

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

<p>In the matter of the application of</p> <p>U.S. BANK NATIONAL ASSOCIATION (as Trustee, Securities Administrator, Paying Agent, and/or Calculation Agent under various Pooling and Servicing Agreements),</p> <p style="text-align: center;">Petitioner,</p> <p>for judicial instructions pursuant to CPLR Article 77.</p>
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Index No. 656028/2021

IAS Part 53

Hon. Andrew J. Borrok

ANSWER OF POETIC HOLDINGS VI LLC IN RESPONSE TO PETITION

Pursuant to the Court’s Orders to Show Cause dated November 29, 2021 and January 10, 2022, Respondent Poetic Holdings VI LLC (“Poetic VI”) respectfully makes this answer in response to the First Amended Petition (“Petition”).

I. Trusts in Which Poetic VI Has an Interest

Poetic VI holds certificates in the following Trusts that are the subject of the Trustee’s Petition: SACO 2005-8, SACO 2005-9, SACO 2005-10, and BSABS 2004-HE10 (collectively, the “Poetic VI Trusts”).¹

II. Positions on Issues Raised in Petition

As to the Poetic VI Trusts, Poetic VI has positions on three issues raised in the Trustee’s Petition.

¹ For three of those Trusts, Poetic VI holds certificates through holdings in three separate net interest margin trusts (the “NIM Trusts”), BSSP 2005-32N, BSSP 2006-3, and BSNIM 2004-HE10. U.S. Bank National Association (“U.S. Bank”) acts as Trustee for those NIM Trusts (the “NIM Trustee”), which is a separate capacity from its capacity as Trustee for the Trusts at issue in the Petition. U.S. Bank, in its capacity as NIM Trustee for those NIM Trusts, acting at the direction of Poetic VI, will file a separate Answer today joining in the positions set forth by Poetic VI herein (the “NIM Answer”). Further information regarding the NIM Trusts and the Trustee’s role is set forth in the NIM Answer.

First, the Petition asks whether the “Retired Class Provision” found in the Poetic VI Trust PSAs should be applied so as to prevent write-ups and distributions to Primary Classes which have had their balances reduced to zero (“Zero Balance Classes”). See Petition ¶ 152(b). Poetic VI’s position is that the Retired Class Provision should be applied in accordance with its plain language to prevent write-ups or distributions to such classes.

Second, the Petition asks whether “Post-Zero Balance Collections” (collections received once the balances of the “Primary Classes” of A, M or B certificates are reduced to zero) should be treated as “Excess Cashflow” or “Principal Distribution Amount.” See Petition ¶ 152(a).² Poetic VI’s position is that, consistent with the language of the Poetic VI Trust PSAs, such amounts should be treated as Excess Cashflow.

Third, the Petition asks for confirmation that the Trustee should continue its current practice with respect to the Poetic VI Trusts of not treating Deferred Principal Collections as Subsequent Recoveries. See Petition ¶ 152(c). Poetic VI’s position is that it should continue to do so.

A. The Retired Class Provision Should Be Applied In Accordance With Its Plain Language To Preclude Write-Ups Or Distributions To Zero-Balance Classes

The language of the Retired Class Provision is clear and specific: it states that “on *any* Distribution Date *after* the Distribution Date on which the Certificate Principal Balance of a Class of Class A, Class B or Class M Certificates has been reduced to zero, that Class of Certificates *will be retired and will no longer be entitled to distributions...*” (emphasis added). This language plainly precludes all future distributions to such a class, because any distribution date after the date on which a class has been reduced to zero will

² Unless otherwise specified, all defined terms in this submission are used as defined as in the Petition.

be a date on which such a class “will be retired” and “will no longer be entitled to distributions.”

By its plain language, this is a permanent state. Even if such a class were to be written up so that its balance were no longer zero, it would still be retired and no longer entitled to distributions. Nothing in the write-up provisions or any other provision of the Poetic VI PSAs purports to override the Retired Class Provision, or create any exception to it, or suggests that if such a class were to receive write-ups, the effect of the Retired Class Provision would be reversed. In fact, the write-up provisions of the Poetic VI Trust PSAs preclude write-ups to Zero Balance Classes, because those provisions apply write-ups in order of each class’s “payment priority” and in accordance with each certificate’s “Percentage Interest” in the distributions owed to the class to which it belongs. See PSA § 5.04(b). Because the Retired Class Provision provides that a Zero Balance Class is retired and no longer entitled to distributions, such a class has neither a payment priority nor a Percentage Interest in any distributions, and is therefore not entitled to write-ups.

