Docket #1258 Date Filed: 4/3/2013

Hugh M. McDonald
Jonathan D. Forstot
Oscar N. Pinkas
DENTONS US LLP
1221 Avenue of the Americas
New York, New York 10020
Tel: (212) 768-6700
Fax: (212) 768-6800

Counsel to Charles Lemonides and ValueWorks LLC

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
AMBAC FINANCIAL GROUP, INC.,	Case No. 10-15973 (SCC)
Debtor.	Related Docket Nos. 1230-32

CHARLES LEMONIDES' AND VALUEWORKS LLC'S OBJECTION TO DEBTOR'S MOTION PURSUANT TO BANKRUPTCY CODE SECTIONS 1127(b) AND 105(a) FOR AN ORDER (I) APPROVING A MODIFICATION OF THE DEBTOR'S CONFIRMED FIFTH AMENDED PLAN OF REORGANIZATION, (II) BARRING CHARLES LEMONIDES FROM SERVING AS A BOARD MEMBER OF THE REORGANIZED DEBTOR, AND (III) DIRECTING THE STATUTORY COMMITTEE OF CREDITORS TO APPOINT A NEW BOARD NOMINEE[1]

Charles Lemonides ("Lemonides") and ValueWorks LLC ("ValueWorks"), by and through their counsel, Dentons US LLP, submit this Objection together with the accompanying Declaration of Charles Lemonides dated April 3, 2013 (the "Lemonides Declaration") and Declaration of Hugh M. McDonald dated April 3, 2013 (the "McDonald Declaration") in opposition to Ambac Financial Group, Inc.'s (the "Debtor") motion (the "Motion," Docket No. 1230), and the Declaration of David Trick dated March 4, 2013 (the "Trick Declaration," Docket

[1] Mr. Lemonides and ValueWorks have only been able to depose one of the six parties in interest they subpoenaed in connection with the Motion, and have only received documents produced by one of the five parties in interest from whom documents were requested. Mr. Lemonides and ValueWorks, therefore, reserve their rights to amend, modify or supplement this Objection and the Lemonides Declaration, and/or file a sur-reply.

No. 1232) and Declaration of Diana Adams dated March 4, 2013 (the "Adams Declaration," Docket No. 1231)[2] filed in support of the Motion, for an order: (i) modifying the Debtor's Fifth Amended Plan of Reorganization (the "Plan," Docket No. 938, Exhibit A) to provide that if an initial director of Ambac Financial Group, Inc. as reorganized after the effective date of the Plan (the "Reorganized Debtor") "becomes incapable, unavailable or unable to serve as a director, the Committee shall . . . appoint a replacement nominee," (Motion, Exhibit B, p. 48), (ii) to bar Mr. Lemonides from serving as a director on the board of the Reorganized Debtor (the "Reorganized Board"), and (iii) directing the Official Committee of Unsecured Creditors (the "Committee") to appoint a new nominee for the Reorganized Board, and in support respectfully state as follows.

PRELIMINARY STATEMENT[3]

Based solely upon naked allegations, misinterpretations and truncated statements taken wholly out of context, the Debtor seeks extraordinary relief in the Motion—the modification of its Plan to override the discretion granted to the Committee under the purported guise of "clarifying" such discretion. The Debtor's entire position rests upon the interpretation of a few words allegedly said during conversations between Mr. Lemonides and the Debtor's Chief Financial Officer (CFO), David Trick, concerning a candidate for the position of Chief Investment Officer (CIO). Based upon Mr. Trick's patent misinterpretation and faulty recollection of the conversations, the Debtor concludes that the Committee should be compelled to withdraw Mr. Lemonides as a nominee for the new board of directors of the Reorganized Debtor, an action the Committee has refused to take after hearing from the Debtor and Mr. Lemonides.

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[2] The Adams Declaration, and to an extent the Trick Declaration, contain numerous hearsay statements and other inadmissible evidence. Mr. Lemonides will move to strike the hearsay and inadmissible evidence.

[3] Capitalized terms not otherwise defined in this preliminary statement shall have the meanings ascribed *infra*.

The Debtor alleges that Mr. Lemonides breached his fiduciary duty by threatening Mr. Trick if he did not hire Mr. Lemonides' friend as CIO. Yet, the Debtor has asked the Committee to look at this situation not once, but twice. Indeed, the Debtor's management approached the Committee before contacting their own internal and external counsel. The Committee is the only party in this bankruptcy to actually speak with Mr. Lemonides about the alleged incident. Inexplicably, the Debtor and Mr. Trick failed to discuss this matter with Mr. Lemonides at any point. Twice the Committee heard from ***all*** concerned, including Mr. Lemonides, and twice determined not to take the action being requested by the Debtor in the Motion. Therefore, the Committee exercised the discretion expressly granted to it by the confirmed Plan three times, appointing Mr. Lemonides as a Board Nominee and twice refusing to remove him, and each time showed utmost confidence in its choice of Mr. Lemonides as a Board Nominee.

Unsatisfied with this outcome, the Debtor approached the U.S. Trustee and then shortly thereafter this Court. The Debtor was recently informed by the U.S. Trustee that it too would not be taking any action and that the U.S. Trustee lacks the authority to change the composition of the proposed board of directors of the Reorganized Debtor post-confirmation. Undaunted by the universal rebuff of its unsupportable position, the Debtor now asks this Court to grant the extraordinary relief being sought in the Motion. Much like the Debtor's factual allegations, the relief it seeks is logically inconsistent and intended to obfuscate its extraordinary nature. The Debtor purportedly seeks a modification to the confirmed Plan to expand the Committee's discretion to permit it to nominate a replacement board member if a current nominee "becomes incapable, unavailable, or unable to serve as a director on the New Board." (Motion, p. 2.) Yet the Debtor's prior conduct clearly demonstrates its belief that the Committee already has this discretion and authority. In fact, the Committee has already exercised this discretion and

authority on three prior occasions. The Committee has exercised the very discretion vested in it by the confirmed Plan and has declined to bar Mr. Lemonides from sitting on the New Board. The Court should not override the Committee's considered exercise of discretion. And even if the Court were to consider doing so, it should not do so on the flimsy record of this Motion.

What is clear from the record is that Mr. Lemonides did not breach any fiduciary duty and is not unfit to serve on the Reorganized Board. He has poured his time and effort into the reorganization of the Debtor as a Committee member for almost two and a half years, and continues to do so despite the pending Motion and baseless allegations contained in it. As Mr. Trick concedes: (i) at no other time in the past two years has he ever felt uncomfortable or upset during any of his interactions with Mr. Lemonides, and (ii) at no time over the past year when Mr. Lemonides was serving as a Board Nominee has Mr. Lemonides ever placed his own personal interests over that of Ambac. (Trick's Deposition Transcript, pp. 320-22, all pages of the deposition transcript cited are attached as Exhibit L to the McDonald Declaration.) There was absolutely no economic benefit to Mr. Lemonides in connection with his recommendation of Mr. Del Pozzo for the CIO position, and the Debtor has not provided, as it cannot provide, any evidence of such benefit. (*See* Lemonides Declaration, ¶ 32). Indeed, it was a desire to have an effective and reliable CIO in place to grow Ambac's investments that prompted Mr. Lemonides to recommend Mario John Del Pozzo in the first place. As Mr. Trick concedes, a good CIO would be good for the company, good for Mr. Trick as CFO and good for investors like ValueWorks. (*Id.* at 216-17.) Clearly, the mere submission of a candidate for the CIO position—notably at the invitation of Ambac—is not the basis to assert a breach of fiduciary duty. Rather, the Debtor's Motion rests upon whether Mr. Lemonides threatened Mr. Trick's future compensation unless he hired a supposedly unqualified Mr. Del Pozzo.

