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

In the Matter of	:	Index No. 401265/2012
	:	
the Rehabilitation of	:	I.A.S. Part 36
	:	(Ling-Cohan, J.)
FINANCIAL GUARANTY INSURANCE COMPANY	:	Re: Motion Sequence No. 16
	:	
	:	**OBJECTION**

OBJECTION OF FEDERAL HOME LOAN MORTGAGE CORPORATION TO THE COMMUTATION OF CERTAIN FGIC POLICIES AND CERTAIN FINDINGS OF FACT SOUGHT BY REHABILITATOR OF FINANCIAL GUARANTY INSURANCE COMPANY SET FORTH IN AFFIRMATION DATED MAY 29, 2013

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Federal Home Loan Mortgage Corporation, a government sponsored enterprise in conservatorship ("Freddie Mac"),[1] by and through its undersigned counsel, hereby files this objection (the "Objection") to the relief sought in this rehabilitation proceeding (the "Rehabilitation Proceeding") by Benjamin M. Lawsky, Superintendent of Financial Services of the State of New York, as the court-appointed rehabilitator (the "Rehabilitator") of Financial Guaranty Insurance Company ("FGIC"), as set forth in the Affirmation of Gary T. Holtzer dated May 29, 2013 [Motion Sequence No. 3929] (the "Holtzer Affirmation") to commute certain FGIC-issued policies and for certain proposed findings of fact—all of which are contained in a settlement agreement by and among the Rehabilitator, FGIC, the ResCap Debtors (as defined below), and certain other parties (the "Settlement Agreement"). In support hereof, Freddie Mac respectfully states as follows:

PRELIMINARY STATEMENT

1. The relief requested in the Holtzer Affirmation is the result of an improper, clandestine attempt to modify FGIC's plan of rehabilitation that this Court already approved on June 11, 2013 (the "Rehabilitation Plan") and to turn that court-approved Rehabilitation Plan on its head. The Rehabilitation Plan and all disclosure made by the Rehabilitator and FGIC concerning the Rehabilitation Plan made clear that similarly situated policyholders were to be treated equally whether they filed a claim a year from now or ten years from now. By modifying the Rehabilitation Plan to terminate and/or commute at a substantial discount (the "FGIC Commutation") the FGIC-issued insurance policies (the "Policies") insuring securities originated

[1] On September 6, 2008, the Director of the Federal Housing Finance Agency (the "FHFA," or, the "Conservator") placed Freddie Mac into conservatorship pursuant to express authority granted under the Housing and Economic Recovery Act of 2008 to preserve and conserve Freddie Mac's assets and property. As Conservator, FHFA immediately succeeded to "all rights, titles, powers and privileges" of Freddie Mac. *See* 12 U.S.C. § 4617(b)(2)(A)(i). This Objection does not constitute submission to this Court's jurisdiction by the FHFA.

by affiliates of Residential Capital, LLC ("ResCap"),[2] the Rehabilitator punishes the FGIC-wrapped ResCap security holders (the "FGIC ResCap Security Holders") without cause. In fact, the Rehabilitation Plan now provides a far less favorable recovery to the ResCap Security Holders than to the other beneficiaries of FGIC-issued policies with the same priority. This is far from fair and equitable treatment, which the Rehabilitator himself set as the benchmark against which the propriety of the plan is to be determined. The Rehabilitator's own disclosures show that holders of FGIC-insured ResCap residential mortgage-backed securities ("RMBS"), such as Freddie Mac, would be materially worse off under the FGIC Commutation than they would be if the Rehabilitation Plan were implemented without it. This Court should not countenance the Rehabilitator's last-minute, arbitrary and capricious attempt to favor one class of beneficiaries over others with the same priority of payment.

2. Specifically, in connection with the Rehabilitation Plan, all of the information available to date suggests that policyholders generally will receive a recovery estimated at a present value of 27 to 30 cents on the dollar (without factoring in litigation recoveries).[3] But as a result of the FGIC Commutation, the Rehabilitator now proposes a recovery of only 21 cents on the dollar.[4] The purported 21-cent recovery assumes that the liabilities for the for the trusts holding the RMBS (the "FGIC-Insured Trusts") will not exceed $1.2 billion. To date, neither

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[2] ResCap and various of its affiliates are operating as debtors and debtors-in-possession (in such capacity, the "ResCap Debtors") in their bankruptcy cases currently pending before Judge Martin Glenn in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), Main Case No. 12-12020 (MG) (the "ResCap Bankruptcy Cases").

[3] *Affidavit of Michael W. Miller in Further Support of Approval of First Amended Plan of Rehabilitation* (the "Miller Affidavit") ¶ 28, Ex. 1 p. 6.

[4] Holtzer Affirmation ¶¶ 5, 21. The Holtzer Affirmation estimates that there are $789 million in claims currently pending against FGIC, with additional claims in excess of $00 million that will arise under the Policies in the future, totaling approximately $1.2 billion in claims. Dividing this into the $253.3 million contemplated to be paid under the Settlement Agreement would provide for a recovery of approximately 21 cents on the dollar. *Id.* Freddie Mac continues to evaluate these numbers and reserves all its rights to supplement or dispute them in the future.

