

LAW OFFICES  
WILLIAMS & CONNOLLY LLP

725 TWELFTH STREET, N.W.

WASHINGTON, D. C. 20005-5901

(202) 434-5000

FAX (202) 434-5029

ENU MAINIGI  
(202) 434-5420  
emainigi@wc.com

EDWARD BENNETT WILLIAMS (1920-1988)  
PAUL R. CONNOLLY (1922-1978)

December 17, 2020

Via NYSCEF and Email

The Honorable O. Peter Sherwood  
New York Supreme Court  
Commercial Division  
60 Centre Street, Room 615  
New York, NY 10007

Re: ***Ambac Assurance Corp. et al. v. Countrywide Home Loans, Inc., et al.,***  
**Index No. 651612/2010**

Dear Justice Sherwood:

As counsel for the Countrywide defendants, we write in response to Your Honor's request, at the December 15 status conference, to explain our view that conducting a bench trial in this matter by remote means in February 2021 is both appropriate and feasible. In response to the pandemic, courts around the country have successfully conducted trials and contested evidentiary matters by Zoom and similar technology, and Ambac did not object to a remote trial until after the Court dismissed its fraud claim. To be sure, in an ideal world, all parties would prefer to try this case before Your Honor in person, but that is not an option. A remote bench trial concerning Ambac's discrete claims for breach-of-contract is far preferable to the alternative of deferring the trial until a post-pandemic date when Your Honor may no longer be able to preside.

1. Ambac does not have an absolute right to an in-person trial that entitles it to an indefinite delay until the conclusion of the worldwide pandemic. To the contrary, the Court has wide discretion to manage its docket and to set the manner and conditions of the trial, *see People v. Wrotten*, 14 N.Y.3d 33, 37 (2009); *State v. Robert F.*, 25 N.Y.3d 448, 453–54 (2015), including the discretion “to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.” N.Y. Judiciary Law § 2-b (3) (McKinney). This includes authority to use video technology in “exceptional circumstances,” *Wrotten*, 14 N.Y.3d at 37, 40, a condition for which the worldwide COVID-19 pandemic undoubtedly qualifies. In fact, multiple New York courts have ordered trials or evidentiary hearings to proceed remotely during the ongoing crisis, even over the objection of one of the parties. *See, e.g., Wyona Apartments LLC v. Ramirez*, 2020 WL 6879003, at \*3–4 (Civ. Ct. N.Y. Cty. Nov. 22, 2020); *Ciccione v. One West 64th Street, Inc.*, 2020 WL 6325719, at \*4–6 (Sup. Ct.

N.Y. Cty. Sep. 08, 2020); *C.C. v. A.R.*, 133 N.Y.S.3d 200, 206–07 (Sup. Ct. Kings Cty. 2020). Federal courts in New York and elsewhere have similarly ordered remote trials during the pandemic over a party’s objection.<sup>1</sup> See, e.g., *Flores v. Town of Islip*, 2020 WL 5211052, at \*1, \*3 (E.D.N.Y. Sept. 1, 2020); *Argonaut Ins. Co. v. Manetta Enters., Inc.*, 2020 WL 3104033, at \*3 (E.D.N.Y. June 11, 2020); *Gould Elecs. Inc. v. Livingston Cty. Rd. Comm’n*, 470 F. Supp. 3d 735, 737 (E.D. Mich. 2020); *Vitamins Online, Inc. v. HeartWise, Inc.*, 2020 WL 3452872, at \*9 (D. Utah June 24, 2020); *Centripetal Networks, Inc. v. Cisco Systems, Inc.*, 2020 WL 3411385, at \*1 (E.D. Va. Apr. 23, 2020); *Xcoal Energy & Res. v. Bluestone Energy Sales Corp.*, 2020 WL 4794533, at \*1 (D. Del. Aug. 18, 2020); *Guardant Health, Inc. v. Found. Med., Inc.*, 2020 WL 6120186, at \*3 (D. Del. Oct. 16, 2020).<sup>2</sup>

2. The Court also asked the parties to address the feasibility and mechanics of a remote trial in this matter. A remote trial is indeed feasible. Microsoft Teams, Zoom and similar applications can accommodate proceedings with hundreds of participants attending at once, and all microphones may be muted except those few who need to speak at any given time. These applications allow exhibits to be displayed to participants on the screen when appropriate. Documents can be made available to the court and the parties in advance through electronic file transfer, or in hard copy binders. Courts and arbitrators around the country have successfully used these new technologies to conduct trials and other contested evidentiary matters, with mostly glowing reviews. See, e.g., *United States v. Davis*, 2020 WL 6196741, at \*5 (D. Del.