The Debtor's case has numerous inconsistencies that call into doubt the veracity of the Debtor's position. First, the Debtor's position is premised on the erroneous supposition that Mr. Lemonides only recommended Mr. Del Pozzo because he was a friend, thereby, as admitted by Mr. Trick, completely excluding any possibility that Mr. Lemonides viewed Mr. Del Pozzo as qualified. Second, the alleged threat to Mr. Trick's compensation makes no sense and is not supported by Mr. Trick's own notes and testimony, or Mr. Lemonides' recollection of the conversation. Indeed, Mr. Trick has acknowledged that his 2013 compensation has already been set. Third, while Mr. Trick may assert that he felt that Mr. Del Pozzo was not qualified to work at Ambac, Mr. Trick nevertheless offered to help him secure an investment advisory position at JP Morgan Chase—hardly something he would do for an unqualified investment professional. And fourth, Mr. Trick's recollection and misinterpretation of statements demonstrates that he leaves no room for other reasonable intentions or meanings. His inferences simply should not be given credence. For example, in early January 2013, Mr. Lemonides informed Mr. Trick that Mr. Del Pozzo enjoyed meeting Mr. Trick and that Mr. Del Pozzo felt that there was a "good opportunity" at Ambac. From this simple statement, Mr. Trick concluded that Mr. Del Pozzo realized that he was not qualified for the CIO position and would not obtain it. Mr. Trick's bizarre non-sequitur undermines Mr. Trick as a reliable interpreter of otherwise clear and innocent comments.

In addition, by requesting that it do so on two prior occasions, the Debtor concedes the Committee currently has the authority to replace Mr. Lemonides, if it saw cause to do so. The Debtor, however, is simply unsatisfied with the result of the Committee's exercise of its expressly delegated discretion and judgment and by the Motion the Debtor seeks to supplant its own whimsical preference for the business judgment of the Committee pursuant to the confirmed

Plan. In fact, rather than seeking to amend the Plan to vest the Committee with additional discretion and authority, the Motion seeks to second guess and override this authority. Significantly, nothing in the Debtor's Motion or any of its supporting papers cast even the slightest doubt that the Committee, after hearing all of the facts and after its counsel conducted its own, independent investigation, exercised its business judgment in good faith by declining to replace Mr. Lemonides. Consequently, the Debtor has stated no basis for the extraordinary relief sought in the Motion: the substitution of the Debtor's own preference for the considered business judgment of the Committee on a decision, which the confirmed Plan unequivocally vested in the Committee.

The credible evidence shows that Mr. Lemonides never made any threats to Mr. Trick, recommended a qualified candidate for the CIO position, and laid the foundation of "goodwill" with the SDC that will permit the Debtor's exit from bankruptcy. All of those actions were beneficial to the Debtor and never intended to be otherwise by Mr. Lemonides.

Mr. Lemonides did nothing to justify the extraordinary relief the Debtor seeks, and still holds no grudge against the Debtor, its management, or the other Board Nominees. Contrary to the Debtor's view, Mr. Lemonides has never, and clearly understands that he can never, exert any influence over board decisions for his personal gain. Mr. Lemonides is prepared to start afresh for the benefit of the Reorganized Debtor.

The Court should deny the Motion and reaffirm the Committee's authority vested in it by the confirmed Plan, which it has now exercised on three prior occasions and unequivocally concluded that Mr. Lemonides should serve on the Reorganized Board.

BACKGROUND AND PROCEDURAL HISTORY[4]

A. COMMITTEE APPOINTMENT, THE PLAN AND THE EFFECTIVE DATE

1. The Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on November 8, 2010. (Docket No. 1.)

2. On November 17, 2010, ValueWorks was appointed as a member of the Committee by the Office of the United States Trustee for the Southern District of New York (the "U.S. Trustee") in the Ambac bankruptcy. (Docket No. 27.) Mr. Lemonides is ValueWorks' Committee representative. (*Id.*)

3. The Plan, filed on March 12, 2012, provides in Article IV.K that:

> On the Effective Date the term of the current members of the Debtor's board of directors shall expire. . . . The New Board shall consist of the Reorganized Debtor's Chief Executive Officer and four (4) additional directors. . . . The interim directors shall be appointed as follows: one (1) director shall be appointed by the Informal Group and ***three (3) directors shall be appointed by the Committee***. . . . The identity of the members of the New Board . . . shall be disclosed at or prior to the Confirmation Hearing.

(emphasis added.)

4. Diana Adams, the Chief Executive Officer of the Debtor, Mr. Lemonides, Victor Mandel, Nader Tavakoli and Jeffrey Stein (collectively, the "Board Nominees") were designated to be the directors of the Reorganized Board. (Ksenak Declaration in Support of Confirmation, Docket No. 864, ¶ 50.)

5. On March 14, 2012, this Court entered an Order confirming the Plan and approving the Board Nominees (the "Confirmation Order," Docket No. 938.)

6. The Plan has not gone effective, despite that it was confirmed over a year ago, because two conditions precedent to consummation of the Plan have not been satisfied. First, the

[4] So as to avoid a wholesale recitation of the Lemonides Declaration, this background section contains only a summary thereof with citation to the relevant paragraphs of the Lemonides Declaration.

IRS Settlement (as defined in the Plan) has not gone effective. (*See* Plan, Article IX.B.) The Debtor has filed a notice that the Internal Revenue Service consented to the extension of the deadline for the IRS Settlement to go effective until June 12, 2013. (Docket No. 1237.) Second, the Mediation Agreement (as defined in the Plan) must go effective. (*See* Plan, Article IX.B.) To do so, the Mediation Agreement must be approved by final, non-appealable order. (Mediation Agreement, § 11(a).) Ambac has been in a partial rehabilitation proceeding since 2010 under the powers of the Office of the Commissioner of Insurance for the State of Wisconsin (the "OCI"). Certain parties appealed the rehabilitation court's order approving the Mediation Agreement, which appeal remains pending.

B. THE CIO SEARCH

7. In or about August of 2012, the Debtor first decided to find a replacement CIO to manage the investment of Ambac's assets.[5] (Lemonides Declaration, ¶ 8; *see* Trick's Deposition Transcript, pp. 45-46.) By October 16, 2012, the Debtor had hired Spencer Stuart, and on that date circulated to the Board Nominees a description (attached as Exhibit A to the Lemonides Declaration) of the position and skills desired in a candidate for the CIO position, stating it would be in the market by November 2012. (Lemonides Declaration, ¶ 9.)

8. In a discussion shortly thereafter, Mr. Lemonides, Mr. Trick and Ms. Adams agreed that the candidate should have experience with fixed-income investments as well as

[5] Perhaps coincidentally, in an SEC filing on August 9, 2012, the Debtor reported almost $100 million in losses on an interest rate "hedging" position for the second quarter of 2012 (the "$100 Million Loss"):

> The losses resulted primarily from mark-to-market movements in the derivative products portfolio caused by declining interest rates in each of the periods. The derivative products portfolio is positioned to benefit from rising rates as an economic hedge against interest rate exposure in the financial guarantee portfolio. . . . This additional interest rate sensitivity contributed losses of $96.8 million . . . for the three . . . months ended June 30, 2012. . . .

