

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

In the matter of the application of

Wells Fargo Bank, National Association, *et al.*,

Petitioners,

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

Index No. 657387/2017

IAS Part 60

Hon. Marcy S. Friedman

**SUBMISSION OF PROPHET
 MORTGAGE OPPORTUNITIES LP,
 POETIC HOLDINGS VI LLC AND
 POETIC HOLDINGS VII LLC IN
 RESPONSE TO PETITION**

Pursuant to the Court's Order to Show Cause filed December 19, 2017 and the Clarifying Order filed January 23, 2018, Respondents Prophet Mortgage Opportunities LP ("Prophet"), Poetic Holdings VI LLC and Poetic Holdings VII LLC ("Poetic") (collectively "Respondents") respectfully make this Submission in response to the Petition.

I. Settlement Trusts in Which Respondents Have an Interest

The following table shows the Settlement Trusts in which Respondents have an interest:

<u>Trust Name (Per Exhibits to Petition)</u>	<u>Trustee</u>
BSABS 2005-EC1	U.S. Bank
BSABS 2005-HE3	U.S. Bank
BSABS 2005-HE5	U.S. Bank
BSABS 2005-HE6	U.S. Bank
BSABS 2005-HE7	U.S. Bank
BSABS 2006-HE1	U.S. Bank
SACO 2005-4	Wilmington Trust
SACO 2005-WM3	U.S. Bank
SACO 2005-7	Wilmington Trust
SACO 2005-9	U.S. Bank
SACO 2005-10	Wilmington Trust

The foregoing Trusts (six “BSABS Trusts” and five “SACO Trusts”) are referred to herein as the “Subject Trusts.” The Subject Trusts are governed by Pooling and Servicing Agreements (“PSAs”) that share materially identical language. Respondents currently take no position on any issue with respect to any Settlement Trust other than the Subject Trusts.

II. Positions on Issues Raised in Petition

As to the Subject Trusts, Respondents have positions on two issues raised in the Trustees’ Petition.

The first issue raised by the Trustees is whether, as to certain Trusts listed on Exhibit D to the Petition, the “Write-Up First Method” or “Pay First Method” (as defined in the Petition) applies (Pet. ¶ 22). The Subject Trusts are among those listed on Exhibit D. Respondents’ position is that, with respect to the Subject Trusts, the Write-Up First Method applies.

The second issue raised by the Trustees’ petition relates to certain Trusts listed on Exhibit G to the Petition, which contain a “Retired Class Provision.” (Pet. ¶ 54, 55). The Subject Trusts are among those listed on Exhibit G. The Trustees ask the Court for direction as to whether they should distribute the settlement payment “without applying or giving any effect whatsoever to the Retired Class Provision,” or whether they should “apply the Retired Class Provision to prevent distribution of the applicable Allocable Shares to any applicable classes of certificates with aggregate certificate principal balances of zero at the time of the distribution of the Allocable Shares and to prevent any portion of the Settlement Payment Write-Up from being applied to any such classes of certificates.” (Pet. ¶ 5(c)). With respect to the Subject Trusts, Respondents’ position is that the Trustees should apply and give effect to the Retired Class Provision, precluding distributions to Zero Balance Classes and any write-ups to such classes.

A. The Write-Up First Method Applies To The Subject Trusts.

The Write-Up First Method applies to the Subject Trusts for the following reasons:

1. The Subject Trust PSAs require a calculation of “Certificate Principal Balance” before a distribution of a Subsequent Recovery (such as the Settlement Payment), and the components of that pre-distribution calculation include the write-up of the existing Certificate Principal Balance.
2. The Subject Trust PSAs provide that written-up Certificates are not entitled to interest on the written-up balance prior to the date of distribution, a provision that is superfluous unless write-ups in fact occur prior to distribution.
3. As to the Subject BSABS Trusts, the PSAs specify that the write-down of Certificate Principal Balances occurs after distribution, yet the PSAs make no such direction with regard to writing up.

B. The Trustees Should Give Effect To The Subject Trusts’ Retired Class Provision.

Certificates in classes where the aggregate Certificate Principal Balance has reached zero (“Zero-Balance Classes” in the Petition) are not entitled to any portion of the Settlement Payment or any write-up.

1. The Subject Trusts’ Retired Class Provision Is Plain And Unambiguous.

Each of the Subject Trusts has a Retired Class Provision:

In addition, notwithstanding the foregoing, on *any* Distribution Date *after* the Distribution Date on which the Certificate Principal Balance of a Class of Class A, Class B or Class M Certificates has been reduced to zero, that Class of Certificates *will be retired and will no longer be entitled to distributions...*

See, e.g., BSABS 2005-HE5 PSA 5.04 (emphasis added). This language is plain. A Zero Balance Class is no longer entitled to distributions. That this is a permanent state is also clear: a

class is retired and no longer entitled to distributions both (a) when there has been a Distribution Date on which a named Class has had its Certificate Principal Balance reduced to zero and (b) “on any Distribution Date after” that has happened.

