

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

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),

Petitioners,

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

Index No. 657387/2017

IAS Part 60

Honorable Marcy S. Friedman

Motion Seq. 12

**MEMORANDUM OF LAW IN OPPOSITION TO ASSURED GUARANTY CORP.'S
MOTION FOR LEAVE TO APPEAR AND PARTICIPATE**

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PRELIMINARY STATEMENT

Assured Guaranty Corp.’s (“Assured’s”) Motion for Leave to Appear and Participate (the “Motion”) lacks merit, disregards the clear deadlines set forth in the Court’s Order to Show Cause (much less without justification), threatens to unfairly prejudice the multitude of Interested Persons who timely appeared in this proceeding, and ignores numerous prior decisions of this Court focused on bringing about the swift and efficient resolution of this proceeding.

Nearly *nine months* after this action was initiated, and nearly *seven months* after Interested Persons were required by Order to Show Cause to appear, Assured filed the instant Motion. Yet Assured—by its own account an “Interested Person”—provides no explanation for why it did not (or could not) comply with the Court’s deadline. Notably, Assured does not dispute the adequacy of the “Notice Program” set forth in the December 19, 2017 Order to Show Cause or otherwise contend that it was unaware of the proceeding. Nor does Assured allege that it was unable or otherwise incapable of appearing in this proceeding by the January 29, 2018 deadline set forth in the Order to Show Cause. Rather, Assured’s “excuse” for delay is its purported surprise at how participants in this Article 77 proceeding are interpreting the governing contracts. But of course, Assured’s failure to foresee the need to “inform the Court of the[] unique features of the GP1 Trust” in January of this year, when its appearance would have been timely, does not constitute good cause sufficient to excuse its dilatory behavior.

Moreover, in addition to its failure to articulate a “good cause” basis for its delay in appearing, Assured also dismisses out of hand the significant amount of time that has now passed since Interested Persons were required to Answer, and the impact Assured’s delayed appearance would have on this proceeding. Amazingly, Assured cites the *nearly seven months* that have passed since the January 29, 2018 deadline as supportive of its Motion. Assured’s contention

that such delay will not prejudice the other parties to this proceeding is not only wrong, but directly contrary to this Court's prior rulings.

Lastly, Assured's attempt to cast its role as "advisory" is little more than a red herring designed to deflect attention from the deficiencies of its tardy Motion. Indeed, notwithstanding the countless references to merely wanting to "inform the Court of the[] unique features of the GP1 Trust" and not taking a position on the Petition Issues, Assured later acknowledges that it wants to appear to "ensure that any order governing the distribution of the GP1 Settlement Payment is consistent with what Assured believes is the correct interpretation of the GP1 Indenture." (Motion at 7.) This statement is tantamount to an acknowledgement that Assured should have timely appeared in this proceeding back in January.

For these reasons, and as set forth in more detail below, the Court should deny Assured's motion for leave to appear and participate.

STATEMENT OF FACTS

On December 15, 2017, 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 (collectively the "Trustees") filed the petition initiating this Article 77 proceeding for judicial instructions concerning the administration and distribution of the \$4.5 billion settlement payment by JP Morgan Chase & Co., and to provide certificate holders in the Settlement Trusts, and *other interested parties*, an opportunity to express their views. (Petition, Dkt. No. 1 at ¶ 9.)

Thereafter, on December 19, 2017, the Court entered the Order to Show Cause initiating this proceeding, which required in pertinent part:

- That Petitioners comply with the “Notice Program,” which was approved by the Court as “the best notice practicable” and “reasonably calculated to put interested parties on notice of this action, and constitutes due and sufficient notice of this special proceeding in satisfaction of federal and state due process requirements and other applicable law.” (Order to Show Cause, Dkt. No. 30 at ¶¶ 6-7.)
- That “any *Interested Person* who wishes to be heard on the merits of the questions presented by the Petition may appear by counsel or (subject to the limitations imposed by CPLR 321(a)) in person at the Final Hearing and present such evidence or argument as may be proper and relevant; provided, however, that, except for good cause shown, no Interested Person shall be . . . ***considered by the Court unless such Interested Person serves an answer to the Petition together with any supporting papers (a “Submission”), on or before Jan. 29, 2018[.]***” (*Id.* at ¶ 9 (emphasis added).)

As of the January 29, 2018 deadline for Interested Persons to appear, fifteen Answers were filed on the docket, covering the interests of more than forty Interested Persons. The Respondents included certificate holders in the underlying Settlement Trusts, holders in NIM trusts, CDOs, and re-REMICs, who have an interest through those investment vehicles in the underlying Settlement Trusts, and Ambac, a monoline insurer. Assured, a monoline insurer, did not file an Answer by the January 29th deadline.