Moreover, as the Petition recognizes, the Trustee’s “course of performance with respect to its general practice” has been to apply the Retired Class Provision so as to prohibit distributions or write-ups to Zero Balance Classes. Petition ¶ 116. Consistent with its general practice and the plain language of the PSAs, the Trustee should continue to apply the Retired Class Provision so as to prohibit distributions or write-ups to Zero Balance Classes.³

B. The Poetic VI Trust PSAs Require That Post-Zero Balance Collections Be Treated As Excess Cashflow

³ As the Petition notes, in *In re Wells Fargo Bank et al*, No. 2020-02716 (1st Dep’t, Aug. 19, 2021), the First Department construed the Retired Class Provision to permit write-ups, in the context of “the administration of a one-time settlement payment” of the JP Morgan settlement, Petition ¶ 116, but that decision is subject to pending motions for leave to appeal.

As the Petition recognizes, the principal waterfall in the Poetic VI Trusts distributes funds to Primary Classes “only until each class’s certificate principal balance is ‘reduced to zero.’” Petition ¶ 93, quoting § 5.04(a)(2) of the PSAs. Therefore, once a Primary Class has a principal balance of zero, it cannot receive distributions under the principal waterfall, including Post-Zero Balance Collections. *See id.*

For the reasons given above, the Retired Class Provision permanently precludes any such class from receiving any future distributions or write-ups. Thus a class that has had its balance reduced to zero cannot have its balance written up again under any circumstances, and cannot become eligible for distributions again. Even if the Retired Class Provision is not construed to preclude write-ups to such classes under all circumstances, however, Post-Zero Balance Collections (as that term is defined in the Petition) do not result in write-ups. As the Petition notes, the only “express mechanism” in the Poetic VI Trust PSAs for applying write-ups is through the application of “Subsequent Recoveries.” Petition ¶ 94. Subsequent Recoveries are defined in the Poetic VI PSAs as “amounts received ... specifically related to a Mortgage Loan that was the subject of a liquidation or final disposition of any REO Property prior to the related Prepayment Period that resulted in a Realized Loss.” PSA § 1.01 (Definition of Subsequent Recoveries). This definition plainly includes only subsequently collected amounts related to liquidations or final dispositions, and does not include collections relating to performing loans, or Deferred Principal Collections on modified loans. Post-Zero Balance Collections thus cannot result in write-ups to the balance of the Primary Classes, and therefore cannot be distributed in the principal waterfall.

Instead, the PSAs require that Post-Zero Balance Collections be treated as Excess Cashflow. The Excess Cashflow waterfall requires distribution, on any given distribution date,

of the “Class C Distribution Amount.” *See* PSA § 5.04(a)(3). The definition of “Class C Distribution Amount” expressly states that “on any Distribution Date on which the Certificate Principal Balances of the Class A, Class M and Class B Certificates have been reduced to zero, the Class C Distribution Amount shall include the Overcollateralization Amount.” *See* PSA § 1.01 (Definition of Class C Distribution Amount). The Overcollateralization Amount is defined as the excess of the mortgage loan principal balances over the aggregate principal balances of the Primary Classes—once the Primary Classes have a balance of zero, the Overcollateralization Amount necessarily equals the remaining balance of the mortgage loans. *See* PSA § 1.01 (Definition of Overcollateralization Amount). The Excess Cashflow waterfall thus provides a “catchall” allowing for distribution of Post-Zero Balance Collections. *See* Petition ¶ 98.

C. The Trustee Should Continue Its Practice Of Not Treating Deferred Principal Collections As Subsequent Recoveries

As the Petition notes, the Poetic VI Trust PSAs define “Subsequent Recoveries” narrowly to include only amounts “specifically related to” a loan that was the subject of liquidation or final disposition of an REO Property. *See* Petition ¶ 124 (quoting PSA § 1.01 (Definition of Subsequent Recoveries)). The definition does not include amounts collected in connection with loan modifications. Under the plain language of the PSAs, therefore, Deferred Principal Collections do not fall within the definition of Subsequent Recoveries, and the Trustee should continue its practice of not treating them as such.

III. Request for Merits Briefing

Poetic VI requests the opportunity to brief these issues and to respond to briefs filed by other parties concerning these issues.

Dated: January 18, 2022

Respectfully submitted,

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