For example, the Certificate Principal Balance of Class M3 in SACO 2005-4 was reduced to zero on the Distribution Date in November 2011. Therefore “on any Distribution Date after” November 2011 – including whatever Distribution Date ultimately becomes the date of distribution of the Allocable Share – Class M3 “will be retired and will no longer be entitled to distributions.” The words “on any Distribution Date after” zero is reached declare as plainly as words can that the state of retirement and lack of entitlement to distributions applies to all future Distribution Dates, not just the one when the Certificate Principal Balance was reduced to zero. The words are unqualified and unequivocal.

Under these explicit terms, Class M3 has been “retired” for over six years and will remain so “on any Distribution Date” going forward. This is consistent with the ordinary usage of the term “retired” in a securities context. Similarly, for over six years Class M3 has been “no longer entitled to distributions,” and “no longer” means “no longer” – especially combined with “on any Distribution Date after” a defined past event has occurred.

The meaning of the Subject Trusts’ Retired Class Provision is underscored by the words with which it begins. That Provision concludes a lengthy, detailed PSA section on distributions of interest and principal. Referring to those distribution instructions, the Retired Class Provision begins with the words, “Notwithstanding the foregoing...” (Pet. ¶ 54.) The placement of this provision, together with the plain meaning of these initial words, makes a simple statement: where the Trustee is engaged in making distributions, then “notwithstanding” the preceding litany of instructions, “retired” Classes receive nothing. A contrary reading would render the

words “notwithstanding the foregoing” meaningless, an unacceptable result under New York law.

The Petition appears to suggest that some uncertainty about the plain meaning of the Retired Class Provision is created by the fact that the PSAs – though they plainly preclude *distributions* to retired classes – “do not expressly preclude Zero Balance Classes from being written up in connection with subsequent recoveries.” (Pet. ¶ 57). But this conflates two separate issues. Even if it were theoretically possible to write up the balance of a retired class, the Subject Trust PSAs unmistakably provide that such classes are never again entitled to distributions. And since such classes are not entitled to distributions on any future distribution date, writing up their principal balance would be pointless and contrary to the underlying rationale for keeping track of certificate principal balances in the first place. *See* Pet. ¶ 3 (“certificate principal balance” is an amount “equal to the total distribution of ‘principal amount’ such certificate is entitled to receive.”)

2. The Trustee’s Historical Practice Is Consistent With The Plain Meaning Of The Subject Trusts’ Retired Class Provision.

Petitioner U.S. Bank National Association (“U.S. Bank”), which is either the trustee or the payment administrator on all of the Subject Trusts, historically has interpreted the PSA language here to preclude distributions and write-ups due to Subsequent Recoveries for Zero-Balance Classes in other Settlement Trusts. U.S. Bank specifically confirmed this reading to Respondent Prophet with respect to a Subject Trust in 2016.

C. The Subject Trusts’ PSA Provisions Control Over Any Contrary Settlement Agreement Provisions.

The Settlement Agreement provides:

7.05. No Amendments to Governing Agreements. The parties agree that this Settlement Agreement reflects a compromise of disputed claims and is not intended

to, and shall not be argued or deemed to constitute, an amendment of any term of any Governing Agreement.

This means that, to the extent the Settlement Agreement could be construed as inconsistent with either the Write-Up First order of operations specified in the Subject Trusts' PSAs or the Retired Class Provision, the PSAs prevail.

In the absence of an amendment to the PSAs, the Trustee is bound to follow their terms. By including the No Amendments provision above, the Settlement Agreement categorically disclaims the only path that would alter the Trustee's obligations under the PSAs as written.

III. The Court Should Rule As To Any Subject Trust That Raises No Disputed Issues.

To the extent that Respondents' positions regarding the Subject Trusts are undisputed, Respondents request that the Court enter a judgment severing any such undisputed Subject Trust from the "Covered Trusts" at issue in the Petition, and directing distribution of the settlement in accordance with Respondents' undisputed positions. *See In re Bank of New York Mellon*, Index No. 150973/2016 (N.Y. Sup. Ct., May 12, 2016).

IV. Request for Merits Briefing

The foregoing is a statement of position only. Respondents request the opportunity to brief these issues and to respond to briefs filed by other parties concerning these issues and the Subject Trusts.

Dated: January 29, 2017

Respectfully submitted,

AXINN, VELTROP & HARKRIDER LLP

/s/ Donald W. Hawthorne
Donald W. Hawthorne
Felix J. Gilman

114 W 47th Street
New York, NY 10036
Tel: 212.728.2200
Fax: 212.728.2201
dhawthorne@axinn.com
fgilman@axinn.com

*Counsel for Respondents Prophet Mortgage
Opportunities LP, Poetic Holdings VI LLC and
Poetic Holdings VII LLC*