

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

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In the matter of the application of	: Index No. 652382/2014
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U.S. BANK NATIONAL ASSOCIATION, THE	: Part 60
BANK OF NEW YORK MELLON, THE BANK OF	:
NEW YORK MELLON TRUST COMPANY, N.A.,	: Motion Sequence No. 7
WILMINGTON TRUST, NATIONAL	:
ASSOCIATION, LAW DEBENTURE TRUST	: Hon. Marcy S. Friedman
COMPANY OF NEW YORK, WELLS FARGO	:
BANK, NATIONAL ASSOCIATION, HSBC BANK	:
USA, N.A., AND DEUTSCHE BANK NATIONAL	:
TRUST COMPANY (as trustees under various Pooling	:
and Servicing Agreements and indenture trustees under	:
various Indentures),	:
	:
Petitioners,	:
	:
for an order, pursuant to CPLR § 7701, seeking judicial	:
instruction.	:
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**AMBAC's MEMORANDUM OF LAW  
IN SUPPORT OF ITS MOTION TO INTERVENE**

Ambac Assurance Corporation and The Segregated Account of Ambac Assurance Corporation (collectively, "Ambac") respectfully submits this Memorandum of Law, together with the Affirmation of Michael C. Ledley dated November 3, 2014, in support of their Motion to Intervene in this proceeding.

**PRELIMINARY STATEMENT**

U.S. Bank National Association ("U.S. Bank"), The Bank of New York Mellon, The Bank of New York Mellon Trust Company, N.A., Wilmington Trust, National Association, Law Debenture Trust Company of New York, Wells Fargo Bank, National Association, HSBC Bank U.S.A., N.A., and Deutsche Bank National Trust Company (collectively, the "Petitioners") filed this Article 77 proceeding to seek judicial approval of a proposed settlement of the claims of

investors in more than 300 trusts (the “Trusts”) for which one of the Trustees serves as trustee (the “Proposed Settlement”) against JPMorgan Chase & Co., and its predecessors and affiliates (collectively, “JPMorgan”). Ambac provides financial guaranty insurance on certificates issued by eight of the Trusts and is a third-party beneficiary of the agreements governing the Trusts. As a result of breaches of representations and warranties and other wrongful conduct by JPMorgan, the Trusts have suffered massive losses suffered by those Trusts resulting in over \$500 million in claims that Ambac has paid or is obligated to pay under its policies.

Ambac is currently engaged in litigation with JPMorgan to recover the losses it suffered as a result of misconduct, including breaches of representations and warranties, by JPMorgan-predecessors Bear Stearns and EMC. On October 16, 2014, however, the First Department affirmed a decision by Judge Ramos to dismiss Ambac’s breach of representation and warranty claims against JPMorgan on the basis of lack of standing because Ambac’s contract rights are purportedly held by the Trustees. Although Ambac believes that ruling is erroneous, Ambac’s sole contractual remedy against JPMorgan is, at least for now, in the hands of the Trustees. Ambac therefore has a direct interest in the certificates that it insures and the claims the Trustees propose to release in connection with the Proposed Settlement.

Ambac therefore seeks an order pursuant to CPLR 401, 1012, and 1013, and Section 18 of this Court’s Order to Show Cause, dated August 15, 2014, to intervene as a respondent in this proceeding to appear and object to the proposed settlement at the December 16, 2014 hearing scheduled by the Court. Ambac should be permitted to intervene in this proceeding because it has an interest in the claims being settled, its interests may not be adequately represented, and it satisfies the requirements for discretionary intervention under CPLR 1013.

## ARGUMENT

“As a general matter, intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings.” *Bernstein v. Feiner*, 842 N.Y.S. 2d 556 (App. Div. 2007). CPLR 1012(a) permits a party to intervene in an action as of right if “the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment” or if “the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound by the judgment.” CPLR 1013 permits a party to intervene with the permission of the Court if “the person’s claim or defense and the main action have a common question of law or fact . . . [and] the intervention will [not] unduly delay the determination of the action or prejudice the substantial rights of any party.”<sup>1</sup> Although any one of these conditions would be sufficient to permit Ambac to intervene, all three are satisfied in this proceeding.

