

NYSCEF DOC. NO. 782

RECEIVED NYSCEF: 12/13/2018

FILED: NEW YORK COUNTY CLERK 11/01/2018 06:12 PM

INDEX NO. 657387/2017

NYSCEF DOC. NO. 761

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At IAS Part 60 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse located at 60 Centre Street, New York, New York on the 11th day of Dec., 2018

PRESENT: Hon. Marcy S. Friedman, Justice.

**FILED**

**DEC 13 2018**

COUNTY CLERK'S OFFICE  
NEW YORK

Index No. 657387/2017

~~PROPOSED~~ CONSENT  
PARTIAL SEVERANCE  
ORDER AND PARTIAL  
FINAL JUDGMENT

BSABS 2005 HE-9

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 Distribution of a Settlement Payment.

WHEREAS, the Petitioners identified in the above case caption commenced this proceeding under CPLR Article 77 by filing a petition (the "Petition") seeking judicial instructions concerning the administration and distribution of a settlement payment (the "Settlement Payment") for 270 residential mortgage-backed securities trusts identified in Exhibit A to the Petition (the "Settlement Trusts") under a settlement agreement dated as of November 15, 2013 and modified as of July 29, 2014 (the "Settlement Agreement"); and

WHEREAS, this [proposed] Partial Severance Order and Partial Final Judgment (the "Order") concerns BSABS 2005-HE9 (the "Undisputed Trust"); and

WHEREAS, the Undisputed Trust is governed by a Pooling and Servicing Agreement (the "Subject PSA"), pursuant to which U.S. Bank National Association is the trustee and payment administrator (in all such capacities collectively, the "Subject Petitioner"); and

WHEREAS, all capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Petition or the Subject PSA, as applicable; and

WHEREAS, pursuant to the Settlement Agreement, the Settlement Payment is to be apportioned among the Settlement Trusts, including the individual loan groups therein and classes of principal only certificates therein, based on "Allocable Shares" calculated in an expert report filed with the Court at NYSCEF Nos. 178 and 179; and

WHEREAS, by Order to Show Cause dated December 19, 2017 and Interim Order dated December 20, 2017 (collectively, the "December Orders"), the Court authorized and directed the Petitioners to place the Allocable Shares for the Settlement Trusts in escrow; and

WHEREAS, the Court has been advised that the escrow provisions of the December Orders have been complied with and that the Allocable Shares for the Settlement Trusts, plus any investment earnings thereon, are currently invested as directed in the December Orders; and

WHEREAS, under the December Orders, the Court directed the Petitioners to provide notice of this proceeding pursuant to the notice program described in the December Orders (the "Notice Program"), and the Court found that the Notice Program was the best notice practicable, was reasonably calculated to put interested persons on notice of the proceeding, and constituted due and sufficient notice of the proceeding in satisfaction of federal and state due process requirements and other applicable laws; and

WHEREAS, the Notice Program directed that interested persons respond to the Petition on or before January 29, 2018, and only Strategos Capital Management, LLC, Tilden Park Capital

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Management LP, Nover Ventures, LLC ("Nover"), and AEGON USA Investment Management, LLC, BlackRock Financial Management, Inc., Cascade Investment, LLC, the Federal Home Loan Bank of Atlanta, the Federal Home Loan Mortgage Corporation (Freddie Mac), the Federal National Mortgage Association (Fannie Mae), Goldman Sachs Asset Management L.P., Voya Investment Management LLC, Invesco Advisers, Inc., Kore Advisors, L.P., Metropolitan Life Insurance Company, Pacific Investment Management Company LLC, Teachers Insurance and Annuity Association of America, the TCW Group, Inc., Thrivent Financial for Lutherans, and Western Asset Management Company (each for themselves and, to the extent applicable, as investment managers of funds and accounts, and collectively, the "Institutional Investors") asserted an interest in the Undisputed Trust; and

WHEREAS, on August 7, 2018, the Court issued a Decision and Order at NYSCEF No. 471 (the "August Order") holding that Nover and certain other parties are dismissed as respondents with respect to any Settlement Trust in which they do not hold certificates; and

