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 Goldman Sachs Bank USA's Motion for Summary Judgment. Julie Landy, Esq., appeared on behalf of the Trustee/Petitioner, U.S. Bank National Association. Richard Klapper, Esq.; Jacob Croke, 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: July 31, 2019

BY THE COURT:

Jennifer L. Frisch
Ramsey County District Court Judge

## Background

The background related to this matter is set forth in the March 5, 2019 Order from this Court denying Goldman's motion for judgment on the pleadings (the "Order"). The parties have concluded discovery and supplemented the record, as described in pertinent part herein. Goldman now moves for summary judgment.

## Legal Analysis

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. No genuine issue of material fact exists "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). "The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *Id.* at 70.

To defeat a motion for summary judgment, the nonmoving party must show that there is a genuine issue of fact for trial. The opposing party may not rely on "unverified and conclusory allegations, or postulated evidence that might be developed at trial, or metaphysical doubt about the facts." *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004). Evidence offered to support or defeat a motion for summary judgment "must be such evidence as would be admissible at trial." *Hopkins v. Empire Fire & Marine Ins. Co.*, 474 N.W.2d 209, 212 (Minn. Ct. App. 1991).

Because a trust indenture is a contract, "[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 intent of the parties. *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 an 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)).

"[A]mbiguity exists where a contract term could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Citibank, N.A. v. Morgan Stanley & Co. Int'l, PLC*, 724 F. Supp. 2d 398, 404 (S.D.N.Y. 2010) (emphasis added), *aff'd*, 482 F. App'x 662 (2d Cir. 2012), as amended (Oct. 25, 2012). "The text should always be read in its context. Indeed, text and context necessarily merge to some extent." *DaPuzzo v. Globalvest Mgmt. Co., L.P.*, 263 F. Supp. 2d 714, 729 (S.D.N.Y. 2003).

## I. WHETHER GOLDMAN RECEIVED PROPER NOTICE PRESENTS A MATERIAL ISSUE FOR RESOLUTION AT TRIAL.

Goldman renews its position that it did not receive notice of a breach sufficient to trigger an Event of Default under the governing agreements, justifying summary judgment in its favor. The Trustee responds that, even if notice to Goldman was somehow technically defective, dismissal of the action does not address the Trustee's request for instructions as to the proper construction of the governing documents. Astra responds that the record evidence presents genuine issues for trial as to whether Goldman received proper notice.

The term "notice" is not defined in the Indenture or the Credit Default Swap. While these documents reference notice in the context of an Event of Default, the governing agreements do not unambiguously set forth from whom such notice must originate or other mandatory contents of such notice identified as allegedly missing here.

Importantly, the record now contains some evidence to contextualize the agreements. The record reveals how Goldman learned of the claimed Event of Default, Goldman's response to that allegation, historical evidence of Goldman's receipt of similar notifications, and responses thereto. Specifically, David Gerst, who "worked on Abacus transactions in 2006" as an associate at Goldman,[1] testified that "in [his] view," a "written notice from our counterparty or its agent indicating clearly what they thought was ineligible and why" would constitute "proper notice" with respect to a "violation of the eligibility criteria" under the Credit Default Swap. Gerst further recalled that Goldman "received notices that presumably or in some cases, I guess were attached as noteholder communications that came from [Astra] to the trustee that were disseminated to the deal parties, including Goldman" and that the "trustee passed along multiple noteholder

[1] Goldman participated in several transactions over the course of many years that fall under the "Abacus" umbrella. This memorandum, however, generally uses "Abacus" to refer to Abacus 2006-10, the Abacus transaction at issue in the instant proceeding.

communications" related to the collateral securities that came from Astra. Gerst further explained that an entity "can take different approaches" to raise an issue with Goldman with respect to the inclusion of ineligible collateral securities. Among those "different approaches," Gerst noted,

> They could go directly to the trustee. If investors—had direct relationship with the trading desk, they could come directly to us. They could potentially ask the trustee if they could speak with us, and the trustee could potentially introduce us if it was someone that we didn't necessarily have a direct relationship with. . . . And I think there are different paths an investor could take in that scenario.

These customs and practices by those involved in the transaction potentially inform the meaning of what may constitute effective "notice" of an Event of Default. This evidence at least presents a genuine issue for trial regarding the particular issue as to what may constitute effective notice under the agreements.[2] Summary judgment is not proper given these circumstances.

