STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF RAMSEY **SECOND JUDICIAL DISTRICT**

In the Matter of: 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	Case Type: Other File No.: 62-TR-CV-18-39 Hon. Jennifer L. Frisch

OBJECTION TO THE PETITION OF U.S. BANK NATIONAL ASSOCIATION BY INTERESTED PERSON ASTRA ASSET MANAGEMENT UK LIMITED

Astra Asset Management UK Limited ("Astra"), on behalf of itself and certain of its advisory funds and managed accounts which hold $47.5 million of the notes (the "Notes") issued by the Abacus 2006-10 collateralized debt obligation (the "Abacus CDO"),[1] respectfully submits this response to the Petition for Instructions in the Administration of a Trust Pursuant to Minn. Stat. § 501C.0201 (the "Petition") filed on August 15, 2018 by U.S. Bank National Association ("US Bank" or the "Trustee"), solely in its capacity as trustee for Abacus. As shown below and in the accompanying affidavit of Uri A. Itkin ("Itkin Aff."), the Trustee should terminate the Abacus CDO because there is an Event of Default under the Credit Default Swap and the Indenture, and 90.06% of the Noteholders support this course of action.[2]

[1] Astra has disclosed to the Trustee the identity and holdings of its advisory funds and managed accounts that hold the Notes, and is prepared to do so as necessary and appropriate in this proceeding.

[2] Capitalized terms used but not defined herein shall have the meaning given in the Petition.

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PRELIMINARY STATEMENT

Courts have long recognized that no one can profit by his own fraud or take advantage of his own wrong. While the Abacus CDO structure is complex, the operative facts make clear that Goldman Sachs Capital Markets, L.P. ("Goldman Sachs") is trying to do just that: Goldman Sachs has violated the governing agreements and concealed its violations so it could exploit Noteholders for over $124 million, and now seeks to keep an additional $70 million obtained through its violations. Under the agreements and governing New York law, the Court should instruct the Trustee to terminate the Abacus CDO, reverse $124 million of investor losses, and stop Goldman Sachs from being unjustly enriched by the fruits of its misconduct.

Goldman Sachs became notorious for another Abacus transaction when it agreed to pay $550 million, the largest-ever penalty collected by the U.S. Securities and Exchange Commission, to settle claims for misrepresentations Goldman Sachs made to investors.[3] In this instance, Goldman Sachs's misconduct involves its ongoing duties to Noteholders, rather than the marketing of the Abacus CDO. As the Protection Buyer, Goldman Sachs is responsible for selecting and directing the purchase of Collateral Securities that secure the Notes. As the Calculation Agent, Goldman Sachs is required to certify that each purchase complies with expressly agreed-to, objective risk standards called the Collateral Securities Eligibility Criteria (the "Eligibility Criteria"). Goldman Sachs abused both roles (i) by directing the purchase of 37 supplemental Collateral Securities that violate the Eligibility Criteria, and (ii) by, on information and belief, falsely certifying the improper purchases to conceal the violations from Noteholders so Goldman Sachs could bilk them of tens of millions of dollars.

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[3] *See* S.E.C. Press Release, "Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO," dated July 15, 2010, *available at* https://www.sec.gov/news/press/2010/2010-123.htm.

Goldman Sachs was able to carry out its scheme by taking advantage of significant informational and risk disparities it has over the Noteholders with respect to the Collateral Securities. As both the Protection Buyer and the Calculation Agent, Goldman Sachs enjoys unique access to information and calculations necessary to making the Eligibility Criteria determination; for this reason, Goldman Sachs is contractually required to provide this data to US Bank, which also serves as the Collateral Administrator. In contrast, Noteholders receive no information that would alert them to an Eligibility Criteria violation, and instead rely on Goldman Sachs and US Bank to comply with their respective obligations. By concealing the violations, Goldman Sachs deprived the Noteholders of the ability to declare an Event of Default and terminate the transaction.