WHEREAS, Nover's filings with the Court at NYSCEF Nos. 600 and 601 contained a list of Settlements Trusts in which Nover continues to assert interests pursuant to the requirements set forth in the August Order and that list does not include the Undisputed Trust; and

WHEREAS, the Institutional Investors, Strategos Capital Management, LLC, and Tilden Park Capital Management LP agree and consent to this Order, which resolves the issues for which judicial instruction was sought concerning the administration and distribution of the Allocable Shares for the Undisputed Trust (the "Subject Allocable Shares"); and

WHEREAS, as used herein, the term "Judgment Entry Date" means the date on which the Clerk's docketing of this Order first appears publicly on the New York State Court Electronic

Filing System, without regard to when the Court actually signs or the Clerk actually enters this Order; and

WHEREAS, for the Undisputed Trust, the term "Overcollateralization Amount Calculation" is used herein to refer to the terms in the Subject PSA prescribing that the "overcollateralization amount" is equal to the excess of the aggregate balances of the mortgage loans held by the Undisputed Trust over the aggregate certificate principal balances of certain designated classes of certificates, as more fully defined and described in the Subject PSA; and

WHEREAS, as used herein, the term "Transfer Month" means the month of the Judgment Entry Date if the Judgment Entry Date is on or before the eighth calendar date of that month, and otherwise the month immediately following; and

WHEREAS, as used herein, the term "Transfer Target Date" means the fifteenth day of the Transfer Month; and

WHEREAS, as used herein, the term "AS Distribution Date" means the Distribution Date for the Undisputed Trust occurring in the Transfer Month; and

NOW, THEREFORE, on the motion of Warner Partners, P.C., Gibbs & Bruns LLP, attorneys for the Institutional Investors; Dechert LLP, attorneys for Strategos Capital Management, LLC; and Kramer Levin Naftalis & Frankel LLP and Schindler Cohen & Hochman LLP, attorneys for Tilden Park Capital Management LP, it is hereby

ORDERED, ADJUDGED and DECREED that, on or before the Transfer Target Date, the Subject Petitioner shall cause escrowed assets to be liquidated to cash with a value equal to the Subject Allocable Shares plus any investment earnings thereon, and shall cause such amounts to be deposited in the Distribution Account of the Undisputed Trust. From the time of the aforescribed deposit, the amounts so deposited shall be deemed the Subject Allocable Shares for

the Undisputed Trust for all purposes under the Settlement Agreement and this Order; and it is further

ORDERED, ADJUDGED and DECREED that sums representing investment earnings accrued on the Subject Allocable Shares not received by the Subject Petitioner at the time escrowed assets are liquidated to cash pursuant to the immediately preceding paragraph ("Trailing Interest") shall be distributed on the Distribution Date for the month the Trailing Interest is received by the Subject Petitioner so long as the Trailing Interest is received on or before the fifteenth day of the month or, if the Trailing Interest is received after the fifteenth day of the month, the Trailing Interest shall be distributed on the Distribution Date for the immediately following month. Any Trailing Interest shall be deemed the Subject Allocable Shares for the Undisputed Trust on which such Trailing Interest was accrued, and any Trailing Interest shall be administered and distributed as a Subject Allocable Share subject to the terms of the Settlement Agreement and this Order; and it is further

ORDERED, ADJUDGED and DECREED that the Subject Petitioner shall distribute the Subject Allocable Shares to certificateholders of the Undisputed Trust on the AS Distribution Date; and it is further

ORDERED, ADJUDGED and DECREED that in administrating and distributing the Subject Allocable Shares for the Undisputed Trust, the Subject Petitioner (i) shall first distribute the Subject Allocable Shares to certificateholders based on certificate principal balances that have not been adjusted by the Settlement Payment Write-Up, and, after such distribution, (ii) shall then increase the applicable certificate principal balances in the amount of the Settlement Payment Write-Up in a manner consistent with this Order; and it is further

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ORDERED, ADJUDGED and DECREED that in administering and distributing the Subject Allocable Shares for the Undisputed Trust, the Subject Petitioner shall account for both the distribution of the Subject Allocable Shares and accompanying Settlement Payment Write-Up when performing the Overcollateralization Amount Calculation; and it is further

