

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

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In the Matter of :  
:   
the Application of :   
:   
Benjamin M. Lawskey, Superintendent of Financial :   
Services of the State of New York, for an order to :   
take possession of the property of and rehabilitate :   
:   
FINANCIAL GUARANTY INSURANCE :   
COMPANY. :   
----- X

Index No. 401265/2012  
  
I.A.S. Part 36  
Hon. Doris Ling-Cohan

**OMNIBUS REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT  
OF THE VERIFIED PETITION OF THE SUPERINTENDENT OF  
FINANCIAL SERVICES OF THE STATE OF NEW YORK**

ERIC T. SCHNEIDERMAN  
Attorney General of the State of New York  
Attorney for the Superintendent of Financial  
Services of the State of New York  
120 Broadway, 24th Floor  
New York, NY 10271  
(212) 416-6276

Elizabeth Prickett-Morgan  
Assistant Attorney General  
of Counsel

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Eric T. Schneiderman, Attorney General of the State of New York (the “**Attorney General**”), on behalf of Benjamin M. Lawsky, Superintendent of Financial Services of the State of New York (the “**Superintendent**”), respectfully submits this omnibus reply memorandum of law (the “**Reply**”) in further support of the injunctive relief requested in the Rehabilitation Petition<sup>1</sup> (the “**Injunctive Relief**”).

The only party to this action – Financial Guaranty Insurance Company (“**FGIC**”) – consented to the appointment of the Superintendent as Rehabilitator and does not oppose the Injunctive Relief. At issue are four objections filed by certain non-party entities, raising issues with respect to certain provisions of the Injunctive Relief and requesting to intervene as parties to the Rehabilitation Proceeding (the “**Objections**”). None of the Objections challenge the appointment of the Superintendent as Rehabilitator.

The objecting non-party entities are: (i) US Bank National Association and US Bank Trust National Association (collectively, “**US Bank**”), each in its capacity as indenture trustee for certain RMBS, municipal debt securities, and other affected transactions insured by FGIC, (ii) Bank of New York Mellon (“**BNY**”) in its capacity as indenture trustee under indentures pursuant to which bonds were issued that are insured by FGIC, (iii) Wells Fargo Bank, N.A. (“**Wells Fargo**”), in its capacity as trustee for certain RMBS and ABS trusts, and (iv) Deutsche Bank National Trust Company and Deutsche Bank Trust Company Americas (collectively, “**Deutsche Bank**” and, together with US Bank, BNY, and Wells Fargo, the “**Objectors**”), each in its capacity as trustee for certain RMBS, other ABS, CLOs and/or CDOs insured by FGIC or its affiliates.

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<sup>1</sup> Capitalized terms not otherwise defined shall have the meanings ascribed to them in the Superintendent’s verified petition dated June 11, 2012 that was filed in the above-captioned case (the “**Rehabilitation Petition**”).

## PRELIMINARY STATEMENT

Over 12,000 persons and entities received notice of the order to show cause that the Court signed on June 11, 2012 (the “**Order to Show Cause**”). Representatives of certain of FGIC’s policyholders and other counterparties have since contacted the Superintendent to discuss the Proposed Rehabilitation Order. The Superintendent addressed their concerns through revisions to the Proposed Rehabilitation Order, which are reflected in a revised order (the “**Revised Proposed Rehabilitation Order**”) attached hereto as **Exhibit 1**. A blacklined copy of the Revised Proposed Rehabilitation Order, marked against the Proposed Rehabilitation Order, is attached hereto as **Exhibit 2**.<sup>2</sup>

The Objections, which should be overruled at this juncture for several reasons, raise discrete challenges or reservations of rights to a limited number of provisions in the Injunctive Relief. Specifically, two of the Objectors (BNY and Deutsche Bank) raise objections primarily to two provisions of the Proposed Rehabilitation Order: (i) Paragraph 12, which prohibits persons and entities from withholding or setting off payments owed to FGIC, and (ii) Paragraph 14, which preserves FGIC’s Control Rights (as defined below). The other two Objectors (US Bank and Wells Fargo) do not raise any specific objections, but reserve their rights to object later and ask that the Court grant the Proposed Rehabilitation Order on an interim basis and authorize them to set aside payments pending a final order. Prior to the June 28, 2012 hearing (the “**Hearing**”), the Superintendent, through counsel, contacted the Objectors in an attempt to resolve certain issues raised in the Objections and reach agreement on a process for resolving the remaining issues raised in the Objections. Although the Superintendent believes that he and the Objectors may reach consensus on these issues before the Hearing, as of the time

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<sup>2</sup> The Superintendent, through counsel, has made the Objectors aware of these changes prior to filing this Reply.

of the filing of this Reply, consensus has not yet been reached with all four Objectors. Accordingly, the Superintendent files this Reply in the event consensus is not reached. In any event, the Superintendent has made revisions to Paragraphs 12 and 14 of the Proposed Rehabilitation Order to address the Objectors' concerns which are reflected in the Revised Proposed Rehabilitation Order.

As demonstrated below, consideration of the Objections at the Hearing would be procedurally improper and imprudent. Instead, the Court should grant the Injunctive Relief and require that the Objectors follow (i) the procedures that were set forth in Paragraph 22 of the Proposed Rehabilitation Order for seeking relief from, or modification of, the Injunctive Relief and which are unchanged in the Revised Proposed Rehabilitation Order (the "**Objection Procedures**") and (ii) the procedures for seeking a ruling with respect to Control Rights that the Superintendent added to Paragraph 14 of the Revised Proposed Rehabilitation Order (the "**Control Rights Procedures**").

The Injunctive Relief, the Objection Procedures, and the Control Rights Procedures were carefully crafted in order to protect the interests of *all* of FGIC's policyholders. As set forth in the Rehabilitation Petition, the Injunctive Relief is necessary to preserve the status quo while the issues underlying the Objections are litigated. It would be unfair to allow the Objectors to delay entry of the Injunctive Relief to seek further modifications that will benefit them, at the expense of FGIC's other policyholders.

The Objectors will not be prejudiced by following the Objection Procedures and the Control Rights Procedures because the Injunctive Relief is intended to remain in place for a limited period of time. The Superintendent intends to file a proposed plan of rehabilitation for FGIC (the "**Plan**") within approximately 60 days from entry of the Revised Proposed

Rehabilitation Order and will ask this Court to approve the Plan on reasonable notice. The terms of the Plan, once the Plan becomes effective, will supersede the Injunctive Relief. The Superintendent intends to ask this Court to set a case status conference for approximately 45 days from the Hearing to confirm the Superintendent's timing for filing the Plan and to set a hearing to approve the Plan<sup>3</sup>. The Objectors have failed to demonstrate that the Superintendent's proposed process for addressing their concerns will result in any immediate or irreparable harm.

The Injunctive Relief requested by the Superintendent is appropriate and necessary in the context of this complex financial restructuring, and is similar to the relief most recently granted in the rehabilitation proceeding concerning the Segregated Account of Ambac Assurance Corporation (the "**Ambac Proceeding**"), which was commenced in 2010 in Wisconsin. The Ambac Proceeding is another court-supervised insurance rehabilitation proceeding involving a financial guaranty insurer, where the court granted similar injunctive relief, over similar objections from the same Objectors. This Court should similarly overrule the Objections and enter the Revised Proposed Rehabilitation Order.

## **ARGUMENT**

### **I. THE SUPERINTENDENT SHOULD BE APPOINTED AS REHABILITATOR**

None of the Objections challenge the appointment of the Superintendent as Rehabilitator. As set forth in the Rehabilitation Petition and the Memo of Law, sufficient

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<sup>3</sup> Although the Superintendent does not intend to preclude anyone from invoking the Objection Procedures or the Control Rights Procedures, in light of the anticipated expedited nature of this proceeding, the Superintendent submits that the Plan approval process will be the most efficient and expeditious time to address the merits of each of the Objectors' concerns (unless such concerns can be resolved consensually before then with the Rehabilitator). Moreover, as the Superintendent clarified in the new Paragraph 23 of the Revised Proposed Rehabilitation Order, any delay in seeking relief from the Injunctive Relief will not result in a waiver of, or otherwise impair, the Objectors' rights.

grounds exist for placing FGIC into rehabilitation pursuant to Section 7402 of the NYIL, and no person or entity has contested the appropriateness of placing FGIC into rehabilitation.

Accordingly, the Superintendent requests that he be appointed as Rehabilitator of FGIC.

## **II. THE MOTIONS TO INTERVENE ARE PROCEDURALLY IMPROPER AND PREMATURE**

BNY's, Deutsche Bank's, and US Bank's requests to intervene are procedurally improper under both the CPLR and the process commonly followed in insurance receivership proceedings. Under either standard, the objections to the Injunctive Relief should not be considered at the Hearing. Instead, an appropriate schedule should be established in accordance with the Objection Procedures or the Control Rights Procedures, as applicable.

### **A. The Motions Fail to Comply with the Order to Show Cause or the CPLR**

As a threshold matter, the Order to Show Cause is directed only to FGIC. It provides for "FGIC, or their counsel, [to] appear and show cause before this Court" at the Hearing "why an order should not be made, pursuant to Article 74 of the New York Insurance Law . . . substantially in the form of [the Proposed Rehabilitation Order]." By statute, no notice to policyholders or other creditors is required before the Court can order the Injunctive Relief provided in the Revised Proposed Rehabilitation Order. *Matter of Nemerov*, 149 Misc. 797, 800-01 (Sup. Ct., N.Y. Co. 1933). The non-party Objectors are trying to piggyback on the schedule set by the Court for FGIC's response. While the Objections may be heard at an appropriate time, in accordance with the Objection Procedures, the Order to Show Cause does not provide for the motions to intervene to be heard at the Hearing.