FGIC nor the Rehabilitator has made adequate disclosures on the origin and viability of such estimates.[5]

3. There is also no evidentiary record before this Court to support the relief sought in the Holtzer Affirmation. The Rehabilitator has not presented any credible financial or other analysis to the Court—or to the FGIC ResCap Security Holders, as beneficiaries of the Policies—to establish that a settlement in contravention of the court-approved Rehabilitation Plan is fair and equitable. Rather, the Rehabilitator negotiated the FGIC Commutation in secret with the Bank of New York, one of the trustees of the FGIC-Insured Trusts (the "FGIC Trustee"), ResCap, and other parties (but not Freddie Mac), agreeing to the proposed terms without providing any notice to the FGIC ResCap Security Holders or this Court. Further, the FGIC Trustee did not obtain the requisite consent of the FGIC ResCap Security Holders to enter into the FGIC Commutation. Instead, the FGIC Trustee and FGIC—without any right under the Rehabilitation Plan to do so—demand that this Court make extra judicial findings that these last-minute plan modifications have been made in good faith and are in the best interest of all policyholders (and that the FGIC Trustee has not acted negligently). There is absolutely no record to support such a finding where, as here, the FGIC ResCap Security Holders have been frozen out. Furthermore, while explicitly inviting the FGIC ResCap Security Holders to appear and providing an opportunity to be heard in the Holtzer Affirmation, on July 9, 2103, the Rehabilitator has again changed his mind and now claims that Freddie Mac has no right to appear and be heard in this Rehabilitation Proceeding.

[5] Freddie Mac is obtaining discovery in the ResCap Bankruptcy Cases from FGIC, the FGIC Trustee, and certain of their experts and has served the Rehabilitator's counsel with discovery requests. Both FGIC and the Rehabilitator's counsel have refused to discuss any potential benefit to be gained by the FGIC Commutation with Freddie Mac.

4. In sum, governing law and the evidentiary record compel the Court to reject the Rehabilitator's proposed modification of the Rehabilitation Plan. Freddie Mac, a major holder of the FGIC-insured RMBS, therefore objects to the FGIC Commutation and the Proposed Findings.

FACTUAL BACKGROUND

1. Freddie Mac's FGIC-Insured RMBS

5. Prior to the commencement of this Rehabilitation Proceeding, certain of the ResCap Debtors originated and/or serviced residential mortgage loans that they contributed or otherwise sold to forty-seven trusts. These trusts then issued RMBS consisting of certificates collateralized by such residential mortgage loans. FGIC, a monoline financial guaranty insurance company, wrote the Policies, which insured the payment of principal and interest with respect to the securities issued by the FGIC-Insured Trusts. By "wrapping" the securities the FGIC-Insured Trusts issued, FGIC essentially guaranteed the payment of principal and interest due on such securities.

6. Freddie Mac holds over $3.055 billion in original face amount of various tranches[6] of RMBS held in nine of the ResCap Trusts covered by the Policies, the payment of principal and interest due being guaranteed by FGIC. Freddie Mac's holdings in the FGIC-Insured Trusts are summarized in the chart below:

[6] A tranche is a class of bonds. Collateralized mortgage obligations are often structured with several tranches of bonds that have various maturities.

Freddie Mac Holdings of FGIC-Insured RMBS

CUSIP	Original Face Amount of Holdings	Description of RMBS Instrument	Trustee
7609854V0	$175,000,000	RAMP 2004-RZ2 AII	BONY/Mellon
7609857G0	$346,990,000	RAMP 2004-RS7 A2A	BONY/Mellon
76110WB88	$337,500,000	RASC 2004-KS7 A2A	BONY/Mellon
76112BL99	$494,922,000	RAMP 2005-RS9 AII	BONY/Mellon
361856BG1	$123,222,000	GMACM 2001-HE2 IIA7	BONY/Mellon
38012EAA3	$646,768,000	GMACM 2006-HE5 1A1	BONY/Mellon
74924XAE5	$326,812,000	RASC 2007-EMX1 A2	U.S. Bank
76112BR36	$405,004,000	RAMP 2005-NC1 AII	U.S. Bank
76112BR85	$199,376,000	RAMP 2005-EFC7 A2	U.S. Bank
TOTAL:	**$3,055,594,000**		

7. On account of the underperformance of the trust collateral, Freddie Mac has not received the principal and interest payments that it should have received from the above-listed FGIC-Insured Trusts. In turn, the trusts presented claims to FGIC to cover the principal and interest shortfalls. FGIC, however, has been unable to make payments under any of the Policies since approximately November of 2009—when the New York State Department of Insurance (now known as the New York Department of Financial Services [the "NYDFS"]) issued an order under N.Y. Ins. Law § 1310 that prevented FGIC from making payments on any policy claims until FGIC's financial condition improved. As a result, Freddie Mac, which itself is in conservatorship, has long-outstanding claims that remain unpaid under the Policies. Freddie Mac also expects to have significant policy claims against FGIC for principal and interest shortfalls in both the near and long-term future.

2. FGIC's Rehabilitation Proceeding

8. On June 11, 2012, after years of FGIC not making any policy claims payments with respect to the FGIC-Insured Trusts, the Superintendent of Financial Services of the State of New York filed a petition in this Court, seeking an order appointing the Superintendent as

FGIC's Rehabilitator pursuant to New York Insurance Law. This Court granted the petition on June 28, 2012, commencing this Rehabilitation Proceeding.

