

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
Distribution of a Settlement Payment.

Index No. 657387/2017

**NOTICE OF
[PROPOSED] PARTIAL
SEVERANCE ORDER
AND PARTIAL
FINAL JUDGMENT WITH
RESPECT TO ONE
SETTLEMENT TRUST,
BSABS 2005-HE3**

Pursuant to Section (3) of the Court’s Scheduling Order dated February 13, 2018, Prophet Mortgage Opportunities LP (“Prophet”), Poetic Holdings VI LLC, Poetic Holdings VII LLC and affiliates (“Poetic”), and the Institutional Investors¹ respectfully submit a [Proposed] Partial Severance Order and Partial Final Judgment with respect to the Settlement Trust BSABS 2005-HE3. BSABS 2005-HE3 has not been the subject of any previous proposed severance order presented to the Court in this proceeding.

As more fully set out in the proposed judgment attached as Exhibit A, after giving effect to the Court’s standing ruling, Poetic, Prophet and the Institutional Investors are the only parties claiming an interest in BSABS 2005-HE3 with standing to appear with respect to that trust, and each respectfully urges the Court to enter the attached proposed judgment.

¹ All references to the ‘Institutional Investors’ in the Order include each and every one of the sixteen institutions identified in the Institutional Investors’ Notice of Appearance (NYSCEF No. 135).

U.S. Bank, the payment administrator and Trustee for BSABS 2005-HE3, has been consulted on the form of this proposed judgment.

Dated: New York, New York
December 28, 2018

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Exhibit A

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 _____ day of _____, 2018

P R E S E N T : Hon. Marcy S. Friedman, Justice.

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.

Index No. 657387/2017

**[PROPOSED]
PARTIAL SEVERANCE
ORDER AND PARTIAL
FINAL JUDGMENT
(BSABS 2005-HE3)**

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-HE3;

WHEREAS, BSABS 2005-HE3 is governed by a Pooling and Servicing Agreement (the “PSA”), pursuant to which Petitioner U.S. Bank National Association is the payment administrator and trustee (in all such capacities collectively, the “Subject Petitioner”); and

WHEREAS, all capitalized terms used and not otherwise defined herein shall have the meanings ascribed to such terms in the Petition or 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 law; and

WHEREAS, the Notice Program directed that interested persons respond to the Petition on or before January 29, 2018, and the Institutional Investors,¹ Prophet Mortgage Opportunities LP (“Prophet”), and Poetic Holdings VI LLC, Poetic Holdings VII LLC, and affiliates (collectively, “Poetic”), and Nover Ventures, LLC (“Nover”) filed submissions asserting an interest in BSABS 2005-HE3; and

WHEREAS, Nover asserted an interest in BSABS 2005-HE3 through ownership interests in other structures, either CDO, re-REMIC, or NIM trusts, but not in certificates issued by BSABS 2005-HE3; and

WHEREAS, on August 7, 2018, the Court granted a motion for summary judgment filed by the Institutional Investors and the AIG Parties, among other investors, thereby dismissing Nover as respondent with respect to any Settlement Trust in which it does not hold certificates (NYSCEF No. 471) (the “Standing Decision”); and

WHEREAS, in the Standing Decision, the Court afforded Nover an opportunity to substitute into the proceeding the trustees of the other CDO, re-REMIC, or NIM trust structures through which it asserted an interest in BSABS 2005-HE3; and

WHEREAS, on September 14, 2018, the Court so-Ordered a Stipulation and Order Regarding Trustee Substitutions, under which Nover did not substitute into this case the trustees of the other CDO, re-REMIC, or NIM trust structures for BSABS 2005-HE3 (NYSCEF No. 514) (the “Trustee Substitution Stipulation”);² and

¹ All references to the “Institutional Investors” in this Order include each and every one of the sixteen institutions identified in the Institutional Investors’ Notice of Appearance (NYSCEF No. 135).

² Poetic and Prophet appeared in this proceeding with respect to BSABS 2005-HE3 through their direct holdings of certificates issued by BSABS 2005-HE3. Additionally, pursuant to the Trustee Substitution Stipulation, U.S. Bank, in its capacity as indenture trustee of the

WHEREAS, after giving effect to the Standing Decision and the Trustee Substitution Stipulation, the Institutional Investors and Poetic and Prophet are the only parties with standing to appear with respect to the BSABS 2005-HE3; and

WHEREAS, by Notice of Appeal dated September 6, 2018, Nover appealed the Standing Decision to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department; and

WHEREAS, Nover has not received a stay of the Standing Decision during the pendency of its appeal; and

WHEREAS, the Institutional Investors and Poetic and Prophet agree and consent to this Order, which resolves the issues for which judicial instruction were sought concerning the administration and distribution of the Allocable Shares for BSABS 2005-HE3 (the “Subject Allocable Shares”); and

WHEREAS, the “Retired Class Provision” is in Section 5.04(a) of the PSA and provides, “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 Certificates or Class M Certificates has been reduced to zero, that Class of Certificates will

