

**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.

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: Index No. 657387/2017

:
: IAS Part 60

:
: Justice Friedman

**RESPONSE OF THE GMO FUNDS
TO PETITION FOR JUDICIAL INSTRUCTION**

GMO Opportunistic Income Fund and GMO Global Real Return (UCITS) Fund (together, the “GMO Funds”) submit this response (the “Response”) to the Verified Petition (the “Petition”) of Wells Fargo Bank, National Association, and the other petitioners set forth in the Petition (collectively, the “Petitioners”) in the above-captioned proceeding.¹

The GMO Funds are holders of Class A-1 certificates (the “Class A-1 Certificates”) under the Bear Stearns Asset Backed Securities 1 Trust 2007-AQ1 (the “BSABS-AQ1 Trust”) and are therefore entitled to distributions from the Settlement Payment. The GMO Funds request that the Court issue an order instructing the Petitioners to distribute the portion of the Settlement Payment

¹ Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Petition.

allocable to the BSABS-AQ1 Trust in accordance with the following instructions: (1) apply the express subsequent recovery write-up instructions in section 5.04(b) of the Pooling and Servicing Agreement for the BSABS-AQ1 Trust (the “PSA”) and (2) in the event that the certificate principal balance of the Class A-1 Certificates is reduced to zero, the Retired Class Provision in the PSA does not preclude the write-up of, or distributions on account of, the Class A-1 Certificates resulting from the Settlement Payment.

**Principal Balance Write-Ups Should Preserve
the Priorities Among Certificateholders Established By the PSA**

This Court should give effect to the specific term of the PSA that expressly directs distribution of the Settlement Payment by writing up the principal balances of each class of Certificateholders in sequential order of payment priority, *i.e.*, first to the Class A-1 Certificates, and next to the Class A-2 certificates. PSA § 5.04(b).² The Petition recognizes that the language of the PSA is consistent with this order of payment, stating that the BSABS-AQ1 Trust is a Settlement Trust that “require[s] write-ups to be applied by ‘payment priority.’” Petition ¶ 50. The Prospectus Supplement for the BSABS-AQ1 Trust also confirms that distribution of subsequent recoveries should be made by writing up the certificate principal balances of each class “in accordance with the priorities described under ‘*Description of the Certificates – Distributions on the Certificates*,’” which in turn provides that distributions of principal are to be made

² Section 5.04(b) of the PSA provides, in relevant part (emphasis added):

the amount of such Subsequent Recoveries will be applied to increase the Certificate Principal Balance of the Class of Certificates **with the highest payment priority** to which Realized Losses have been allocated. . . The amount of any remaining Subsequent Recoveries will be applied to increase the Certificate Principal Balance of the Class of Certificates with the next highest payment priority

“sequentially to the Class A-1, Class A-2, and Class A-3 Certificates, in that order, in each case until the Certificate Principal Balance thereof is reduced to zero.”

The Settlement Agreement did not intend to alter the distribution priorities under individual Governing Agreements. Indeed, the Settlement Agreement states that it “shall not be argued or deemed to constitute, an amendment of **any** term of any Governing Agreement” (Settlement Agreement § 7.05) (emphasis added), and that each Settlement Trust’s Allocable Share shall be distributed to Investors “in accordance with the distribution provisions of the Governing Agreements” (Settlement Agreement § 3.06(a)). The sequence for writing up principal balances that result from a subsequent recovery varies among the numerous Governing Agreements. *See* Petition ¶¶ 41-51. Where the Governing Agreement of a particular trust expressly selected a specific order of distribution priorities for different classes of Certificateholders, the Settlement Agreement should not override the bargained-for contractual rights reflected in that economic agreement. The Governing Agreement for the BSABS-AQ1 Trust provides a clear write-up instruction for the application of subsequent recoveries and that instruction should be followed. To the extent this Court determines that the write-up provision in the PSA appears inconsistent with the write-up provision in the Settlement Agreement, this Court should still apply the specific instructions in the PSA.

The Retired Class Provision in the PSA Should Not Prevent the Write-Up of Certificate Principal Balances on Account of Settlement Payments

This Court should not interpret the Retired Class Provision of section 5.04(a) of the PSA to override the clear intent of the separate provision of section 5.04(b) of the PSA addressing Subsequent Recoveries. Subsections 5.04(a)(1), (a)(2), and (a)(3) provide for the manner and order of priority for distributions of Interest Funds, Principal Funds, Principal Distributions, and Excess Cashflow (each, as defined in the PSA). In its next-to-last paragraph, section 5.04(a) also

provides that, “notwithstanding the foregoing,” after the Certificate Principal Balance of a Class of Certificates has been reduced to zero, it will be retired and no longer receive distributions. The next section of the PSA, section 5.04(b), provides for the separate manner and order of priority for distribution of Subsequent Recoveries. That section begins, “[i]n addition to the foregoing distributions.” PSA § 5.04(b). Accordingly, by the plain language of the PSA, the Retired Class Provision of Section 5.04(a) does not purport to limit the write-up of principal balances or distributions under Section 5.04(b).

As the Petition notes, that logical result is also consistent with the specific language of the PSA. Nothing in the Retired Class Provision of PSA section 5.04(a) prevents classes with a certificate principal balance of zero from being written up by a Subsequent Recovery.

Accordingly, the GMO Funds respectfully request that the Court issue an order directing the Petitioners to distribute the Settlement Proceeds for the BSABS-AQ1 Trust certificates in accordance with the foregoing. The GMO Funds reserve all rights to supplement this Response.

Dated: New York, New York
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