Thereafter, this Article 77 proceeding moved forward on an expedited basis. (*See* June 19, 2018 Transcript, Dkt. No. 457 at 30-31.) The February 13, 2018 Scheduling Order entered by the Court required that Interested Persons exchange specified information by verified affidavit within eight days. (*Id.* at 30.) Additional requests for discovery in connection with the standing motion were addressed during a March 9, 2018 teleconference with the Court, where it was decided that briefing would conclude by April 26, 2018, and oral argument held on May 7, 2018. (*Id.*) Notably, while the case was proceeding quickly, Assured does not contend that it ever sought to appear, participate, or otherwise indicate its intent to appear or participate prior to filing this Motion.

It was not until July 26, 2018—after the issues relating to any Interested Person’s right to appear had been fully submitted and argued—that Assured first sought to appear in this proceeding. In its Motion, Assured cites, as the primary factors motivating its decision to now appear in this proceeding: (i) the Petition’s ambiguous discussion of overcollateralization, which it claims did not expressly raise a question as to how the insurance features of the GP1 Trust should factor into the distribution of the GP1 Settlement Payment; and (ii) the April 25, 2018 BSABS 2005-HE7 Order, “which detailed the distribution of the Settlement Payment allocated to the relevant Settlement Trust and the related certificate balance write-ups.” (*See generally* Motion.)

Though it purports to take no position on the “Petition Issues,” Assured nonetheless does take a position on the application of the “Write-Up First Method” vs the “Pay First Method”—maintaining that “in the case of the GP1 Trust, no distribution should be made to certain subordinate classes of notes, nor should there be any write up of such subordinate classes of notes, under any circumstances[.]” (Motion at 4.) Assured later implicitly confirmed in the Motion that it was in fact taking a position on certain Petition Issues as it is seeking to appear “in order to ensure that any order governing the distribution of the GP1 Settlement Payment is consistent with what Assured believes is the correct interpretation of the GP1 Indenture.” (Motion at 7.)

ARGUMENT

I. ASSURED SHOULD NOT BE GRANTED LEAVE TO PARTICIPATE IN THIS ARTICLE 77 PROCEEDING.

A. Assured’s Motion Is Not Supported By Good Cause.

Assured’s Motion disregards a fundamental tenet of good cause—there must be a “satisfactory explanation for the untimeliness.” *See, e.g., Brill v. City of New York*, 2 N.Y.3d

648, 652 (2004); *Malayeva v City of New York*, No. 4024/12, 2017 N.Y. Misc. LEXIS 1245 (Sup. Ct. Queens Cnty. Mar. 27, 2017). It is incumbent on Assured, as the party that failed to timely appear in this matter, to establish that “good cause” existed to excuse its delay. *Anonymous v. Anonymous*, 123 A.D.3d 581, 582 (1st Dep’t 2014) (Motion Court was within its right to deny plaintiff’s request for an extension where plaintiff failed to demonstrate good cause). “Vague, unsubstantiated, and conclusory assertions” are insufficient as a matter of law to satisfy a party’s burden to establish good cause. *See Batista v. Batista*, No. 201931, 2009 N.Y. Misc. LEXIS 2373, at *9 (Sup. Ct. Nassau Cnty. Feb. 24, 2009) (citing *Dettmann v. Page*, 18 A.D.3d 422 (2nd Dep’t 2005)). It is axiomatic that “[n]o excuse at all, or a perfunctory excuse, cannot be ‘good cause.’” *Brill*, 2 N.Y.3d at 652.

At its best, Assured’s bases for seeking leave to appear are little more than vague, unsubstantiated, and conclusory assertions. Assured contends that it did not appear by the January 29th deadline because the “Petition’s discussion of overcollateralization did not raise a question as to how the insurance features of the GP1 Trust should factor into the distribution of the GP1 Settlement Payment.” (Motion at 6.) This contention, however, does not hold water. Assured’s argument ignores that Ambac, a monoline insurer of three of the Settlement Trusts, managed to review the Petition and raise substantively identical concerns in its January 29, 2018 Answer. (Dkt. No. 76.) As Ambac timely explained, the “Petition is silent on a provision contained in the PSAs for two of the Ambac Trusts . . . that renders the [two Petition] issues irrelevant.” (*Id.* at 3.) This is because “the Settlement Payment is to be distributed first to the Certificate Insurer to the extent the Certificate Insurer has not been reimbursed for losses.” (*Id.*)

Indeed the scope and potential implications of this Article 77 proceeding were publicly available for all to see. (*See* Order to Show Cause at ¶¶ 6-7 (discussing Notice Program).) The

Petition states in the very first paragraph that it “concerns the administration and distribution of the Settlement Payment with respect to the Settlement Trusts.” (Dkt. No. 1 at 2). It also expressly discusses issues of “overcollateralization,” the typical distribution of cash flow to certificate insurers, and the potential implications of how the Petition Issues may impact the distributions. (Id. at 11-17.). Insofar as Ambac was able to review the Petition and recognize the value of appearing in this proceeding back in January, so too should have Assured. (See Dkt. No. 76.)