### **I. THIS PROCEEDING INVOLVES A CLAIM FOR DAMAGES FOR INJURY TO PROPERTY, AND AMBAC WILL BE AFFECTED BY THE JUDGMENT**

Ambac, as financial guaranty insurer for certain certificates issued by eight of the Trusts, has an interest in the certificates that it insures and with respect to which it had paid or will pay claims. If approved, the Proposed Settlement would release substantially all contractual claims of the Trusts, thereby materially affecting investors' and Ambac's ability to recoup losses from defective loans sold to the Trusts by JPMorgan. Moreover, the Court's August 15 Order to Show Cause contemplates that “potentially interested persons” defined in paragraph 4 of the Affirmation of Robert C. Micheletto dated August 4, 2014, to include financial guaranty insurers like Ambac, may have an interest in these proceedings and provides in Section 18 that requests

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<sup>1</sup> Because this is a “special proceeding” under Article 77, all petitions to intervene, including as of right, require the approval of the Court. CPLR 401.

to intervene in this proceeding may be made by Order to Show Cause. Ambac is therefore a party that is permitted to intervene as of right in this proceeding under CPLR 1012.

## **II. AMBAC'S INTERESTS WILL NOT BE ADEQUATELY REPRESENTED**

CPLR 1012 also permits intervention as of right where “the representation of the person’s interest by the parties is or may be inadequate.” To intervene as an adverse party, Ambac need not show that the representation of its interests is necessarily inadequate; it is sufficient for Ambac to show merely that Petitioners *may* not adequately represent Ambac’s interests. *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986).<sup>2</sup> Courts also have held that “[t]ypically, persons seeking intervention need only carry a ‘minimal’ burden of showing that their interests are inadequately represented by the existing parties.” *U.S. v. Union Electric Company*, 64 F.3d 1152, 1168 (8th Cir. 1995). Ambac’s interests here are similar, but not identical to the interests of other parties that are affected by the settlement. This is precisely the circumstance that CPLR 1012 was designed to address by permitting parties like Ambac to intervene as of right to protect its own interests.

## **III. AMBAC SATISFIES THE REQUIREMENTS FOR DISCRETIONARY INTERVENTION UNDER CPLR 1013**

The Court has discretion to permit a party to intervene when “the person’s claim or defense and the main action have a common question of law or fact.” CPLR 1013. In this case, it is particularly appropriate for the Court to exercise its discretion to permit intervention, because “in the absence of the intervenors, there is, as a practical matter, no real adversary proceeding before the court.” *In re The Petroleum Research Fund*, 3 N.Y.S.2d 693 (App. Div. 1956). Under Federal Rule of Civil Procedure 24(b), on which CPLR 1013 is patterned, “intervention is appropriate where the intervenor seeks virtually the same relief as the named

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<sup>2</sup> CPLR 1012 is modeled after Rule 24 of the Federal Rules of Civil Procedure. Judicial opinions that interpret Rule 24 are thus persuasive authority for this Court.

plaintiff and . . . is encouraged if the proposed intervenors' claims will add to the Court's understanding of the facts." *Rodriguez v. Debuono*, No. 97 Civ. 0700, 1998 WL 542323, at \*\*2-3 (S.D.N.Y. Aug. 24, 1998); *see also Commack Self-Service Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 106 (E.D.N.Y. 1996) (intervenors "will bring a different perspective to the case and will contribute relevant factual variations that may assist the court in addressing the constitutional issue raised").

Finally, permitting Ambac to intervene in this proceeding will not "unduly delay the determination of the action or prejudice the substantial rights of any party." CPLR 1013. Ambac filed the motion to intervene in a timely manner, within the deadline for parties to file objections in this Court.

#### CONCLUSION

For all of these reasons, Ambac respectfully requests that the Court grant its application and amend the caption to add Ambac as an intervenor-respondent in this Article 77 proceeding.

Dated: New York, New York  
November 3, 2014

WOLLMUTH MAHER & DEUTSCH LLP

By: \_\_\_\_\_

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