9. The Rehabilitator, among other things, thereafter submitted to this Court a proposed plan of rehabilitation for FGIC. The plan was subsequently modified, culminating in a version this Court approved on June 11, 2013. Over the course of approximately 2.5 years, Freddie Mac was closely involved in lengthy negotiations surrounding the structure of the eventual Rehabilitation Plan.

10. The Rehabilitation Plan provides that the holders of FGIC policy claims will receive payments of 17.25% of the total amount of their claims against FGIC (the "Cash Payment Percentage" or "CPP"), which will be adjusted over time. The financial disclosures in connection with the Rehabilitation Plan contemplate that the present value of recoveries under a "Base Scenario" will be between 27 and 30 cents on the dollar for FGIC policy claims.[7] The Rehabilitation Plan contains mechanisms that will "true up" earlier-filed FGIC policy claims such that these earlier-dated claims may receive subsequent payments based upon subsequent increases to CPP.

11. Yet, on May 29, 2013, the Rehabilitator requested that this Court enter an order to show cause (the "Order to Show Cause") inviting parties opposing the relief sought in the Holtzer Affirmation to object to such relief by July 16, 2013. This Court entered the Order to

[7] The financial disclosures in the Miller Affidavit also contain a "Stress Scenario," where present-value recoveries are estimate to be between 17 and 18 cents on the dollar. (Miller Affidavit, Ex. 1, p. 7.) The Stress Scenario, however, assumes "a non-catastrophic scenario envisioning a severe economic recession that is accompanied by (i) sharp declines in home prices and the financial markets, (ii) significant unemployment, (iii) high mortgage default rates and (iv) other negative indicators of potential relevance to FGIC's insured exposures." Rehabilitation Plan at 14. The far more likely "Base Scenario," by contrast, assumes "FGIC's then-current expectation of future Claims, investment performance, recoveries, financial markets and other factors of relevance to CPP Revaluations bases on circumstances, events and projections that FGIC anticipates are reasonably likely to occur." (*Id.* at 3.) Of course, if the economy improves even more than is contemplated by the "Base Scenario", the present value of cash payments would likely exceed the 27-30 cent range.

Show Cause on May 30, 2013. Through the Holtzer Affirmation, the Rehabilitator seeks this Court's authorization for it and FGIC to enter into the Settlement Agreement and this Court's approval of the same.

12. Freddie Mac objects to certain key elements of the Settlement Agreement. First, Freddie Mac objects to the FGIC Commutation: that is, the settlement, discharge, and release of FGIC's obligations under the Policies, in contravention of the court-approved recoveries under the Rehabilitation Plan summarized above, in exchange for a bulk, one-time cash payment from FGIC to the (and other trustees of the FGIC-Insured Trusts) in an amount totaling $253.3 million, effectively commuting the Policies, preventing any further claims against FGIC under the Policies, and eliminating the obligation of the FGIC Trustee to pay future premiums. (*See* Settlement Agreement §§ 2.01(a)(i), (b), 2.02.) The second objection concerns certain proposed findings of facts that the FGIC Trustee is demanding this Court to make, effectively blessing its actions in commuting the Policies and confirming that such actions are made in good faith, in the best interest of policyholders, and without negligence (the "Proposed Findings").

13. The Settlement Agreement's ultimate effectiveness largely depends on two conditions precedent: the approval of the Settlement Agreement by this Court and the approval of the Settlement Agreement by the Bankruptcy Court in the ResCap Bankruptcy Cases. (*See* Settlement Agreement § 3.01; 9019 Motion ¶ 27.) For the reasons set forth herein, Freddie Mac opposes the approval of the Settlement Agreement requested in the Holtzer Affirmation.

3. The ResCap Bankruptcy Cases and the 9019 Motion

14. Relevant to this Rehabilitation Proceeding are ResCap's bankruptcy cases pending in the Bankruptcy Court before Judge Martin Glenn. The ResCap Debtors, once the fifth-largest mortgage servicing business and the tenth-largest mortgage origination business in

the United States, filed for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code on May 14, 2012. Prior to the closing of their Bankruptcy Court-approved sales of substantially all their assets, the ResCap Debtors were a leading residential real estate finance company indirectly owned by Ally Financial, Inc.

15. As part of the ResCap Debtors' mortgage servicing and origination businesses, ResCap Debtors, GMAC Mortgage, LLC, and Residential Funding Company, LLC, acted as Sponsor, Depositor, Master Servicer, Primary Servicer, or Subservicer in connection with transactions involving the securitization of residential mortgages through securitization trusts. In conjunction with their various roles in these transactions, certain of the ResCap Debtors were parties to the various agreements governing the creation and operation of the FGIC-Insured Trusts.

16. On June 7, 2013, the ResCap Debtors filed a motion seeking the Bankruptcy Court's approval to enter into the Settlement Agreement under Bankruptcy Rule 9019 (the "9019 Motion"). The Settlement Agreement must be approved by both this Court and the Bankruptcy Court because the ResCap Debtors and FGIC are parties to it. The standards for approval in each case are quite different, however, as elaborated upon below.