NIM Trusts identified in Exhibit B to the Trustee Substitution Stipulation (solely in such capacity, the “NIM Trustee”), substituted into the proceeding on behalf of Poetic and Prophet with respect their holdings in NIM Trusts that hold interests in certain Settlement Trusts, including BSABS 2005-HE3. This substitution was effectuated pursuant to and in accordance with a direction and indemnity agreement by and among Poetic, Prophet, and the NIM Trustee. At the direction of Prophet and Poetic, the NIM Trustee also agrees and consents to this Order. As set forth in the applicable agreements, U.S. Bank’s capacity in its role as NIM Trustee is separate and distinct from U.S. Bank’s capacity in its role as Trustee and/or Payment Administrator for the Settlement Trusts, and these separate roles were created at the closing of the applicable transactions. In this proceeding, U.S. Bank has separate counsel for its NIM Trustee roles and Trustee/Payment Administrator roles.

be retired and will no longer be entitled to distributions, including distributions in respect of Prepayment Interest Shortfalls or Basis Risk Shortfall Carry Forward Amounts;” and

WHEREAS, Class A and Class M certificates were issued by BSABS 2005-HE3, but Class M-2, Class M-3, Class M-4, and Class M-5 are the only classes of certificates that currently have aggregate certificate principal balances greater than zero dollars (\$0.00) (exclusive of Class CE, P, RX, or R certificates, which may currently have nominal outstanding balances); and if the Subject Petitioner is required to apply the Retired Class Provision to permit the Settlement Payment Write-Up to be applied only to applicable classes of certificates with aggregate certificate principal balances greater than zero dollars (\$0.00) on the date of the distribution of the Subject Allocable Shares, as is contemplated by this Order, then a portion of the Settlement Payment Write-Up will not be applied to write up any of the Class A or Class M certificates and, instead, such portion will be applied to write up the nominal outstanding balance of the Class CE certificates (but the nominal balance of the Class CE certificates may be subject to downward adjustments made in the normal course of the administration of BSABS 2005-HE3 on any Distribution Date) (the “Class CE Increase”); 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, 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 BSABS 2005-HE3 occurring in the Transfer Month, and

WHEREAS, as used herein, the term “Overcollateralization Amount Calculation” is used herein to refer to the terms in the BSABS 2005-HE3 PSA prescribing that the “overcollateralization amount” is equal to the excess of the aggregate balances of the mortgage loans held by BSABS 2005-HE3 over the aggregate certificate principal balances of certain designated classes of certificates, as more fully defined and described in the BSABS 2005-HE3 PSA; and

NOW, THEREFORE, on the motion of Warner Partners, P.C., Gibbs & Bruns LLP, attorneys for the Institutional Investors, and Axinn Veltrop Harkrider LLP, attorneys for Prophet and Poetic, 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 BSABS 2005-HE3. From the time of the aforescribed deposit, the amounts so deposited shall be deemed the Subject Allocable Shares for BSABS 2005-HE3 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 a Subject Allocable Share for BSABS 2005-HE3 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 BSABS 2005-HE3 on the AS Distribution Date; and it is further

ORDERED, ADJUDGED and DECREED that in administering and distributing the Subject Allocable Shares for BSABS 2005-HE3, 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 by the amount of the Settlement Payment Write-Up or a portion thereof in a manner consistent with this Order and with the Class CE Increase; and it is further

ORDERED, ADJUDGED and DECREED that in administering and distributing the Subject Allocable Shares for BSABS 2005-HE3, 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 by the amount of the

Settlement Payment Write-Up or a portion thereof in accordance with the write-up instructions in Section 5.04(b) of the PSA and in a manner consistent with this Order; and it is further

ORDERED, ADJUDGED and DECREED that in administering and distributing the Subject Allocable Shares for BSABS 2005-HE3, the Subject Petitioner shall (i) apply the Retired Class Provision to prevent the distribution of the Subject Allocable Shares to any applicable class of certificates with aggregate certificate principal balances of zero dollars (\$0.00) on the date of the distribution of the Subject Allocable Shares, and (ii) apply the Retired Class Provision to permit the Settlement Payment Write-Up to be applied only to applicable classes of certificates with aggregate certificate principal balances greater than zero dollars (\$0.00) on the date of the distribution of the Subject Allocable Shares; and it is further

ORDERED, ADJUDGED and DECREED that in administering and distributing the Subject Allocable Shares for BSABS 2005-HE3, 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 (exclusive of any portion of the Settlement Payment Write-Up applied as Class CE Increase as provided for in the PSA) and (ii) then reducing such certificate principal balances by an amount equal to the applicable Subject Allocable Share, 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 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 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 BSABS 2005-HE3, or (iii) any 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 BSABS 2005-HE3 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 the Subject Petitioner's administration and distribution of the Settlement Payment with respect to BSABS 2005-HE3, 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

_____, 2018

Hon. Marcy Friedman. J.S.C.

Judgment signed and entered this _____ day of _____ 2018.

Clerk of New York County