STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

In the Matter of: | Court File No. 62-TR-CV-18-39

The trusteeship created by Abacus 2006-10, Ltd., and Abacus 2006-10, Inc., relating to the issuance of Notes pursuant to an Indenture dated as of March 21, 2006. | **ORDER**

The above entitled matter came before the Honorable Jennifer L. Frisch, Judge of District Court, upon Intervenor Goldman Sachs Bank USA's Motion for Judgment on the Pleadings. Julie Landy, Esq., appeared on behalf of the Trustee/Petitioner, U.S. Bank National Association. Richard Klapper, Esq.; Jacob Croke, Esq.; William Wassweiler, Esq.; and Gretchen Gurstelle, Esq., appeared on behalf of Goldman Sachs Bank USA. Uri Itkin, Esq.; Nicholas Callahan, Esq.; and Andrew Kurland, Esq., appeared on behalf of Astra Asset Management UK Limited. Based upon the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that the motion is DENIED.

Dated: March 5, 2019

BY THE COURT:

Jennifer L. Frisch
Ramsey County District Court Judge

Summary of Pleadings

Trustee U.S. Bank National Association ("U.S. Bank"), a national banking association with its principal corporate trust office located in Saint Paul, Minnesota, initiated the instant proceeding to obtain instructions in the administration of a trust instrument pursuant to Minn. Stat. §§ 501C.0201(c)(2), 501C.202(4) and (24). The trust instrument, an Indenture dated March 21, 2006, authorizes Abacus 2006-10 to issue Notes to investors based on the performance of a portfolio of commercial mortgage-backed securities. Rather than holding the mortgage-backed securities as collateral, Abacus entered into a Credit Default Swap with Goldman Sachs Capital Markets, L.P. ("Goldman").[1] Astra Asset Management UK Limited ("Astra"), a hedge fund that holds Notes under the Indenture, filed an Objection to the Trustee's Petition, seeking termination of the Credit Default Swap and other relief. Goldman opposes Astra's request and seeks judgment on the pleadings.

THE ABACUS 2006-10 COLLATERALIZED DEBT OBLIGATION

The Indenture facilitates investor access to a portfolio of 70 commercial mortgage-backed securities (the "Reference Portfolio") by structuring a collateralized debt obligation called Abacus 2006-10 ("Abacus" or the "Issuer").[2] A collateralized debt obligation is a pool of debt contracts—such as mortgages—generally housed in a Special Purpose Entity (here, Abacus), repackaged into various classes, and sold to investors. Pursuant to the Indenture, Abacus issues Notes intended to generate a return for investors based on the performance of the Reference

[1] In the instant proceeding Goldman Sachs Bank USA represents Goldman Sachs Capital Markets, L.P., as successor-in-interest.

[2] There are two entities referred to as "Abacus 2006-10"—Abacus 2006-10, Ltd., and Abacus 2006-10, Inc. Abacus 2006-10, Ltd., is a party to all of the agreements discussed herein. Abacus 2006-10, Inc., however, is a party only to the Indenture. The distinction between these entities is not material to the instant motion.

Portfolio. The Indenture also establishes U.S. Bank (as successor-in-interest to LaSalle National Banking Association) as Trustee.

Abacus is a *synthetic* collateralized debt obligation, meaning it does not hold the underlying mortgage-backed securities. Instead, Abacus entered into a Credit Default Swap with Goldman. The Credit Default Swap serves as collateral for the Notes issued under the Indenture. Under the Credit Default Swap, Goldman pays the Issuer a fixed monthly payment. In return, the Issuer makes a "floating payment" to Goldman upon occurrence of a credit event on a security in the Reference Portfolio.

To fund its floating payments to Goldman, the Issuer used the proceeds from the initial sale of Notes under the Indenture to purchase initial Collateral Securities. The Issuer liquidates the Collateral Securities as necessary to fund payments to Goldman. Goldman may direct the Issuer to purchase Supplemental Collateral Securities to fund further floating payments. When selecting Supplemental Collateral Securities, Goldman must verify that the securities meet certain Eligibility Criteria, purportedly to ensure that the securities are relatively low-risk investments.