OBJECTION

1. Freddie Mac has standing to appear and be heard in this Rehabilitation Proceeding

17. As an initial, threshold matter, Freddie Mac has standing to appear and be heard in this Rehabilitation Proceeding. In the Holtzer Affirmation, counsel for the Rehabilitator expressly states:

> **Giving all Investors** [which includes Freddie Mac] **notice and an opportunity to be heard at the Hearing pursuant to the Order to Show Cause** ensures that the Settlement Agreement (if approved), including the release of FGIC from all

> present and future obligations and liabilities with respect to the Policies, will bind any Investors that may in the future attempt to assert claims against FGIC for payment under the Policies and dilute recoveries to FGIC's policyholders as a whole.[8]

The Order to Show Cause also provides that "Any Investor [which includes Freddie Mac] objecting to the relief sought by the Rehabilitator, as set forth in the Affirmation, shall file an objection with this Court . . . ."[9]

18. Accordingly, FGIC's ResCap Security Holders have standing to appear and be heard in FGIC's rehabilitation proceeding, particularly to object to the relief sought by the Holtzer Affirmation. The Rehabilitator's contention in its July 9, 2013, letter to this Court that Freddie Mac has no standing in this proceeding is simply sophistry and contravenes the express statements in the Holtzer Affirmation acknowledging Freddie Mac's standing to appear and be heard.[10]

2. This Court should not approve the Settlement Agreement containing the objectionable provisions

19. This Court should not approve the Settlement Agreement containing the FGIC Commutation and the Proposed Findings. As an initial matter, as Judge Glenn recognized, there the Bankruptcy Court will evaluate the Settlement Agreement under a different standard than this Court.[11] While the Bankruptcy Court will consider whether the Settlement Agreement is in the best interests of the ResCap Debtors and their creditors, this Court, by contrast, must address

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[8] Holtzer Affirmation ¶ 29 (emphasis added). The Holtzer Affirmation defines "Investors" as follows: "The Trusts issued securities, notes, bonds, certificates and/or other instruments backed by the residential mortgage loans (the "**Securities**") to investors (the "**Investors**")." *Id.* ¶ 4. This plainly includes Freddie Mac.

[9] Order to Show Cause ¶ 1.

[10] Because of the Rehabilitator's abrupt *volte-face*, Freddie Mac plans to file a motion to intervene out of an abundance of caution to preserve its rights.

[11] *See Order Concerning the Use of Discovery Obtained in Connection with the Rule 9019 FGIC Settlement Hearing* (ResCap Bankruptcy ECF No. 4191) ("All parties acknowledge that there are different standards for approval of the FGIC Settlement by each court.").

whether the Settlement Agreement and, in particular, the FGIC Commutation, is appropriate with respect to FGIC's policyholders and is not otherwise in violation of New York Insurance Law and the Rehabilitation Plan. The Bankruptcy Court is concerned only with ResCap and its creditors generally and will not, as this Court must, focus particularly on the rights of the beneficiaries of the Policies and the FGIC ResCap Security Holders. *Compare Motorola, Inc. v. Official Committee of Unsecured Creditors (In re Iridium Operating LLC)*, 478 F.3d 452, 462 (2d Cir 2007) (considering, *inter alia*, the "paramount interests of the [debtor's] creditors" when determining whether to approve settlement under Bankruptcy Rule 9019), *with Frontier Ins. Co.*, 36 Misc.3d 529, 541-42 (N.Y. Sup. Ct. 2012) (recognizing as relevant considerations whether a rehabilitation plan will provide claimants less favorable treatment than liquidation, and whether all policyholders/creditors of similar priority are treated the same).

20. Furthermore, courts recognize that state statutes (such as New York's) granting exclusive jurisdiction over insurers' rehabilitation or liquidation proceedings reverse-preempt the exercise of jurisdiction by federal authorities or courts, including bankruptcy courts, because it would impede or supersede the state processes regulating the business of insurance. *See, e.g.*, *Munich Am. Reinsurance Co. v. Crawford,* 141 F.3d 585, 595 (5th Cir 1998); *Davister Corp. v. United Republic Life Ins. Co.,* 152 F.3d 1277, 1281 (10th Cir 1998); *Advanced Cellular Sys., Inc. v. Mayol,* 235 B.R. 713, 724-25 (Bankr. D.P.R. 1999). Indeed, the Bankruptcy Court cannot address claims related to Freddie Mac's FGIC-insured RMBS because such claims arise under the Policies and are against FGIC—an insurer who cannot be a debtor under Bankruptcy Code § 109(b)(2)—and therefore must be resolved in this Rehabilitation Proceeding, by this Court, and pursuant to the Rehabilitation Plan approved by the Court.

21. This Court therefore bears the "ultimate responsibility" to supervise the Rehabilitator's actions in respect of the rehabilitation proceeding and to make sure that the FGIC-wrapped RMBS "holders are properly . . . protected." *In re State Title & Mortg. Co.*, 289 N.Y.S. 487, 494 (N.Y. Sup. Ct. 1936); *see also In re People by Van Schaick (Nat'l Sur. Co.)*, 239 A.D. 490, 496 (N.Y. App. Div. 1933) (statute permitting rehabilitation places "great responsibility" on the superintendent of insurance and that any abuse of power should be checked by the courts), *aff'd*, 191 N.E. 521 (N.Y. 1934). While the Rehabilitator has discretion as to many of the actions taken in that role, those actions may not be "arbitrary, capricious or an abuse of discretion," and, if they are arbitrary and capricious, this Court must disapprove them as such. *Callon Petroleum Co. v. Superintendent of Ins.*, 53 A.D.3d 845, 845 (N.Y. App. Div. 2008). In supervising the Rehabilitator's actions, this Court is tasked with evaluating the fairness of the Rehabilitator's actions to FGIC's policyholders. *In re N.Y. Title & Mortgage Co.*, 281 N.Y.S. 715, 729 (N.Y. Sup. Ct. 1935). Courts' general deference to the determinations of the NYDFS is not boundless. *In re Mills v. Fla. Asset Fin. Corp.*, 31 A.D.3d 849, 850 (N.Y. App. Div 2006) ("The courts will generally defer to the rehabilitator's business judgment and disapprove the rehabilitator's actions only when they are shown to be arbitrary, capricious or an abuse of discretion.").