In directing the purchase of ineligible Collateral Securities ("Ineligible Securities"), Goldman Sachs took on no additional risk but will pocket the entire reward. Under the agreements, Goldman Sachs is entitled to collect any excess proceeds generated if the Collateral Securities rise in value. In contrast, except in certain limited circumstances not applicable here, the Noteholders bear the entire risk of loss or default on the Collateral Securities, with the Eligibility Criteria serving as their bargained-for source of risk protection. By violating the Eligibility Criteria, Goldman Sachs exposed Noteholders to prohibited risk, but instead of compensating them, Goldman Sachs is paying itself.

Goldman Sachs's gambit has paid off, as it stands to collect nearly $70 million of gains it made on the Ineligible Securities, and has collected tens of millions of dollars in protection payments, including over $124 million since 2013, while the Abacus CDO was in default. Had Goldman Sachs complied with its obligations or disclosed its violations to Noteholders, it would not be able to pocket these amounts. This is a textbook example of ill-gotten gains.

Astra has held the most senior Notes since 2013, and its holdings of $47.5 million currently represent approximately 47% of the outstanding Notes. Along with another investor, a Deutsche Bank affiliate, Astra has sought to investigate and enforce Goldman Sachs's violations since 2016. Unable to obtain any relief from Goldman Sachs, Astra declared the Event of Default in May 2018 and asked the Trustee to terminate the entire CDO. Astra's Notice of Default specifically identified the Ineligible Securities and the Eligibility Criteria breached. This information was plainly sufficient for Goldman Sachs to address its violations, but it has abjectly refused to do so and has continued to collect protection payments and write down the Notes.

Faced with Goldman Sachs's denials, the Trustee filed the Petition. The Petition seeks several instructions, but they all boil down to a single factual question: whether Goldman Sachs violated the Eligibility Criteria in directing the purchase of the supplemental Collateral Securities. If the answer is "Yes," and it is at least with respect to the 37 Ineligible Securities Astra identified, the Trustee should terminate the Abacus CDO and enforce Noteholders' rights against Goldman Sachs. Specifically, Astra responds to the Petition as follows:

1. *There is an Event of Default under the Credit Default Swap and the Indenture:* Goldman Sachs as the Protection Buyer, and the Issuer as Goldman Sachs's counterparty, each bears an affirmative duty to follow the Eligibility Criteria. A breach of their obligations is an Event of Default under the Credit Default Swap and the Indenture, respectively.

2. *The Trustee can terminate the Credit Default Swap even if there is an Event of Default under the Credit Default Swap but not the Indenture:* As noted, the Issuer's purchase of Ineligible Securities *is* an Event of Default under the Indenture. In any case, the Trustee can terminate the Credit Default Swap directly on the Issuer's behalf.

3. The vast majority of Noteholders support terminating the Credit Default Swap: As the Trustee confirmed on September 18, 90.06% of the Noteholders have voted to declare an Event of Default under the Credit Default Swap and terminate the Credit Default Swap.

4. The excess Liquidation Proceeds should be distributed to Noteholders: The contractual remedy for an Event of Default is termination and mandatory redemption of the Notes. The termination should occur as of the date of Goldman Sachs's earliest violation, and no later than 2013, to avoid rewarding Goldman Sachs's deception and to recoup the benefits Noteholders have conferred on Goldman Sachs. The Trustee should also escrow all future protection payments and stop future write-downs of the Notes pending this proceeding.

As Astra will prove at trial with the benefit of discovery and expert testimony, there is an Event of Default under the Credit Default Swap and the Indenture, and the Trustee should terminate the Abacus CDO, make Noteholders whole, and reclaim Goldman Sachs's ill-gotten gains.