(August 9, 2012 10-Q, p. 85, located at http://www.sec.gov/Archives/edgar/data/874501/000119312512347714/d357769d10q.htm (last visited on April 3, 2013).)

alternative asset classes. (*See* Trick Declaration, ¶ 7; Adams Declaration, ¶ 7.) The job description was then amended by adding that a candidate would have ideal experience if he/she possessed: "Experience in managing a broad range of debt instruments, including taxable and tax exempt municipal bonds, ABS and MBS, and corporate bonds, *as well as alternative investments such as equities, hedge funds, bank loans.*" (Description of CIO Position, Lemonides Declaration, Exhibit A (emphasis added); *see* Trick's Deposition Transcript, pp. 179-80.) Ms. Adams and Mr. Trick also encouraged Mr. Lemonides and the other Board Nominees to submit any recommendations for the CIO position. (Lemonides Declaration, ¶ 10.)

C. THE DEBTOR'S INVESTMENT PORTFOLIO

9. Mr. Lemonides is familiar with the Debtor's nearly $6 billion investment portfolio, which is heavily weighted in low-yield fixed income securities. (*Id.* at ¶ 12; *see* Ambac's Third Quarter 2012 10-Q, p. 90, located at http://www.sec.gov/Archives/edgar/data/874501/000119312512470880/d411147d10q.htm (last visited on April 3, 2013).)

10. As described by Mr. Lemonides, who has over 25 years of investing experience and manages a portfolio of roughly $200 million of investments, low-yield fixed income securities have appreciated significantly in the past several years as interest rates have declined to historic lows. (Lemonides Declaration, ¶ 2.) While this has led to meaningful gains to date, the high current prices of the securities can cause significant risk of loss should current conditions reverse. (*Id.* at ¶¶ 13-14.) Reliance upon the current interest rate environment, without diversifying Ambac's investment portfolio, may well lead to negative outcomes for the investment portfolio. (*Id.*)

D. MARIO'S CANDIDACY FOR THE CIO POSITION

11. Due to Ambac's need for growth over the long-term, it is, in Mr. Lemonides' view, more akin to an endowment because its insurance business is in runoff and so investment is Ambac's principal source of revenue. (*Id.* at ¶¶ 15 and 17.) The demands and direction of the portfolio have therefore shifted dramatically. (*See id.* at ¶¶ 14-18.)

12. After investing a great deal of time, resources, and energy in this subject, which is so vital to Ambac's post-bankruptcy success, Mr. Lemonides concluded that his friend, Mr. Del Pozzo, was an excellent candidate for the CIO position. Mr. Del Pozzo has over 20 years of investing experience and five years of experience overseeing $2.5 billion in assets invested in very much the style and manner that Mr. Lemonides envisioned for Ambac. (*Id.* at ¶ 19.)

13. On December 4, 2012, following up on a communication he had with Mr. Trick, Mr. Lemonides e-mailed Mario's résumé to Mr. Trick with a request that he call to discuss it in more detail. (*Id.* at ¶ 21; *see* December 4, 2012 E-mail from Mr. Lemonides to Trick, attached as Exhibit C to the Lemonides Declaration.) On December 6, 2012, not yet having heard from Mr. Trick, Mr. Lemonides called him to follow-up. (*Id.* at ¶ 22.) Mr. Lemonides asked Mr. Trick if he had a chance to review the résumé, to which he responded that he had and that he did not see Mario as a good fit, but that he had no doubt that Mr. Lemonides would be able to explain why Mr. Lemonides thought he was. (*Id.*)[6]

[6] The Debtor's complaint regarding Mr. Del Pozzo's candidacy for the CIO position was that he did not have enough "buy side experience." (Trick Declaration, ¶ 15). Mr. Lemonides believes that criticism is unfounded. Mr. Del Pozzo has over 20 years' experience as an investor in fixed income securities and alternative asset classes, as well as 5 years of "buy side experience" in the asset classes Ambac invests in, managing investment portfolios aggregating over $450 million and providing investment allocation and management services regarding client investments of over $2.5 billion in the aggregate. In addition, the Debtor's distinction between "buy side experience" and "sell side experience" is not as significant as the Debtor suggests. Both buyers and sellers have knowledge of the market, the assets to be invested in and their performance, and while the buyer may do more diligence to ensure an asset is appropriate for its portfolio, the seller has to have a similar skill set and familiarity with the asset and client's portfolio in order to successfully "sell" the asset. Indeed, Mr. Trick

14. Mr. Lemonides discussed Mario's investing experience, and pointed out the five years he spent at Geforin overseeing an investment program that was very analogous to what Ambac would need to change to, and with dollars in assets under management very similar to Ambac's portfolio. (*Id.* at ¶ 23.) As Mr. Trick offered critiques of Mario's qualifications, Mr. Lemonides patiently explained why those criticisms were off-point. (*Id.* at ¶ 24.) They ended the conversation with the understanding that Mario would be diligently vetted for the CIO position. (*Id.*) Indeed, only an hour after the call, Mr. Trick sent Mr. Del Pozzo's résumé to Spencer Stuart to setup an interview—without mention of any threat or undue pressure to anyone. (December 6, 2012 E-mail from Ambac to Spencer Stuart, attached as Exhibit A to the McDonald Declaration; *see* Chain of E-mails Ending with December 17, 2012 E-mail from Spencer Stuart to Ambac, attached as Exhibit B to the McDonald Declaration.)

15. Mr. Lemonides asked Mr. Trick about progress on the CIO search in a December 17, 2012 phone call. (*Id.* at ¶ 26.) By that time, it was four months since the company had determined to seek a new CIO. (*Id.*) Mr. Trick advised that nothing had taken place since Mr. Lemonides had sent him Mario's résumé, and no progress would be made until January 2013. (*Id.*) This lackadaisical attitude was distressing to Mr. Lemonides. (*Id.*) Because he expected effective changes to the portfolio to be something that will take a new CIO months and quarters to accomplish, and because he sensed a clock ticking with increasing risk, Mr. Lemonides considered (and still considers) it very important that a new CIO be installed as soon as possible.

himself had more "sell side" experience before joining Ambac, but believes he made the transition to the "buy side" at Ambac fairly seamlessly. (Trick's Deposition Transcript, p. 111: Q: "[Y]ou were more sell side in your experience prior to joining Ambac?" A: "Generally speaking, that's correct." Q: "You moved over [to Ambac] and became more of a buy side person?" A: "That's correct." Q: "In your view, fairly seamlessly?" A: "Generally speaking, that's correct.")

(*Id.* at ¶ 29.)[7]

E. PHANTOM PRESSURE ON MR. TRICK TO HIRE MARIO

16. Mr. Trick claims that Mr. Lemonides made supposedly threatening comments to him, none of which is true as set forth in detail in Mr. Lemonides' Declaration. Mr. Lemonides did not state that hiring Mario "would be good for [Mario], good for [Lemonides] and good for [Trick]." (Trick Declaration, ¶ 10.) On a later call—not on December 6, 2012 as Mr. Trick asserts—Mr. Lemonides explained to Mr. Trick in some detail how hiring Mario was a "win" for everyone: (i) Ambac, in that it would then have an experienced CIO with the skills set forth in the description of the CIO position—including experience with fixed-income investments as well as alternative asset classes that Mr. Trick and Ms. Adams agreed was required, and more, who could grow Ambac's investment portfolio, (ii) Mr. Trick, in that he would have a competent CIO reporting to him, (iii) Mario, as he had left his then-current job to move back to the United States for family reasons and had not yet secured a new position, and (iv) Mr. Lemonides, because having a competent CIO in place would align with his fiduciary duty as a director of the Reorganized Debtor. (Lemonides Declaration, ¶ 32.) As Mr. Trick concedes, a good CIO would be good for the company, good for Mr. Trick as CFO and good for investors like ValueWorks. (Trick's Deposition Transcript, pp. 216-17.)