The Credit Default Swap consists of three documents: (1) an ISDA Master Agreement; (2) a Schedule to the Master Agreement ("ISDA Schedule"), which modifies the Master Agreement in some respects; and (3) a CDS Confirmation. These three documents, along with the Indenture, are attached to the Petition and incorporated therein.

ALLEGED VIOLATIONS

In March 2013, Astra purchased Notes from the Issuer. Astra later began to suspect that certain Collateral Securities did not satisfy the Eligibility Criteria. In a letter to the Trustee dated February 27, 2017, Astra and an unnamed noteholder expressed "concern[] that the Issuer holds and has held in the past certain Supplemental Collateral Securities that [Astra] does not believe

satisfy all of the Collateral Security Eligibility Criteria and as such are in breach of the terms of the Notes." Astra claimed that it had "identified numerous examples of Supplemental Collateral Securities (for example CUSIP 362367AB0) that do not meet the Collateral Security Eligibility Criteria as described on page 65 of the Offering Circular." Astra offered to provide a list of securities in violation of the Eligibility Criteria, with their respecting ISINS/CUSIPS numbers, upon request. "As the joint holders of the Majority of the Aggregate USD Equivalent Amount of the Notes," Astra and the unnamed noteholder directed the Trustee to appoint an independent party to investigate whether the Supplemental Collateral Securities satisfied the Eligibility Criteria.

In a letter dated September 26, 2017, Astra asked the Issuer to investigate and take action in relation to certain alleged breaches of the Credit Default Swap. Astra's letter precipitated a series of e-mail exchanges between the Issuer and Astra regarding the alleged breaches. In a letter dated December 21, 2017, Astra again asked Abacus to investigate and act on the alleged breaches. The Issuer responded to Astra's letters on January 29, 2018, stating that the Issuer lacked authority to take the action Astra requested.

In a letter dated May 24, 2018, Astra sent the Trustee a letter with the subject line: "Notice of Default." Astra purported to hold "over 47% of the Aggregate USD Equivalent Outstanding Amount of the Notes" and represented that Hout Bay 2006-1, Ltd., holder of an additional 43% of the Notes, was required to vote on those Notes in the same manner as Astra. Astra "hereby provid[ed] notice that an Event of Default ha[d] occurred and [wa]s continuing under the Credit Default Swap and the Indenture" as a "result of the Issuer's repeated purchases of ineligible Supplemental Collateral Securities at the direction of [Goldman]." The claimed ineligible securities purchased under Goldman's direction "include[d], among other things, Supplemental Collateral Securities that were not the senior-most class with respect to the allocation of losses,

contrary to section (ii) of the Collateral Security Eligibility Criteria." An attachment to the letter listed the allegedly ineligible securities by Security I.D., notational amount, and month of addition. Astra requested that the Trustee terminate the Credit Default Swap and proceed with Mandatory Redemption of the Notes in accordance with the Indenture.

On May 31, 2018, the Trustee issued a notice of Astra's letter to the noteholders. The following day, an affiliate of Goldman purchased the outstanding Supplemental Collateral Securities that Astra had identified in its May 24, 2018 letter. Goldman represents that all securities were purchased at par value, with no loss to the Trust. Correspondence continued between Goldman, Astra, and the Trustee, in which Goldman and Astra disputed whether Goldman's actions cured any breach.

On August 15, 2018, the Trustee filed a Petition for instructions as to whether the supplemental securities met the Eligibility Criteria, and, if they did not meet that criteria, what actions, if any, the Trustee may or must take in response. Relevant to the instant motion, the Petition requested an order that would (1) state whether an Event of Default had occurred and is continuing under the Credit Default Swap and/or the Indenture, (2) whether the Trustee may terminate the Credit Default Swap if there is no Event of Default under the Indenture, and (3) finding that a majority of noteholders have not instructed the Trustee to terminate the Credit Default Swap.

Then, in a letter dated August 24, 2018, Astra submitted to the Trustee a Solicitation for Vote or Consent and asked that the vote be distributed to noteholders. On September 18, 2018, the Trustee confirmed that 90% of noteholders had voted to declare an Event of Default under the Credit Default Swap and to terminate the Credit Default Swap. In the meantime, Goldman and Astra filed Objections to the Petition. Goldman now moves for judgment on the pleadings.