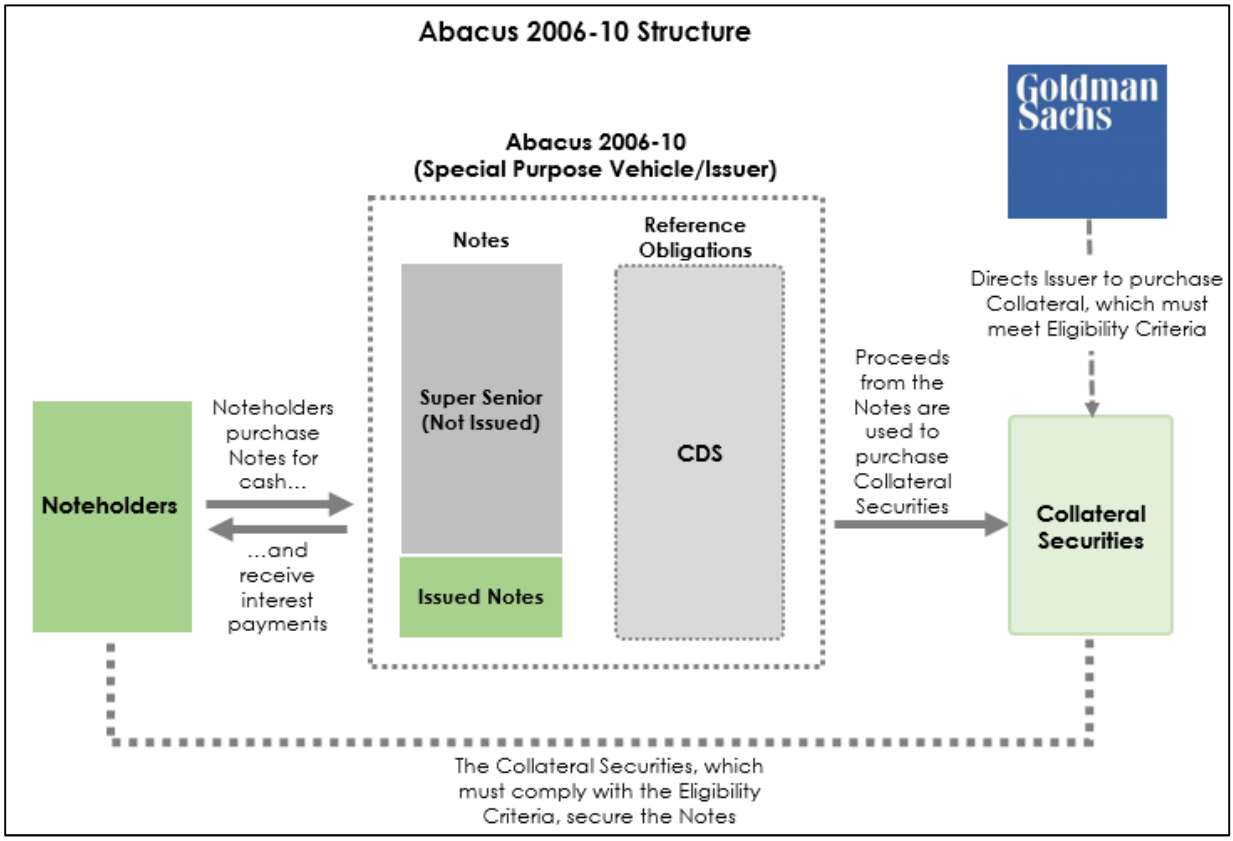
STATEMENT OF FACTS

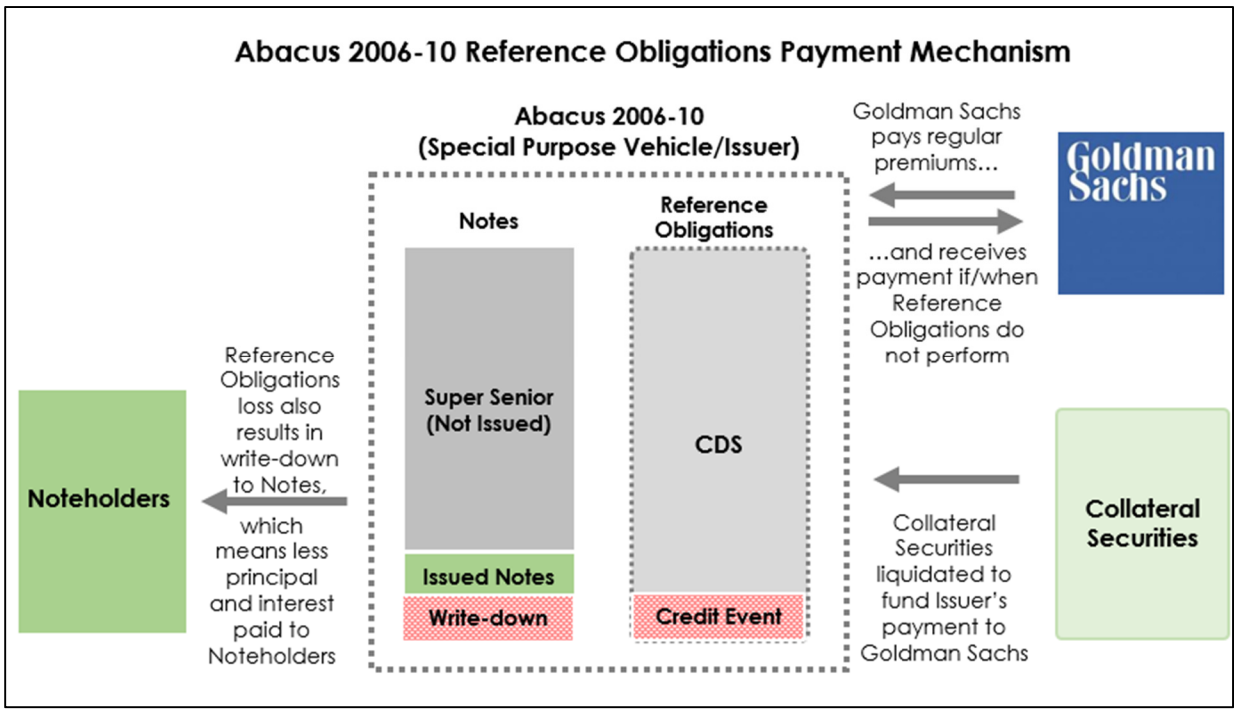
A. The Abacus CDO Structure

Goldman Sachs created the Abacus CDO in 2006. It is a synthetic CDO effected through a series of integrated agreements, whereby investors insured – *i.e.*, sold protection to Goldman Sachs on – a pool of securities (the "Reference Obligations") in exchange for monthly interest payments, pursuant to the terms of the Credit Default Swap. At inception, the Issuer, a special purpose vehicle, issued the Notes pursuant to the Indenture. Goldman Sachs sold the Notes to investors, with the proceeds used to purchase the Collateral Securities.

If the Reference Obligations default or suffer losses, Goldman Sachs collects a cash protection payment funded by the liquidation of one or more of the Collateral Securities, and the Notes are written down. When the Notes mature or are redeemed, the Collateral Securities are

liquidated, and the proceeds are used to repay the Notes, with Goldman Sachs receiving any excess proceeds. A diagram of the Abacus CDO is set forth below:





1. The Indenture

The Issuer issued $543.75 million of various classes of Notes in 2006 pursuant to the Indenture. Currently, approximately $94 million of the Notes remain outstanding. The Notes pay a monthly interest payment, and their principal is repaid at maturity or upon acceleration, redemption, or otherwise. (Indenture (Pet. Ex. 1) §§ 2.3, 2.7.) The proceeds from the Notes were used to purchase the initial Collateral Securities. (*Id.* § 3.5.) US Bank, as the successor to LaSalle Bank National Association, serves as the Trustee under the Indenture. New York law governs the Indenture. (*Id.* § 14.9.)