In addition, while three of the Objectors have sought to have their objections heard pursuant to formal motions to intervene, none of the Objectors has properly noticed a motion to intervene, which would be improper in an Article 74 proceeding in any event (as

discussed below). Both BNY's and US Bank's objections are noticed as cross-motions to intervene.<sup>4</sup> CPLR 2215, however, provides that only "*a party* may serve upon the moving party a notice of cross-motion demanding relief." (Emphasis added). BNY admits in its papers – as it must – that "[t]he only parties to the current proceeding are FGIC and the Superintendent." (Mem. in Support of Cross-Motion by BNY to Intervene Seeking Modifications to the Proposed Order of Rehabilitation (hereinafter, "**BNY Obj.**") 8.) Neither BNY nor US Bank therefore has any standing to file a cross-motion. Indeed, since only a non-party can file a motion to intervene, no such motion could ever be filed as a cross-motion.

The intervention motion filed by Deutsche Bank is noticed to be heard "at a time and place to be set by the Court." CPLR 2214(a), however, provides that "[a] notice of motion shall specify the time and place of the hearing on the motion." Deutsche Bank apparently failed to comply with the statute so that it could show up on June 28 and ask the Court to be heard at that time. If so, that procedure is not authorized by the CPLR and violates the Superintendent's right to proper notice. Alternatively, if Deutsche Bank is only seeking to obtain an appropriate schedule for consideration of its Objection, then the Superintendent agrees that such a schedule should be adopted, in accordance with the Objection Procedures; however, the motions to intervene should not be considered at the Hearing.

#### **B. The Motions are Inconsistent with New York Precedent**

The Objectors' requests for formal intervention are also inconsistent with insurance receivership proceedings. The general rule is that, "[b]ecause the Superintendent holds office as Liquidator [or, in this case, as Rehabilitator] to protect the interests of policyholders in the liquidation [or rehabilitation] proceeding, there is generally no need for the

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<sup>4</sup> Although US Bank originally filed a motion to intervene, it later amended its papers to notice the motion to intervene as a cross-motion.



policyholders to speak on their own behalf as a matter of due process.” *Matter of Midland Ins. Co.*, 18 Misc.3d 1117(A), 2008 WL 151786, at \*6 (N.Y. Sup. Ct. Jan. 14, 2008) (citations omitted). Instead, as in related corporate proceedings, the Court gives notice to interested parties and permits them to be heard in such manner as the Court deems proper. *Id.* at \*7 (citing N.Y. Bus. Corp. Law §1008(b)).

In the *Midland* case, instead of filing motions to intervene in the proceeding, “the Liquidators, the Major Policyholders, and Midland’s reinsurers approached the Supreme Court to address their disagreement concerning the Liquidator’s decision to disallow certain of the Major Policyholders’ claims.” *Matter of Midland Ins. Co.*, 16 N.Y.3d 536, 542 (2011). “Consequently, during the spring of 2006, the parties negotiated and agreed upon a proposed case management order,” which the Supreme Court so ordered, and which “set forth a procedure to resolve the legal disputes between the parties.” *Id.* Similarly, in this matter, the Superintendent has proposed the Objection Procedures and the Control Rights Procedures to resolve disputes within the Rehabilitation Proceeding.

**C. The Objectors Should Comply with the Objection Procedures and the Control Rights Procedures**

The Objection Procedures provide that any person seeking modification of, or relief from, the Injunctive Relief (an “**Objecting Party**”) shall submit a written request to the Rehabilitator setting forth good cause for the requested modification or relief. If an Objecting Party and the Rehabilitator fail to reach an agreement on the issue raised within 30 days, or such longer time as the parties agree, the Objecting Party may then seek relief from the Court. The Objection Procedures are designed to facilitate timely, consensual resolutions of any objections to the Injunctive Relief, without unnecessarily delaying or interfering with the Rehabilitation

Proceeding. The Superintendent has determined that the Objection Procedures serve the best interests of all of FGIC's policyholders, and this determination is entitled to broad deference.<sup>5</sup>

The Control Rights Procedures provide a mechanism for indenture trustees and servicers to seek a ruling from the Court, on an expedited basis if necessary, if the Rehabilitator (or his designee) directs any of the indenture trustees or servicers to take an action that they do not think they are obligated to take, or refrain from taking an action that they think they are obligated to take. This procedure is designed to establish an orderly process for litigating disputes about Control Rights without prejudicing the indenture trustees or servicers.

It is respectfully submitted that the Court should enter the Revised Proposed Rehabilitation Order which will allow the Objectors to continue to work to reach a consensual settlement with the Rehabilitator before seeking relief from the Court. In the short time since the Order to Show Cause was entered the collaborative process proposed in the Revised Proposed Rehabilitation Order has worked. Although not ordered to do so, the Superintendent provided notice of entry of the Order to Show Cause by (i) first class mail to over 12,000 known policyholders and creditors, (ii) publication in the Wall Street Journal and the Bond Buyer, and (iii) posting copies of the Order to Show Cause and the papers upon which it was granted, including the Proposed Rehabilitation Order, on the website <http://www.fgicrehabilitation.com>. In the approximately two weeks since the Court entered the Order to Show Cause, representatives of a number of the entities that received such notice have contacted the

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<sup>5</sup> See Superintendent's Memorandum of Law in Support of the Rehabilitation Petition, filed June 11, 2012 (hereinafter, the "**Memo of Law**") at § 1. In arguing that the Court should defer to the Superintendent's determinations with respect to what relief is in the best interests of all of FGIC's policyholders, the Superintendent is not suggesting, as BNY implies, that the Court is not the ultimate decision-maker. (See BNY Obj. § II.) The Superintendent merely submits that case law supports the Court's deference to recommendations of the Superintendent, "the administrative officer to whom supervision of the insurance companies has been entrusted by the Legislature" *In re N.Y. Title & Mortgage Co.*, 281 N.Y.S. 715, 729 (N.Y. Sup. Ct. 1935).

Superintendent in an effort to discuss their concerns regarding the Injunctive Relief, consistent with the Objection Procedures. The Superintendent has been able to successfully address these concerns by making certain revisions to the Proposed Rehabilitation Order, which changes are reflected in the Revised Proposed Rehabilitation Order or the Control Rights Procedures.

The Objectors should not be permitted to bypass the Objection Procedures or the Control Rights Procedures. As explained in greater detail below, the Objectors have failed to demonstrate any immediate or irreparable harm that would result if the Court enters the Revised Proposed Rehabilitation Order, including the Injunctive Relief, as is, and requires the Objectors to follow the Objection Procedures and the Control Rights Procedures. Indeed, the Objectors themselves argue that the Court should grant them more time to consider and brief their Objections. Paragraph 23 of the Revised Proposed Rehabilitation Order, which the Superintendent added in order to afford interested persons or entities more time, explicitly provides that entry of the order will in no way waive, bar, or otherwise impair the Objectors' rights.

Although the Objectors also argue for delay in entering the Revised Proposed Rehabilitation Order, delaying entry of the Order will jeopardize FGIC's transition into this large and complex rehabilitation proceeding. As discussed *infra*, the Superintendent is seeking to preserve the assets of FGIC for the benefit of all of its policyholders and the requested Injunctive Relief is needed to maintain and preserve FGIC's estate. The Court should be guided by the Superintendent's intended schedule for this proceeding as a whole, under which he intends to file and circulate the Plan within approximately 60 days from entry of the Revised Proposed Rehabilitation Order, which, if approved, will supersede the Injunctive Relief in the Revised Proposed Rehabilitation Order. Allowing the Objectors to delay entry of the Revised Proposed

Rehabilitation Order would be unfair to FGIC's other policyholders, and would unnecessarily interfere with the Superintendent's ability to fulfill his statutory mandate to "take such steps toward the removal of the causes and conditions which have made [the Rehabilitation Proceeding] necessary." NYIL § 7403(a). Accordingly, the Court should deny the requests to intervene and require the Objectors to follow the Objection Procedures and the Control Rights Procedures in the same manner as all other policyholders and other interested entities.<sup>6</sup>

### **III. THE INJUNCTIVE RELIEF REQUESTED IS NECESSARY AND APPROPRIATE**

As set forth in greater detail in the Rehabilitation Petition and the Memo of Law, the Injunctive Relief is appropriate in the context of this Rehabilitation Proceeding and is necessary to preserve FGIC's assets for the benefit of all of its policyholders. The Objectors do not challenge the Injunctive Relief in its entirety, but instead focus primarily on two provisions – Paragraph 12, which prohibits persons and entities from withholding or setting off payments due to FGIC, and Paragraph 14, which preserves FGIC's Control Rights (as defined below). These provisions of the Injunctive Relief fall squarely within the Court's broad authority under Section 7419 of the NYIL to restrain all persons from "the waste or disposition of FGIC's property" and to "prevent interference with the superintendent or the [rehabilitation] proceeding, or the waste of the assets of the insurer." N.Y. Ins. Law § 7419. Further, in the Ambac Proceeding,

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<sup>6</sup> The Superintendent does not object to US Bank's and Wells Fargo's reservations of rights, to the extent they merely seek to reserve their rights to object to the relief requested in the event they cannot reach a consensual resolution of their objections with the Superintendent, in accordance with the Objection Procedures. However, the Superintendent opposes US Bank's and Wells Fargo's requests to put a time limitation on the Revised Proposed Rehabilitation Order or to escrow payments, as discussed in more detail below.

another court-supervised insurance rehabilitation proceeding involving a financial guaranty insurer, a Wisconsin Court entered substantially the same relief.<sup>7</sup>

Based on even a cursory review of the factual background and legal arguments made in each of the Objections, it is clear that the Objections should not bar entry of the Injunctive Relief as set forth in the Revised Proposed Rehabilitation Order. The Court should enter the Injunctive Relief, which the Superintendent believes is in the interest of all of FGIC's policyholders. The Objectors will have an opportunity to present their arguments to the Court at an appropriate time pursuant to the Objection Procedures and the Control Rights Procedures.