17. Mr. Trick also alleges that "Lemonides explained that he, as a member of the New Board, would have an 'influence' on the New Board's views of me and ultimately my compensation, and that hiring [Mario] would help Lemonides 'develop' his view of my position

[7] It also seemed obvious to Mr. Lemonides that the process for emerging from bankruptcy was going to be very complicated and challenging for senior management. (Lemonides Declaration, ¶ 28). And just as the CIO search had already been "back-burnered," the details of the emergence process would likely do the same. (*Id.*) Therefore, if the search were not in its final stages by the time of emergence, it would likely be further delayed. (*Id.*)

and compensation." (Trick Declaration, ¶ 10.) Again, Mr. Lemonides never made such a threat. Instead, he explained to Mr. Trick on a later call—not on December 6, 2012 as Mr. Trick asserts—that he would take into consideration Mr. Trick's failure to hire a CIO with the sense of urgency it deserved, and also told Mr. Trick it was his decision whether to hire Mario. (Lemonides Declaration, ¶ 33.)

18. Mr. Trick also alleges that Mr. Lemonides threatened his compensation during the calls. (Trick Declaration, ¶ 13.) Mr. Lemonides made no such reference to Mr. Trick's compensation. (Lemonides Declaration, ¶ 35.) The fact that Mr. Lemonides did not threaten Mr. Trick's position or compensation is consistent with Mr. Trick's reaction to those conversations and subsequent actions. During the calls, Mr. Trick did not get hostile, raise his voice, advise he had an employment contract and fixed compensation, or say he could not be fired by a non-director and non-employee, any or all of which could be expected of a conversation in which an executive felt his position or $1 million compensation was threatened. Mr. Trick's subsequent actions also demonstrate that the alleged threats could not have been made. Within an hour of the conversation, Mr. Trick had Mr. Del Pozzo's résumé sent to Spencer Stuart and requested that Mr. Del Pozzo be interviewed by them and Mr. Trick himself, all without any mention of a "threat" from Mr. Lemonides. (*See* Trick Declaration, ¶ 9; McDonald Declaration, Exhibit C.)

19. Mr. Trick claims as well that "Lemonides indicated that hiring [Mario] would 'get [Lemonides] comfortable with [Trick's] operation' and therefore with [Trick], which would 'go a long way' since Mr. Lemonides would be on the New Board." (Trick Declaration,¶ 10.) Again, that is not what Mr. Lemonides said. What he did say was that hiring a competent CIO, like Mario, would give Mr. Lemonides confidence as a new board member that Ambac would maximize the return on its chosen investments. (Lemonides Declaration, ¶¶ 32 and 34.) That

statement is self-explanatory, having a competent CIO in place would align with Mr. Lemonides' fiduciary duty as a director of the Reorganized Debtor to ensure maximum return on Ambac's investments. (*Id.* at ¶ 34.)

20. Nor did Mr. Lemonides—as Mr. Trick alleges—ever tell Mr. Trick that "'coming from where [I] come[] from' agreeing to meet with someone and then not hiring them is not different from not agreeing to meet with them in the first place." (Trick Declaration, ¶ 10.) Indeed, that alleged statement makes no sense. Instead, Mr. Lemonides said that merely interviewing Mario for the sake of an interview, with no serious intent of possibly hiring him, was the same as not interviewing him at all. (Lemonides Declaration, ¶ 36.)

21. Moreover, the documentary evidence is at odds with Mr. Trick's allegations of threats. On December 19, 2012, after all of the conversations about the CIO position took place and after Mr. Trick had reported the substance of those conversations to Ms. Adams, (Trick Declaration, ¶¶ 11 and 14), Ms. Adams sent an e-mail to all the Board Nominees, including Mr. Lemonides, saying "[t]he CIO search continues on track-since we originally spoke to you about it," (Lemonides Declaration, ¶ 37, Exhibit D, p. 2.) She made no mention of an allegedly untoward conduct, or any alleged pressure asserted on Mr. Trick. Instead, she acknowledged Mr. Lemonides' investing "expertise"[8] and that the ***Debtor would continue seeking his input on all candidates for the CIO position***, stating "[w]e will keep you all informed of the progress and, given your expertise in this area, share resumes of the finalists with you." (*Id.*)

22. Thereafter, on January 7, 2013, Ms. Adams sent a follow-up email to the Board

[8] Mr. Lemonides is a Certified Financial Analyst with over 25 years of investing experience. He founded ValueWorks in 2001 and has served as its Portfolio Manager since that time. He is responsible for all of the investment decisions of ValueWorks' portfolio (*i.e.* "buy side experience"), which has roughly hundreds of millions of dollars in assets under management, including extensive experience with fixed-income investments as well as alternative asset classes. *See ValueWorks: About Us*, located at http://www.valueworksllc.com/about.php (last visited on April 3, 2013) (entire paragraph.)

Nominees, including Mr. Lemonides, again stating the search for the CIO position was proceeding smoothly. (Lemonides Declaration, ¶ 38 (citing January 7, 2013 E-mail from Adams to Board Nominees.) Again, no indication of anything allegedly improper.

F. MR. TRICK'S TENDENCIES TO TELL MR. LEMONIDES WHAT HE THOUGHT MR. LEMONIDES WANTED TO HEAR, OR TO MISINTERPRET INFORMATION

23. Mr. Lemonides has had a concern that Mr. Trick has a tendency to tell Mr. Lemonides what Mr. Trick thought Mr. Lemonides wanted to hear, requiring Mr. Lemonides to probe into the facts, not just be put off by Mr. Trick's statements. For example, Mr. Trick advised Mr. Lemonides that the entire investment portfolio was managed by Ambac. (Lemonides Declaration, ¶ 48.) Mr. Lemonides later learned from the CIO that in fact a significant portion of the investment portfolio is managed by two outside firms. (*Id.*) Mr. Trick also advised Mr. Lemonides that Spencer Stuart's referral fee was smaller if the company identified the CIO candidate, but Ms. Adams later advised Mr. Lemonides the full referral fee would have to be paid, regardless of who identified the candidate that was hired. (*Id.* at ¶ 49.)

24. Mr. Trick also has a tendency to infer oddly or incorrectly from others' clear statements. This is critical if there is an issue of credibility. The notion that Mr. Lemonides recommended Mario because Mr. Lemonides thought he was a qualified candidate is completely and implausibly discounted by Mr. Trick. When asked at his deposition, "[s]o you do exclude from your analysis the possibility that [Lemonides] truly felt that [Del Pozzo] was qualified?," Mr. Trick responded "I guess so." (*Id.* at 348.) "There's only one reason why I think [Lemonides] would indicate that Mario is the best candidate. . . . The only reason I could think of is given that he's a friend of [Lemonides]." (*Id.* at 239; *see id.* at 240.) As explained above, objectively and subjectively, Mr. Del Pozzo was a very well qualified candidate.