2. The Credit Default Swap

To effect the protection aspect of the CDO, the Issuer entered into the Credit Default Swap with Goldman Sachs. The Credit Default Swap consists of three integrated agreements: the Master Agreement, the Schedule, and the Confirmation. (Pet. Exs. 2a, 2b, 2c.) The Master Agreement describes the general terms of the Swap, including the circumstances giving rise to an Event of Default and termination of the Credit Default Swap. The Schedule modifies and specifies certain terms of the Master Agreement, including the governing law (New York). The Confirmation sets forth the specific terms of the fixed and floating payments, as well as the provisions governing the purchase of Collateral Securities.

Under the Credit Default Swap, Goldman Sachs pays to the Issuer a fixed monthly payment, which forms part of the monthly coupon payments that Noteholders receive under the Indenture. (Pet. Ex. 2c § 2; Indenture § 2.7.) In exchange, upon default or write-down (either, a "Credit Event") of the Reference Obligations, Goldman Sachs receives a protection payment in the form of a floating payment. (Pet. Ex. 2c § 3.) The Issuer makes the protection payment by liquidating the Collateral Securities as necessary and remitting the proceeds to Goldman Sachs. (Indenture § 12.1.)

The protection payment also reduces, or "writes down," the outstanding principal balance of the Notes pursuant to an agreed-to loss allocation mechanism. (Indenture § 2.14.) The write-down reduces the amount of the monthly interest paid to the affected Notes, as well as the amount of principal repaid to those Notes at maturity or early redemption. (*Id.* § 2.7.) Put simply, as the Reference Obligations experience Credit Events, the Notes are written down until their balance is reduced to zero.

3. The Other Agreements

The Issuer entered into several other agreements in connection with the CDO. The Issuer appointed US Bank as the Collateral Administrator pursuant to the Collateral Administration Agreement. As the Collateral Administrator, US Bank is required, among other things, to monitor and maintain certain information concerning the Collateral Securities.

The Issuer also entered into the Collateral Disposal Agreement with Goldman Sachs, appointing Goldman Sachs as the Collateral Disposal Agent. As Collateral Disposal Agent, Goldman Sachs is tasked with liquidating the Collateral Securities as necessary.

The Issuer also entered into a Collateral Put Agreement and Basis Swap with Goldman Sachs (or its affiliates). The Basis Swap concerns the monthly interest payment to Notes issued in foreign currencies. The Collateral Put Agreement gives the Issuer the option to require Goldman Sachs to repurchase a Collateral Security at 100% of its principal amount if it cannot be liquidated at that price. This option applies only in certain, limited circumstances, such as if Goldman Sachs exercises its option to redeem certain Notes during the Abacus CDO's lifetime. (Indenture § 12.6.) Those circumstances are not applicable here.

B. The Collateral Securities Eligibility Criteria

Under the Credit Default Swap, Goldman Sachs agreed to direct the Issuer, and the Issuer separately agreed, to purchase supplemental Collateral Securities if the initial Collateral

Securities are redeemed or amortized, or if the Abacus CDO issues additional Notes. (Pet. Ex. 2c § 5.) Goldman Sachs does not have unfettered discretion to select supplemental Collateral Securities; rather, it must strictly comply with certain, expressly delineated Eligibility Criteria at the time of purchase. (*Id.*) The Eligibility Criteria are a material provision of the Credit Default Swap, as they protect the Noteholders by ensuring that each supplemental Collateral Security meets a contractually agreed-to risk profile at purchase.

Goldman Sachs, as the Calculation Agent under the Credit Default Swap, is required to confirm that the Collateral Securities comply with the Eligibility Criteria. Among other things, Goldman Sachs is required to provide to US Bank, as the Collateral Administrator, "the relevant information and calculations used by [Goldman Sachs] to confirm compliance" with the Eligibility Criteria. (*Id.* § 7(c).)

Investors do not receive the data that Goldman Sachs provides to US Bank under the Credit Default Swap. Rather, investors rely on Goldman Sachs and the Issuer to confirm compliance with the Eligibility Criteria (*id.*), and only receive certain basic information about the Collateral Securities in the Trustee's monthly remittance reports. (*See*, *e.g.*, Itkin Aff. Ex. A at 22-23.)