**A. Requiring Continued Payments to FGIC is Necessary and Appropriate**

**1. The Objectors Failed to Demonstrate that They Will Suffer Harm if Required to Make Payments During the Rehabilitation Proceeding**

To preserve the status quo, Paragraph 12 of the Revised Proposed Rehabilitation Order prohibits any person or entity from withholding or continuing to withhold, failing to pay, setting off, or taking similar action with respect to payments owed to FGIC or FGIC CP. Since

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<sup>7</sup> See *In re Rehab. of Segregated Account of Ambac Assurance Corp.*, Decision on Motions Challenging the Legality of the Establishment and Structure of the Segregated Account; the Challenges to the Temporary Injunction Concerning the Exercise of Control Rights, Withholding of Premiums and Other Objections; and Motions to Formally Intervene as Parties to this Rehabilitation Action, Case No. 10 CV 1576, 11-12 (Wisc. Cir. Ct. Oct. 25, 2010), available at <http://ambacpolicyholders.com/court-filings/> (noting that “retention of these control rights in the Rehabilitator is vital to the Rehabilitator and carrying out the Rehabilitator’s duties” and rejecting the requests of Deutsche Bank, US Bank, and BNY to escrow their premiums). BNY’s attempt to distinguish the injunctive relief granted in the Ambac Proceeding based on differences between the NYIL and the Wisconsin insurance statute is unconvincing. (See BNY Obj. 14.) While Section 645.05(k) of the Wisconsin Insurers Rehabilitation and Liquidation Act gives Wisconsin courts broad authority to enjoin “[a]ny other threatened or contemplated action that might lessen the value of the insurer’s assets or prejudice the rights of policyholders, creditors or shareholders or the administration of the proceeding,” as noted above, Section 7419 of the NYIL similarly gives New York courts broad authority to restrain all persons from “the waste or disposition of FGIC’s property” and to “prevent interference with the superintendent or the [rehabilitation] proceeding, or the waste of the assets of the insurer.” Contrary to BNY’s assertion, the Wisconsin statute does not “by its express terms provid[e] broader authority for granting injunctive relief than is provided under §7419 of the [NYIL].” (BNY Obj. 14.) Although the two statutes use different words, both give courts broad authority to issue a wide range of injunctive relief in the context of insurance rehabilitation proceedings.

FGIC ceased writing new financial guaranty policies in January 2008, payments from existing policies and reimbursements for payments previously made by FGIC under its financial guaranty insurance policies have been FGIC's largest source of operating income. (Affidavit of John S. Dubel, dated June 27, 2012 (the "Dubel Aff.") ¶ 7.)

The Superintendent anticipates that the proposed Plan will address payments owed to FGIC and FGIC CP. Accordingly, the Superintendent submits that any dispute as to whether policyholders should be able to setoff or withhold payments is best litigated in the context of Plan approval, where all parties will have had the opportunity to analyze the method by which the Rehabilitator will remove the causes and conditions that led to the rehabilitation. Because the Superintendent anticipates an expeditious process to approve the Plan, no irreparable harm should result to the Objectors if they are required to continue making payments (as virtually all have been doing) pending approval of the Plan.

None of the Objectors have in fact demonstrated any immediate and irreparable harm that would result from making premium and other payments to FGIC as they come due pending approval of the Plan. Based on FGIC's estimates of the premiums it expects to receive over the next six months from the Objectors, FGIC estimates that approximately \$2.9 million of premiums per month are scheduled to be paid by the Objectors in the next several months. (Dubel Aff. ¶ 8). FGIC, on the other hand, currently has approximately \$2 billion of cash and investments on hand. (*Id.* ¶ 9). Thus, contrary to US Bank's assertion that the Injunctive Relief would "permanently alter the baseline, bargained-for contractual rights of the parties to each FGIC Policy/Contract" (Mem. of Law in Support of Motion to Intervene and Response and Reservation of Rights of US Bank to Proposed Rehabilitation Order 4), in the event the Court later determines that any of the Objectors should not have been required to make payments to

FGIC during the Rehabilitation Proceeding, FGIC will have adequate resources to comply with the Court's order. In fact, as reflected in the Revised Proposed Rehabilitation Order, the Superintendent has revised Paragraph 12 of the Proposed Rehabilitation Order to explicitly provide that the Rehabilitator will refund any payments made to FGIC or FGIC CP during the Rehabilitation Proceeding if this Court determines that a particular person or entity or group of persons or entities should have been allowed to set-off or recoup such payments. Given FGIC's cash and investments on hand and the fact that if the Revised Proposed Rehabilitation Order is entered the Rehabilitator will have ultimate responsibility for FGIC's operations, it is unnecessary to expend time and resources setting up deal-specific escrow accounts, as Deutsche Bank suggests (Mem. of Law in Support of Motion by Deutsche Bank to Intervene and in Preliminary Opposition to the Proposed Rehabilitation Order (hereinafter, "**Deutsche Bank Obj.**") 8), because such escrow accounts would not provide any greater security for such funds and would add unnecessary cost to, and an unnecessary administrative burden for, the Rehabilitator.

**2. The Court has the Authority Under Section 7419 of the NYIL to Prohibit Setoff of Premiums<sup>8</sup>**

Despite Deutsche Bank's assertions that requiring policyholders to continue making premium and other payments owed to FGIC is "unlawful," (*see* Deutsche Bank Obj. 1, 4), such relief falls within the Court's authority to issue injunctive relief pursuant to Section 7419 of the NYIL.<sup>9</sup> In addition, given the unique nature of financial guaranty insurers, such as FGIC,

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<sup>8</sup> The Superintendent reserves the right to brief this legal issue in more detail in the context of the Plan.

<sup>9</sup> Although Deutsche Bank can point to examples of New York courts that have permitted policyholders to setoff premiums owed to an insolvent insurer (*see* Deutsche Bank 6-7 (*citing Van Schaick v. Astor*, 277 N.Y.S. 394 (App. Div. 1935) and *Pink v. Isle Theatrical Corp.*, 3 N.E.2d 521, 521 (N.Y. 1936))), these examples do not stand for the proposition that New York courts lack the authority to enjoin policyholders from exercising their right to setoff premiums, pursuant to Section 7419 of the NYIL, when appropriate.

maintaining the status quo with regard to payments due to FGIC is a reasonable interim measure to prevent “the waste or disposition of [FGIC’s] property until further order of the court.” N.Y. Ins. Law § 7419(a). Section 7427(a) of the NYIL<sup>10</sup> permits the set off of mutual debts or credits, but does not clearly grant the insurer’s counterparty a unilateral right to set off. Further, courts in other jurisdictions have granted similar relief in complex insurance rehabilitation proceedings.<sup>11</sup> For all the foregoing reasons, the Court should grant the relief in Paragraph 12 of the Revised Proposed Rehabilitation Order.

**B. Preserving FGIC’s Control Rights is Necessary and Appropriate**

Paragraph 14 of the Revised Proposed Rehabilitation Order prohibits all persons and entities from exercising certain of FGIC’s approval, consent, direction, determination, appointment, request, voting, veto, waiver, or other contractual rights (the “**Control Rights**”) during the Rehabilitation Proceeding. These Control Rights are crucial to protecting FGIC’s interests for the benefit of all of its policyholders. Stripping FGIC’s Control Rights at this juncture would upset the status quo and penalize FGIC for availing itself of a statutory rehabilitation scheme and for its regulator’s efforts to rehabilitate FGIC outside of a formal proceeding. As discussed in more detail in the Memo of Law, enforcement of these types of *ipso facto* provisions is prohibited in many rehabilitation schemes. *See e.g.*, 11 U.S.C. § 365(e)

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<sup>10</sup> Section 7427(a) of the NYIL provides that “[i]n all cases of mutual debts or mutual credits between the insurer and another person in connection with any action or proceeding under [Article 74], such credits and debts shall be set off and the balance only shall be allowed or paid.” N.Y. Ins. Law § 7427(a).

<sup>11</sup> *See, e.g. In re Rehab. of Segregated Account of Ambac Assurance Corp.*, Order for Temporary Injunctive Relief, Case No. 10-CV1576, ¶¶ 4-6 (Wis. Cir. Ct. Mar. 24, 2010) ¶7, *available at* <http://ambacpolicyholders.com/court-filings/> (“All persons and entities are enjoined and restrained from withholding or failing to pay or setting-off premiums or other payments (including without limitation recoveries, reimbursements, interest, deferred interest, and default interest”); *In re Rehab. of Mut. Benefit Life Ins. Co.* 89 (Sup. Ct. N.J. Aug. 12, 1993) (“policyholders are forced to continue paying premiums or else have their cash surrender value reduced to support unpaid premiums”) (a copy of this order is available upon request to the Superintendent’s counsel).