Standard of Review

As a threshold matter, the parties agree that Minnesota procedural law governs the instant motion. Matters of procedure are generally governed by the law of the forum state, *Zaretsky v. Molecular Biosystems, Inc.*, 464 N.W.2d 546, 548 (Minn. Ct. App. 1990), and Goldman expressly invokes Minn. R. Civ. P. 12.03 and associated case law in its motion.

To withstand a motion for judgment on the pleadings, the party opposing the motion "must state facts that, if proven, would support a colorable claim and entitle it to relief." *Midwest Pipe Insulation, Inc. v. MD Mech., Inc.*, 771 N.W.2d 28, 31 (Minn. 2009). The Court "must accept the allegations contained in the challenged pleading as true." *Id.* The Court may consider the pleadings themselves and "any documents or statements incorporated by reference into the pleadings." *Greer v. Prof'l Fiduciary, Inc.*, 792 N.W.2d 120, 131 (Minn. Ct. App. 2011); *see also Gretsch v. Vantium Capital, Inc.*, 846 N.W.2d 424, 429 n.4 (Minn. 2014) (concluding that affidavits referenced in the complaint were incorporated into the pleadings).

Minnesota courts do not dismiss complaints for insufficient pleading "unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." *First Nat'l Bank of Henning v. Olson*, 74 N.W.2d 123, 129 (Minn. 1955) (quoting *Dennis v. Vill. of Tonka Bay*, 151 F.2d 411, 412 (8th Cir. 1945)); *see also N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963) ("[A] pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded."). The Minnesota Supreme Court confirmed in *Walsh v. U.S. Bank* that Minnesota is a notice-pleading state and "does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it." 851 N.W.2d 598, 604-05 (Minn. 2014). The

Walsh Court confirmed that "when our rules of civil procedure require more factual specificity—or 'particularity'—for a certain type of pleading, *they say so clearly*." *Id.* at 605 (emphasis added). If a pleading is "'so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading,' that party may move for a more definite statement," which in turn "shall point out the defects complained of and the details desired." *Id.* (quoting Minn. R. Civ. P. 12.05).

Legal Analysis

With respect to the substantive issues arising between the parties, both the Indenture and the Credit Default Swap expressly provide that New York law applies. *See* Minn. Stat. § 501C.0107(a)(1) (stating that the meaning and legal effect of the terms of a trust are determined by the law of the jurisdiction designated in the trust); *Milliken & Co.* v. *Eagle Packaging Co.*, 295 N.W.2d 377, 380 & n.1 (Minn. 1980) ("This court is 'committed to the rule' that parties may agree that the law of another state shall govern their agreement and will interpret and apply the law of another state where such an agreement is made." (quoting *Combined Ins. Co. of Am. v. Bode*, 77 N.W.2d 533, 536 (Minn. 1956)).

Under New York law, "[a] trust indenture is a contract" and, therefore, "[i]nterpretation of indenture provisions is a matter of basic contract law." *Quadrant Structured Prods. Co. v. Vertin*, 16 N.E.3d 1165, 1172 (N.Y. 2014) (quoting *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1049 (2d Cir. 1982)). The underlying principle of contract interpretation is that agreements are governed by the intent of the parties. *Greenfield v. Philles Records*, 780 N.E.2d 166, 170 (N.Y. 2002). The text of the writing is the best evidence of the parties' intent. *Slamow v. Del Col*, 594 N.E.2d 918, 919 (N.Y. 1992). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield*, 780 N.E.2d at 170. Whether the agreement is ambiguous on its face is a question of

law. *Id.* "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion.'" *Id.* at 170-71 (quoting *Breed v. Ins. Co. of N. Am.*, 385 N.E.2d 1280, 1282 (N.Y. 1978)). But the contract must be "read as a whole" and, if possible, "interpreted as to give effect to its general purpose. . . . The meaning of a writing may be distorted where undue force is given to single words or phrases." *Westmoreland Coal Co. v. Entech, Inc.*, 794 N.E.2d 667, 670 (N.Y. 2003) (quoting *Empire Props. Corp. v. Manufacturers Trust Co.*, 43 N.E.2d 25, 28 (N.Y. 1942)).

