
New York Supreme Court

Appellate Division—First Department

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, NA, 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),

**Appellate
Case No.:
2020-02716**

Petitioners,

For Judicial Instructions under CPLR Article 77
on the Distribution of a Settlement Payment

(For Continuation of Caption See Inside Cover)

JOINT REPLY BRIEF FOR PROPHET AND POETIC PARTIES

AXINN, VELTROP & HARKRIDER LLP
114 West 47th Street
New York, New York 10036
(212) 728-2200
dhawthorne@axinn.com
fgilman@axinn.com

PERKINS COIE LLP
1155 Avenue of the Americas,
22nd Floor
New York, New York 10036
(212) 262-6900
mgilmore@perkinscoie.com

*Attorneys for Appellants-Respondents
Prophet Mortgage Opportunities LP,
Poetic Holdings VI LLC and Poetic
Holdings VII LLC*

*Attorneys for Appellant-Respondent
U.S. Bank N.A., solely in its
capacity as NIM Trustee for the
Poetic and Prophet Trusts*

Appellants-Respondents

AEGON USA INVESTMENT MANAGEMENT, LLC, BLACKROCK FINANCIAL MANAGEMENT, INC., CASCADE INVESTMENT, LLC, FEDERAL HOME LOAN BANK OF ATLANTA, FEDERAL HOME LOAN MORTGAGE CORP., FEDERAL NATIONAL MORTGAGE ASSOCIATION, GOLDMAN SACHS ASSET MGMT L.P., VOYA INVESTMENT MGMT LLC, INVESCO ADVISERS, INC., KORE ADVISORS, L.P., METROPOLITAN LIFE INS. CO., PACIFIC INVESTMENT MGMT COMPANY LLC, TEACHERS INS. AND ANNUITY ASSOC. OF AMERICA, TCW GROUP, INC., THRIVENT FINANCIAL FOR LUTHERANS and WESTERN ASSET MGMT. CO.
(the “Institutional Investors”)

– and –

Appellants-Respondents

AMERICAN GENERAL LIFE INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK and THE VARIABLE ANNUITY LIFE INSURANCE COMPANY
(the “AIG Parties”)

– and –

Appellants-Respondents

ELLINGTON MANAGEMENT GROUP, L.L.C. and DW PARTNERS LP
(the “Ellington and DW Parties”)

– and –

Appellants-Respondents

TILDEN PARK INVESTMENT MASTER FUND LP on behalf of itself and its advisory clients, TILDEN PARK MANAGEMENT I LLC on behalf of itself and its advisory clients and TILDEN PARK CAPITAL MANAGEMENT LP on behalf of itself and its advisory clients
(the “Tilden Park Parties”)

– and –

Appellants-Respondents

PROPHET MORTGAGE OPPORTUNITIES LP, POETIC HOLDINGS VI LLC, POETIC HOLDINGS VII LLC and U.S. BANK NATIONAL ASSOCIATION, solely in its capacity as Indenture Trustee for the Prophet and Poetic Trusts
(the “Prophet and Poetic Parties”)

– and –

Appellant-Respondent

AMBAC ASSURANCE CORPORATION
(“Ambac”)

– and –

Appellants-Respondents

U.S. BANK NATIONAL ASSOCIATION, as NIM Trustee, U.S. Bank, solely in
its capacity as Indenture Trustee for the HBK Trusts
(the “HBK Parties”)

– against –

Respondent

NOVER VENTURES, LLC
 (“Nover”)

– and –

Respondent

D.E. SHAW REFRACTION PORTFOLIOS, L.L.C.
 (“D.E. Shaw”)

– and –

Respondent

STRATEGOS CAPITAL MANAGEMENT, LLC
 (“Strategos”)

– and –

Respondents

OLIFANT FUND, LTD., FFI FUND LTD. and FYI LTD.
 (the “Olifant Parties”)

– and –

Respondents

GMO OPPORTUNISTIC INCOME FUND
 and GMO GLOBAL REAL RETURN
 (the “GMO Parties”)

TABLE OF CONTENTS

ARGUMENT.....1

CONCLUSION.....2

TABLE OF AUTHORITIES

No authorities cited.