& 363(l) (making unenforceable *ipso facto* provisions in contracts and leases under the U.S. Bankruptcy Code); 12 U.S.C. § 1821(e)(13)(A) (allowing the Federal Deposit Insurance Corporation to enforce contracts notwithstanding *ipso facto* clauses). In any event, as already mentioned, the Injunctive Relief is only temporary and will be revisited shortly as part of approval of the proposed Plan.

As discussed in more detail below, not only have the Objectors failed to demonstrate any immediate or irreparable harm that would result from allowing FGIC to retain its Control Rights during the Rehabilitation Proceeding, but certain of the Objectors, such as BNY, have made factual allegations that are inaccurate.

**1. FGIC Maintains its Control Rights Under the Jefferson County Indenture**

BNY incorrectly argues that FGIC is not trying to preserve the status quo, but rather, attempting to have this Court restore Control Rights that FGIC has already lost and cites FGIC's obligations related to bonds issued by Jefferson County, Alabama (the "**JeffCo Transaction**") as the primary example. (BNY Obj. 11.) A review of BNY's Objection and some recent correspondence between FGIC and BNY reveals that as a factual matter, FGIC believes it continues to maintain its Control Rights in the JeffCo Transaction. (See Dubel Aff. ¶ 6.) Notably, in its Objection, BNY fails to even acknowledge that any purported loss of FGIC's Control Rights is, and has been, vigorously disputed by FGIC.

The relevant indenture in the JeffCo Transaction (together with any supplemental indentures, the "**Jefferson County Indenture**") provides that FGIC retains its Control Rights "for so long as it has not failed to comply with its payment obligations under the [insurance policy issued by FGIC]." (Jefferson County Indenture, Section 17.3.) BNY has not alleged, nor could it, that FGIC has defaulted on any actual payment obligations under any applicable

insurance policy. There are no outstanding unpaid claims against FGIC with respect to the JeffCo Transaction. (*See Dubel Aff.* ¶ 6.) The Superintendent and his counsel are continuing to evaluate BNY's argument that there was an anticipatory breach that resulted in FGIC's loss of its Control Rights, but as a preliminary matter, the Superintendent sees significant flaws in BNY's argument.

First, Section 17.3 of the Jefferson County Indenture merely sets forth a condition precedent for the exercise of FGIC's Control Rights. In fact, FGIC is not even a party to the Jefferson County Indenture and its payment obligations are set forth in a separate insurance policy. Anticipatory breach doctrine applies to an anticipatory breach of a contract counterparty's obligations under a contract – not to an anticipatory breach of a condition precedent.

Second, even if the anticipatory breach doctrine applies, the Superintendent is unaware of any action by FGIC that constituted an anticipatory breach of its obligations under an insurance policy. BNY contends that the issuance of the 1310 Order was an anticipatory breach which, on its face, would completely undermine the NYIL's comprehensive scheme for remedying an insurer's capital impairment. Issuance of a 1310 order does not mean an insurance company will never pay claims – it merely gives the insurer breathing room to rehabilitate itself. Indeed, the Superintendent anticipates that the proposed Plan will restructure FGIC's insurance policies in a manner that will allow FGIC to comply with its payment obligations under modified policies going forward. Accordingly, there is ample reason to expect that the condition precedent in Section 17.3 of the Jefferson County Indenture will continue to be satisfied.<sup>12</sup>

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<sup>12</sup> BNY's argument that FGIC lost its Control Rights when it failed to provide adequate assurance of its future ability to perform is equally flawed. (*See BNY Obj.* 10.) The Jefferson County Indenture does not

**2. FGIC Should Not Lose its Control Rights as a Result of the 1310 Order or the Commencement of this Rehabilitation Proceeding**

Certain Objectors, such as Deutsche Bank and Wells Fargo, argue that FGIC lost its Control Rights either because FGIC failed to pay claims as a result of the 1310 Order or because of the commencement of the Rehabilitation Proceeding (Deutsche Bank Obj. 8; Limited Joinder of Wells Fargo ¶¶ 4-5.) Even if the underlying documents do provide that failure to pay claims or commencement of an Article 74 proceeding are defaults that result in FGIC's loss of Control Rights, such provisions should not be enforced because they are *ipso facto* provisions that are disfavored in insolvency proceedings.

Any provision that deprives FGIC of rights due to a commencement of an insolvency proceeding is clearly an *ipso facto* provision. Because the 1310 Order was issued by the Superintendent in an attempt to rehabilitate FGIC outside of a formal Article 74 proceeding, any provision in a contract or policy that would deprive FGIC of its Control Rights by virtue of FGIC's failure to pay claims in accordance with the 1310 Order is essentially an *ipso facto* provision that also should not be enforced. As discussed in the Memo of Law, prohibiting the enforcement of these types of *ipso facto* provisions against a financial guaranty insurer is clearly within the Court's authority to stay, modify, or terminate individual contractual rights for the benefit of all policyholders. (See Mem. of Law § III.A.2.)

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give BNY the right to demand adequate assurance of future performance in connection with Section 17.3, nor is the Superintendent aware of any legal right for BNY to request such assurances.

Similarly unpersuasive is BNY's argument that FGIC lost its Control Rights because it allegedly refused to provide indemnification. BNY's reliance on any lack of indemnification is a red herring. Any indemnification obligation in the Jefferson County Indenture might at most provide BNY an excuse not to comply with FGIC's directives, but would not result in loss of FGIC's Control Rights. (Jefferson County Indenture, Section 17.3.)

**3. The Objectors Failed to Demonstrate that they Will Suffer Immediate and Irreparable Harm**

As discussed above, it is not necessary for the Court to address the Objectors' arguments with respect to Control Rights at this juncture. This is a complicated proceeding. Affording the Rehabilitator and the Objectors an opportunity to continue to try to resolve their issues consensually and to ideally resolve these issues in the context of the Plan is the most practical and efficient approach under the circumstances, and the approach which is fairest to all policyholders and other interested entities. If such a resolution turns out not to be possible, the Objectors' rights to challenge the Injunctive Relief will not be waived or otherwise impaired. The Objectors can still seek relief from the Injunctive Relief pursuant to the Objection Procedures and the Control Rights Procedures.

The Objectors have failed to demonstrate any immediate or irreparable harm that will result from preserving FGIC's Control Rights in this interim period, particularly in light of the revision to Paragraph 14 discussed above. No Objector has identified any outstanding direction from FGIC that is before it. In the event the Rehabilitator determines to exercise any of FGIC's Control Rights, the Objectors will have ample opportunity to object to such direction and seek relief from the Court on an expedited basis if necessary pursuant to the Control Rights Procedures. For all the foregoing reasons, the Court should grant the relief requested in Paragraph 14 of the Revised Proposed Rehabilitation Order.

**CONCLUSION**

For the reasons set forth above, this Court should deny the Objections, and grant the relief requested in the Rehabilitation Petition and such other and further relief as the Court deems just and proper.

Dated: New York, New York  
June 28, 2012

Eric T. Schneiderman  
Attorney General of the State of New York

Attorney for the Superintendent of Financial  
Services of the State of New York

By:


  
Elizabeth Prickett-Morgan  
Assistant Attorney General  
120 Broadway, 24th Floor  
New York, NY 10271  
(212) 416-6276

Exhibit 1

Revised Proposed Rehabilitation Order

AT IAS PART 36 OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, AT THE COURTHOUSE, 60 CENTRE STREET, IN THE COUNTY, CITY AND STATE OF NEW YORK, ON THE 28<sup>TH</sup> DAY OF JUNE, 2012

PRESENT:  
HON. DORIS LING-COHAN, J.S.C.

-----	X	
	:	
In the Matter of	:	
	:	
the Application of	:	Index No. 401265/2012
	:	
Benjamin M. Lawsky, Superintendent of Financial	:	<b><u>ORDER OF REHABILITATION</u></b>
Services of the State of New York, for an order to	:	
take possession of the property of and rehabilitate	:	
	:	
FINANCIAL GUARANTY INSURANCE	:	
COMPANY.	:	
-----	X	

Petitioner, Benjamin M. Lawsky, Superintendent of Financial Services of the State of New York (the “**Superintendent**”), having moved this Court for an order placing Financial Guaranty Insurance Company (“**FGIC**”) into rehabilitation, and upon reading and filing the Order to Show Cause dated June 11, 2012, the verified petition of the Superintendent, duly verified the 11th day of June, 2012 (the “**Rehabilitation Petition**”),<sup>1</sup> the exhibits attached to the Rehabilitation Petition, and the Memorandum of Law in Support of the Rehabilitation Petition, and the Court having held a full hearing to consider the requested relief, this Court finds that:

- a. FGIC is a New York State stock insurance company that issued financial guaranty insurance;
- b. FGIC’s statutory home office is located at 125 Park Avenue, New York, New York 10017;

<sup>1</sup> Capitalized terms not otherwise defined shall have the meanings ascribed to them in the Rehabilitation Petition.