Goldman seeks judgment on the pleadings, alleging that the parties' respective agreements unambiguously demonstrate that (1) Astra did not provide sufficient contractual notice of any breach; (2) no continuing Event of Default occurred within the meaning of the parties' agreements; and (3) Goldman immediately and fully cured any breach or default, leaving no actionable claim. For the reasons set forth herein, judgment on the pleadings is not proper.

I. THE PLEADINGS SET FORTH SUFFICIENT NOTICE TO GOLDMAN OF A BREACH.

Goldman raises various arguments related to whether it received proper notice of any alleged breach, implicating both the sufficiency of the pleading itself and, secondarily, the substantive notice provisions set forth both in the Indenture and the Credit Default Swap. The pleadings fairly notify Goldman of a claim that it defaulted on its obligations. *See Walsh*, 851 N.W.2d at 604-05.

The pleadings and attached documents demonstrate the nature of the dispute. In Astra's May 24, 2018 letter to the Trustee, Astra "provide[d] notice that an Event of Default has occurred and is continuing under the Credit Default Swap and the Indenture . . . . as a result of the Issuer's repeated purchases of ineligible Supplemental Collateral Securities at the direction of [Goldman]."

Astra noted that the CDS Confirmation "makes clear that . . . [Goldman] is obligated to supply information and calculations needed to confirm that each Supplemental Collateral Security satisfies the Collateral Security Eligibility Criteria." The Ineligible Collateral purchased under Goldman's direction "include[d], among other things, Supplemental Collateral Securities that were not the senior-most class with respect to the allocation of losses, contrary to section (ii) of the Collateral Security Eligibility Criteria." An attachment to the letter listed the allegedly ineligible securities. In its Objection, Astra alleges that "[t]hese violations—as well as any other violations that Astra has not uncovered but which likely exist given Goldman Sachs's obstruction—are a breach of Goldman Sachs's and the Issuer's respective obligations to strictly comply with the Eligibility Criteria."

Notwithstanding Goldman's complaint regarding lack of specificity as to the precise nature of any claim, these documents, all attached and incorporated into the pleadings, supply sufficient notice to Goldman of the nature of a claim, namely, that Goldman breached the terms of the Credit Default Swap by directing the purchase of specific securities that allegedly did not meet the Eligibility Criteria. These alleged violations included violations of the obligation to ensure that the securities were of the senior-most class issued by their obligors. As the entity that directed these transactions, Goldman was in a position to determine whether the purchased securities satisfied the Eligibility Criteria. In fact, the CDS Confirmation requires Goldman to provide the Trustee with information and calculations used by Goldman to confirm compliance with the Eligibility Criteria. Indeed, Goldman appears to be well aware of the nature of the claim, able to

discover the more specific basis for such claims, and otherwise defend itself. While Goldman complains about the lack of particularity, these pleadings are sufficient under Minnesota law.[3]

II. THE INDENTURE AND CREDIT DEFAULT SWAP DO NOT PRECLUDE THE SUBSTANTIVE CLAIMS AS A MATTER OF LAW.

Turning to the substantive objections, Goldman argues that the agreements at issue do not provide for actionable claims related to the alleged wrongdoing and, even if a claim once existed, Goldman has since fully cured any breach, resulting in no loss to any affected entity. The issues raised by Goldman are not proper subjects for judgment on the pleadings.

A. The pleadings set forth allegations of an Event of Default.

Goldman first alleges that an Event of Default did not occur because it did not receive proper "notice" and that such notice is a condition precedent to an Event of Default. More specifically, Goldman alleges that any notice it received was ineffective because Astra did not specify which Eligibility Criteria were unsatisfactory for each allegedly ineligible Supplemental Collateral Security.

When not stated in the plain language of the document, the level of specificity required in a notice of default is an issue of fact. *See BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, 778 F. Supp. 2d 375, 399 (S.D.N.Y. 2011) (applying New York law); *DeLago v. Robert Plan Corp.*, No. 04 CIV. 3193 (JFK), 2006 WL 489845, at *4 (S.D.N.Y. Feb. 28, 2006) (stating that "[i]t is not unreasonable to assume that the parties intended some sort of specific detail of a default to be cited" but that "[b]ecause the parties' intent is a matter of inquiry, the Court cannot decide as a matter of law" whether notice was effective).