C. Majority Of Noteholders Seek To Enforce The Eligibility Criteria Violations

Astra purchased the Notes in March 2013, and holds $47.5 million of the most senior class, Class A, of the Notes. In 2016, Astra and Deutsche Bank AG London Branch, who at the time collectively held the majority of the Notes, began to suspect that certain Collateral Securities did not satisfy the Eligibility Criteria. They raised their concerns first directly with Goldman Sachs, and then in early 2017, with the Trustee and the Issuer. (Itkin Aff. Ex. B.)

In or about July 2017, the Trustee requested a direction and indemnity in order to proceed with the investigation. In August 2017, the Notes held by Deutsche Bank were written down to

zero as a result of protection payments collected by Goldman Sachs, thereby extinguishing Deutsche Bank's vote under the Indenture. At that time, Astra no longer had the majority of the outstanding Notes, and did not proceed with the direction and indemnity.

In September 2017, Astra obtained a legal opinion from Jones Day that analyzed and confirmed the violations with respect to two representative examples of the Ineligible Securities. In October 2017, however, Jones Day abruptly withdrew its opinion by letter to the Trustee, citing non-compliance with its "internal opinion procedures." Notably, Jones Day did not retract the substance of its analysis, and Astra stands by it today. Indeed, as Astra later learned, Jones Day withdrew its opinion in response to direct pressure from Goldman Sachs. Astra also believes that Goldman Sachs caused the resignation of the Jones Day attorney who authored the opinion.

In late 2017, Astra asked the Issuer to take action in light of Goldman Sachs's violations. The Issuer refused, however, asserting that it could not because it had granted all of its right and interest in the Credit Default Swap to the Trustee. (Itkin Aff. Ex. C.)

D. Astra Declares An Event Of Default And Asks The Trustee To Terminate The Abacus CDO

On May 24, 2018, Astra sent to the Trustee a Notice of Default pursuant to the Indenture. The Notice identified 37 Ineligible Securities, as well as the Eligibility Criteria they violated, and requested that the Trustee terminate the Abacus CDO. (Pet. Ex. 3.) Goldman Sachs responded to Astra's Notice of Default on June 15, denying the violations but nevertheless purporting to cure the Event of Default by (i) repurchasing all outstanding Collateral Securities and (ii) paying to the Issuer $153,300 as reimbursement for a Collateral Security write-down. (Pet. Ex. 4.)

Astra responded to Goldman Sachs's letter on June 29, reaffirming the existence of the Event of Default, reiterating its termination request, and asking the Trustee to escrow the $70

million of Goldman Sachs's ill-gotten gains in the meantime. (Pet. Ex. 5.) Goldman Sachs did not respond until August 13, when it largely restated its position. (Pet. Ex. 6.)

To date, Goldman Sachs has disclosed no information – none – concerning the Ineligible Securities. Instead, Goldman Sachs has offered bare and conclusory denials, and has resorted to intimidation (as it did with Jones Day), by informing Astra that Goldman Sachs would not engage in any trading activities with Astra pending the resolution of this matter.

E. 90.06% Of Noteholders Support Termination

On August 24, 2018, Astra asked the Trustee to solicit the vote of all Noteholders with respect to declaring an Event of Default under the Credit Default Swap and terminating the Credit Default Swap. The response deadline for the solicitation was September 14, 2018. On September 18, 2018, the Trustee confirmed that 90.06% of the Noteholders voted in favor of declaring an Event of Default under the Credit Default Swap and terminating the Credit Default Swap. (Itkin Aff. Ex. D.) According to the Trustee, 2.69% of the Noteholders voted against, and 7.25% did not respond. (*Id.*)

F. Goldman Sachs Continues To Collect Protection Payments And Noteholders Continue To Suffer Losses As The Notes Are Written Down Further

Since 2013, Goldman Sachs has collected protection payments and has written down the Notes by $124,251,574. Goldman Sachs has continued to do so despite Astra's declaration of the Event of Default. Since May 2018, Goldman Sachs has collected $2,707,406.02 in protection payments, and will likely collect another $17 million in September 2018. If Goldman Sachs is permitted to continue this course of conduct, it will write down tens of millions of dollars of the remaining Notes during the course of this proceeding.