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<sup>1</sup> Many other remote trials have proceeded during the pandemic without objection. See, e.g., *Amtrust N. Am., Inc. v. Kf&B, Inc.*, 2020 WL 6306444, at \*7 (S.D.N.Y. Oct. 27, 2020); *Hallett v. Gov’t Employee Ins. Co.*, 2020 WL 6580407, at \*1 n.1 (D.S.C. Nov. 10, 2020); *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 2020 WL 5518146, at \*3 (S.D.N.Y. Sept. 14, 2020); see also *A Major Trial for Voting Rights in Florida Is Happening on Video Chat*, The New York Times (Sept. 17, 2020), <https://www.nytimes.com/2020/04/27/us/florida-felons-voting-trial.html> (describing the remote trial in *Jones v. DeSantis*, 462 F. Supp. 3d 1196 (N.D. Fla. 2020), *rev’d and vacated on other grounds*, 975 F.3d 1016 (11th Cir. 2020) (en banc)); Cara Salvatore, *How Seattle’s Federal Court Has Pioneered Zoom Jury Trials*, Law360 (Nov. 20, 2020), <https://www.law360.com/articles/1331134/how-seattle-s-federal-court-has-pioneered-zoom-jury-trials> (describing that the U.S. District Court for the Western District of Washington has had at least four jury trials over Zoom).

<sup>2</sup> One can imagine a trial so long and complex that it would be improper to proceed remotely. The West Virginia opioids trial that Ambac’s counsel referenced, for example, is a 12-week trial, involving five separately represented parties and dozens of lawyers from across the United States. That case raises extraordinarily complex legal and factual issues, and the parties anticipate calling at least one hundred witnesses. The complaint is more than 450 pages long, and makes sprawling allegations of misconduct spanning more than a decade. To prove their claims, the plaintiffs would need to establish a complex causal chain between the distribution of prescription medicine to DEA licensed pharmacies and alleged harms from individuals’ abuse and misuse of prescription and non-prescription opioids. This straightforward breach-of-contract case is a stark contrast to the West Virginia opioids matter. The excerpts Ambac read—out of context—from the defendants’ briefing in that case do not support Ambac’s objection to a remote trial here.

Oct. 22, 2020) (“[T]he undersigned Judge has presided over three remote bench trials using videoconference technology . . . [and] [i]t has been the Court’s experience, while sitting as a factfinder, that this technology allows for thorough and effective examinations, including challenges to credibility.”); *Gould Elecs.*, 470 F. Supp. 3d at 741 (“[V]ideoconference technology has been implemented successfully to conduct bench trials in cases involving varying degrees of complexity”); *Lynch v. State*, 2020 WL 5984790, at \*3 (Conn. Super. Ct. Sept. 11, 2020) (“[T]his court finds the use of an interactive audiovisual device to be an extraordinarily effective alternative to conducting court proceedings in the usual manner[.]”). Virtual trials have become sufficiently commonplace during the pandemic that the U.S. District Court for the Western District of Washington has published a handbook with guidance for attorneys.<sup>3</sup>

The parties’ counsel in this case have personal experience with remote technology for trials and other contested proceedings. Countrywide’s counsel Mr. Smurzynski participated in a week-long arbitration in September of this year, which was fully remote using Zoom. Ambac’s counsel, Selendy & Gay, recently represented a monoline insurer (like Ambac) in a remote bench trial in the U.S. District Court for the Southern District of New York involving complex financial instruments called collateralized debt obligations, where the court “made repeated findings that the remote proceedings had worked well and that it was able to view the witnesses, hear what they said, and make credibility determinations.” *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 2020 WL 5518146, at \*4 (S.D.N.Y. Sept. 14, 2020). In this very case, the parties have used Zoom during the pandemic to conduct expert depositions, which have included many exhibits displayed remotely to the witnesses and the parties. And the multiple hearings the Court has overseen in this matter using Microsoft Teams have worked efficiently and without incident.

3. Ambac’s prior statements and behavior supply further proof that a remote trial in February is appropriate. The pandemic has largely closed the courts to in-person operations since March 2020. Yet, until December 04, 2020, when the Court granted Countrywide’s motion for summary judgment on Ambac’s fraud claim, Ambac unwaveringly insisted on a trial at the earliest possible opportunity and never once mentioned an objection to remote proceedings. Contrary to its current suggestion, Ambac also urged that a trial in this matter would be straightforward and would take no more than four weeks – even at a time when the trial would have included the fraud claim and the secondary liability claims against Bank of America Corp., in addition to the current breach of contract claims. *See* Transcript of 07 Jul. 2020 Status Conference at 7:20–8:20 (Statement of P. Selendy). Ambac’s sudden request to postpone the trial is a response to this Court’s decision on the fraud motion. It has nothing to do with Ambac’s newfound objection to remote proceedings.

Respectfully Submitted,

/s/ Enu A. Mainigi  
Enu A. Mainigi

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<sup>3</sup> *Virtual Trials, Bench & Jury, A Handbook for Attorneys* (W.D. Wash. Sept. 28, 2020), <https://www.wawd.uscourts.gov/sites/wawd/files/VirtrualTrialHandbookforAttorneys.pdf>.

*Ambac Assurance Corp. et al. v. Countrywide Home Loans, Inc., et al.* Index No. 651612/2010

*Counsel for Defendants Countrywide Home  
Loans, Countrywide Financial Corporation,  
and Countrywide Securities Corporation*

cc: All counsel of record