

**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

**RESPONSE OF AMBAC
ASSURANCE CORPORATION AND
THE SEGREGATED ACCOUNT OF
AMBAC ASSURANCE
CORPORATION TO THE
PETITION**

TABLE OF CONTENTS

I. Introduction.....1

II. Ambac is Entitled to the Allocable Shares for Insured Loan Groups in GPMF
2006-AR2 and GPMF 2006-AR32

III. Certificates in GPMF 2005-AR5 Should Be Written Up as Required by the
Settlement Agreement Before the Settlement Payment is Distributed3

 A. All Certificates that Were Written Down for Realized Losses Should Be
 Written Up in the Manner Contemplated by the Settlement Agreement.....4

 B. The Write-Up First Method Should Be Used4

IV. CONCLUSION.....5

I. Introduction

Ambac Assurance Corporation and the Segregated Account of Ambac Assurance Corporation¹ (together, “Ambac”), the Certificate Insurer of certain classes of certificates issued by three trusts (GPMF 2006-AR2; GPMF 2006-AR3; and GPMF 2005-AR5) (the “Ambac Trusts”) that are included in the J.P. Morgan Global RMBS Settlement, respectfully submits this response to the Petition dated December 15, 2017 (the “Petition”),² filed by the Trustees seeking this Court’s instruction as to the distribution of settlement payments under the Settlement Agreement. Although the Trustees identify two issues with respect to the Ambac Trusts—(1) whether Write-Up First or Pay-First should be used; and (2) whether senior certificates should be written up by the amount of the Settlement Payment—the Petition is silent on a provision contained in the PSAs for two of the Ambac Trusts (GPMF 2006-AR2 and GPMF 2006-AR3) that renders the two identified issues irrelevant with respect to the distribution of the Settlement Payment for these two Trusts.³ By the plain language of the PSAs, the Settlement Payment is to be distributed first to the “Certificate Insurer” to the extent the Certificate Insurer has not been reimbursed for losses. Because Ambac, the Certificate Insurer, has made unreimbursed insurance claim payments in excess of the amount of the Allocable Share for the insured Loan Groups of each of these two Trusts, Ambac is entitled to the full Allocable Share for those Loan Groups. Ambac also appears in this proceeding as subrogee of the holders of insured certificates (the II-A-2 and III-A-2 certificates) in GPMF 2005-AR5 in support of a direction that all classes of certificates that were written down for Realized Losses be written up in the reverse order in

¹ The insurance policies on which Ambac’s interest is based were allocated to the Segregated Account on March 24, 2010. The Second Amended Plan of Rehabilitation for the Segregated Account was approved on January 22, 2018 and the Segregated Account will be merged into Ambac Assurance Corporation upon the effective date of that plan.

² Capitalized terms not defined herein have the meanings given to such terms in the Petition.

³ Ambac insures the Class I-A-2 and II-A-2 certificates in GPMF 2006-AR2 and the Class II-A-2 certificates in GPMF 2006-AR3.

which the Realized Losses were allocated to the extent of the Allocable Share, as required by the Settlement Agreement, and to advocate for the use of the Write-Up First Method.

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

The plain language of the PSAs for GPMF 2006-AR2 and GPMF 2006-AR3 requires the payment of the full Allocable Shares for the insured Loan Groups in those trusts to Ambac. The Settlement Agreement specifies that the Allocable Shares are to be treated as though they were Subsequent Recoveries under the PSAs. (Settlement Agreement § 3.06(a), NYSCEF Doc. No. 3) (the Allocable Shares are made “for further distribution to Investors in accordance with the distribution provisions of the Governing Agreements . . . as though such Allocable Share was a ‘subsequent recovery’ . . .”).⁴ The section of the PSAs for GPMF 2006-AR2 and GPMF 2006-AR3 regarding subsequent recoveries specifies that such distribution is to be made to the “Certificate Insurer,” here Ambac. “Subsequent Recoveries will first [be] used to pay any amounts owed to the Certificate Insurer as set forth in Section 6.02(c).” GPMF 2006-AR3 PSA § 6.02(b); GPMF 2006-AR2 PSA § 6.02(b). Section 6.02(c) provides that:

Subsequent Recoveries will be allocated first to the Certificate Insurer for payment on any Reimbursement Amounts for such Distribution Date in respect of any Deficiency Amount described in clauses (a)(2) or (b)(y) of such definition, but only to the extent of the portion of Subsequent Recoveries that were paid by the Certificate Insurer for Realized Losses that were allocated to Class II-A-2 Certificates, as applicable.

GPMF 2006-AR3 PSA § 6.02(c) (emphasis added); *see also* GPMF 2006-AR2 PSA § 6.02(c) (same). Ambac is the Certificate Insurer for the Class II-A-2 certificates in GPMF 2006-AR3 and for the Class I-A-2 and Class II-A-2 certificates in GPMF 2006-AR2. GPMF 2006-AR3 PSA Article I (Definitions); GPMF 2006-AR2 PSA Article I (Definitions). Ambac has paid

⁴ The Settlement Agreement is available at Exhibit B to the Petition.

claims on Realized Losses for the Class II-A-2 Certificates in GPMF 2006-AR3 and on the Realized Losses for the Class I-A-2 Certificates and Class II-A-2 Certificates in GPMF 2006-AR2 in amounts exceeding the Allocable Shares for those Trusts and Loan Groups.⁵ Ambac therefore is entitled to the full Allocable Shares.