25. Mr. Trick also bizarrely believed that Mr. Del Pozzo got the impression he would

no longer be considered for the CIO position after interviewing with Mr. Trick even though that was never communicated to Mr. Del Pozzo. (*Id.* at 276-77.) Indeed, Mr. Lemonides told Mr. Trick after the interview that Mr. Del Pozzo felt the CIO position was a "good opportunity," (Lemonides Declaration, ¶ 51), but Mr. Trick somehow concluded that meant that Mr. Del Pozzo "realized after the interview that he wasn't qualified," (Trick's Deposition Transcript, p. 278.) When asked at his deposition whether Mr. Del Pozzo's comment could mean he had a good opportunity to get the CIO position, Mr. Trick responded "I guess he could have interpreted that, but I don't see why he would interpret that." (*Id.* at 279.)

26. Finally, while Mr. Lemonides denies ever telling Mr. Trick to hire Mr. Del Pozzo, even in Mr. Trick's version of the conversation, Mr. Lemonides supposedly told Mr. Trick that he "should" hire Mr. Del Pozzo, which would be completely consistent with the recommendation of a qualified candidate, versus Mr. Trick's interpretation that "***should***" (assuming it was even said) meant Mr. Trick "***had***" to hire Mr. Del Pozzo. (*Id.* at 238-39.)

G. THE COMMITTEE DOESN'T ACCEPT MR. TRICK'S VERSION OF THE STORY

27. Despite the Debtor's belief that "Lemonides's conduct breached his fiduciary duties as a Committee member and renders him unfit for service as a member of the New Board," (Motion, ¶ 32), it was not until February of 2013 that the Debtor informed Committee counsel of the alleged conversations between Messrs. Trick and Lemonides. (February 13, 2013 Letter from Debtor's Counsel to Committee Counsel, attached as Exhibit D to McDonald Declaration.)

28. Upon receipt of the letter, the Committee met to discuss the allegations, and also interviewed Mr. Lemonides regarding them. By letter dated February 19, 2013 (attached as Exhibit E to the McDonald Declaration), Committee counsel responded to the Debtor that "[t]he

Committee has met and considered the information in your letter and is taking no action on the Debtor's request to remove Lemonides. . . ."

29. The Debtor sent another letter to Committee counsel on February 21, 2013 (attached as Exhibit F to the McDonald Declaration) asking to meet with the Committee members to present in "detail our reasons for [our] position. . . ." That meeting took place on February 25, 2013, and was attended by Mr. Trick, Ms. Adams, the Board Nominees, and the Committee members, including Mr. Lemonides. (Lemonides Declaration, ¶ 41.) Mr. Trick and Ms. Adams presented the Debtor's allegations to the Committee members in detail and responded to their questions, after which the Committee again refused to remove Mr. Lemonides. (*Id.*)

30. The Committee is the only party in interest that interviewed both Mr. Trick and Mr. Lemonides prior to the filing of the Motion, and twice refused to remove Mr. Lemonides from the Committee or substitute a new Board Nominee in response to the Debtor's allegations.

31. The Debtor then sent a letter to the U.S. Trustee on February 26, 2013 (attached (without exhibits) as Exhibit G to the McDonald Declaration) requesting that Mr. Lemonides be removed from the Committee and as a Board Nominee. The U.S. Trustee responded by letter dated March 13, 2013 (attached as Exhibit H to the McDonald Declaration) that it too would take no action.

H. MR. LEMONIDES COULD NOT DECREASE MR. TRICK'S COMPENSATION OR FIRE HIM

32. Mr. Trick's allegations also make no sense because there was no way in which Mr. Lemonides could have decreased Mr. Trick's compensation or fired him. The vast majority of Mr. Trick's $1 million compensation was set by contract, specifically an employment agreement dated February 24, 2012 guaranteeing him an annual salary of $600,000 and a

severance payment of at least that amount, as well as annual retention payments of $440,000 (paid quarterly). (2011 10-K, p. 221, located at http://www.sec.gov/Archives/edgar/data/874501/000119312512127521/d272123d10k.htm (last visited on April 3, 2013) (shows salary, bonus and retention payments in 2011); Trick's Employment Agreement, p. 1, attached as Exhibit I to McDonald Declaration; *see generally* Form of Retention Agreement, attached as Exhibit J to McDonald Declaration (only the form of Ambac's executive retention agreement was filed publicly).)

33. Mr. Trick testified at his deposition that his salary for 2013 has already been set by the current board of Ambac, and his ability to obtain a severance equal to one year's salary will continue under Ambac's severance policy regardless of whether his employment agreement expired. (Trick's Deposition Transcript, pp. 193-96.)

34. Mr. Lemonides also could not fire Mr. Trick. As a Board Nominee, Mr. Lemonides had no power to affect or determine who remains in the Debtor's employ, and as a director of the Reorganized Debtor Mr. Lemonides could not unilaterally fire an executive. (Reorganized Debtor's Bylaws, attached to the McDonald Declaration as Exhibit K, § 3.01: "The business and affairs of the Corporation shall be managed by the Board"; § 3.07: "A majority of the total number of Directors then in office (but in no event less than three Directors) shall be present in person as any meeting of the Board in order to constitute a quorum for the transaction of business at such meeting, and the vote of a majority of those Directors present at any such meeting at which a quorum is present shall be necessary for the passage of any resolution or act of the Board.")

35. Also, Mr. Trick's employment agreement was with AAC. (McDonald Declaration, Exhibit I.) Mr. Lemonides is not a Board Nominee of AAC, and would never have

had the power to terminate an employment agreement by that entity even if he were to become a member of the AAC board.

I. MR. LEMONIDES ALSO MADE A CONSCIOUS EFFORT TO INCLUDE THE BOARD NOMINEES IN THE CIO SEARCH AND HIRING PROCESS

36. The Debtor asserts that "Lemonides's attempt to exclude the other New Board nominees from the CIO search and hiring process shows a further lack of business judgment and a disregard for established corporate decision-making procedures." (Motion, ¶ 36; *see* Motion, ¶¶ 19, 25 and 47.) This assertion is again incorrect.

37. The Board Nominees met on October 19, 2012 and discussed the type of candidate they felt was qualified for the CIO position. (Lemonides Declaration, ¶ 55.) They agreed that the candidate needed broader experience and exposure, with experience in alternative asset classes taking priority over experience with fixed-income investments like municipal bonds in order to grow Ambac's investment portfolio over the long-term. (*Id.*) They also agreed that a candidate need not be a perfect fit for the CIO position as stated in the job description. (*Id.*) A candidate capable of maximizing the growth of the investment portfolio was paramount. (*Id.*)

38. In late November 2012, Mr. Lemonides also spoke to each of Messrs. Tavakoli, Mandel and Stein regarding Mr. Lemonides' thought to recommend Mario, discussed or offered to discuss Mario's experience with them, offered to send each Mario's résumé – which none wanted to see, and disclosed to each that Mario was a friend. (*Id.* at ¶ 56.) None of them expressed any reservation. (*Id.*)

39. After submitting Mario's résumé, Mr. Lemonides did not in any way alter or request to alter the Debtor's "corporate decision-making procedures," (Motion, ¶ 36.) Instead, completely in accordance with the procedures the Debtor had established, the Debtor considered Mr. Del Pozzo, submitted him to Spencer Stuart, and then had Mario interviewed by Spencer

Stuart and Mr. Trick. (Lemonides Declaration, ¶ 57.) Mr. Lemonides never went outside of the Debtor's procedures. (*Id.*)

J. COMMUNICATIONS WITH THE SDC

40. The Debtor also complains that Mr. Lemonides had inappropriate conversations with the SDC. (Motion, pp. 8-9 and 15.) To the contrary, any conversations Mr. Lemonides had with the SDC were appropriate, were encouraged by the Debtor, and were designed to expedite the effective date of the Plan.

