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.

<u>ALLEGED VIOLATIONS</u>

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