Put simply, if Assured was unclear as to what arguments were going to be made, and/or how those arguments would impact the SACO 2005-GP1 trust, it should have done what the other Respondents in this Article 77 proceeding did—answer the Petition by January 29, 2018. Assured’s failure to appreciate all arguments that would be raised in this proceeding does not constitute “good cause” for its participating at this late stage.

Assured’s contention that it did not appreciate the need to appear until it reviewed the **April 25, 2018** BSABS 2005-HE7 Order is similarly flawed. (See Motion at 3-4.) Putting aside whether Assured should have appeared in this Article 77 proceeding by the January 29, 2018 deadline—which it should have—Assured still did not act timely upon the alleged learning of facts that it asserts drove it to appear. Indeed, Assured does not explain why it took **four months** from the filing of the severance order, and nearly **three months** from its entry, to move for leave to appear in this proceeding. (See Dkt. Nos. 292-93, 357.) Courts routinely find that such lengthy unexplained delays undermine a claim that good cause exists. See, e.g., *Allen v. Krna*, 282 A.D.2d 946, 948 (3d Dep’t 2001) (upholding lower court’s finding that motion for extension two months after deadline was too long); *Zamir v. Hilton Hotels Corp.*, 304 A.D.2d 493, 494 (1st Dep’t 2003) (same).

In sum, Assured's motion is replete with vague, unsubstantiated, and conclusory assertions about its delay, and for good reason—there was no “good cause” or satisfactory explanation for Assured's tardiness. Assured knew, or should have known all along that the issues it now cites were always in play. Given all that was publicly known about the Petition, the Trust, and the parties' respective positions, Assured has not and cannot articulate a good cause basis for excusing its late Motion.

B. The Parties' Would Be Prejudiced If Assured Were Permitted To Appear.

In its Motion, Assured is dismissive of the substantial and very real prejudice that the Parties to this action would be subject to should Assured be permitted to participate at this late stage. *See Blay v Frost*, 126 A.D.3d 659, 660 (2nd Dep't 2015) (finding plaintiff failed to show that defendant would not be prejudiced by extension of time). In light of the very real and substantial risk of prejudice, the Court should use its “inherent power . . . to control [its] calendar[] and supervise the progress and conduct of litigation” and preclude Assured from appearing in this proceeding. *Novaro v. Jomar Real Estate Corp.*, 156 A.D.2d 213, 214 (1st Dep't 1989).

Indeed, the situation presented by Assured's motion is not dissimilar from HBK's motion for leave to amend that was denied by this Court, in this Article 77 proceeding, earlier this summer. (*See* Dkt. Nos. 386-393). As was the case with the HBK motion, Assured's delay in asserting its interest in the GP1 Settlement Trust has caused unfair prejudice to the other respondents. (*See* June 19, 2018 Transcript, Dkt. No. 457 at 30-31.) For example, Assured's failure to timely seek to participate in this action “has effectively prevented the other respondents from seeking timely discovery” of Assured's interests in this proceeding. (*Id.* at 30.) Further, as the Court found was the case with HBK, permitting Assured to participate in this proceeding would threaten to “upset the schedule for hearing of the standing issues previously set by this

Court, and would deprive the other respondents of the opportunity to be heard on the sufficiency of the certificates to confer [Assured's] standing, or alternatively would delay briefing of the merits by at least several months in order to afford the other respondents an opportunity to address [Assured's] newly asserted basis for standing.” (*Id.* at 31.)

Lastly, and perhaps most importantly permitting any party—Assured included—to appear at this late stage would signal to other potentially Interested Persons that they too could circumvent the deadlines set forth by the Court. Such a finding would undermine the integrity of the Court's processes. (*Id.*)

Because of this significant prejudice to the timely Respondents in this proceeding, Assured's Motion—like HBK's—must be denied.

C. Assured's Motion To “Advise” The Court Is No Different From The “Participation” Standard The Court Held Required A Direct Holding.

Assured's attempt to cast its role as “advisory” and to inform the Court of the “unique features” of the GP1 Trust is little more than a red herring. At bottom, Assured is seeking to participate in this proceeding so that it may advocate for its preferred interpretation of the GP1 Indenture. This position is no different than the full “participation” that was at issue in the standing motion. As Your Honor ruled in deciding that motion, participation is limited to those who have made the requisite showing that they are beneficiaries of the Settlement Trusts. (Standing Order, Dkt. No. 471 at 12.) Having made no such showing and having failed to comply with every single requirement for participation, Assured should not be allowed to appear in this litigation.

CONCLUSION

For the foregoing reasons, Nover Ventures, LLC respectfully requests that the Court deny Assured's motion.

Dated: August 9, 2018
New York, New York

Respectfully submitted,

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