ARGUMENT

The Petition seeks instructions regarding the administration and discharge of the Trustee's duties under the Indenture. Under New York law, which governs the Indenture, a "trust indenture is a contract," and its interpretation "is a matter of basic contract law." *Quadrant Structured Prods. Co. v. Vertin*, 23 N.Y.3d 549, 559 (N.Y. 2014) (quotations omitted). In construing a contract, New York courts "look to its language, for a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Id.* at 559-560 (quotations omitted).

In addition to interpreting the Indenture and other supporting agreements, the principal issue before the Court is whether Goldman Sachs violated the Eligibility Criteria. As Astra will show at trial – with the benefit of expert testimony and discovery of relevant facts uniquely in Goldman Sachs's possession as the Protection Buyer and the Calculation Agent – Goldman Sachs violated the Eligibility Criteria on a wide scale, and Goldman Sachs's responses are rife with misrepresentations. Accordingly, the Abacus CDO should be terminated and the Noteholders should be made whole for the tens of millions of dollars in protection payments Goldman Sachs collected through breach and deceit.

I. There Is An Event of Default Under The Credit Default Swap And The Indenture

In its Notice of Default, Astra specifically identified 37 Ineligible Securities that violated, among others, subsection (ii) of the Eligibility Criteria. (Pet. Ex. 3; Ex. 2c § 5.) These 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. The breaches are an Event of Default under the Credit Default Swap and the Indenture, respectively.

A. Goldman Sachs's Direction To Purchase Ineligible Securities Is An Event Of Default Under The Credit Default Swap

The Credit Default Swap Confirmation imposes upon Goldman Sachs an affirmative obligation to only purchase supplemental Collateral Securities that comply with the Eligibility Criteria. (Pet. Ex. 2c § 5.) The Eligibility Criteria are clearly delineated and non-negotiable; Goldman Sachs has no discretion to relax or disregard them. *See Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (N.Y. 2002) ("[A] written agreement . . . must be enforced according to the plain meaning of its terms."). Goldman Sachs's breach of the Confirmation is plainly a breach of the Credit Default Swap agreement. This is an Event of Default under the Credit Default Swap, which entitles the Trustee to terminate the Credit Default Swap on behalf of the Noteholders. (Pet. Ex. 2a §§ 5(a)(ii), 6(a).) The Event of Default occurred at Goldman Sachs's earliest violation and continued as Goldman Sachs's violations continued.

Goldman Sachs nevertheless contends that its violations were merely "technical" and "*de minimis*," and that the Event of Default had somehow been cured because it has converted all of the Ineligible Securities into cash and because it purported to reimburse the Abacus CDO for losses suffered in connection with one of the Collateral Securities. (Pet. Ex. 6.) This self-serving rationale is an exercise in misdirection.

1. Goldman Sachs's Violations Were Material

Contrary to Goldman Sachs's assertions, an actionable breach of the Eligibility Criteria does not require a Collateral Security default ("Collateral Default"). A Collateral Default is a separate violation that is an "additional" ground for termination. (Pet. Ex. 2b § 1.8(ii) ("It shall be an Additional Termination Event … if a Collateral Default has occurred and is continuing.")) A Collateral Default leads to losses on the Notes, which is why Noteholders have the option to

substitute *eligible* Collateral Securities at the *Noteholders' expense* to avoid a Collateral Default ahead of time.[4] (*Id.* § 12.2.)