41. Since the commencement of Ambac's partial rehabilitation proceeding in 2010, Mr. Lemonides built a rapport with the SDC, Roger Peterson, over the course of several lunches and telephone calls so that he, in various Ambac-related capacities, could be generally informed of his views on various topics.

42. A condition precedent for the Plan to go effective is that the Mediation Agreement must be effective. (Plan, Article Plan, Article IX.B.(vii).) The Debtor started engaging the SDC to meet or waive that condition, and included the Board Nominees in those discussions. (Lemonides Declaration, ¶ 61.)

43. Mr. Lemonides had conversations with the SDC in January 2013, which did not include any substantive discussion of tax issues. (*Id.* at ¶ 62.) Then, in a conversation initiated by the SDC on February 5, 2013, Mr. Lemonides first learned the SDC may be willing to settle the tax issues, something that had not previously been disclosed to the Board Nominees. However, Mr. Lemonides got the distinct "impression from [the SDC] that as soon as we are willing to sit down and settle this, he is pleased to wrap up the entire bankruptcy. He suggested he's been ready to talk for some time now." (*Id.* (quoting February 5, 2013 E-mail from Lemonides.) After reaching out to Committee counsel and the Debtor's management to get a better understanding, Committee counsel responded and advised Mr. Lemonides that he would

receive a complete analysis of the situation shortly, which came later that day, and asked that no one, including the Debtor, discuss with the SDC in the meantime. (*Id.* at ¶ 63.) Mr. Lemonides did just that. (*Id.*)

44. Only two weeks later, Ms. Adams sent an email (attached as Exhibit I to Lemonides Declaration) to Messrs. Tavakoli and Lemonides stating "I had my weekly meeting with [the SDC] today and he told me that he intends to call each of you tomorrow. I believe [the SDC's] interest in speaking to you is a result of the goodwill you have shown in laying a groundwork for positive interaction post-emergence." Ms. Adams encouraged Mr. Lemonides to take the SDC's call without scripting the conversation first. (Lemonides Declaration, ¶ 64 (citing E-mail from Adams to Lemonides.) Mr. Lemonides did so three days later and reported the substance of his conversation to the Committee. (Lemonides Declaration, ¶ 64.)

45. The Debtor's Motion also implies a concern that these conversations would jeopardize its reorganization or the resolution of the tax issues. That concern never existed, as Mr. Trick testified at his deposition, the only concern of his or Ms. Adams' was "mixed messaging" if a Board Nominee had not been fully "briefed" before having a conversation with the SDC—which would have been "embarrassing," but not pose any substantive threat to the Debtor. (Trick's Deposition Transcript, pp. 130-32.) As Mr. Trick himself stated, "[a] meeting between the [SDC] and a board nominee would be fine, as long as the board nominee was fully briefed before that meeting and there was a clear objective established for that meeting." (*Id.* at 134.)

46. Indeed, the Debtor's letter to the Committee requesting Mr. Lemonides' removal dated February 13, 2013—a week after the last conversation complained of took place—specifically states ***the Debtor could not identify "any immediate negative repercussions of***

[Lemonides'] communications with [the SDC]. . . ." (McDonald Declaration, Exhibit D) (emphasis added.) That is because there was and is none, as confirmed only days later in a February 19, 2013 e-mail from ***Ms. Adams to Mr. Lemonides stating "[the SDC] told me that he intends to call . . . you tomorrow. I believe [the SDC's] interest in speaking to you is a result of the goodwill you have shown in laying a groundwork for positive interaction post-emergence.***" (Lemonides Declaration, Exhibit I) (emphasis added.)

ARGUMENT

A. MR. LEMONIDES DID NOT BREACH HIS FIDUCIARY DUTY AS A COMMITTEE MEMBER

47. Mr. Lemonides has faithfully served on the Committee for almost two and a half years, working in a collaborative and productive way to guide the reorganization of the Debtor. Mr. Lemonides has also spent considerable time and effort with the Debtor and its management to understand their operations in order to faithfully serve in his new role as director of the Reorganized Debtor. All of his efforts have been to assist in growing Ambac's investment portfolio and getting the Debtor out of bankruptcy. Given the seriousness of the Debtor's breach of fiduciary duty allegation, and the harm caused to Mr. Lemonides' reputation by casting the unsupported aspersion, it is dispensed first.

48. Committees are given the powers and duties under Section 1103 of the Bankruptcy Code. Implied in this grant of authority is a fiduciary duty to constituents, coupled with "an implicit grant of limited immunity." *In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 717, 722 (Bankr S.D.N.Y. 1992) (hereinafter "*Drexel Burnham*"); *see Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 514 (S.D.N.Y. 1994); *In re L.F. Rothschild Holdings, Inc.*, 163 B.R. 45, 49 (S.D.N.Y. 1994) (hereinafter "*Rothschild*"). The fiduciary duty of a member of a creditors' committee inures to the class of unsecured creditors of the Debtor, and not to any

individual creditor or the debtor. *Pan Am Corp.*, 175 B.R. at 514; *In re Barney's, Inc.*, 197 B.R. 431, 441-42 (Bankr. S.D.N.Y. 1996); *Drexel Burnham*, 138 B.R. at 722.

49. There are three instances that would support a finding of breach of fiduciary duty to remove a committee member. The first is willful misconduct. *Pan Am Corp.*, 175 B.R. at 514; *see Rothschild*, 163 B.R. at 49; *see also Drexel Burnham*, 138 B.R. at 722. "Willful misconduct requires a showing of either the intentional performance of an act with knowledge that the performance of the act will probably result in injury or the intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences." *Pan Am Corp.*, 175 B.R. at 514-15 n.66. Second, *ultra vires* actions taken beyond the powers and duties ascribed to the committee. *Pan Am Corp.*, 175 B.R. at 514; *see Rothschild*, 163 B.R. at 49. "*Ultra vires* actions require a showing that the conduct was engaged in without any authority whatever." *Pan Am Corp.*, 175 B.R. at 514-15 n.66. Third, that the committee member has a conflict of interest, over an above its disinterestedness as a creditor or a different view on how to achieve the committee's duties, so strong that the conflict of interest gives rise to a breach of fiduciary duty. *In re Barney's, Inc.*, 197 B.R. at 442-43. To warrant such a finding, the conflict must be supported by "specific evidence"—well in excess of conclusory allegations, as seen here—of a breach of fiduciary duty or a likelihood that one will be committed. *Id.* (denying motion to remove committee member because conclusory assertions did not amount to "specific evidence" of conflict of interest, and could not substantiate a finding of breach of fiduciary duty).

