

**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),

Petitioners,

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

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Index No. 657387/2017

Hon. Marcy S. Friedman

**RESPONSIVE MERITS BRIEF OF
AMBAC ASSURANCE
CORPORATION**

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Ambac Assurance Corporation (“Ambac”), the Certificate Insurer for certain classes of certificates issued by three trusts (GPMF 2006-AR2; GPMF 2006-AR3; and GPMF 2005-AR5) (the “Ambac Trusts”) at issue in this proceeding, respectfully submits this responsive memorandum of law concerning the distribution of payments under the Settlement Agreement.¹

I. Ambac is Entitled to the Full Allocable Shares for Insured Loan Groups in GPMF 2006-AR2 and GPMF 2006-AR3

In its opening memorandum of law, Ambac explained that the PSAs for GPMF 2006-AR2 and GPMF 2006-AR3 (the “2006 Trusts”) give Ambac priority rights to Subsequent Recoveries to the extent of Ambac’s unreimbursed claim payments for Realized Losses. *See* Ambac Opening Brief (NYSCEF No. 528), at 3-6. Because Ambac’s unreimbursed claim payments for Realized Losses far exceed the Allocable Shares for the insured loan groups in the 2006 Trusts, these entire Allocable Shares must be paid to Ambac. *Id.* No other interested party addressed these arguments in its opening brief.

Without addressing the argument discussed above, Nover Ventures suggested that “the distribution of a large portion of the Settlement Payment to a certificate insurer” would be an “absurd” result.² NYSCEF No. 600, at 20. In support of this assertion, Nover cited Section 3.06(a) of the Settlement Agreement, which provides that each Trust’s Allocable Share shall be deposited “for further distribution to Investors” in accordance with the distribution provisions of the Governing Agreements. Any suggestion that this portion of the Settlement Agreement overrides Ambac’s entitlement to Subsequent Recoveries under the PSA is flatly inconsistent

¹ Capitalized terms not defined herein have the meanings given to them in the Petition for judicial instructions under Article 77 (NYSCEF No. 1) or the relevant Pooling and Servicing Agreements.

² Nover made this point in the context of arguing against the “pay first” method. As Ambac explained in its opening brief, Ambac’s right to receive the entire Allocable Shares moots the question of whether a “pay first” or “write-up first” approach is required for the 2006 Trusts. As noted below, Ambac advocates for the “write-up first” method for GPMF 2005-AR5 (referred to as the “2005 Trust” in its opening brief).

with Nover's central contention, which is that "where the Governing Agreements unambiguously dictate how funds should be dispersed, the terms of the Governing Agreements control." Nover Brief (NYSCEF No. 600), at 4. Indeed, Nover relies heavily on Section 7.05 of the Settlement Agreement, which provides that the Settlement Agreement "shall not be argued or deemed to constitute, an amendment of any term of any Governing Agreement." *See id.* at 5. Thus, the Settlement Agreement cannot be construed as superseding the unambiguous PSA provisions giving Ambac the right to receive Subsequent Recoveries "first," before other parties. GPMF 2006-AR2 PSA (NYSCEF No. 530) §§ 6.02(b)-(c); GPMF 2006-AR3 PSA (NYSCEF No. 534) §§ 6.02(b)-(c).

II. For GPMF 2005-AR5, the Write-Up First Method Should Be Used

For GPMF 2005-AR5, Ambac argued that the Settlement Agreement requires that certificates be written up *before* distributions are made to holders, *i.e.*, the "write-up first" method. *See* Ambac Opening Brief (NYSCEF No. 528), at 8-9. One brief taking the opposite position, filed by the Institutional Investors and AIG, asserts that the "pay first" method must be used, *inter alia*, "[b]ecause the Governing Agreements are silent as to the order of operations." NYSCEF No. 576, at 5-6. This is not the case for GPMF 2005-AR5, where the PSA directly addresses the order of operations. More specifically, the definition of "Current Principal Amount" includes within the sum to be distributed as of any Distribution Date "any Subsequent Recoveries added to the Current Principal Amount of such Certificates pursuant to Section 6.02(h) hereof." GPMF 2005-AR5 PSA (NYSCEF No. 537) Article I. Several other interested parties have explained why similar contractual provisions require use of the "write-up first" method, and those arguments apply with equal force here. In order to avoid duplicative briefing,

Ambac respectfully refers the Court to the following arguments made by other interested parties on this issue:

(1) The PSA requires use of the write-up first method because Subsequent Recoveries are included in the definition of “Current Principal Amount,” which is analogous to the definition of “Certificate Principal Balance” referenced in other briefs. *See* Olifant Funds Opening Brief (NYSCEF No. 545), at 3-6; Nover Ventures Opening Brief (NYSCEF No. 600), at 14-18; Tilden Park Opening Brief (NYSCEF No. 515), at 14-16.³

(2) The Settlement Agreement does not specify use of the “pay-first” method, and, in any event, cannot supersede language in the Governing Agreements requiring use of the “write-up first” method. *See* Olifant Funds Opening Brief (NYSCEF No. 545), at 3-4; Nover Ventures Opening Brief (NYSCEF No. 600), at 14-15, 18-20;⁴ DW Partners and Ellington Opening Brief (NYSCEF No. 609), at 21-22.

(3) Petitioners have contended in other proceedings that similar PSA language requires use of the “write-up first” method, and have taken steps to clarify this point in subsequent settlement agreements. *See* Olifant Funds Opening Brief (NYSCEF No. 545), at 6-8.

(4) The court decision cited in favor of the “pay first” method was based on materially different language in both the settlement agreement and the governing agreements at issue in that case. *See* Olifant Funds Opening Brief (NYSCEF No. 545), at 8-10.

³ Ambac does not adopt Tilden Park’s argument against Ambac’s interpretation of the Settlement Agreement (NYSCEF No. 515, at 12-13), but does adopt its argument against the construction of the Settlement Agreement advocated by the Institutional Investors and AIG (*id.* at 13-14).

⁴ Ambac disagrees with Nover’s brief to the extent it disputes Ambac’s priority right to receive Subsequent Recoveries in the 2006 Trusts, and to the extent it contends that only subordinate certificates should be written up.

III. All GPMF 2005-AR5 Certificates That Were Written Down by Realized Losses Should Be Written Up

In its opening brief, Ambac argued that *all* certificates that were previously written down by Realized Losses should be written up, notwithstanding language in the PSA referring only to the write-up of Subordinate Certificates. Ambac's opening brief cited Section 3.06(b) of the Settlement Agreement in support of this argument, as did the briefs of a number of other interested parties. Ambac Opening Brief (NYSCEF No. 528), at 7-8.

It is now apparent that the only interested party that disagrees with this position is Nover Ventures. Some of the arguments made on this issue by other interested parties apply with equal force to GPMF 2005-AR5. In order to avoid duplicative briefing, Ambac respectfully refers the Court to the following arguments made by other interested parties:

(1) The Settlement Agreement specifies which classes of certificates are eligible for a write-up, and they include senior certificates to which realized losses have been allocated. *See* DW Partners and Ellington Opening Brief (NYSCEF No. 609), at 6-7; Institutional Investors and AIG Opening Brief (NYSCEF No. 576), at 21; Tilden Park Opening Brief (NYSCEF No. 515), at 19-20.

(2) Writing up subordinate certificates, but not senior certificates, is not required by the PSA. It also would be inconsistent with the application of Subsequent Recoveries contemplated by the definition of "Realized Losses," which refers to the reduction of Realized Losses to the extent Subsequent Recoveries are applied to reduce the Current Principal Amount of "any Class of Certificates." GPMF 2005-AR5 PSA (NYSCEF No. 537) Article I (emphasis added). Furthermore, limiting write-ups to subordinated certificates would create absurd results, and certain PSA language referring to write-up of only the subordinated certificates most likely

constitutes a drafting error. *See* DW Partners and Ellington Opening Brief (NYSCEF No. 609), at 9, 15-17; Institutional Investors and AIG Opening Brief (NYSCEF No. 576), at 21-23.

IV. CONCLUSION

For the foregoing reasons, the Court should instruct Wells Fargo, as Trustee, to pay the entire Allocable Shares for loan group II of GPMF 2006-AR3 and loan groups I and II of GPMF 2006-AR2 directly to Ambac. The Court also should instruct Wells Fargo to distribute the Allocable Shares for loan groups II and III of GPMF 2005-AR5 using the Write-Up First Method, and to write up all certificates that were written down for Realized Losses by the amount of the Allocable Shares, in the reverse order that Realized Losses were allocated as required by the Settlement Agreement, and then to pay to Ambac, as subrogee of the holders of the GPMF 2005-AR5 Insured Certificates, the portion of the Allocable Shares that would otherwise be payable to such holders.

Date: September 28, 2018

By:

/s/ Henry J. Ricardo

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