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[3] Notably, even courts applying a heightened *Twombly-Iqbal* pleading standard have not required loan-specific notice at the pleadings stage. *See, e.g., Royal Park Investments SA/NV v. HSBC Bank USA, Nat. Ass'n,* 109 F. Supp. 3d 587, 600-01 (S.D.N.Y. 2015).

The term "notice" is not defined in the Indenture or the Credit Default Swap. The ISDA Master Agreement provides for written notice and other communications. The parties agree, and the pleadings demonstrate, that Goldman received some notice in writing. And Goldman concedes that it undertook immediate corrective action upon receipt of that writing. Although the Indenture does provide that certain notices must "specify[] the default," the Indenture does not set forth precisely what aspect of a default or breach must be "specified" or what level of specificity is required.[4] *Cf. Manta Indus., Ltd. v. TD Bank, Nat'l Ass'n*, No. 17 CIV. 2495 (LAP), 2018 WL 2084167, at *4 (S.D.N.Y. Mar. 29, 2018) (discussing N.Y. C.P.L.R. § 5222(a), which requires that a restraining notice "specify" the parties, the date of judgment, the court in which judgment was entered, and the names of the parties against who judgment was entered); *DKR Soundshore Oasis Holding Fund Ltd. v. Merrill Lynch Int'l*, 80 A.D.3d 448, 450 (N.Y. App. Div. 2011) (discussing provision that notices "must contain a description in reasonable detail of the facts relevant to the determination that a Credit Event had occurred"). Whether the purported notice to Goldman satisfies the intended contractual notice requirements is not an issue subject to resolution on the pleadings alone.[5]

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[4] Goldman cites Section 6(a) of the ISDA Master Agreement, which provides that, upon occurrence of an Event of Default, Goldman is entitled to notice "specifying the relevant Event of Default" before designation of an Early Termination Date for outstanding transactions. The ISDA Schedule, however, amends Section 6 as follows:

> Notwithstanding any provision to the contrary contained in Section 6 of this Agreement, . . . if at any time an Event of Default has occurred and is continuing, a Non-Defaulting Party may designate an Early Termination Date no earlier than 10 Business Days *following notice* to the Defaulting Party.

ISDA Schedule § 1.9 (emphasis added). The word "specify" is absent from the amendment, which by its own terms applies notwithstanding any other provision to the contrary in Section 6. *See Warberg Opportunistic Trading Fund, L.P. v. GeoResources, Inc.*, 112 A.D.3d 78, 83 (N.Y. App. Div. 2013) ("It is well settled that trumping language such as a 'notwithstanding' provision 'controls over any contrary language' in a contract." (quoting *Handlebar, Inc. v. Utica First Ins. Co.*, 290 A.D.2d 633, 635 (N.Y. App. Div. 2002))).

[5] New York law appears to require different standards for interpreting contractual notice requirements depending upon the type of relief sought. *Compare Mahoney v. Sony Music Entm't*, No. CIV. 5045 RJS AJP, 2013 WL 491526, at *7 (S.D.N.Y. Feb. 11, 2013) ("Where, as here, the notice requirement is a condition precedent not to

B. The parties' agreements do not unambiguously require a party to "declare" an Event of Default in every circumstance.

Goldman further alleges that it is entitled to judgment on the pleadings because a "declaration" of Event of Default has not occurred within the meaning of the parties' agreements. Goldman specifically asserts that Astra cannot "declare" an Event of Default because Astra is not a party to the Credit Default Swap or the Indenture. Goldman has not specified any contractual language that requires a "declaration" of any party as a prerequisite to an Event of Default. A contract generally must set forth conditions precedent in "unmistakable language." *Bank of N.Y. Mellon Trust Co. v. Morgant Stanley Mortg. Capital, Inc.*, 821 F.3d 297, 305-06 (2d Cir. 2016) (applying New York law).