- c. FGIC is subject to the New York Insurance Law (“**NYIL**”) and, in particular, to Article 74 thereof;
- d. FGIC has consented to entry of an order of rehabilitation pursuant to Article 74 of the NYIL by a resolution of FGIC’s board of directors;
- e. FGIC is insolvent within the meaning of Section 1309 of the NYIL;
- f. FGIC has been unable to comply, within the time designated by the Superintendent, with an order of the Superintendent pursuant to Section 1310 of the NYIL, to make good an impairment of its capital or minimum surplus to policyholders;
- g. It is in the best interest of FGIC’s policyholders, creditors, and the general public that the Superintendent be directed to take possession of FGIC’s property and to rehabilitate its business and affairs;
- h. FGIC is the sole member of FGIC Credit Products, LLC (“**FGIC CP**”), a Delaware limited liability company that issued credit default swaps (“**CDS**”) to certain buyers of credit protection. FGIC wrote financial guaranty insurance policies for the benefit of counterparties to CDS with FGIC CP (collectively, “**Counterparties**”), which policies insure FGIC CP’s obligations under such CDS. The financial obligations of FGIC and FGIC CP, with respect to such CDS, are sufficiently interconnected to warrant a grant of the relief requested herein with respect to FGIC CP; and
- i. Judicial immunity applies to the Rehabilitator, the New York Liquidation Bureau (the “**NYLB**”), and their respective employees, attorneys, representatives, and agents for any action taken by them when acting in good faith, in accordance with the orders of this Court, and/or, in the case of the Rehabilitator and the NYLB, in the performance of their duties pursuant to Article 74 of the NYIL.

NOW, on motion of Eric T. Schneiderman, Attorney General of the State of New York, it is ORDERED as follows:

- 1. The relief requested in the Rehabilitation Petition is granted;
- 2. The Superintendent, and his successors in office, is appointed rehabilitator (the “**Rehabilitator**”) of FGIC and is vested with all powers and authority expressed or implied under Article 74 of NYIL and this Order;
- 3. The Rehabilitator is authorized and directed to take possession and/or control of FGIC’s property and assets and to conduct FGIC’s business;
- 4. The Rehabilitator may deal with the property and business of FGIC in FGIC’s name or in the name of the Rehabilitator including, without



limitation, continue, commence, advance, defend, or prosecute any action, claim, lawsuit, arbitration, alternative dispute resolution proceeding, or other formal legal or administrative proceedings in any municipal, state, federal, or foreign court, administrative body, or other tribunal;

5. The Rehabilitator is directed to take such steps toward the removal of the causes and conditions that make this rehabilitation proceeding (the “**Rehabilitation Proceeding**”) necessary as the Rehabilitator may deem prudent and advisable;
6. All persons and entities, other than the Rehabilitator, are permanently enjoined and restrained, except as authorized by the Rehabilitator or his designee in writing, from: (i) transacting FGIC’s business, (ii) disposing of FGIC’s property; (iii) interfering with the Rehabilitator’s possession, control, or management of FGIC’s property or the discharge of the Rehabilitator’s duties with regard to FGIC or the Rehabilitation Proceeding; and (iv) disclosing the name, address, or contact information of FGIC’s policyholders, or any other information that is proprietary to FGIC or not in the public domain;
7. All persons and entities are permanently enjoined and restrained from wasting or permitting to be done any act or thing that might waste FGIC’s property;
8. All persons and entities are enjoined and restrained from commencing, continuing, advancing, or otherwise prosecuting any actions, claims, lawsuits, arbitrations, alternative dispute resolution proceedings, or other formal legal or administrative proceedings in any municipal, state, federal, or foreign court, administrative body, or other tribunal, against (i) the Rehabilitator, the New York State Department of Financial Services (“**NYSDFS**”), the Superintendent, the NYLB, any of their respective officers, employees, attorneys, representatives, or agents, or any directors, officers, employees, attorneys, representatives, or agents of FGIC or FGIC CP, in each case as related to FGIC, FGIC CP, the Rehabilitation Circumstances (as defined below), or the Rehabilitation Proceeding; or (ii) FGIC or FGIC CP.
9. All persons and entities are enjoined and restrained from taking any steps to transfer, foreclose, sell, assign, garnish, levy, encumber, attach, dispose of, exercise, or enforce purported rights in or against any claimed interest in any property or assets of FGIC or FGIC CP or any part thereof;
10. All directors, trustees, officers, employees, agents, or representatives, if any, of FGIC and FGIC CP are hereby enjoined and restrained from paying any claims or performing any other obligations of FGIC or FGIC CP under any policy, contract, or other instrument to which FGIC or FGIC CP is a party or by which FGIC or FGIC CP is bound (a “**FGIC**

**Policy/Contract**”) except as authorized by the Rehabilitator or his designee in writing;

11. All persons and entities are enjoined and restrained from seeking to acquire, acquiring, or exercising voting or other corporate governance rights pursuant to or under FGIC’s outstanding preferred stock;
12. All persons and entities are enjoined and restrained from withholding or continuing to withhold, subordinating, failing to pay, setting-off, or taking similar action with respect to payments (including, without limitation, recoveries or reimbursements) owed (or that would have been or would be owed but for the commencement or continuation of the Rehabilitation Proceeding or the occurrence or existence of any of the Rehabilitation Circumstances) to FGIC or FGIC CP under any FGIC Policy/Contract, or any Transaction Document (as defined below) executed in connection with the issuance of or entry into such FGIC Policy/Contract or related to such FGIC Policy/Contract or any obligations insured or covered thereby, regardless of the existence of any provisions in such FGIC Policy/Contract or Transaction Document that would or may otherwise permit such withholding, subordination, failure to pay, setting-off, or similar action; *provided, however*, that if this Court enters an order that becomes final and non-appealable holding that a particular person or entity or group of persons or entities should have been able to set-off or recoup any given payment during the pendency of the Rehabilitation Proceeding, the Rehabilitator shall refund as an administrative expense any such payment that was made to FGIC or FGIC CP during the pendency of the Rehabilitation Proceeding. As used herein, the term “**Rehabilitation Circumstances**” means the circumstances and events, whenever arising, giving rise to the Rehabilitation Proceeding or in existence from and after, or giving rise to or at any time resulting from, issuance of the 1310 Order, including (i) the financial condition of FGIC or FGIC CP, (ii) the grounds for the Rehabilitation Proceeding described in the Rehabilitation Petition, (iii) actions taken or statements made by FGIC, FGIC CP, the NYSDFS, the Superintendent, the NYLB or any other person or entity in connection with or in contemplation of the 1310 Order or the Rehabilitation Proceeding, (iv) any ratings downgrade of FGIC or any affiliate thereof, (v) any failure by FGIC or FGIC CP to pay any amount (whether due to the 1310 Order, the injunctive relief in the Order to Show Cause, this Order, or otherwise), and (vi) the issuance and existence of the 1310 Order;
13. All persons and entities (other than the Rehabilitator or as authorized in writing by the Rehabilitator or his designee) are enjoined and restrained from (i) terminating, accelerating, liquidating, closing out, collecting on, claiming against, making any demand or delivering any notice under, or otherwise exercising or enforcing rights or remedies or taking any action under or with respect to, or attempting to terminate, accelerate, liquidate,

close out, collect on, claim against, make any demand or deliver any notice under, or otherwise exercise or enforce rights or remedies or take action under or with respect to any FGIC Policy/Contract or any Transaction Document (as defined below) executed in connection with the issuance of or entry into such FGIC Policy/Contract or related to such FGIC Policy/Contract or any obligations insured or covered thereby, on the basis of the commencement or continuation of the Rehabilitation Proceeding or the occurrence or existence of any of the Rehabilitation Circumstances, regardless of the existence of any provisions in such FGIC Policy/Contract or Transaction Document (as defined below) that would or may otherwise permit or require such termination, acceleration, liquidation, closing out, collection, claim, demand, notice, exercise, enforcement, or action, and/or (ii) asserting claims as a result of any actual or attempted early termination of any FGIC Policy/Contract including without limitation Termination Payments (whether calculated on the basis of “Market Quotation”, “Loss”, “Close-out Amount,” or other methodologies) under or in relation to such FGIC Policy/Contract;

14. All persons and entities (other than the Rehabilitator or as authorized in writing by the Rehabilitator or his designee) are enjoined and restrained from: (i) exercising or taking any action to exercise any approval, consent, direction, determination, appointment, request, voting, veto, waiver, or other right or remedy that FGIC or FGIC CP has (through the right to direct or grant or withhold consent with respect to such exercise or otherwise) (or that FGIC or FGIC CP would have but for the commencement or continuation of the Rehabilitation Proceeding or the occurrence or existence of any of the Rehabilitation Circumstances) under or with respect to any policies, contracts, or other instruments or documents relating to any FGIC Policy/Contract or any obligations insured or covered thereby, including without limitation any financial guaranty policies, fee letters or premium agreements, insurance and indemnification agreements, credit default swaps or other credit derivative transaction agreements, interest rate or currency rate swap agreements, basis swap agreements, total return swap agreements, indentures, trust deeds, pooling and servicing agreements, pooling agreements, sale and servicing agreements, sale agreements, collateral management or administration agreements, servicing agreements, credit or loan agreements, residential mortgage-backed securities transaction documents, guarantee investment certificates, custodial account agreements, note purchase agreements, or other financing or transaction documents of any kind (collectively, “**Transaction Documents**” and each a “**Transaction Document**”) or under applicable law (collectively, the “**FGIC Rights**”); or (ii) failing to take, or taking any action inconsistent with, any action (or inaction) directed (whether actively or passively) to be taken pursuant to the exercise by FGIC, FGIC CP, or the Rehabilitator of any FGIC Rights; or (iii) failing to provide, or causing to be provided, to FGIC or FGIC CP any notice, request, or other communication or document that FGIC or