22. The Rehabilitator has acknowledged that the Rehabilitation Plan (and any modifications thereto) is (and must be) "fair and equitable" to "FGIC Policyholders." Consider Pages 20-21 of the Disclosure Statement, which was meant to provide adequate information on the terms of the Rehabilitation Plan:

> Provisions of the Plan relevant to the Policy Restructuring are in the Restructured Policy Terms. The Restructured Policy Terms include the mechanism for paying Permitted Policy Claims, as well as procedures for revaluating FGIC's financial condition to determine whether additional Cash payments may be made on

account of Permitted Policy Claims. **Consistent with the goal of the Plan, the Rehabilitator developed the Restructured Policy Terms to maximize the extent to which FGIC's Policyholders are treated in a fair and equitable manner. The Restructured Policy Terms are designed to address challenges the Rehabilitator faced in achieving this goal.**

Page 21 of the Disclosure Statement continues:

> First, because FGIC likely will not have sufficient assets to pay in full in Cash all Policy Claims that have arisen but have not been paid or that are expected to arise over the Run-Off Period, which may last 40 years, the Restructured Policy Terms provide for payment of only a portion of each Permitted Policy Claim in Cash. **FGIC will satisfy the remainder of each Permitted Policy Claim through future payments on account of a DPO for the related Policy, to the extent payable under the Plan. FGIC will track DPOs on a Policy-by-Policy basis, and will reduce each DPO by the amount of any Cash payments or Deemed Cash** Payments made with respect to Permitted Policy Claims under the related Policy, as discussed below. These contingent additional payments under DPOs will be payable only if, when and to the extent FGIC determines, in consultation with a third-party firm and with NYSDFS approval, that it has sufficient assets to pay in Cash an increased portion of each previously Permitted Policy Claim and each Policy Claim it expects to permit in a Stress Scenario during the Run-Off Period.
>
> **This approach is designed so that all of FGIC's Policyholders receive the same percentage (or CPP) of Cash on account of their Permitted Policy Claims, whether arising in the next five years or in the next few decades.**

23. Yet the FGIC Commutation is diametrically opposed to the treatment of FGIC ResCap Security Holders set forth in the section of the Disclosure Statement quoted above and proposes to pay investors far less than the present value of their distribution under the Rehabilitation Plan.

24. Further, section 9.3 of the Rehabilitation Plan provides:

> From and after the Effective Date, only the NYSDFS may modify the Plan and only to **the extent it determines necessary for the fair and equitable treatment of Policyholders in general**; provided, however, that the NYSDFS shall obtain prior Court approval for any material modification.

25. Finally, the Rehabilitator's expert, Mr. Miller of Lazard Frères & Co., prefaced his "Updated Run-Off Projections" with the statement that:

> **In developing the Plan and determining whether the Plan is fair and equitable to all of FGIC's Policyholders**, the Rehabilitator analyzed FGIC's ability to satisfy its financial obligations while maintaining the minimum policyholders' surplus for a financial guaranty insurance company under Section 6902(b)(1) of the NYIL.[12]

Indeed, the NYDFS acts arbitrarily and capriciously when it proposes to treat similarly situated policyholders differently, and courts will not approve rehabilitation plans (and modifications thereto) in that instance. *See Frontier*, 36 Misc. 3d at 541-42; *Knickerbocker Agency, Inc. v. Holz*, 4 A.D.2d 71, 73 (N.Y. App. Div. 1957) ("A pre-eminent purpose of article XVI of the Insurance Law is to 'insure equitable treatment for its creditors and to avoid preferences.'").

26. Although Freddie Mac is only beginning to receive information from the parties to the settlement negotiations, all of the *available* evidence indicates that the Settlement Agreement is facially contrary to the FGIC ResCap Security Holders' best interest. As indicated above, FGIC's most recent financial disclosures in the Rehabilitation Proceeding project that policyholders will receive present-value recoveries on FGIC policy claims in the amount of 27-30 cents on the dollar before any litigation recoveries.[13] By contrast, under the FGIC Commutation——the FGIC ResCap Security Holders will only receive approximately 21 cents on the dollar.[14]

27. The record is also devoid of any evidence that the terms of the Settlement Agreement are in the best interests of the FGIC ResCap Security Holders. Not only is it disturbing that the Settlement Agreement was negotiated in secret beginning in April—only to be made public to Freddie Mac shortly before the Debtors filed the 9019 Motion in the Bankruptcy

[12] Affidavit of Michael W. Miller in Further Support of Approval of First Amended Plan of Rehabilitation (the "Miller Affidavit") at Ex. 1 p. 1.

[13] Miller Affidavit, ¶ 28, Ex. 1 p. 6

[14] *See* Holtzer Affirmation ¶¶ 5, 9-10.

