

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

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In the matter of the application of
WELLS FARGO BANK, NATIONAL :
ASSOCIATION, U.S. BANK NATIONAL :
ASSOCIATION, THE BANK OF NEW YORK :
MELLON, THE BANK OF NEW YORK :
MELLON TRUST COMPANY, N.A., :
WILMINGTON TRUST, NATIONAL :
ASSOCIATION, HSBC BANK USA, N.A., and :
DEUTSCHE BANK NATIONAL TRUST :
COMPANY (as Trustees, Indenture Trustees, :
Securities Administrators, Paying Agents, and/or :
Calculation Agents of Certain Residential Mortgage- :
Backed Securitization Trusts), :

INDEX NO. 657387/2017

Friedman, J.

Petitioners, :

For Judicial Instructions under CPLR Article 77 on
the Administration and Distribution of a Settlement
Payment. :

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**BRIEF OF ASSURED GUARANTY CORP.
AS AMICUS CURIAE**

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TABLE OF CONTENTS

| | <u>PAGE</u> |
|--|--------------------|
| INTEREST OF <i>AMICUS CURIAE</i> | 1 |
| BACKGROUND | 2 |
| ARGUMENT | 3 |
| CONCLUSION..... | 7 |

INTEREST OF *AMICUS CURIAE*

Assured Guaranty Corp. (“Assured”) submits this brief as *amicus curiae*, pursuant to the Court’s Order, in connection with the Petition dated December 15, 2017, NYSCEF Doc. No. 1 (the “Petition”), regarding the distribution of the Settlement Payment¹ allocated to a single Settlement Trust, the SACO Trust 2005-GP1 (the “GP1 Trust”) (hereinafter the “GP1 Settlement Payment”). Assured is the note insurer for the Class A-1 Notes and the Class M-1 Notes (collectively, the “Insured Notes”) issued by the GP1 Trust pursuant to a Financial Guaranty Insurance Policy, effective September 9, 2005 (the “GP1 Policy”) and, to date, has paid approximately \$43.5 million under the GP1 Policy to cover losses on the Insured Notes. *See generally* NYSCEF Doc. No. 468, GP1 Policy.² As note insurer, Assured is an express third-party beneficiary under the Indenture dated as of September 9, 2005, pursuant to which the GP1 Trust issued the notes (the “GP1 Indenture”), and is expressly subrogated to the rights of the holders of the Insured Notes for all amounts that it previously paid under the GP1 Policy. *See* NYSCEF Doc. No. 467, GP1 Indenture §§ 4.11, 11.17. Assured also has express reimbursement rights under the GP1 Indenture, which are separate from and in addition to its subrogation rights.

Assured has not appeared as an Interested Party because it takes no position on the specific issues raised in the Petition regarding the GP1 Trust (i.e., whether the GP1 Settlement Payment should be treated as principal collections or interest collections, and whether the GP1 Settlement Payment should be distributed according to the “Pay First” or “Write-up First” method) (the “Petition Issues”). Rather, Assured submits this brief as *amicus curiae* to provide

¹ Capitalized terms used but not defined herein have the same meaning as ascribed in the Petition.

² The Affidavit of Errol Uhr, submitted in connection with Assured’s Motion for Leave to Appear, provided that Assured has paid approximately \$43.6 million under the GP1 Policy. *See* NYSCEF Doc. No. 465, Affidavit or Affirmation in Support of Motion ¶ 4. Since the date of the Affidavit, the GP1 Policy payments went down to \$43.5 million due to reimbursement amounts paid to Assured.

the Court with information regarding the insured features of the GP1 Trust, which has not been presented by another Interested Party to date, and to ensure that this information is appropriately considered in any order governing distribution of the GP1 Settlement Payment. Assured believes that because of the insured features of the GP1 Trust—which result in no overcollateralization being created in the GP1 Trust from the GP1 Settlement Payment—no distribution of the GP1 Settlement Payment should be made to notes subordinate to the Class M-1 Insured Notes, nor should there be any write-up of such subordinate classes of notes under any circumstances as a result of the GP1 Trust receiving the GP1 Settlement Payment.