The governing agreements do not set forth conditions precedent to an Event of Default with unambiguous specificity. Although multiple notice provisions exist, not all of the notice provisions specify those authorized to give notice. For example, pursuant to the Indenture, either the Trustee or 25% of noteholders may notify the Issuer of a breach, which may become an Event of Default absent correction of the breach within 30 days. But pursuant to Section 5(a)(ii) of the ISDA Master Agreement, which forms part of the Credit Default Swap, an Event of Default occurs when a breach has not been remedied thirty days "after notice of such failure is given to the party." This provision does not specify who may give a notice or at least provides for ambiguity as to who may give notice. Such ambiguity prohibits judgment on the pleadings here.

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forfeiture or termination, but rather to bringing an action for unpaid royalties, the notice at issue should be examined from a 'more relaxed perspective.'" (quoting *Lurzer GMBH v. Am. Showcase, Inc.*, 75 F.Supp.2d 98, 102 (S.D.N.Y.1998)), *with In re 4Kids Entm't, Inc.*, 463 B.R. 610, 684 (Bankr. S.D.N.Y. 2011) ("[I]t is clear under New York law that where, as here, a party seeks what amounts to a forfeiture, a notice of breach will be scrutinized and any inadequacy—be it trivial or material—will defeat such party's claim."). Here, the Trustee seeks instructions both with respect to the termination of the Credit Default Swap and distribution of Liquidation Proceeds upon Mandatory Redemption. The parties have not briefed the applicable notice standards with respect to such claims and the Court need not decide this issue for purposes of the instant motion.

Goldman invokes the rule against surplusage to allege that, because certain provisions require notice by a particular party or the Trustee, notice directly from noteholders is necessarily excluded. Goldman cites Section 5.19 of the Indenture, Section 6(a) of the ISDA Master Agreement, and Section 5.2(iv) of the ISDA Schedule, all of which authorize the Trustee to act to enforce the terms of the Credit Default Swap or notify Goldman of a breach under certain circumstances. "[A] court should not 'adopt an interpretation' which will operate to leave a 'provision of a contract . . . without force and effect.'" *Ruttenberg v. Davidge Data Sys. Corp.*, 215 A.D.2d 191, 196 (N.Y. App. Div. 1995) (quoting *Laba v. Carey*, 29 N.Y.2d 302, 308 (1971)). But this rule "should not be carried to absurd lengths to imbue meaning into every legalistic jotting," particularly when language that may be meaningful in some contexts but not others. *See Schron v. Troutman Saunders LLP*, 97 A.D.3d 87, 95 (N.Y. App. Div. 2012), *aff'd, Schron v. Troutman Sanders LLP*, 20 N.Y.3d 430 (2013).

At this procedural juncture and without the benefit of a full record setting forth the context of the parties' relationships, the Court is not in a position to determine the effect of the construction sought by Goldman and cannot determine, as a matter of law, that "it appears to a certainty" that the relief sought is not available "under any state of facts which could be proved in support of the claim," *First Nat'l Bank of Henning*, 74 N.W.2d at 129.

C. The Indenture does not unambiguously limit the breaching party to the Issuer.

Goldman next alleges that the Issuer is the only party who may breach the Indenture. Section 5.1(d) of the Indenture defines an Event of Default as "a default in the performance, in a material respect, or breach, in a material respect, of any covenant, representation, warranty or other agreement *of the Issuers*." (Emphasis added.) Pursuant to Section 5 of the CDS Confirmation, "Goldman may, in its sole discretion direct [the Issuer] to purchase (and [the Issuer] shall so

purchase) one or more [Supplemental Collateral Securities] subject to . . . the Collateral Security Eligibility Criteria." Goldman interprets these provisions to prohibit the Issuer from second-guessing the selection of Supplemental Collateral Securities by Goldman and argues that if, by the terms of the Credit Default Swap, the selection of Supplemental Collateral Securities is not the decision of the Issuer, the selection of such securities cannot be a breach under Section 5.1(d) of the Indenture.

The plain language of the Indenture does not support this interpretation. The Indenture does not define an Event of Default as a "breach . . . *by* the Issuers." Rather, it refers to a "breach . . . *of* any . . . agreement of the Issuers." Indenture § 5.1(d) (emphasis added). The Indenture does not unambiguously provide that the Issuer must be the breaching party for the breach to constitute an Event of Default.