Court, and contemporaneously requested that this Court approve the Settlement Agreement—none of the parties to the Settlement have provided *any* justification for, or any meaningful information about, the economics of the FGIC Commutation.[15] Indeed, the parties to the Settlement Agreement have outright refused to provide any such information.

28. Even though the parties to the secret settlement have not yet provided Freddie Mac with the economics of the FGIC Commutation, it is obvious on its face that the FGIC Commutation is arbitrary, capricious, and an abuse of the Rehabilitator's discretion. This Court should not permit the Rehabilitator to unfairly discriminate against one group of beneficiaries under the Policies materially worse than similarly situated beneficiaries of other FGIC-issued policies after touting a Rehabilitation Plan that purported to ensure fair and equitable baseline recoveries for all insureds.

3. The FGIC Trustee Did Not Obtain the Required Consent to Enter into the FGIC Commutation

29. In any event, the FGIC Commutation should not be approved because the FGIC Trustee had no authority under the governing trust documents or the Trust Indenture Act § 316(b) to enter into the FGIC Commutation without the consent of the FGIC ResCap Security Holders. The FGIC Trustee neither obtained nor solicited such consent. Instead, the FGIC Trustee seeks to avoid the need for such consent by demanding extra judicial findings that they believe obviate such consent. If in fact the FGIC Trustee and FGIC have the right commute the Policies, there is no reason for this to grant them a comfort order with such findings, and this Court should not approve findings that are unlawful or otherwise contrary to public policy. *See*

[15] Shortly after the Rehabilitator filed the Holtzer Affirmation and the ResCap Debtors filed the 9019 Motion, counsel for Freddie Mac contacted the Rehabilitator's counsel directly to inquire why the Settlement was in Freddie Mac's best interests. The Rehabilitator's counsel refused to provide any such justification or analysis.

In re Rosenberg, No. 09-46326, 2010 Bankr. LEXIS 371, at *11 (Bankr. E.D.N.Y. Feb. 5, 2010) ("[P]arties cannot enter into a settlement that violates law or public policy"). It is well established that "[s]ettlements are void against public policy . . . if they directly contravene a state or federal statute or policy." *In re Smith*, 926 F.2d 1027, 1029 (11th Cir. 1991).

a) The FGIC Commutation and the Proposed Findings violates the governing trust documents

30. Nine separate FGIC-insured Trusts issued Freddie Mac's FGIC-insured RMBS and also hold the residential mortgages backing such securities. The trustees for each of the nine FGIC-Insured Trusts have executed either an Indenture or are party to a Pooling and Serving Agreement (a "PSA") (in the case of the remaining seven). Each of the Governing Trustee Documents provides that the FGIC Trustee may not take certain actions without the express consent of varying percentages of the applicable Holders.

31. By way of example, the section 9.02 of the Indenture for the GMACM Home Equity Loan Trust 2001-HE2 § 9.02 provides, in pertinent part:

> Supplemental Indentures With Consent of Noteholders. The Issuer and the Indenture Trustee, when authorized by an Issuer Request, may, with prior notice to the Rating Agencies and with **the consent of** the Enhancer and **the Noteholders of not less than a majority of the Note Balances of each Class of Notes affected thereby**, by Act (as defined in Section 10.03 hereof) of such Noteholders delivered to the Issuer and the Indenture Trustee, **enter into an indenture or indentures supplemental hereto for the purpose of adding any provisions to, or changing in any manner or eliminating any of the provisions of, this Indenture or of modifying in any manner the rights of the Noteholders under this Indenture** [emphasis added] . . . .

32. The FGIC ResCap Security Holders were never consulted on the proposed commutation of their claims against FGIC and no vote has been offered. Furthermore, the FGIC Trustee has not provided any evidence that the Policies are trust estate property that they have the unilateral right to commute without the consent of each of the FGIC ResCap Security

Holders.[16]

33. The other seven PSAs contain substantially similar provisions. The FGIC Trustee breached each of those agreements for the same reasons.[17] In short, the FGIC Trustee willfully took actions expressly prohibited under the Transaction Documents, breaching those documents, as well as their fiduciary duties to the FGIC ResCap Security Holders. The FGIC Commutation and the Proposed Findings should not be approved for that reason alone.

b) The FGIC Commutation and the Proposed Findings contravene the Trust Indenture Act

34. The FGIC Trustee also entered the Settlement Agreement in violation of Federal law. As such, the Trust Indenture Act governs these documents, whether they are Indentures or PSAs. *See Policemen's Annuity & Benefit Fund of Chicago v. Bank of Am., N.A.*, No. 12-civ-2865, 2013 U.S. Dist. LEXIS 64499, at *25-26 (S.D.N.Y. May 6, 2013) (PSAs subject to the Trust Indenture Act). Trust Indenture Act § 316(b) provides, in pertinent part:

> Prohibition of impairment of holder's right to payment. Notwithstanding any other provision of the indenture to be qualified, **the right of any holder of any indenture security to receive payment of the principal of and interest on such indenture security**, on or after the respective due dates expressed in such indenture security, or to institute suit for the enforcement of any such payment on or after such respective dates, **shall not be impaired or affected without the consent of such holder** . . . .