50. The level of misconduct required for overcoming the qualified immunity of a committee member is made clear by *Pan Am*. The *Pan Am* court held that "Delta has failed to prove that the Creditors Committee engaged in willful misconduct or *ultra vires* action or that any alleged wrongdoing by the Committee caused harm to Delta." *Pan Am Corp.*, 175 B.R. at

514-15. This despite that the court found that the creditors' committee's and its chairman's "behavior toward Delta in making threats to obstruct Delta's interests unless Delta provided increased financing, attempts to renegotiate final executed agreements, threats to Pan Am's President [(for example, a threat to name him in a suit by the committee)], and threats to tie up Delta in litigation were obstructive of the relationship required if the reorganization was to go forward and Pan Am II was to succeed." *Id.* at 513.

51. There is no evidence, aside from conclusory allegations, that Mr. Lemonides engaged in any misconduct sufficient to support a breach of fiduciary duty. The only credible evidence is to the contrary. First, only one party actually considered both sides of this issue—the Committee—and twice concluded that no action was required. (*See* Lemonides Declaration, ¶¶ 40-42.) Had the Committee believed that a breach of fiduciary duty occurred, it would have acted.[9] Second, the Debtor's Motion rests entirely on Mr. Trick's credibility and his perception of Mr. Lemonides' comments. That credibility is seriously undermined by Mr. Trick's bizarre, illogical and extreme conclusions, as set forth above, regarding the undisputed language of various statements made by Mr. Lemonides. And such extraordinary relief should not be granted on such a flimsy record. Moreover, the Debtor's own actions, not its unsupported allegations, demonstrate that no such breach could have occurred. Communications by Ms. Adams to the Board Nominees about the search for a replacement CIO, after the discussions between Messrs. Trick and Lemonides took place, make clear the CIO search was proceeding as the Debtor planned, and even acknowledged Mr. Lemonides' investing "expertise" and requested his input on the hiring process. (Lemonides Declaration, Exhibits D and E). Hardly the reaction one would expect by the CEO to a Board Nominee only days after he allegedly threatened the

[9] The U.S. Trustee also took no action in response to the Debtor's request to remove Mr. Lemonides. (McDonald Declaration, Exhibit H; *see* Lemonides Declaration, ¶ 43.)

employment of her second in command. Mr. Lemonides' interactions with the SDC also did not result in any "adversity" to the Debtor as feared in its February 13, 2013 letter to Committee counsel. (McDonald Declaration, Exhibit D, p. 3.) Six days after the Debtor first requested that the Committee remove Mr. Lemonides, Ms. Adams sent an email to him regarding the SDC recognizing the "goodwill you have shown in laying a groundwork for positive interaction post-emergence." (Lemonides Declaration, Exhibit I). Again, not the reaction one would expect if there were ever negative repercussions from Mr. Lemonides' interfacing with the SDC. Mr. Lemonides understands the Debtor and the SDC reached a settlement in principle a few weeks later during the week of March 11, 2013, eviscerating any doubt that Mr. Lemonides impeded the Debtor's reorganization.[10] (Lemonides Declaration, ¶ 65.)

B. MR. LEMONIDES DID NOT BREACH ANY FIDUCIARY DUTY UNDER DELAWARE CORPORATE LAW

52. Mr. Lemonides' actions also could not constitute a breach of fiduciary duty as a director were the Plan effective or even assuming he presently served in such a capacity.

53. In the absence of "fraud, bad faith, or self-dealing in the usual sense of personal profit or betterment," Delaware law[11] presumes "that in making a business decision the directors of a corporation acted on an informed basis, . . . and in the honest belief that the action taken was in the best interests of the company. . . ." *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 746-47 (Del. Chan. Ct. 2005), *aff'd*, 906 A.2d 27 (Del. 2006). "In the absence of this evidence, the board's decision will be upheld unless it cannot be attributed to any rational business purpose." *Id.* at 747.

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[10] Indeed, the requisite conduct for a breach of fiduciary duty is still lacking even if the Debtor's allegations are assumed to be true. *See Pan Am Corp.*, 175 B.R. at 514-15.

[11] The Debtor and the Reorganized Debtor are incorporated in Delaware. As such, Delaware law applies pursuant to the internal affairs doctrine.

54. As a result, Delaware law permits the finding of a director's breach of fiduciary duty under only three circumstances. The first is a breach of the duty of care, which requires that a director was "grossly negligent" in the amount of care used in taking an action versus the "amount of care which ordinarily careful and prudent men would use in similar circumstances. . . ." *Id.* at 749. The second is the duty of loyalty, which requires a proven conflict between a director's duty and his self-interest, such as pecuniary gain to the detriment of the corporation in a transaction with the corporation, or receipt of a personal benefit that does not redound to all shareholders. *Id.* at 751. Third, the director must be shown to have acted in bad faith as "Delaware law presumes that directors act in good faith when making business judgments." *Id.* at 753. Bad faith requires a finding that action was taken for a reason other than a "genuine attempt to advance the corporate welfare," such as greed, hatred, envy or revenge, or when a transaction is "known to constitute a violation of applicable positive law." *Id.* at 753, 754.

55. Assuming Mr. Lemonides served as a director were the Plan effective or he presently served in such a capacity, no breach of fiduciary duty could be shown. The Debtor cannot show any action taken by Mr. Lemonides was done other than on an informed basis "and in the honest belief that the action taken was in the best interests of the company." Instead, his actions in proposing a CIO that would grow the Debtor's investment portfolio and laying a foundation of goodwill with the SDC—which shortly thereafter resulted in a settlement the Debtor had desired for months—redounded to the benefit of Ambac, despite any miscommunication that may have occurred. There was absolutely no economic benefit to Mr. Lemonides in connection with his recommendation of Mr. Del Pozzo for the CIO position, and the Debtor has not provided, as it cannot provide, any evidence of such benefit. (*See* Lemonides Declaration, ¶ 32). Mr. Lemonides also made every "genuine attempt to advance the corporate

welfare."

56. Finally, Mr. Trick also admitted (Trick's Deposition Transcript, pp. 320-22) that in the time Mr. Lemonides was a Board Nominee he did not act in any other way contrary to his fiduciary duty or put his interest ahead of the company's:

> Q: . . . Of the meeting you were present at with the board nominees, in which some of the topics I've previously referenced were discussed, did anyone, anyone in the room present at that meeting, raise any issues or concerns during the course of that meeting with the position [Lemonides] was advocating or taking on a particular issue?
>
> . . . .
>
> A: I don't seem to recall a specific debate between the board nominees on any particular topic as to a particular position.
>
> Q: Did [Lemonides] ever advocate a position in which [he] was perceived to -- other than the issue we have with respect to [Mr. Del Pozzo] which you allege, did [Lemonides] advocate any positions during the course of these meetings in which you felt he was putting his own personal interests ahead of the interests of Ambac?
>
> A: No, none that I recall.
>
> Q: During the course of any of these meetings, do you recall anyone indicating that they felt that [Lemonides] was putting his personal interest ahead of the interest of Ambac?
>
> A: No.
>
> Q: After any of these meetings, did any of the other board nominees or those present contact you and say [] something to the effect that they felt [Lemonides] was putting his personal interest ahead of Ambac?
>
> A: No.

57. No breach of fiduciary duty by Mr. Lemonides could be shown by the Debtor.

C. MR. LEMONIDES IS FIT TO SERVE AS A DIRECTOR OF THE REORGANIZED DEBTOR

58. Mr. Lemonides is also eminently fit to serve on the Reorganized Board. Neither the Debtor's allegations nor the authority it cites in the Motion can support a finding to the contrary.

