

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), :

INDEX NO. 657387/2017

Friedman, J.

Petitioners, :

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

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REPLY BRIEF OF STRATEGOS CAPITAL MANAGEMENT, LLC

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Respondent Strategos Capital Management, LLC (“Strategos”), by and through its undersigned counsel, hereby submits its reply brief regarding the issues raised by the Petition.¹ Strategos also adopts and incorporates by reference Point I of the Reply Brief of Tilden Park Capital Management LP (NYSCEF Doc. No. 727).

Only a handful of respondents (Institutional Investors, AIG, Poetic, Prophet, and the NIM Trustee at the direction of HBK) currently take the position that the “Retired Class Provision” precludes the write-up of zero balance bonds.² AIG and the Institutional Investors contend, without any analysis, that the Trustees should enforce the Retired Class Provision to prevent the write-up of zero balance bonds. NYSCEF Doc. No. 663 at 18. AIG and the Institutional Investors neither refute nor address any of the arguments raised by the Respondents advocating that the Retired Class Provision does not preclude the Trustees from writing-up zero balance bonds. *Id.*

Notably, AIG and the Institutional Investors support a “structural adjustment” to the Retired Class Provision that “if the Settlement Payment exceeds the realized losses of the then-outstanding certificates,” that the Trustees should write-up the zero balance bonds “in order to keep the Trust’s assets and liabilities in balance.” *Id.* n.28. AIG and the Institutional Investors’ support of this “structural adjustment” is significant because whether a zero balance bond should be written up by the Settlement Payment becomes relevant only “if the Settlement Payment exceeds the realized losses of the then-outstanding certificates. . . .” Thus, AIG and the Institutional Investors’ position regarding how the Trustees should apply the Retired Class

¹ Capitalized terms not defined herein shall have the meaning ascribed to them in the Petition.

² See NYSCEF Doc. Nos. 563, 576, 663, 677.

Provision is consistent in practice with the views set forth by the Respondents advocating that the Retired Class Provision should not preclude the write-up of zero class bonds.

Poetic, Prophet, and the NIM Trustee at the direction of HBK concede, as they must, “that the PSAs do not, in so many words, say ‘zero balance classes may not be written up,’” and that “it is true that the write-up provisions of the PSAs do not contain the magic words ‘Zero Balance Classes may not be written up’.” NYSCEF Doc. No. 677 at 4. Accordingly, they concede that the plain and unambiguous reading of the write-up provision of the PSAs (§5.04(b) in the majority of the agreements at issue) requires the Trustees to write-up all “Outstanding” classes that have experienced realized losses—including zero balance bonds—up to the amount of their realized losses. They argue, however, that the Retired Class Provision (located in section 5.04(a)), supersedes the plain and unambiguous language in section 5.04(b) and precludes the Trustees from writing up zero balance bonds.

As articulated by Respondents advocating the contrary view, Poetic, Prophet, and the NIM Trustee’s flawed interpretation of the Retired Class Provision can succeed only if the Court:

- (i) accepts the contention that the language “on any Distribution Date after the Distribution Date on which the Certificate Principal Balance of a [Class of A, M, or B Certificates] has been reduced to zero, that Class of Certificates will be retired and will no longer be entitled to distributions” means that under no circumstances and regardless of what other provisions of the Governing Agreements may provide senior classes of Outstanding certificates that experienced significant losses reducing their certificate principal balances to zero may never benefit from any subsequent recoveries (which is not the case);
- (ii) ignores and leaves without any force and effect other provisions of the Governing Agreements, including, among others, section 5.04(b) that specifically addresses when certificate

classes should be written-up and the definition of “Outstanding,” which draws a distinction between a “retired” and “cancelled” class; and

(iii) writes into section 5.04(b) what Poetic, Prophet, and the NIM Trustee concede the drafters of the Governing Agreements did not include—that “Zero Balance Classes may not be written up.”

The Court should reject Poet, Prophet, and the Nim Trustee’s interpretation because such an interpretation ignores the plain and unambiguous language of the Governing Agreements and requires a strained and unreasonable interpretation of those provisions in order to attempt to harmonize and give effect to them. *See Natixis Real Estate Capital Tr. 2007-HE2 v. Natixis Real Estate Holdings, LLC*, 50 N.Y.S.3d 13, 18 (1st Dep’t 2017) (“contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect . . .”). That flawed interpretation would also require the insertion of language into section 5.04(b) that does not exist. The interpretation of the Retired Class Provision advocated by Poetic, Prophet, and the NIM Trustee would also have the effect of wrongly creating a windfall for subordinate certificates that would benefit from an increase of overcollateralization to the detriment of senior certificates whose losses remain unremedied. There can be no dispute that that was not the intent of the drafters of the Governing Agreements.

For the foregoing reasons, Strategos requests that the Court instruct the Trustee to distribute the Settlement Payment and write up, as necessary, to the certificate classes in BSABS 2005-HE9 and BSABS 2005-AQ2 whose principal balances were reduced to zero because of realized losses.

Dated: October 10, 2018
New York, New York

Respectfully submitted,

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