FGIC CP may have the right to receive (or that FGIC or FGIC CP would or may have the right to receive but for the commencement or continuation of the Rehabilitation Proceeding or the occurrence or the existence of any of the Rehabilitation Circumstances). For the avoidance of doubt, this paragraph does not enjoin or restrain any servicer (including any master servicer, sub-servicer or special servicer) from servicing underlying collateral to the extent it would be permitted to do so under the applicable Transaction Documents (without regard to the commencement or continuation of the Rehabilitation Proceeding or the occurrence or existence of any Rehabilitation Circumstances). In addition, notwithstanding anything to the contrary in this Paragraph 14, (i) if the Rehabilitator (or his designee) directs an indenture trustee or another type of corporate trustee (collectively, an “**Indenture Trustee**”) or servicer to take an action or refrain from taking an action (collectively, the “**Direction**”) that the Indenture Trustee or servicer believes it is not obligated to take or refrain from taking, the Indenture Trustee or servicer may seek a ruling from this Court (on an expedited basis if necessary) as to whether it is required to comply with the Direction, and the Indenture Trustee or servicer shall not be in contempt of Court for not complying with the Direction prior to this Court’s ruling so long as the Indenture Trustee or servicer (a) seeks a ruling no later than five (5) business days after the Rehabilitator (or his designee) gives it the Direction and (b) provides prompt notice to the Rehabilitator of its request for a ruling; *provided, however*, that nothing herein shall prohibit the Rehabilitator from seeking a ruling (on an expedited basis if necessary) with respect to the Direction at any time; and (ii) if an Indenture Trustee or servicer intends to exercise any FGIC Right, (x) the Indenture Trustee or servicer shall provide the Rehabilitator with prompt notice of its intent to exercise such FGIC Right, and (y) if the Rehabilitator believes that the Indenture Trustee or servicer is not permitted to exercise such FGIC Right, the Rehabilitator may seek a ruling from this Court as to whether to preclude such exercise (on an expedited basis if necessary) within five (5) business days after receiving notification of the intended exercise of a FGIC Right;

15. FGIC and all persons and entities having any property belonging to or relating to FGIC, as applicable, including but not limited to, business records, insurance policies, claims files (electronic or paper), software programs, bank records, or any tangible or intangible items of value, shall preserve such property and are directed, immediately upon the Rehabilitator’s request, to assign, transfer, turn over and deliver such property to the Rehabilitator or his designees;
16. Any person or entity providing claims processing services, data processing services, electronic records retention services, or other information technology services to or on behalf of FGIC shall maintain and preserve all information in its possession (“**Information**”) relating in any way to FGIC and its rights and obligations, wherever located, including but not

limited to all documents, data, electronic files and records, computer equipment (e.g., servers and printers), software programs and software licenses owned or leased by FGIC and are directed, upon the Rehabilitator's request, to promptly submit all such Information to the Rehabilitator or his designees;

17. Any bank, savings and loan association, other financial institution or any other entity or person, which has on deposit or in its possession, custody, or control any of FGIC's funds, accounts or assets, shall immediately upon the Rehabilitator's request and direction: (i) turn over custody and control of such funds, accounts, or assets to the Rehabilitator or his designees; (ii) transfer title of such funds, accounts, or assets to the Rehabilitator or his designees; (iii) change the name of such accounts to the name of the Rehabilitator; (iv) transfer funds from such bank, savings and loan association or other financial institution; or (v) take any other action necessary for the proper conduct of the Rehabilitation Proceeding;
18. Without limiting the ability of the Rehabilitator to reject, modify, or renegotiate any contract, lease, or arrangement concerning FGIC, all persons and entities that provide goods or services to FGIC shall continue to provide such goods or services to the Rehabilitator pursuant to the terms of any contract, lease, or other arrangement with FGIC, regardless of the existence of any provisions in any contract or lease that would otherwise excuse performance on the basis of the commencement or continuation of the Rehabilitation Proceeding or the occurrence or existence of any of the Rehabilitation Circumstances;
19. All persons and entities are enjoined and restrained from seeking to impose liability upon the Rehabilitator, the NYLB, or any of their respective employees, attorneys, representatives, or agents relating to or arising out of the Rehabilitation Proceeding or the Rehabilitation Circumstances;
20. The injunctive relief granted by this Order shall issue without the furnishing of an undertaking by the Superintendent. CPLR § 2512(a);
21. Notwithstanding anything to the contrary in this Order, nothing herein prevents any person or entity from asserting a claim in the Rehabilitation Proceeding; *provided, however*, that no person or entity may trigger or submit claims for Termination Payments (or take any action in furtherance thereof) or otherwise take any action prohibited by the provisions of this Order. Pending further Court order, policyholders and other claimants should submit their notices of claim or similar demands pursuant to the deadlines, procedures, and service requirements specified in their policies or contracts. Without extending the deadlines for filing claims that may be set forth in any FGIC Policy/Contract, the deadline set forth in Section 7432(b) of the NYIL for all persons and entities having claims against

FGIC to file or present their claims to the Rehabilitator is deferred until further order of this Court;

22. Any person seeking modification of, or relief from, the injunctive relief set forth in this Order (an “**Objecting Party**”) shall submit a written request to the Rehabilitator setting forth good cause for such modification or relief. If the Objecting Party and the Rehabilitator reach a settlement regarding such modification or relief, the Rehabilitator shall submit a request to this Court seeking approval of such settlement. If the Objecting Party and the Rehabilitator fail to reach a settlement within 30 days of the Rehabilitator’s receipt of such request, or such longer time as both the Rehabilitator and the Objecting Party agree, the Objecting Party may seek relief with this Court;
23. The failure by any person or entity to have objected to the injunctive relief set forth in this Order by June 22, 2012, any delay in seeking modification of, or relief from, the injunctive relief set forth in this Order through the procedures set forth in Paragraph 22 of this Order, and any delay in seeking a ruling from this Court pursuant to Paragraph 14 of this Order shall not waive, bar, or otherwise impair the right of such person or entity to challenge the validity of or seek to set aside all or any portion of the injunctive relief set forth in this Order or be deemed a waiver of any right to take any action that has been stayed by this Order if the injunctive relief applicable to such action is modified or lifted. Any person or entity that intends to challenge or seek to set aside all or any portion of the injunctive relief set forth in this Order shall follow the procedures set forth in Paragraph 22 hereof. Nothing in this Order shall be deemed to constitute a determination of any person’s or entity’s rights under any Transaction Documents or applicable law so long as the procedures in Paragraphs 14 and 22 are complied with;
24. The Rehabilitator may at any time make further application to this Court for such further and different relief as he sees fit;
25. A copy of this Order shall be served forthwith by certified and regular mail upon: John S. Dubel, Chief Executive Officer of FGIC, at the statutory home office of FGIC, located at 125 Park Avenue, New York, New York 10017, and Stroock & Stroock & Lavan LLP attn. William D. Latza, counsel for FGIC, located at 180 Maiden Lane, New York, NY 10038;
26. The Rehabilitator shall provide notice of this Order to all creditors and policyholders by (i) mailing such notice to all known creditors and policyholders by first class mail; (ii) publishing such notice in the Wall Street Journal and The Bond Buyer; and (iii) posting such notice on the internet website maintained by the NYLB for the Rehabilitation Proceeding at <http://www.fgicrehabilitation.com> (which shall be

accessible from <http://www.nylb.org> and <http://www.fgic.com>) within 30 days after the entry of this Order;

- 27. This Court shall have exclusive jurisdiction to interpret, implement, and enforce the provisions of this Order and to hear any and all matters relating to the Rehabilitation Proceeding; and
- 28. All further papers with respect to FGIC in this proceeding shall bear the caption:

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

----- X  
: Index No. 401265/2012  
In the Matter of the Rehabilitation of :  
FINANCIAL GUARANTY INSURANCE :  
COMPANY. :  
: :  
----- X

E N T E R

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J.S.C.

Exhibit 2

Blackline of the Revised Proposed Rehabilitation Order



AT IAS PART 36 OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, AT THE COURTHOUSE, 60 CENTRE STREET, IN THE COUNTY, CITY AND STATE OF NEW YORK, ON THE 28<sup>TH</sup> DAY OF JUNE, 2012

PRESENT:

HON. DORIS LING-COHAN, J.S.C.

-----	X	
	:	
In the Matter of	:	
	:	
the Application of	:	Index No. <u>401265</u> /2012
	:	
Benjamin M. Lawskey, Superintendent of Financial	:	<b><u>ORDER OF REHABILITATION</u></b>
Services of the State of New York, for an order to	:	
take possession of the property of and rehabilitate	:	
	:	
FINANCIAL GUARANTY INSURANCE	:	
COMPANY.	:	
-----	X	

Petitioner, Benjamin M. Lawskey, Superintendent of Financial Services of the State of New York (the “**Superintendent**”), having moved this Court for an order placing Financial Guaranty Insurance Company (“**FGIC**”) into rehabilitation, and upon reading and filing the Order to Show Cause dated June 11, 2012, the verified petition of the Superintendent, duly verified the 11th day of June, 2012 (the “**Rehabilitation Petition**”),<sup>1</sup> the exhibits attached to the Rehabilitation Petition, and the Memorandum of Law in Support of the Rehabilitation Petition, and the Court having held a full hearing to consider the requested relief, this Court finds that:

- a. FGIC is a New York State stock insurance company that issued financial guaranty insurance;
- b. FGIC’s statutory home office is located at 125 Park Avenue, New York, New York 10017;

<sup>1</sup> Capitalized terms not otherwise defined shall have the meanings ascribed to them in the Rehabilitation Petition.

