
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 OPENING BRIEF FOR PROPHET AND POETIC PARTIES

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Poetic Holdings VI LLC and Poetic
Holdings VII LLC*

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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”)

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No authorities cited.

Non-Party Appellant-Respondent U.S. Bank National Association (“U.S. Bank”), 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, submit this brief in support of their appeal from all portions of the Decision and Order of the Honorable Marcy S. Friedman (“Supreme Court”) dated February 13, 2020, and entered February 13, 2020. The RMBS Trusts at issue in this appeal, and in which the NIM Trusts and Poetic and Prophet hold interests, are listed at Exhibits A and B to the March 10, 2020 Notice of Appeal (R. 9-10, Dkt. No. 849) (collectively, the “Poetic and Prophet Trusts.”)¹

¹ Pursuant to the Supreme Court’s order (Dkt. No. 471) (the “Substitution Order”) and at the direction of Poetic Holdings VI LLC, Poetic Holdings VII LLC (collectively, “Poetic”) and Prophet Mortgage Opportunities Fund LLP (“Prophet”), U.S. Bank, solely in its capacity as Indenture Trustee (the “NIM Trustee”) under the NIM Trusts referenced on Exhibit A to the March 10, 2020 Notice of Appeal (R. 9, Dkt. No. 849) which hold a direct interest in the Poetic and Prophet Trusts, substituted into the Supreme Court proceedings in place of Poetic and Prophet. This memorandum reflects the positions of Poetic and Prophet. U.S. Bank, in its capacity as Indenture Trustee under certain other NIM Trusts, pursuant to the Substitution Order and acting at the direction of HBK Master Fund L.P. (“HBK”), separately appeared in the proceedings before Supreme Court. In that separate capacity, U.S. Bank, acting at the direction of HBK, is separately filing a brief in this appeal. 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.

Supreme Court’s Decision addresses the distribution and administration of a roughly \$4.5 billion settlement relating to numerous RMBS Trusts, including the Poetic and Prophet Trusts. The Decision should be reversed, as it relates to the Poetic and Prophet Trusts, because Supreme Court erroneously held that classes of certificates in the Poetic and Prophet Trusts which have had their certificate principal balances reduced to zero may be written up and receive future distributions, despite provisions in each of the pooling and servicing agreements (“PSAs”) governing the Poetic and Prophet Trusts stating that once a class of A, M or B certificates has had its principal balance reduced to zero (a “Zero Balance Class”) such a class “will be retired and will no longer be entitled to distributions” on any subsequent distribution date (the “Retired Class Provision”).

QUESTION PRESENTED

1. Whether, when the Certificate Principal Balance of a class of certificates has been reduced to zero, and the Retired Class Provisions of the Poetic and Prophet Trust PSAs state that such a Zero Balance Class “will be retired and will no longer be entitled to distributions” on any subsequent distribution date, Supreme Court erred in holding that such a class may nevertheless be written up and receive future distributions?

Answer: Yes. Under the Poetic and Prophet Trust PSAs, once the Certificate Principal Balance of a class of A, M, or B certificates has been reduced to zero, that class may never again be written up or receive distributions.

STATEMENT OF FACTS AND ARGUMENT

In all respects relevant to this appeal, the PSAs for the Poetic and Prophet Trusts are substantially identical to the PSAs for the “HBK Trusts,” as that term is defined in the separate appeal brief of U.S. Bank in its capacity as Indenture Trustee to certain NIM Trusts, solely at the direction of HBK Master Fund L.P., filed today (the “HBK Brief”).² Each of the Poetic and Prophet Trusts contains a Retired Class Provision and one or more Zero Balance Classes.

Appellants join in all of the arguments made in the HBK Brief with respect to the Retired Class Provision, in particular section II of that brief, and adopt by

² Each of the Poetic and Prophet Trust PSAs is substantially identical, in all respects relevant to this appeal, to the BSABS 2005-AQ2 PSA, to which the HBK Brief cites as an exemplar. A representative Poetic and Prophet Trust PSA, for BSABS 2006-HE1, can be found at R. 14244-14621 (NYSCEF 755), in which the Retired Class Provision appears at Section 5.04 of that PSA, R. 14401, and provides that:

In addition, notwithstanding the foregoing, on any Distribution Date after the Distribution Date on which the Certificate Principal Balance of a Class of Class I-A Certificates or Class I-M Certificates has been reduced to zero, that Class of Certificates will 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.

reference the HBK Brief's Statement Of Facts. As set forth in the HBK Brief, Supreme Court erred both in holding that a Zero Balance Class could be written up, and in assuming that, if such a class were to be written up, it would therefore become eligible to receive future distributions. In fact, the Retired Class Provision, and related terms of the PSAs in which the Provision appears, provide categorically and without exception that once a class of A, M, or B certificates has had its principal balance reduced to zero, it will never again be eligible to receive distributions or write-ups, on any subsequent date.

For the reasons set forth in the HBK Brief, and adopted by reference herein, this Court should reverse Supreme Court's decision as it relates to the Poetic and Prophet Trusts, and hold that the Retired Class Provisions should be enforced by their plain language, and thus that Zero Balance Classes can neither be written up nor receive distributions.

Dated: New York, New York
November 2, 2020

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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.

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Dated: New York, New York
November 2, 2020

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STATEMENT PURSUANT TO CPLR § 5531

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, 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.

1. The index number of the case in the court below is 657387/17.
2. The full names of the original Petitioners are as set forth above. There have been no changes.
3. The action was commenced in Supreme Court, New York County.
4. The action was commenced on December 15, 2017 by filing of a Petition. Respondents D.E. Shaw Refraction Portfolios, L.L.C, HBK Master Fund L.P., Olifant Fund, Ltd., FFI Fund Ltd., FYI Ltd., Ellington Management Group L.L.C., Prophet Mortgage Opportunities LP, Poetic Holdings VI LLC and Poetic Holdings VII LLC, FT SOF IV Holdings, LLC, Fir Tree Capital Opportunity Master Fund, L.P., Fir Tree Capital Opportunity Master Fund III, L.P., Tilden Park, AEGON USA Investment Management, LLC, BlackRock Financial Management, Inc., Cascade Investment, LLC, the Federal Loan Bank of Atlanta, the Federal Home Loan Mortgage Corporation (Freddie Mac), the Federal 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, Western Asset Management Company, 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, The Variable Annuity Life Insurance Company, GMO Opportunistic Income Fund, GMO Global Real Return (UCITS) Fund, Axonic Capital LLC, Nover Ventures, LLC, Strategos Capital Management, LLC filed their Responses to Petition on January 29, 2018.

5. This is an Article 77 Proceeding.
6. This appeal is from the Decision and Order of the Honorable Marcy S. Friedman, dated February 13, 2020, which held, as relevant to this appeal, that (1) the settlement payment write-up should be made using the subsequent recovery write-up instructions in the associated pooling and servicing agreements (“PSAs”), unless the relevant PSA is silent as to the write-up mechanics, in which case the Settlement Agreement write-up instruction should be applied as a “gap filler”; (2) the Petitioners should not write up the certificate principal balances of senior certificates in connection with the settlement payment in trusts where the PSA write-up instructions only indicate a write-up of subordinated certificates; and (3) with respect to calculating the overcollateralization amount as to certain “Pay First” trusts, Petitioners should take into account both a reduction of the certificate principal balance and an increase of the certificate principal balance prior to making any distribution.
7. This appeal is on the full reproduced record.