Rights.

The Rehabilitator has also failed to demonstrate why FGIC should be entitled to receive 100% of its premiums when, under the Plan, FGIC would only be responsible for a fraction of any claim that might arise. Instead, the Obligors, with the concurrence of the Beneficiaries, should be permitted to cease payments under the fee letters relating to the Financial Guarantees, in exchange for the Beneficiaries foregoing any potential future recovery and releasing FGIC from any further liability. Under these circumstances, there is little doubt that the Obligors would be better off if the Plan were not approved, leaving the Obligors free, should they so choose, to exercise their Termination Rights against FGIC.

Third, as mentioned above, as a consequence of Section 7.8 and the "deemed cure" aspects of the Plan, under the voting mechanisms contained in the finance documents, FGIC would be reinstated as the "Controlling Party" for the purposes of administering key consents, waivers and amendments under the finance documents, to the exclusion of the Beneficiaries. It is inequitable that FGIC should be in a position to control the financing aspects of the Project in the same manner it did when it was purportedly providing the Beneficiaries with comprehensive AAA-rated Financial Guarantees that covered 100% of their exposure under

the financing documents they originally entered into. FGIC now proposes to provide only the Partial Recovery to those Beneficiaries, yet those Beneficiaries would be deprived of any effective control over the financing aspects of the Project, despite now taking effective risk on the ability of the Obligors and others to meet their payment obligations under the finance documents. It would be far more reasonable to permit the Obligors to exercise the Termination Rights, thereby allowing FGIC to come off the risks and the Beneficiaries to control the financing aspects of the Project.

Finally, in violation of Section 7434 of the NYIL, the Plan prefers one group of similarly situated policyholders over a group in the same class of policyholders, including the Obligors, through the Novation Agreement. The Novation Agreement would deprive FGIC's estate of the reinsurance relating to the public finance business by transferring such business with the reinsurance attached out of the estate. The Plan would transfer the reinsurance to National Public, at the expense of the Obligors and others policyholders. This action is totally inappropriate in light of FGIC's non-public finance policyholder's needs

II. THE PLAN SHOULD NOT BE CONFIRMED BECAUSE IT CONTAINS SEVERAL DEFICIENCIES AND OBJECTIONABLE PROVISIONS

The Court should not confirm the Plan as proposed by the Rehabilitator for the additional reasons identified below:

- The Plan is nothing more than a disguised liquidation of FGIC without any court oversight in violation of Section 7405 of the NYIL. After the Plan becomes effective, this court will not have any oversight over FGIC's property or the conduct of its business even though the Plan contemplates no business other than a run-off of FGIC's policies.
- The Rehabilitator has not adequately demonstrated that policyholders would recover more under the Plan than in a liquidation, nor has the Rehabilitator

permitted policyholders to opt out of the Plan. See Carpenter v. Pac. Mut. Life Ins. Co., 10 Cal. 2d 307 (1937) (en banc), aff'd sub nom., Neblett v. Carpenter, 305 U.S. 297 (1938).

- The Rehabilitator has failed to provide any justification for applying a discount rate of 10-20% in calculating the present value recoveries of policyholders. Courts have rejected applying discount rates in excess of 10% in the context of bankruptcy valuation analysis. See e.g., United Air Lines, Inc. v. Reg'l Airports Improvement Corp., 564 F.3d 873, 878 (7th Cir. 2009) (finding 10% discount rate too high); In re AMR Corp., 477 B.R. 384 (Bankr. S.D.N.Y. 2012) (finding 8.5% discount rate reasonable).

- Under Section 7.8 of the Plan, policyholders (and others) are enjoined, on a permanent basis, from exercising a wide range of rights they may have in connection with their policies, many of which are wholly unrelated to the Rehabilitation. The Rehabilitator has failed to demonstrate that the broad permanent injunctions applicable to policyholders are necessary in order for this rehabilitation to be effective or fall within any of the requirements for an injunction set forth in Section 7419(b) of the NYIL. The post-Effective Date permanent injunction contemplated by the Plan is not "necessary to prevent interference with the superintendent or the proceeding, or waste of the assets of the insurer" and is far broader in scope than merely enjoining "the commencement or prosecution of any actions." See Muir v. Transp. Mut. Ins. Co., 523 A.2d 1190, 1193-94 (Pa. Commw. Ct. 1987) (approving an injunction that only prohibits the commencement of any suits or proceedings at law).

- A key assumption underlying the Run-Off Projections and the Liquidation Analysis is that FGIC will not write any new insurance polices. However, under Section 7.10 of the Plan the decision whether to permit FGIC to write new insurance policies rests solely with the NYSDFS, thereby depriving policyholders of any due process to challenge such a decision, which may have an adverse impact on their recoveries.

- Sections 2.6 and 7.10(b) of the Plan are inconsistent. Section 2.6 provides that holders of Equity Interests shall not be entitled to any distributions unless all claims are paid in cash or fully reserved for, as determined by FGIC with the express written consent of the NYSDFS. Section 7.10(b) does not contain the same limitations, thereby depriving policyholders of the benefit of the bargain contemplated by Section 2.6.
- Section 7.8(c) of the Plan enjoins parties from exercising the right of setoff in violation of Section 7427 of the NYIL.

CONCLUSION

For the reasons set forth herein, CHP Holdings, on its own behalf and on behalf of the other Obligors, respectfully requests that the Court disapprove the Plan as proposed, insofar as it relates to the Obligors' and the Beneficiaries' respective rights and circumstances, as discussed herein.

Dated: New York, NY
January 22, 2013

Respectfully submitted,

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