D. The pleadings alone do not conclusively establish that the claimed breach was immaterial.

Goldman next argues that the pleadings do not set forth a material breach, as required by the terms of the Indenture. The Indenture defines an "Event of Default" as "a default in the performance, in a *material* respect, or breach, in a *material* respect, of any . . . agreement of the Issuers . . . ." Indenture § 5.1(d) (emphasis added).

A breach of contract is material when it is "so substantial and fundamental" that it "strongly tend[s] to defeat the object of the parties in making the contract." *Smolev v. Carole Hochman Design Grp., Inc.*, 79 A.D.3d 540, 541 (N.Y. App. Div. 2010) (quoting *Callanan v. Keeseville, Ausable Chasm & Lake Champlain R.R. Co.*, 92 N.E. 747, 752 (N.Y. 1910)). Materiality is primarily a question of fact. *Bear, Stearns Funding, Inc. v. Interface Grp.-Nevada, Inc.*, 361 F. Supp. 2d 283, 296 (S.D.N.Y. 2005).

The pleadings contain allegations that the alleged breach by Goldman was material. In its Objection, Astra claims that "[t]he Eligibility Criteria determine the risk of supplemental Collateral Securities, and as such, they were highly material to Noteholders' decision to invest in and continue holding the Notes." According to Astra, if Goldman had "disclosed that it was planning to violate the Eligibility Criteria as it saw fit, investors would not have purchased the Notes, or at minimum, not at the terms offered" by Goldman. The pleadings therefore set forth sufficient allegations to withstand the instant motion to dismiss.

E. The pleadings do not conclusively demonstrate that Goldman fully cured the alleged breach.

Goldman also seeks judgment on the pleadings on the grounds that it fully cured any breach and that no Event of Default is continuing. Goldman alleges that, on June 1, 2018, an affiliate of Goldman repurchased the outstanding Supplemental Collateral Securities at par value and that, as a matter of law, securities that have been repaid in full cannot represent outstanding breaches. The pleadings contain allegations, however, that Goldman has not fully cured the alleged breach. The pleadings contain allegations that the alleged breaches strike at the heart of the transaction, that the purpose of Eligibility Criteria served to reduce investor risk and preserve principal, and that the purchase of ineligible securities undercut that purpose to the detriment of investors. The Court cannot determine to a certainty that no facts exist in support of Astra's claims.

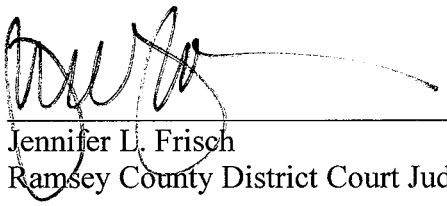
Moreover, the agreements at issue do not set forth the manner in which the breach alleged here may be remedied, if at all, leaving an ambiguity as to the parties' intent as to whether the action to address the claimed breach made the investors whole or is continuing in nature. The agreements do not unambiguously set forth that these events are subject to any cure, let alone the cure that Goldman pursued. *Cf. LaSalle Bank Nat. Ass'n v. Merrill Lynch Mortg. Lending, Inc.*, 2007 WL 2324052, at *5 (S.D.N.Y. Aug. 13, 2007) (discussing a contract that provided for specific

methods of curing a breach).[6] Whether the purchase of Ineligible Securities may be remedied in a manner not specifically set forth in the agreements is not a proper matter for decision at this procedural posture.

Because the pleadings sufficiently set forth a request for instruction and the matters subject to instruction are not subject to resolution on the pleadings alone, **IT IS HEREBY ORDERED** that the Motion for Judgment on the Pleadings is DENIED. Resolution of the remaining issues raised by the motion papers is not necessary at this procedural juncture, and the Court reserves ruling on those issues pending further motion practice and/or trial.

Dated: March 5, 2019

BY THE COURT:



Jennifer L. Frisch
Ramsey County District Court Judge

6 Goldman cites *In re Taddeo*, which states that "[c]uring a default commonly means taking care of the triggering event and returning to pre-default conditions." 685 F.2d 24, 26-27 (2d Cir. 1982). But the *Taddeo* court was discussing the Bankruptcy Code. The pleadings do not establish that the factual context here is similar to *Taddeo*.