BACKGROUND

On July 26, 2018, Assured filed a motion for leave to appear and participate in the instant Article 77 Proceeding (the “Proceeding”) (hereinafter the “Motion”). Assured had not previously appeared in the Proceeding, but in April 2018, Assured became aware of certain orders entered pertaining to other Settlement Trusts, which detailed how the distribution of the share of the Settlement Payment allocated to the relevant Settlement Trusts should be made through their payment waterfalls and how the related certificate balance write-ups should occur. Upon learning of these orders, Assured conferred with U.S. Bank, National Association (“U.S. Bank”), the securities administrator for the GP1 Trust, concerning how the GP1 Trust’s insured features should affect the distribution of the GP1 Settlement Payment. U.S. Bank informed Assured that if it wished to advance information regarding the GP1 Trust, it should seek leave to appear in the Proceeding, and that U.S. Bank would not oppose the Motion. Assured moved for leave to appear, in order to provide the Court with information regarding the insured features of

the GP1 Trust. *See* NYSCEF Doc. Nos. 463-68. Ultimately, on consent of the interested parties, the Court permitted Assured to file the instant brief as *amicus curiae* to present that information.³

ARGUMENT

If the GP1 Settlement Payment is distributed as principal funds and by using the Pay First method—the two issues raised by the Petition and to be determined in the Proceeding—the insured features of the GP1 Trust become relevant. Assured takes no position on whether those determinations are correct. But the Petition explains that for certain trusts, the use of the “Pay First Method may cause the OC Trusts to appear to be temporarily overcollateralized,” Petition ¶ 28, resulting in the distribution of some of the settlement proceeds to subordinated notes. The Petition explains that this is because under the Pay First method, “[t]he Settlement Payment is treated as though it was a subsequent recovery included in principal funds and, as a result, the aggregate certificate principal balances are reduced by the amount of the Settlement Payment[.]” making it thereby “appear that the overcollateralization amount includes the entire amount of the Settlement Payment[.]” *Id.* But if the Pay First method is applied to the GP1 Trust, the unique provisions of the GP1 Indenture require that the calculation of any overcollateralization amount include in the determination of the outstanding Note Principal Balance the \$43.5 million that Assured has paid out under the GP1 Policy. Given the size of this amount, under the terms of the GP1 Indenture, the GP1 Settlement Payment distribution will not build any overcollateralization that could be paid out to subordinated notes since the outstanding Note Principal Balance (inclusive of Assured’s policy payments) is greater than the aggregate mortgage loan balance and

³ The Court also granted Assured’s request to reserve its right to renew its Motion to appear as an Interested Party, rather than as *amicus curiae*, in the event that Nover Ventures’ appeal of the Court’s finding that Nover Ventures does not have standing with respect to Settlement Trusts in which it does not hold a direct interest, is denied. *See* NYSCEF Doc. No. 471, Decision and Order on Motion Sequence 005, dated August 7, 2018 (the “Standing Order”); NYSCEF Doc. No. 502, Notice of Appeal of Nover Ventures, LLC, dated September 6, 2018. Nover Ventures confirmed during the hearing that it does not hold a direct interest in the GP1 Trust, and that its standing with respect to the GP1 Trust is therefore subject to its appeal of the Court’s Standing Order.

GP1 Settlement Payment.

The GP1 Indenture defines how overcollateralization must be calculated. Specifically, it defines the “Overcollateralization Amount” as the “amount, if any, by which the Invested Amount exceeds the *aggregate* Note Principal Balance.” GP1 Indenture, Appendix A, Definitions at 23 (emphasis added). “Invested Amount” refers to the aggregate mortgage loan balance for the trust. *Id.* at Appendix A, Definitions at 14; *see also* Petition ¶ 28. “Note Principal Balance” is defined as the “sum of the Note Principal Balances of all Outstanding Notes of such Class,” and “Outstanding” is, in turn, defined to include notes that have been paid with proceeds of the GP1 Policy; it specifically states that “Notes that have been paid with proceeds of the [GP1] Policy will be considered outstanding for purposes of Section [4.11] of the [GP1] Indenture.” *See* GP1 Indenture, Appendix A, Definitions at 20-22.⁴ In other words, for purposes of calculating the Overcollateralization Amount for the GP1 Trust, the aggregate certificate principal balance (the “Note Principal Balance” under the terms of the GP1 Indenture) includes the entire amount that Assured has paid under the GP1 Policy.

Given that Assured has paid \$43.5 million under the GP1 Policy, there is no possible way the GP1 Settlement Payment could create overcollateralization. The GP1 Trust’s aggregate mortgage loan balance (which is the “Invested Amount” under the GP1 Indenture) is approximately \$5.4 million. *See* Affirmation of Roger A. Cooper in Support of Assured Guaranty Corp.’s Brief as *Amicus Curiae* (“Cooper Aff.”), Ex. A, Trustee Report dated August 27, 2018, at 1, 5. The principal balances for the Class A-1 Notes and Class M-1 Notes are approximately \$2.7 million and \$2 million respectively (not taking into account Assured’s

⁴ The relevant provision contains a typographical error in its reference to Section 4.12. It is clear that the relevant provision intends to refer to Section 4.11, which sets forth Assured’s subrogation rights, as Section 4.11 itself inadvertently states that “action shall be taken pursuant to *this Section 4.12.*” *See* GP1 Indenture § 4.11 (emphasis added).

subrogation rights discussed above). *See id.* at 1. The Note Principal Balance thus includes both that outstanding \$4.7 million and the \$43.5 million paid by Assured under the GP1 Policy, for a total of approximately \$48.2 million.