ORDERED, ADJUDGED and DECREED that to effectuate the immediately preceding paragraph, the Subject Petitioner shall calculate the aggregate certificate principal balances used for the Overcollateralization Amount Calculation by (i) first increasing such certificate principal balances by the amount of the Settlement Payment Write-Up and (ii) then reducing such certificate principal balances by an amount equal to the Subject Allocable Shares, and this paragraph and the immediately preceding paragraph shall have no application to the calculation of certificate principal balances for any purposes other than performing the Overcollateralization Amount Calculation, and, further, for the avoidance of doubt, with respect to the Distribution Date on which the Subject Allocable Shares are distributed, the instructions in this paragraph and the immediately preceding paragraph are intended to and shall prevent the Undisputed Trust from being overcollateralized as a result of the receipt, administration, and/or distribution of the Subject Allocable Shares (but shall not impact whether the Undisputed Trust is overcollateralized on such Distribution Date as a result of anything unrelated to the receipt, administration, and/or distribution of the Subject Allocable Shares); and it is further

ORDERED, ADJUDGED and DECREED that in administering and distributing the Subject Allocable Shares for the Undisputed Trust, the Subject Petitioner shall not use the Settlement Agreement Write-Up Instruction for any purposes, and shall increase the certificate principal balances for the applicable classes of certificates in the amount of the Settlement Payment



Write-Up using the subsequent recovery write-up instruction in Section 5.04(b) of the Subject PSA; and it is further

ORDERED, ADJUDGED and DECREED that in administering and distributing the Subject Allocable Shares for the Undisputed Trust, the Subject Petitioner shall (i) apply the Retired Class Provision to prevent the distribution of the Subject Allocable Shares to classes of Class A Certificates or Class M Certificates with aggregate certificate principal balances of zero dollars (\$0.00) at the time of the distribution of the Subject Allocable Shares ("Retired Classes") and (ii) apply the Retired Class Provision to permit the Settlement Payment Write-Up to be applied only to classes of Class A Certificates or Class M Certificates with aggregate certificate principal balances greater than zero dollars (\$0.00) at the time of the distribution of the Subject Allocable Shares (the "Outstanding Classes"); *provided, however*, that if the Settlement Payment Write-Up exceeds the aggregate unpaid realized losses of all Outstanding Classes of the Undisputed Trust, such excess amount of the Settlement Payment Write-Up shall be applied to the Retired Classes in such Undisputed Trust in a manner consistent with this Order; and it is further

ORDERED, ADJUDGED and DECREED that any aspects of the administration and distribution of the Subject Allocable Shares not expressly addressed in this Order shall be performed as provided for in the Subject PSA and the Settlement Agreement; and it is further

ORDERED, ADJUDGED and DECREED that this Order is not applicable to, and shall be without prejudice to and shall have no precedential effect on, (i) any argument of any party concerning the appropriate administration and distribution of the Settlement Payment where there is a dispute among the parties regarding how the Settlement Payment should be administered and distributed; (ii) the Settlement Trusts for which no investors have appeared in this proceeding or any trust, indenture, or other securitization other than the Undisputed Trust, or (iii) any

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**Consent Severance Order and Partial Judgment**

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applications to certificate balances (e.g., write-ups) or distributions of payments or funds other than the Subject Allocable Shares; and it is further

ORDERED, ADJUDGED and DECREED that certificateholders, noteholders, and any other parties claiming rights or interests in the Undisputed Trust are barred from asserting claims against the Subject Petitioner with respect to any conduct taken to implement and comply with the terms of this Order and with respect to such Subject Petitioner's administration and distribution of the Subject Allocable Shares, so long as such conduct is performed in accordance with the terms of this Order; and it is further


ORDERED that the Clerk of New York County be, and he hereby is, directed to enter this Order forthwith and without delay.

Dated: New York, New York

*December 11, 2018*

  
Hon. Marcy Friedman, J.S.C.

Judgment signed and entered this 13<sup>th</sup> day of December, 2018.

  
Clerk of New York County

**FILED**

**DEC 13 2018**

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Judgment

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