

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

**REPLY MEMORANDUM OF LAW OF  
U.S. BANK NATIONAL ASSOCIATION,  
IN ITS CAPACITY AS TRUSTEE FOR  
THE NIM TRUSTS LISTED ON  
EXHIBIT A, AND POETIC AND  
PROPHET, ON THE ORDER OF THE  
DISTRIBUTION OF THE SETTLEMENT  
PAYMENT**

Respondents U.S. Bank National Association, solely in its capacity as Indenture Trustee for the NIM Trusts listed on Exhibit A (the “NIM Trusts”), at the direction of Poetic and Prophet, and together with Poetic and Prophet as certificateholders in the Settlement Trusts listed on Exhibit B (the “Poetic / Prophet Trusts”), jointly submit this reply memorandum of law regarding the order of distribution of the settlement payment.

**Argument**

The Trustees’ Petition asks the Court for instructions on whether to “administer and distribute the applicable Allocable Shares using the Pay First Method, the Write-Up First Method, or a different method authorized by this Court.” Pet. Request For Relief 5(a).<sup>1</sup> The

<sup>1</sup> Pursuant to the Court’s Order dated September 14, 2018 and at the direction of Respondents Poetic and Prophet (each in their capacities as holders of notes issued by the NIM Trusts), U.S. Bank, solely in its capacity as Indenture Trustee under the NIM Trusts referenced on Exhibit A hereto (which hold a direct interest in the Settlement Trusts referenced on Exhibit B hereto), has substituted into this proceeding in place of Respondents Poetic and Prophet. This reply memorandum of law addresses only the Order of Payment Issue and it reflects the position of Poetic and Prophet. U.S. Bank, in its capacity as Indenture Trustee under certain other NIM Trusts, has also substituted into this proceeding on behalf of Respondents HBK Master Fund LP (“HBK”). At the direction of HBK, U.S. Bank (a) submitted a separate memorandum of law addressing the Order of Payment Issue with respect to Settlement Trusts in which HBK holds interests (the “HBK Memorandum of Law”) and (b) will submit another reply memorandum of law further addressing the Order of Payment Issue with respect to the same Settlement Trusts

Petition notes that the Settlement Agreement “left unaddressed” whether the Petitioners should apply write-ups for the Settlement Payment before or after the payment is distributed to Certificateholders. Pet. 21. Therefore, the Petition states that “[f]or Settlement Trusts with Governing Agreements that clearly specify a particular order of operations ... Petitioners are required and intend to follow the provisions of the Governing Agreements for such Settlement Trusts.” Pet. 23.

For the reasons given in Respondents’ opening memorandum of law on the order of distribution (Dkt. 568), the plain text of the PSAs for the Poetic / Prophet Trusts requires that write-ups occur prior to distributions to certificateholders. For those trusts, therefore, the Trustee should apply the Write-Up First Method.

Some Respondents have taken the position that the Settlement Agreement requires that the Pay First Method be applied to *all* trusts. *See* Opening Brief of The Institutional Investors and AIG (Dkt. 576) at 4-6. It does not. The operative provision of the Settlement Agreement, section 3.06(b), simply provides that write-ups shall take place “[a]fter the distribution of the Allocable Share to a Settlement Trust.” It does not say after the distribution of the Allocable Share to *investors* – by contrast to the Settlement Agreement in the Countrywide Article 77, which said exactly that. Countrywide Settlement Agreement 3(d)(ii). Nor does it say that write-ups shall take place after the distribution of the Allocable Share to the Settlement Trusts but

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in which HBK holds interest (the “HBK Reply Memorandum of Law” and together with the HBK Memorandum of Law, the “HBK Memoranda”). Additionally, U.S. Bank, in its capacity as Indenture Trustee for all the NIM Trusts participating in this proceeding, at the direction of HBK, Poetic and Prophet, together with Poetic and Prophet, is also submitting a joint brief addressing issues raised in the Petition regarding the Retired Class Provision. The HBK Memoranda, may, in some respects, advance, or may have advanced, as applicable, positions contrary to those asserted herein; however, as contemplated by the Court’s substitution order, U.S. Bank has taken appropriate measures to address any potential or actual conflicts of interest. Furthermore, U.S. Bank’s capacity in its role as NIM Trustee hereunder is a separate and distinct capacity from that of U.S. Bank in its role as Petitioner and Trustee of the Settlement Trusts.

before distributions to investors. The Settlement Agreement’s text clearly draws a distinction between “distribution of the Allocable Share to a Settlement Trust,” Settlement Agreement 3.06(b), and “further distribution to investors,” Settlement Agreement 3.06(a). The Settlement Agreement is thus silent as to when the write-up should take place, except that it should come at some point, and that point being after the money enters the Trust’s collection or distribution accounts.

“For the avoidance of doubt,” the Settlement Agreement further provides that its write-up provisions “shall not affect the distribution of the Settlement Payment provided for in Subsection 3.06(a).” Settlement Agreement 3.06(b). Subsection 3.06(a) provides that the distribution of the Settlement Payment shall be “in accordance with the distribution provisions of the Governing Agreements.” Settlement Agreement 3.06(a). The Settlement Agreement thus leaves the order of operations to the Governing Agreements for each Trust, as the Petition recognizes. And, for the reasons given in Respondents’ opening memorandum, the text of the distribution provisions of the PSAs for the Poetic / Prophet Trusts – in particular the section titled “Distributions” and the definition of “Certificate Principal Balance” as used therein – requires the application of the Write-Up First Method.

Poetic and Prophet take no position on the appropriate order of operations for any trusts other than the Poetic / Prophet Trusts.

### **Conclusion**

For the foregoing reasons, Respondents respectfully request that the Court instruct the Trustees to apply the Write-Up First Method with respect to the Poetic / Prophet Trusts.

Dated: September 28, 2018

Respectfully submitted,

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**EXHIBIT A**

<b>NIM Trusts</b>	<b>Settlement Trusts</b>
BSNIM 2005-HE3N	BSABS 2005-HE3
BSNIM 2005-HE6N	BSABS 2005-HE6
BSSP 2005-29N	SACO 2005-WM3
BSSP 2005-32N	SACO 2005-9
BSSP 2006-3	SACO 2005-10

**EXHIBIT B**

<b><u>Settlement Trust</u></b>
<u>BSABS 2005-HE3</u>
<u>SACO 2005-4</u>
<u>SACO 2005-7</u>
<u>SACO 2005-WM1</u>