15 U.S.C. § 77ppp(b) (emphasis added).

35. Here, the FGIC Commutation impairs—or at the very least affects—the rights of

[16] Indeed, the governing trust documents (and the Trust Indenture Act) demonstrate that the FGIC Trustee owes fiduciary duties to the holders of FGIC-wrapped ResCap securities (such as Freddie Mac). Moreover, major holders such as Freddie Mac also have the right to direct the FGIC Trustee not to enter the Settlement Agreement. Freddie Mac has informed the FGIC Trustee that it does not want the FGIC Trustee to support the Settlement Agreement and reserves to send the FGIC Trustee a formal direction letter on this point.

[17] *See* PSAs for RASC 2004-KS7A2A, RASC 2007-EMX1A2 (relevant portions attached hereto as Exhibit C) §§ 2.06, 3.14(d), and 4.02; PSAs for RAMP 2004-RZ2AII, RAMP 2005-RS9AII, RAMP 2005-NC1AII, RAMP 2005-EFC7A2 (relevant portions attached hereto as Exhibit D) §§ 2.06; RAMP 2004-RS7A2A (relevant portions attached hereto as Exhibit E) §§ 11.01(b).

holders of FGIC-insured RMBS to receive the payment of principal and interest thereon. Further, the Holtzer Affirmation requests approval of the Settlement Agreement such that "[a]lthough the Trustees are the exclusive holders of the Policies, the Settlement Agreement and the proposed Court Order provide that the resolution set forth in the Settlement Agreement (once effective) will be binding on all Investors holding Securities insured by the Policies."[18] Hence, the Settlement Agreement also impairs the rights of the FGIC ResCap Security Holders from asserting their rights to claim against the Policies to recover the principal and interest owed to them as holders of FGIC-insured RMBS.

36. Because of the Settlement Agreement's effects on the rights of the FGIC ResCap Security Holders, as the beneficiaries of the Policies, the FGIC Trustee was required to obtain the consent (including Freddie Mac's) it seeks to bind to the Settlement Agreement. The FGIC Trustee's apparent blanket approval of the Settlement Agreement, without the required consent of investors, to bind all holders of the FGIC-insured RMBS violates the Trust Indenture Act. This Court should not approve the FGIC Commutation and the Proposed Findings. Any commutation of the Policies and fixing of claims against FGIC should not be effective against those parties that have not consented to such treatment.

4. There is no basis for the proposed findings that the FGIC Trustee acted in good faith and without negligence

37. Even if this Court were to enter an order approving the FGIC Commutation and the Proposed Findings, which it should not, no basis exists for the finding in the proposed order annexed to the Holtzer Affirmation that the FGIC Trustee acted in good faith and without negligence. The question of good faith (especially the good faith of fiduciaries, such as the

[18] Holtzer Affirmation at 5.

FGIC Trustee) is primarily one of fact, and all the facts here point to a clear lack of good faith on the FGIC Trustee's part. *E.g., Schwartz v. Marien*, 37 N.Y.2d 487, 493 (N.Y. 1975) ("Good faith or bad faith as the guide or the test of fiduciary conduct is a state or condition of mind—a fact—which can be proved or judged only through evidence."). Indeed, as set forth above, their entry into the Settlement Agreement without the requisite approval of the FGIC ResCap Security Holders is both a breach of the governing trust documents and a violation of the Trust Indenture Act. The FGIC Trustee did not notify or advise FGIC-wrapped ResCap security holders with respect to the Settlement Agreement in any way; instead, such holders (including Freddie Mac) were shut out and kept in the dark. The FGIC Trustee has also given up significant claims for the breach of representations and warranties against the ResCap Debtors as part of the Settlement Agreement, but it is unclear what—if any—consideration it received in exchange for the abandonment of such claims.

38. Under such circumstances, the FGIC Trustee's conduct here militates strongly against any finding that the FGIC Trustee acted good faith when they entered into the Settlement Agreement. Moreover, there is no evidentiary record before this Court to support the Rehabilitator's requested findings that the FGIC Trustee acted "reasonably," in "good faith" and in the "best interests" of the FGIC ResCap Security Holders.

39. The FGIC Trustee negotiated the FGIC Commutation in secret without even attempting to involve major stakeholders (such as Freddie Mac) in the process. The fact that certain institutional investors were permitted to have a place at the table is of no import: there is no indication to date that any of those institutional investors held the FGIC-wrapped ResCap RMBS at issue here, and, in any case, their involvement still would not justify freezing out the FGIC ResCap Security Holders who are the beneficiaries of the Policies.

40. The FGIC Trustee—which was (and is) obligated to act as fiduciaries for holders of FGIC-insured RMBS—simply agreed to the proposed terms of the Settlement Agreement without providing any notice to (or obtaining the requisite consent of) the FGIC ResCap Security Holders.

41. Additionally, Freddie Mac suspects that the Rehabilitator may be delaying the Rehabilitation Plan's effective date until (at least) August 6, 2013, in order to implement the FGIC Commutation before the Rehabilitation Plan goes effective.[19] Had the Rehabilitation Plan gone immediately effective as this Court suggested at the June 11th approval hearing, FGIC's options to implement the FGIC Commutation would have been limited. Notably, despite FGIC's attempt to delay the implementation of the Rehabilitation Plan, the ResCap Settlement and the FGIC Commutation are not a condition to the Rehabilitation Plan's going effective according to its terms, and there is no reason to delay the Plan's effectiveness based upon the ResCap Settlement. Instead, the ResCap Settlement does nothing other than materially modify the payment terms of the Rehabilitation Plan as already approved by this Court.