- c. FGIC is subject to the New York Insurance Law (“**NYIL**”) and, in particular, to Article 74 thereof;
- d. FGIC has consented to entry of an order of rehabilitation pursuant to Article 74 of the NYIL by a resolution of FGIC’s board of directors;
- e. FGIC is insolvent within the meaning of Section 1309 of the NYIL;
- f. FGIC has been unable to comply, within the time designated by the Superintendent, with an order of the Superintendent pursuant to Section 1310 of the NYIL, to make good an impairment of its capital or minimum surplus to policyholders;
- g. It is in the best interest of FGIC’s policyholders, creditors, and the general public that the Superintendent be directed to take possession of FGIC’s property and to rehabilitate its business and affairs;
- h. FGIC is the sole member of FGIC Credit Products, LLC (“**FGIC CP**”), a Delaware limited liability company that issued credit default swaps (“**CDS**”) to certain buyers of credit protection. FGIC wrote financial guaranty insurance policies for the benefit of counterparties to CDS with FGIC CP (collectively, “**Counterparties**”), which policies insure FGIC CP’s obligations under such CDS. The financial obligations of FGIC and FGIC CP, with respect to such CDS, are sufficiently interconnected to warrant a grant of the relief requested herein with respect to FGIC CP; and
- i. Judicial immunity applies to the Rehabilitator, the [New York Liquidation Bureau \(the “NYLB”\)](#), and their respective employees, attorneys, representatives, and agents for any action taken by them when acting in good faith, in accordance with the orders of this Court, and/or, in the case of the Rehabilitator and the NYLB, in the performance of their duties pursuant to Article 74 of the NYIL.

NOW, on motion of Eric T. Schneiderman, Attorney General of the State of New York, it is ORDERED as follows:

1. The relief requested in the Rehabilitation Petition is granted;
2. The Superintendent, and his successors in office, is appointed rehabilitator (the “**Rehabilitator**”) of FGIC and is vested with all powers and authority expressed or implied under Article 74 of NYIL and this Order;
3. The Rehabilitator is authorized and directed to take possession and/or control of FGIC’s property and assets and to conduct FGIC’s business;
4. The Rehabilitator may deal with the property and business of FGIC in FGIC’s name or in the name of the Rehabilitator including, without

limitation, continue, commence, advance, defend, or prosecute any action, claim, lawsuit, arbitration, alternative dispute resolution proceeding, or other formal legal or administrative proceedings in any municipal, state, federal, or foreign court, administrative body, or other tribunal;

5. The Rehabilitator is directed to take such steps toward the removal of the causes and conditions that make this rehabilitation proceeding (the “**Rehabilitation Proceeding**”) necessary as the Rehabilitator may deem prudent and advisable;
6. All persons and entities, other than the Rehabilitator, are permanently enjoined and restrained, except as authorized by the Rehabilitator or his designee in writing, from: (i) transacting FGIC’s business, (ii) disposing of FGIC’s property; (iii) interfering with the Rehabilitator’s possession, control, or management of FGIC’s property or the discharge of the Rehabilitator’s duties with regard to FGIC or the Rehabilitation Proceeding; and (iv) disclosing the name, address, or contact information of FGIC’s policyholders, or any other information that is proprietary to FGIC or not in the public domain;
7. All persons and entities are permanently enjoined and restrained from wasting or permitting to be done any act or thing that might waste FGIC’s property;
8. All persons and entities are enjoined and restrained from commencing, continuing, advancing, or otherwise prosecuting any actions, claims, lawsuits, arbitrations, alternative dispute resolution proceedings, or other formal legal or administrative proceedings in any municipal, state, federal, or foreign court, administrative body, or other tribunal, against (i) the Rehabilitator, the New York State Department of Financial Services (“**NYSDFS**”), the Superintendent, the ~~New York Liquidation Bureau (the “NYLB”)~~, any of their respective officers, employees, attorneys, representatives, or agents, or any directors, officers, employees, attorneys, representatives, or agents of FGIC or FGIC CP, in each case as related to FGIC, FGIC CP, the Rehabilitation Circumstances (as defined below), or the Rehabilitation Proceeding; or (ii) FGIC or FGIC CP.
9. All persons and entities are enjoined and restrained from taking any steps to transfer, foreclose, sell, assign, garnish, levy, encumber, attach, dispose of, exercise, or enforce purported rights in or against any claimed interest in any property or assets of FGIC or FGIC CP or any part thereof;
10. All directors, trustees, officers, employees, agents, or representatives, if any, of FGIC and FGIC CP are hereby enjoined and restrained from paying any claims or performing any other obligations of FGIC or FGIC CP under any policy, contract, or other instrument to which FGIC or FGIC CP is a party or by which FGIC or FGIC CP is bound (a “**FGIC**

**Policy/Contract**”) except as authorized by the Rehabilitator or his designee in writing;

11. All persons and entities are enjoined and restrained from seeking to acquire, acquiring, or exercising voting or other corporate governance rights pursuant to or under FGIC’s outstanding preferred stock;
12. All persons and entities are enjoined and restrained from withholding or continuing to withhold, subordinating, failing to pay, setting-off, or taking similar action with respect to payments (including, without limitation, recoveries or reimbursements) owed (or that would have been or would be owed but for the commencement or continuation of the Rehabilitation Proceeding or the occurrence or existence of any of the Rehabilitation Circumstances) to FGIC or FGIC CP under any FGIC Policy/Contract, or any Transaction Document (as defined below) executed in connection with the issuance of or entry into such FGIC Policy/Contract or related to such FGIC Policy/Contract or any obligations insured or covered thereby, regardless of the existence of any provisions in such FGIC Policy/Contract or Transaction Document that would or may otherwise permit such withholding, subordination, failure to pay, setting-off, or similar action; provided, however, that if this Court enters an order that becomes final and non-appealable holding that a particular person or entity or group of persons or entities should have been able to set-off or recoup any given payment during the pendency of the Rehabilitation Proceeding, the Rehabilitator shall refund as an administrative expense any such payment that was made to FGIC or FGIC CP during the pendency of the Rehabilitation Proceeding. As used herein, the term “**Rehabilitation Circumstances**” means the circumstances and events, whenever arising, giving rise to the Rehabilitation Proceeding or in existence from and after, or giving rise to or at any time resulting from, issuance of the 1310 Order, including (i) the financial condition of FGIC or FGIC CP, (ii) the grounds for the Rehabilitation Proceeding described in the Rehabilitation Petition, (iii) actions taken or statements made by FGIC, FGIC CP, the NYSDFS, the Superintendent, the NYLB or any other person or entity in connection with or in contemplation of the 1310 Order or the Rehabilitation Proceeding, (iv) any ratings downgrade of FGIC or any affiliate thereof, (v) any failure by FGIC or FGIC CP to pay any amount (whether due to the 1310 Order, the injunctive relief in the Order to Show Cause, this Order, or otherwise), and (vi) the issuance and existence of the 1310 Order;
13. All persons and entities (other than the Rehabilitator or as authorized in writing by the Rehabilitator or his designee) are enjoined and restrained from (i) terminating, accelerating, liquidating, closing out, collecting on, claiming against, making any demand or delivering any notice under, or otherwise exercising or enforcing rights or remedies or taking any action under or with respect to, or attempting to terminate, accelerate, liquidate,

close out, collect on, claim against, make any demand or deliver any notice under, or otherwise exercise or enforce rights or remedies or take action under or with respect to any FGIC Policy/Contract or any Transaction Document (as defined below) executed in connection with the issuance of or entry into such FGIC Policy/Contract or related to such FGIC Policy/Contract or any obligations insured or covered thereby, on the basis of the commencement or continuation of the Rehabilitation Proceeding or the occurrence or existence of any of the Rehabilitation Circumstances, regardless of the existence of any provisions in such FGIC Policy/Contract or Transaction Document (as defined below) that would or may otherwise permit or require such termination, acceleration, liquidation, closing out, collection, claim, demand, notice, exercise, enforcement, or action, and/or (ii) asserting claims as a result of any actual or attempted early termination of any FGIC Policy/Contract including without limitation Termination Payments (whether calculated on the basis of “Market Quotation”, “Loss”, “Close-out Amount,” or other methodologies) under or in relation to such FGIC Policy/Contract;