The record also contains evidence that in 2010, Farmington Finance Ltd. directed a complaint to then-trustee Bank of America about the inclusion of ineligible securities, ratings downgrade, and accompanying damages to the noteholder. The then-trustee forwarded the information to Goldman, and Goldman undertook remedial action in response. The record shows that Goldman received information about the claimed Event of Default in the same manner here—Astra communicated the claimed breach to U.S. Bank as Trustee, and the Trustee forwarded the communication to Goldman. Whether this mechanism for delivery is a "notice" sufficient or acceptable pursuant to the parties' agreement remains an open question for trial.

In any event, Goldman implores the Court to "consider the entire contract" and interpret its notice prescriptions in the way "which best accords with the sense of the remainder of the contract," *Galli v. Metz*, 973 F.2d 145, 149 (2d Cir. 1992). At this stage of the action, and in light of the previously identified ambiguities in the governing documents, dismissal of this trust

---

[2] As set forth in the Order, the type of notice required depends on whether the remedy sought amounts to a forfeiture, an open question for trial.

instruction proceeding for lack of notice does not "best accord" with the "sense of the remainder of the contract," namely those provisions directing the Trustee to initiate proceedings to seek judicial direction when confronted with conflicting interpretations from different stakeholders. The governing agreements direct the Trustee to initiate these proceedings, and dismissal now would leave the Trustee without the instructions it claims it needs to fulfill its obligations and serves no productive purpose, particularly when Goldman has always been well-apprised of the nature of the claims.

## II. MATERIAL ISSUES FOR TRIAL EXIST AS TO WHETHER THE ALLEGED BREACH IS SUBJECT TO A CURE.

Goldman resurrects its claim that there is no continuing Event of Default within the meaning of the Credit Default Swap. On summary judgment, Goldman presents evidence that it repurchased all of the allegedly ineligible Supplemental Collateral Securities at par value by June 1, 2018. Goldman argues that its repurchase of these securities cured any alleged breach and resulted in no loss to noteholders.

As set forth in the Order, the Credit Default Swap and related agreements do not unambiguously set forth the matter in which the alleged breach at issue here—the purchase of ineligible Supplemental Collateral Securities—may be remedied. But the record now contains disputed evidence that, even though Goldman claims to have repurchased the ineligible securities at par, that repurchase did not make the noteholders whole and the Event of Default continues. Astra engaged an expert witness, Dr. Joseph Pimbley, who opined that the inclusion of ineligible securities in the portfolio created excessive risk resulting in an uncured loss of value to investors. And Dr. Pimbley opines in his supplemental affidavit that the ratings downgrade associated with the inclusion of those ineligible securities resulted in actual damage to the noteholders. In light of

the foregoing, genuine issues of material fact exist as to whether a continuing Event of Default exists within the meaning of the Credit Default Swap.

### III. THE CONTRACTS DO NOT PRECLUDE EQUITABLE REMEDIES AS A MATTER OF LAW.

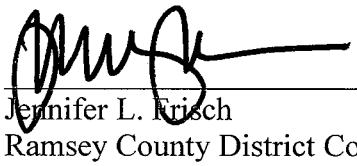
Goldman seeks summary judgment related to the Trustee's request for instruction regarding the waterfall provisions of the contract documents, claiming that the option of equitable reformation is unavailable as a matter of law. Under New York law, equitable relief is generally unavailable where the relevant contracts "cover the dispute at issue." *See, e.g.*, *Joseph Sternberg, Inc. v. Walber 36th St. Assocs.*, 187 A.D.2d 225, 227-28 (N.Y. App. Div. 1993). But to determine whether an equitable cause of action survives despite the presence of a written contract, "[i]t is only necessary to observe that the contract is ambiguous, and does not, as a matter of law, bar recovery." *Id.* 228-29.

As set forth herein and in the Order, the contracts at issue do not unambiguously resolve all of the issues in the Petition. And Minn. Stat. § 501C.0202(4) vests this Court with the authority to "construe, interpret, or reform the terms of a trust, or authorize a deviation from the terms of a trust." At this procedural posture, and on this disputed record, the Court declines to foreclose available remedies.

All of the issues raised by Goldman are subject to resolution at trial. Accordingly, **IT IS HEREBY ORDERED** that the Motion for Summary Judgment is DENIED.

Dated: July 31, 2019

BY THE COURT:



Jennifer L. Frisch
Ramsey County District Court Judge