42. If the FGIC Trustee and the Rehabilitator are so confident that they have the authority to implement the FGIC Commutation without Court order, then there is no need for this Court to issue what is tantamount to a comfort order as to the FGIC Trustee's good faith and the purported "benefits" inuring to FGIC-wrapped ResCap RMBS holders. The fact that the Rehabilitator and the FGIC Trustee seek a comfort order is telling: rather than simply letting the Rehabilitation Plan go effective and effecting the FGIC Commutation later (which the

[19] *See* Hr'g Tr. 7:26-8:6 (June 13, 2013): "MR. HOLTZER: Right now, your Honor, we don't anticipate going effective before August 6th. Currently, your Honor is aware that there are hearings before your Honor that may occur on August 6th depending on whether there's any objections on two stipulations and settlements that we submitted to your Honor."

Rehabilitator and the Trustee have asserted is within their power), they seek this Court's imprimatur first. The reason is simple: the FGIC Commutation is a material modification to the Rehabilitation Plan that could not be put into place had the Rehabilitation Plan gone effective on June 11. This Court should not permit it now.

5. Freddie Mac is entitled to discovery and an evidentiary hearing

43. If this Court does not deny the relief sought in the Holtzer Affirmation outright, then it should, at minimum, postpone the hearing on the Settlement Agreement to allow Freddie Mac to obtain limited, expedited discovery against the Rehabilitator and his advisors.[20] Although the Rehabilitator's counsel has appeared at hearings in the Bankruptcy Court and at depositions, the Rehabilitator has repeatedly claimed that he is not a party to the ResCap Bankruptcy Cases and has refused to produce documents in response to Freddie Mac's document requests. Further, neither the Rehabilitator nor FGIC have provided any record of their deliberations on the recovery to FGIC ResCap Security Holders—other than the Holtzer Affirmation, which is hearsay and offers no substantive evaluation of actual recoveries to parties such as Freddie Mac. Indeed, Freddie Mac sought to have a dialogue with FGIC's and the Rehabilitator's counsel to shed some light on why the FGIC Commutation was in Freddie Mac's best interest. FGIC's and the Rehabilitator's counsel, however, refused to discuss these issues.

44. Discovery is necessary here because none of the Rehabilitator, FGIC, or the FGIC Trustee (who is a fiduciary under the governing trust documents to holders of FGIC-insured RMBS such as Freddie Mac) to date has provided any meaningful information as to the economic justification for the terms of the Settlement Agreement, including the FGIC

[20] In the ResCap Bankruptcy Cases, Freddie Mac has served various parties involved in the negotiation of the Settlement Agreement (including the FGIC Trustee, FGIC, and certain of their advisors) with document requests and notices of deposition.

Commutation. There is no computation of Freddie Mac's or other investors' recovery. There is also no basis for the estimated liabilities that are being extinguished under the FGIC Commutation. Nor has the FGIC Trustee provided any evidence regarding their good faith in entering the Settlement Agreement. Indeed, the Bankruptcy Court recognized these issues and permitted Freddie Mac and other parties to take limited discovery in connection with the 9019 Motion. Because the Rehabilitator (despite being represented by counsel at depositions and at hearings in the Bankruptcy Court) has claimed that he is not a party to the ResCap Bankruptcy Cases and has refused to produce documents or otherwise provide meaningful responses to Freddie Mac's discovery requests, Freddie Mac respectfully requests that this Court require the Rehabilitator to provide discovery on the issues discussed herein.

45. Further, because this Court is called to decide whether the FGIC Commutation is fair and equitable (and whether the Rehabilitator acted arbitrarily and capriciously by proposing to treat one group of beneficiaries of FGIC-issued insurance policies materially better than others entitled to the same treatment), this Court should consider the Settlement Agreement at a full evidentiary hearing where the parties have the ability to introduce witnesses (both fact and expert) to prove their case. Freddie Mac does not seek an unreasonable delay of this Court's consideration of the relief sought in the Holtzer Affirmation, but Freddie Mac is entitled to basic discovery so that it can evaluate the terms of the Settlement Agreement and make its case that this Court should not approve it in its present form in a full evidentiary before this Court.

JOINDER

46. Freddie Mac hereby joins all other objections to the relief sought in the Holtzer Affirmation to the extent such objections are not inconsistent herewith.

RESERVATION OF RIGHTS

47. Freddie Mac expressly reserves all of its rights to supplement this Objection; to object to relief sought in the Holtzer Affirmation at the August 6, 2013, hearing on any other grounds; to take discovery regarding the relief sought in the Holtzer Affirmation; to introduce discovery obtained in the ResCap Bankruptcy Cases in connection with this Objection; and to introduce and/or cross-examine witnesses at the August 6, 2013, hearing on the relief sought in the Holtzer Affirmation.

CONCLUSION

48. For the reasons set forth above, Freddie Mac respectfully requests that the Court sustain the Objection, deny the relief sought in the Holtzer Affirmation, and decline to approve the Settlement Agreement in its current form. Freddie Mac also respectfully requests that the Court refrain from making findings that the FGIC Trustee acted in good faith and without negligence in any orders related to the relief sought in the Holtzer Affirmation.

Dated: July 16, 2013
New York, New York

Respectfully submitted,

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