14. All persons and entities (other than the Rehabilitator or as authorized in writing by the Rehabilitator or his designee) are enjoined and restrained from: (i) exercising or taking any action to exercise any approval, consent, direction, determination, appointment, request, voting, veto, waiver, or other right or remedy that FGIC or FGIC CP ~~may have directly or indirectly~~ has (through the right to direct or grant or withhold consent with respect to such exercise or otherwise) (or that FGIC or FGIC CP would ~~or may have directly or indirectly~~ but for the commencement or continuation of the Rehabilitation Proceeding or the occurrence or existence of any of the Rehabilitation Circumstances) ~~(the “FGIC Rights”)~~ under or with respect to any policies, contracts, or other instruments or documents relating to any FGIC Policy/Contract or any obligations insured or covered thereby, including without limitation any financial guaranty policies, fee letters or premium agreements, insurance and indemnification agreements, credit default swaps or other credit derivative transaction agreements, interest rate or currency rate swap agreements, basis swap agreements, total return swap agreements, indentures, trust deeds, pooling and servicing agreements, pooling agreements, sale and servicing agreements, sale agreements, collateral management or administration agreements, servicing agreements, credit or loan agreements, residential mortgage-backed securities transaction documents, guarantee investment certificates, custodial account agreements, note purchase agreements, or other financing or transaction documents of any kind (collectively, “**Transaction Documents**” and each a “**Transaction Document**”) or under applicable law (collectively, the “FGIC Rights”); or (ii) failing to take, or taking any action inconsistent with, any action (or inaction) directed (whether actively or passively) to be taken ~~under any Transaction Document~~ pursuant to the exercise by FGIC, FGIC CP, or the Rehabilitator of any FGIC Rights; or (iii) failing to

provide, or causing to be provided, to FGIC or FGIC CP any notice, request, or other communication or document that FGIC or FGIC CP may have the right to receive (or that FGIC or FGIC CP would or may have the right to receive but for the commencement or continuation of the Rehabilitation Proceeding or the occurrence or the existence of any of the Rehabilitation Circumstances).- For the avoidance of doubt, this paragraph does not enjoin or restrain any servicer (including any master servicer, sub-servicer or special servicer) from servicing underlying collateral to the extent it would be permitted to do so under the applicable Transaction Documents (without regard to the commencement or continuation of the Rehabilitation Proceeding or the occurrence or existence of any Rehabilitation Circumstances); In addition, notwithstanding anything to the contrary in this Paragraph 14, (i) if the Rehabilitator (or his designee) directs an indenture trustee or another type of corporate trustee (collectively, an “**Indenture Trustee**”) or servicer to take an action or refrain from taking an action (collectively, the “**Direction**”) that the Indenture Trustee or servicer believes it is not obligated to take or refrain from taking, the Indenture Trustee or servicer may seek a ruling from this Court (on an expedited basis if necessary) as to whether it is required to comply with the Direction, and the Indenture Trustee or servicer shall not be in contempt of Court for not complying with the Direction prior to this Court’s ruling so long as the Indenture Trustee or servicer (a) seeks a ruling no later than five (5) business days after the Rehabilitator (or his designee) gives it the Direction and (b) provides prompt notice to the Rehabilitator of its request for a ruling; *provided, however*, that nothing herein shall prohibit the Rehabilitator from seeking a ruling (on an expedited basis if necessary) with respect to the Direction at any time; and (ii) if an Indenture Trustee or servicer intends to exercise any FGIC Right, (x) the Indenture Trustee or servicer shall provide the Rehabilitator with prompt notice of its intent to exercise such FGIC Right, and (y) if the Rehabilitator believes that the Indenture Trustee or servicer is not permitted to exercise such FGIC Right, the Rehabilitator may seek a ruling from this Court as to whether to preclude such exercise (on an expedited basis if necessary) within five (5) business days after receiving notification of the intended exercise of a FGIC Right;

15. FGIC and all persons and entities having any property belonging to or relating to FGIC, as applicable, including but not limited to, business records, insurance policies, claims files (electronic or paper), software programs, bank records, or any tangible or intangible items of value, shall preserve such property and are directed, immediately upon the Rehabilitator’s request, to assign, transfer, turn over and deliver such property to the Rehabilitator or his designees;
16. Any person or entity providing claims processing services, data processing services, electronic records retention services, or other information technology services to or on behalf of FGIC shall maintain and preserve

all information in its possession (“**Information**”) relating in any way to FGIC and its rights and obligations, wherever located, including but not limited to all documents, data, electronic files and records, computer equipment (e.g., servers and printers), software programs and software licenses owned or leased by FGIC and are directed, upon the Rehabilitator’s request, to promptly submit all such Information to the Rehabilitator or his designees;

17. Any bank, savings and loan association, other financial institution or any other entity or person, which has on deposit or in its possession, custody, or control any of FGIC’s funds, accounts or assets, shall immediately upon the Rehabilitator’s request and direction: (i) turn over custody and control of such funds, accounts, or assets to the Rehabilitator or his designees; (ii) transfer title of such funds, accounts, or assets to the Rehabilitator or his designees; (iii) change the name of such accounts to the name of the Rehabilitator; (iv) transfer funds from such bank, savings and loan association or other financial institution; or (v) take any other action necessary for the proper conduct of the Rehabilitation Proceeding;
18. Without limiting the ability of the Rehabilitator to reject, modify, or renegotiate any contract, lease, or arrangement concerning FGIC, all persons and entities that provide goods or services to FGIC shall continue to provide such goods or services to the Rehabilitator pursuant to the terms of any contract, lease, or other arrangement with FGIC, regardless of the existence of any provisions in any contract or lease that would otherwise excuse performance on the basis of the commencement or continuation of the Rehabilitation Proceeding or the occurrence or existence of any of the Rehabilitation Circumstances;
19. All persons and entities are enjoined and restrained from seeking to impose liability upon the Rehabilitator, the NYLB, or any of their respective employees, attorneys, representatives, or agents relating to or arising out of the Rehabilitation Proceeding or the Rehabilitation Circumstances;
20. The injunctive relief granted by this Order shall issue without the furnishing of an undertaking by the Superintendent. CPLR § 2512(a);
21. ~~Nothing~~Notwithstanding anything to the contrary in this Order, nothing herein prevents any person or entity from asserting a claim in ~~this~~the Rehabilitation Proceeding~~;~~; *provided, however*, that no person or entity may trigger or submit claims for Termination Payments (or take any action in furtherance thereof) or otherwise take any action prohibited by the provisions of this Order. Pending further Court order, policyholders and other claimants should submit their notices of claim or similar demands pursuant to the deadlines, procedures~~;~~, and service requirements specified in their policies or contracts. Without extending the

~~deadline~~deadlines for filing ~~a claim~~claims that may be set forth in any FGIC Policy/Contract, the deadline set forth in Section 7432(b) of the NYIL for all persons and entities having claims against FGIC to file or present their claims to the Rehabilitator is deferred until further order of this Court;

22. Any person seeking modification of, or relief from, the injunctive relief set forth in this Order (an “**Objecting Party**”) shall submit a written request to the Rehabilitator setting forth good cause for such modification or relief. If the Objecting Party and the Rehabilitator reach a settlement regarding such modification or relief, the Rehabilitator shall submit a request to ~~the~~this Court seeking approval of such settlement. If the Objecting Party and the Rehabilitator fail to reach a settlement within 30 days of the Rehabilitator’s receipt of such request, or such longer time as both the Rehabilitator and the Objecting Party agree, the Objecting Party may seek relief with this Court;
23. The failure by any person or entity to have objected to the injunctive relief set forth in this Order by June 22, 2012, any delay in seeking modification of, or relief from, the injunctive relief set forth in this Order through the procedures set forth in Paragraph 22 of this Order, and any delay in seeking a ruling from this Court pursuant to Paragraph 14 of this Order shall not waive, bar, or otherwise impair the right of such person or entity to challenge the validity of or seek to set aside all or any portion of the injunctive relief set forth in this Order or be deemed a waiver of any right to take any action that has been stayed by this Order if the injunctive relief applicable to such action is modified or lifted. Any person or entity that intends to challenge or seek to set aside all or any portion of the injunctive relief set forth in this Order shall follow the procedures set forth in Paragraph 22 hereof. Nothing in this Order shall be deemed to constitute a determination of any person’s or entity’s rights under any Transaction Documents or applicable law so long as the procedures in Paragraphs 14 and 22 are complied with;
24. ~~23.~~The Rehabilitator may at any time make further application to this Court for such further and different relief as he sees fit;
25. ~~24.~~A copy of this Order shall be served forthwith by certified and regular mail upon: John S. Dubel, Chief Executive Officer of FGIC, at the statutory home office of FGIC, located at 125 Park Avenue, New York, New York 10017, and Stroock & Stroock & Lavan LLP attn. William D. Latza, counsel for FGIC, located at 180 Maiden Lane, New York, NY 10038;
26. ~~25.~~The Rehabilitator shall provide notice of this Order to all creditors and policyholders by (i) mailing such notice to all known creditors and policyholders by first class mail; (ii) publishing such notice in the Wall



Street Journal and The Bond Buyer; and (iii) posting such notice on the internet website maintained by the NYLB for ~~this~~the Rehabilitation Proceeding at <http://www.fgicrehabilitation.com> (which shall be accessible from <http://www.nylb.org> and <http://www.fgic.com>) within 30 days after the entry of this Order;

27. ~~26.~~ This Court shall have exclusive jurisdiction to interpret, implement, and enforce the provisions of this Order and to hear any and all matters relating to the Rehabilitation Proceeding; and

28. ~~27.~~ All further papers with respect to FGIC in this proceeding shall bear the caption:

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

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	:	Index No. <del>401265</del> <u>401265</u> /2012
In the Matter of the Rehabilitation of	:	
FINANCIAL GUARANTY INSURANCE	:	
COMPANY.	:	
	:	
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E N T E R

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J.S.C.