III. Certificates in GPMF 2005-AR5 Should Be Written Up as Required by the Settlement Agreement Before the Settlement Payment is Distributed

Ambac, as Certificate Insurer, is subrogated to the rights of holders of insured certificates to the extent they have received insurance payments from Ambac. GPMF 2005-AR5 PSA § 4.10(d) (“[T]o the extent the Certificate Insurer pays any Insured Amount, either directly or indirectly . . . to the Holder of a Insured Certificate, the Certificate Insurer will be entitled to be subrogated to any rights of such Holder to receive the amounts for which such Insured Amount was paid . . .”).

Two issues raised in the Petition apply to the distribution of the Allocable Share related to GPMF 2005-AR5: (1) whether all certificates should be written up by the amount of the Settlement Payment (Petition ¶¶ 45-48); and (2) whether the Write-Up First Method or Pay First Method should be used (Petition ¶¶ 21-40). The certificate principal balance of all classes of certificates that have been written down by Realized Losses should be written up in the reverse order that those Realized Losses were allocated by the amount of the Allocable Share, and the distributions should be made pursuant to the Write-Up First Method.⁶

⁵ If necessary, Ambac is prepared to make an evidentiary submission regarding its unreimbursed claim payments.

⁶ In light of the argument presented, *supra* § II, it is not necessary for the Court to reach these issues for GPMF 2006-AR2 or GPMF 2006-AR3, since the entirety of the Allocable Share for the Loan Groups supporting the Ambac-insured certificates should be paid directly to Ambac. In the alternative, to the extent the Court holds otherwise, Ambac, as subrogee to its insured certificateholders in those two trusts, takes the same positions as it takes for GPMF 2005-AR5.

A. All Certificates that Were Written Down for Realized Losses Should Be Written Up in the Manner Contemplated by the Settlement Agreement

The Class A certificates must be written up by the amount of any realized losses allocated to the Class A certificates. The Settlement Agreement specifies that the write up is to occur without restriction that would exclude the Class A certificates. “After the distribution of the Allocable Share to a Settlement Trust pursuant to Subsection 3.06(a), the Accepting Trustee for such Settlement Trust will apply . . . the amount of the Allocable Share for that Settlement Trust *in the reverse order of previously allocated losses, to increase the balance of each class of securities (other than any class of REMIC residual interests)* to which such losses have been previously allocated” Settlement Agreement § 3.06(b) (emphasis added). The only classes exempt from the write up are the REMIC residual interests; all other classes, including Class A certificates, are to be written up by the amount of the Settlement Payment “by not more than the amount of such losses previously allocated to that class of securities” *Id.* This clear language is consistent with the intent of the PSA and the Settlement Agreement: the most senior certificates should bear losses only after subordinate certificates have borne losses.

B. The Write-Up First Method Should Be Used

The Settlement Agreement requires that certificates be written up before distributions are made, *i.e.*, the Write-Up First Method. The Settlement Agreement provides for an iterative process for the Settlement Payment from J.P. Morgan to flow to the ultimate recipients. First, the Settlement Payment “shall be deposited into the related Trust’s collection or distribution account.” Settlement Agreement § 3.06(a). Then, the Settlement Payment is distributed “in accordance with the distribution provisions of the Governing Agreements . . . as though such Allocable Share was a ‘subsequent recovery’” *Id.* Section 3.06(b) discusses the timing of the write-up. Write-up occurs “[a]fter the distribution of the Allocable Share *to a Settlement*

Trust pursuant to Subsection 3.06(a)” Settlement Agreement § 3.06(b) (emphasis added). Therefore, write-up occurs after the deposit of the Settlement Payment into each trust’s distribution and collection account, but before distribution to the ultimate recipients. Were write-up to occur after payment to the Trust and after distribution, Section 3.06(b) would be written to require write-up to occur after the distribution of the Allocable Share *to investors*. But instead, the Settlement Agreement specifies that the write-up occurs after payment *to the Trust*, which, by definition, occurs before distribution to the ultimate recipients. *See Goldstein v. AccuScan, Inc.*, 2 N.Y.3d 811, 812 (2004) (“[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.”). Nothing in the PSA is inconsistent with this clear order of operations specifying the Write-Up First method.

IV. CONCLUSION

For these reasons, the Court should instruct Wells Fargo (the Trustee for GPMF 2006-AR2, GPMF 2006-AR3, and GPMF 2005-AR5) to distribute the Settlement Payment allocated to Loan Group II of GPMF 2006-AR3 and Loan Groups I and II of GPMF 2006-AR2 to Ambac as required by those trusts’ PSAs. The Court also should instruct Wells Fargo to distribute the Settlement Payment allocated to 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 Share, in the reverse order that Realized Losses were allocated as required by the Settlement Agreement.

Date: January 29, 2018

By:

/s/ Henry J. Ricardo

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CERTIFICATE OF SERVICE

I certify that on January 29, 2018, I caused this Response to be served on all parties who have appeared in this action via NYSCEF. I also caused service to be effectuated on all parties who have appeared by overnight mail.

/s/ Henry J. Ricardo_____

Henry J. Ricardo