Non-Party Appellant-Respondent U.S. Bank National Association (“U.S. Bank” or the “NIM Trustee”), solely in its capacity as Indenture Trustee for certain NIM Trusts (the “NIM Trusts”) holding interests in certain RMBS Trusts, and solely at the direction of Appellant-Respondents Poetic Holdings VI LLC, Poetic Holdings VII LLC (“Poetic”) and Prophet Mortgage Opportunities LP (“Prophet”), by its undersigned counsel, together with Poetic and Prophet as certificateholders in certain RMBS Trusts (collectively, “the Poetic and Prophet Parties”) respectfully submit this brief in further support of the Poetic and Prophet Parties’ Opening Brief appealing from the Decision and Order of Supreme Court, entered February 13, 2020.¹

ARGUMENT

The Poetic and Prophet Parties join in the arguments with respect to the Retired Class Provision made in the reply brief of U.S. Bank in its capacity as Indenture Trustee to certain NIM Trusts, solely at the direction of HBK Master Fund

¹ All capitalized terms not defined herein shall have the meaning set forth set in the Poetic and Prophet Parties’ Opening Brief. As explained in footnote 1 of the Poetic and Prophet Parties’ Opening Brief, incorporated here by reference, this brief reflects the positions of Poetic and Prophet. U.S. Bank submits this memorandum solely in its capacity as Indenture Trustee of the Poetic and Prophet NIM Trusts, and solely at the direction of Poetic and Prophet. Further, 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 RMBS trusts at issue in the underlying settlement.

L.P., filed today (the “HBK Reply Brief”), and in particular in the arguments made in Section I of that brief.

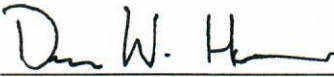
For the reasons given in the HBK Opening and Reply Briefs, Supreme Court erred in permitting write-ups and distributions to Zero Balance Classes, contrary to the terms of the Retired Class Provision of the Poetic and Prophet Trust (and HBK Trust) PSAs. The Retired Class Provision plainly, unambiguously and without exception forbids distributions or write-ups to Zero Balance Classes, on any date after the date on which such a class’s certificate principal balance has been reduced to zero. Respondents’ reading of the Retired Class Provision as imposing a merely temporary or reversible condition is, for the reasons given in the HBK Opening and Reply Briefs, inconsistent with the plain language of the contracts.

CONCLUSION

The Poetic and Prophet Parties respectfully request that this Court reverse Supreme Court’s decision as it relates to the Poetic and Prophet Trusts, and direct the RMBS Trustees to enforce the Retired Class Provision by its plain terms and not increase, or “write up,” Zero Balance Classes upon the Poetic and Prophet Trust’s receipt of Subsequent Recoveries.

Dated: New York, New York
December 18, 2020


**AXINN VELTROP & HARKRIDER
LLP**

By:  _____

Donald W. Hawthorne
Felix J. Gilman
114 W. 47th Street
New York, NY 10036
Telephone: (212) 728-2200
E-mail: dhawthorne@axinn.com
fgilman@axinn.com

*Attorneys for Appellants-Respondents
Poetic Holdings VI LLC, Poetic Holdings
VII LLC, and Prophet Mortgage
Opportunities LP*

PERKINS COIE LLP

By:  _____

Martin Gilmore
Sean Connery
1155 Avenue of the Americas, 22nd
Floor
New York, NY 10036-2711
Tel: (212) 261-6814
E-mail: mgilmore@perkinscoie.com

*Attorneys for Appellant-Respondent U.S.
Bank N.A., solely in its capacity as NIM
Trustee for the Poetic and Prophet Trusts*

PRINTING SPECIFICATION STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

Type: A proportionally spaced typeface was used, as follows:

| | |
|--------------------------|-----------------|
| Name of Typeface: | Times New Roman |
| Point Size: | 14 |
| Line Spacing: | Double |

Word Count: The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 446.

Dated: New York, New York
 December 18, 2020

**AXINN VELTROP & HARKRIDER
LLP**

By: Donald W. Hawthorne
Felix J. Gilman
114 W. 47th Street
New York, NY 10036
Telephone: (212) 728-2200
E-mail: dhawthorne@axinn.com
 fgilman@axinn.com
*Attorneys for Appellants-Respondents
Poetic Holdings VI LLC, Poetic Holdings
VII LLC, and Prophet Mortgage
Opportunities LP*