As the Petition explains, if the Pay First method is used, “[f]or purposes of calculating the overcollateralization amount, the aggregate certificate principal balances would be treated as if decreased” by the settlement amount “to account for the incoming Settlement Payment.”

Petition ¶ 29. Here, using the Pay First method as described, the approximately \$6 million in settlement proceeds allocated to the GP1 Trust would lead to a maximum decrease in the Note Principal Balance to approximately \$42.2 million. That balance is nowhere close to being less than the approximately \$5.4 million aggregate mortgage loan balance, which would need to be the case under the GP1 Indenture, and as the Petition also explains, in order for there to be any Overcollateralization Amount resulting from the distribution of the \$6 million GP1 Settlement Payment. Accordingly, because the GP1 Settlement Payment cannot lead to any overcollateralization in the GP1 Trust, no notes subordinate to the Class M-1 Notes would receive any of the GP1 Settlement Payment.

If the Court determines that the GP1 Settlement Payment should be distributed as principal funds but the Write-up First method should be used, again no overcollateralization would be created and no notes subordinate to the Class M-1 Notes would receive any of the GP1 Settlement Payment because the outstanding Note Principal Balance (inclusive of Assured’s \$43.5 million of payments under the GP1 Policy) far exceeds the approximately \$5.4 million aggregate mortgage loan balance and the \$6 million GP1 Settlement Payment. *See* Petition ¶¶ 22, 29.

Finally, under the GP1 Indenture’s waterfall provisions themselves, whether the funds are

distributed as principal proceeds or interest proceeds, Assured is entitled to be reimbursed for the payments it has made under the GP1 Policy (plus accrued interest thereon) prior to any distributions of proceeds to subordinated noteholders. *See* GP1 Indenture §§ 3.03(a), 3.03(e)(1). Specifically, if the GP1 Settlement Payment is treated as principal, all \$6 million should be distributed as “Available Principal Payment Amount” under the principal waterfall in Section 3.03(e)(1) of the GP1 Indenture—because, as discussed above, there is no overcollateralization created by the GP1 Settlement Payment, and consequently, there is no “Overcollateralization Reduction Amount” to be subtracted in calculating the “Available Principal Payment Amount.” *See* GP1 Indenture, Appendix A, Definitions at 2, 23. That section provides for distribution in the following order of priority: to the Class A Notes; then to the Class M-1 Notes; then to the Note Insurer for any unreimbursed draws (plus applicable interest) made under the GP1 Policy; and finally, to other subordinated classes of notes. *See* GP1 Indenture § 3.03(e)(1).

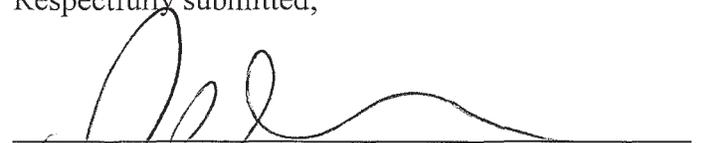
Alternatively, if the GP1 Settlement Payment is treated as interest, it should be distributed as “Interest Collection Amount” under Section 3.03(a) of the GP1 Indenture, which provides for distribution in the following order of priority: to the Note Insurer for any premium due under the GP1 Policy; then to the Class A-1 Notes and Class A-2 Notes; then to the Note Insurer as reimbursement for prior draws (plus applicable interest) made under the GP1 Policy; then to the Class M-1 Notes; and finally, to other subordinated classes of notes. *See id.* §§ 3.03(a)(1)-(4). In sum, in either of these cases, Assured’s reimbursement for the \$43.5 million it paid under the GP1 Policy (plus accrued interest thereon) stands in seniority under the waterfalls to any distribution to subordinate noteholders. Assured would need to be reimbursed in full for the \$43.5 million it has paid under the GP1 Policy (plus accrued interest thereon) before any of the GP1 Settlement Payment could be distributed to any subordinate noteholders.

CONCLUSION

Assured respectfully requests that the Court take notice of the facts presented in its Motion for Leave to Appear and the instant Brief as *Amicus Curiae*, and consider such facts in reaching any determination with respect to distribution of the GP1 Settlement Payment.

Dated: September 14, 2018
New York, New York

Respectfully submitted,



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