59. The sole authority cited by the Debtor for the argument that the Court can alter

corporate governance decisions required "real jeopardy to reorganization prospects" to permit such action. (Motion, ¶ 54: citing "*In re Johns-Manville Corp.*, 801 F.2d 60, 66-67 (2d Cir. 1986) (stating that the bankruptcy court may override certain corporate governance rights where there is 'real jeopardy to reorganization prospects.')."") The Debtor's reorganization was never in jeopardy as a result of Mr. Lemonides' actions. At most, the Debtor was concerned about "embarrassing" "mixed messaging," which could never amount to an impediment to reorganization since the Debtor itself admits "[a] meeting between the [SDC] and a board nominee would be fine, as long as the board nominee was fully briefed before that meeting and there was a clear objective established for that meeting." (Trick's Deposition Transcript, p. 134.) Mr. Lemonides sought only to benefit the Debtor, and did so by catalyzing the Debtor's settlement with the SDC, one of two conditions precedent left to be satisfied for the Plan to go effective.

60. Moreover, the only case the Debtor relies upon, *In re Johns-Manville Corp.* concerned governance changes prior to confirmation of a plan, when the bankruptcy court presided with the full panoply of jurisdiction under 28 U.S.C. § 1334. Here the Plan has been confirmed, and so this Court's jurisdiction is limited by Section 1142 of the Bankruptcy Code, namely that which is necessary to implement or consummate the Plan as confirmed. 11 U.S.C. § 1142(b); *see, e.g.*, 8 COLLIER ON BANKRUPTCY ¶ 1142.03 (16th ed. rev.).[12] Mr. Lemonides is not standing in the way of the Debtor's reorganization, he has expedited it. He never made any

[12] While some cases permit post-confirmation jurisdiction for "interference" with consummation of a plan, those cases are unavailing for two reasons. First, such interference must be with consummation of the plan as drafted, as those cases seek to enforce Section 1142(b), which limits a court's jurisdiction that necessary to implement or consummate the Plan as confirmed. Second, even if "interference" could be read broadly to cover anything in a plan that might jeopardize a reorganization, here there was no action that jeopardized reorganization. Section 1127(b) of the Bankruptcy Code does not alter this analysis as post-confirmation plan modifications must be "warrant[ed]." (11 U.S.C. § 1127(b): "Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification. . . ."). For the reasons stated in this Objection, no Plan modification is warranted.

threat to Mr. Trick, and only recommended Del Pozzo for the CIO position in an effort to grow Ambac's investments, which redounds to the benefit of all its shareholders and creditors. He also laid the foundation of "goodwill" with the SDC, recognized expressly by Ms. Adams in her email to Mr. Lemonides, (Lemonides Declaration, Exhibit I), which permitted and expedited the settlement of tax issues agreed upon in principle just three weeks later.

61. Mr. Lemonides' conduct has not "created tension between Lemonides and the Debtor's management, as well as between Lemonides and the other New Board nominees." (Motion, ¶ 53). He simply did what he thought was best for Ambac within the confines of his roles and fiduciary duty. Moreover, Mr. Lemonides is willing to put the Debtor's allegations behind him and start afresh. (Lemonides Declaration, ¶ 68.)

62. And as Mr. Trick conceded, if the Motion were denied he would remain in Ambac's employ, and he believes both Ambac's executive management and the Reorganized Board would continue to be able to perform their duties.

Q: So what would you do? Would you resign?

A: I don't think I would resign, no.

Q: You just wouldn't interact with the board any more?

A: I would interact with the board, but I wouldn't interact with [Lemonides] on a one-on-one basis.

Q: You would still be able to do your job as [CFO]?

A: I believe so.

Q: And Ms. Adams would be able to do her job as CEO?

A: I presume so.

Q: The board would be able to function as a board of directors?

A: I don't know if that's the case.

Q: Why would it not be able to function as a board of directors?

A: Well, I mean, I guess they can function. I think there would be some tension between the board or between the other three [Board Nominees] and [Lemonides].

Q: Do you know that for a fact?

A: Do I know that for a fact? No.

Q: Have you asked them whether they can work with [Lemonides]?

A: I have not.

(Trick's Deposition Transcript, pp. 315-16.)

63. To the extent the Court has any lingering concern regarding the potential for future tension between Mr. Lemonides and management or directors of the Reorganized Debtor, that concern is eviscerated by the Reorganized Debtor's corporate documents and Delaware law. As a director of the Reorganized Debtor, Mr. Lemonides would have no ability to effectuate board action by himself. He would need the votes of one or two more of the five directors of the Reorganized Debtor for corporate action. (Reorganized Debtor's Bylaws, McDonald Declaration, Exhibit K, §§ 3.01 and 3.07: two or three directors required for corporate action depending on whether three or five directors attend a board meeting.) Delaware corporate law also provides the means to break a deadlock between directors if their views differ regarding the management of the corporation's affairs. 8 Del. C. § 226(a)(2).

D. THE EXTRAORDINARY RELIEF REQUESTED IN THE MOTION SHOULD BE DENIED

64. The Debtor is seeking to curtail the right given the Committee in the Plan to appoint three Board Nominees (Plan, Article IV.K) by purporting to "clarify" the Committee's discretion of which individual to appoint. That relief is wholly inconsistent with the letter and spirit of the Plan and the Court's Confirmation Order. By requesting that it do so, the Debtor has conceded the Committee has the authority to replace Mr. Lemonides, if it saw cause to do so. The Debtor is simply unsatisfied with the result of the Committee's exercise of its discretion and judgment, and by the Motion seeks to supplant the Debtor's own preference for the business judgment of the Committee. The only credible evidence shows that Mr. Lemonides never made

any threats to Mr. Trick, recommended a qualified candidate for the CIO position, and laid the foundation of "goodwill" with the SDC that will permit the Debtor's exit from bankruptcy. In any event, the Motion and the record in this matter provide no serious foundation for the extraordinary relief sought. Nothing in the Motion casts even the slightest doubt that the Committee, after interviewing Mr. Trick and Mr. Lemonides, hearing all of the facts and after its counsel conducted its own, independent investigation, exercised its business judgment in good faith by declining to replace Mr. Lemonides. The Debtor has stated no basis for the extraordinary relief sought in the Motion: the substitution of the Debtor's preference for the considered business judgment of the Committee on a decision, which the confirmed Plan unequivocally vested in the Committee. The Committee has exercised its judgment and has determined on two occasions, at the request of the Debtor, not to alter its decision.

65. Mr. Lemonides holds no grudge against the Debtor, its management, or the other Board Nominees. He is prepared to start afresh with each for the benefit of the Reorganized Debtor once this chapter is over. (Lemonides Declaration, ¶ 68.) Accordingly, the Court should deny the Motion and reaffirm the Committee's authority vested in it by the confirmed Plan, which it has exercised on three prior occasions and unequivocally concluded that Mr. Lemonides should serve on the Reorganized Board.

. . .

CONCLUSION

For all of the foregoing reasons, Mr. Lemonides and ValueWorks respectfully request that the Court deny the Motion, and grant such other and further relief to Mr. Lemonides and ValueWorks as this Court deems just and proper.

Date: April 3, 2013

Respectfully submitted,

DENTONS US LLP

By: */s/ Hugh M. McDonald*

Hugh M. McDonald
Jonathan D. Forstot
Oscar N. Pinkas
1221 Avenue of the Americas
New York, New York 10020
Tel: (212) 768-6700
Fax: (212) 768-6800

Counsel to Charles Lemonides and ValueWorks LLC