By contrast, the agreements do not require Noteholders to spend their own funds to police compliance with the Eligibility Criteria. This makes sense, as the purpose of the Eligibility Criteria was to guarantee that Noteholders were exposed to agreed-to levels of risk with respect to the Collateral Securities. Indeed, Noteholders have no commercial reason to take on any additional risk with respect to the Collateral Securities, nor do they benefit in any way from taking on any such risk, because they only receive the outstanding balance of their Notes and Goldman Sachs keeps the rest. (Indenture § 11.1.)

Goldman Sachs's attempt to downplay its violations as "technical" and "*de minimis*" is too clever by half. The Eligibility Criteria determine the risk of supplemental Collateral Securities, and as such, they were highly material to Noteholders' decision to invest in and to continue holding the Notes. Had Goldman Sachs 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 Sachs.

Moreover, Goldman Sachs's violation were plainly not "*de minimis*." For example, Astra's Notice of Default described two of the 37 Ineligible Securities: a Class 2A1 certificate issued by a residential mortgage-backed security known as GSAA 2006-11, purchased by the Issuer in July 2006, and a Class A-4 certificate issued by a student loan-backed security, known

[4] Goldman Sachs's contention that it (or its affiliate) bears the risk of Collateral Default is just smoke and mirrors. Goldman Sachs is required to purchase Collateral Securities at 100% of their value – *i.e.*, to reimburse the Issuer for losses when the Collateral Securities are liquidated – *only if* Goldman Sachs exercises its option to redeem certain Notes or a reimbursement payment is due to Noteholders as a result of a reversed loss on the Reference Obligation. (Indenture § 12.6.) *In all other instances*, including in the event of a Collateral Default, Noteholders bear the risk that the recovery will be less than 100% of the value of the Collateral Security.

as SLM 2006-3, purchased by the Issuer in June 2014. (Pet. Ex. 3 at 7.) With respect to SLM 2006-3, the Class A-4 class was not "senior to any other classes of such securities issued by such obligor with respect to the allocation of losses," (Pet. Ex. 2c § 5(ii)), as it incurs losses *pro rata* with other classes in the event of default leading to acceleration. The Class 2A1 of GSAA 2006-11 likewise absorbs losses *pro rata* upon the occurrence of certain defined events. These violations materially increase the risk inherent in both Securities, as they would be more likely to experience losses in comparison to the Collateral Securities actually permitted under the Eligibility Criteria. Indeed, as reflected by the nearly $70 million of gains Goldman Sachs generated on these and other Ineligible Securities, the additional risk these Securities posed was significant.

2. Goldman Sachs's Belated Cure Attempts Are Unavailing

Goldman Sachs effectively conceded its violations by attempting to cure in response to Astra's Notice of Default. Goldman Sachs's belated cure attempt was illusory, however, as it only enriched Goldman Sachs. By purchasing the remaining Collateral Securities and purporting to reimburse the Trust for a write-down, Goldman Sachs simply increased the excess proceeds that it will collect after the Notes are repaid.

Indeed, Goldman Sachs's purported cure is no cure at all, as it does not return to Noteholders the tens of millions of dollars in protection payments they paid to Goldman Sachs while it systematically deprived them of the benefit of their bargain. Nor does it return to Noteholders the $70 million in gains that Goldman Sachs stands to collect at their expense. Unless Goldman Sachs returns *those* amounts to Noteholders, the Event of Default will continue.

B. The Issuer's Purchase Of Ineligible Securities Is An Event Of Default Under The Indenture

The Issuer separately agreed in the Confirmation to purchase only eligible supplemental Collateral Securities. (Pet. Ex. 2c § 5 ("Goldman may, in its sole discretion direct the Counterparty to purchase (*and the Counterparty shall so purchase*)" supplemental Collateral Securities "subject to … the Collateral Security Eligibility Criteria") (emphasis added).) The Issuer's promise is an affirmative obligation. *See*, *e.g.*, Black's Law Dictionary (10th ed. 2014) (defining "Shall" as "[h]as a duty to; more broadly, is required to"); *Mazzella v. Capital One, N.A.*, 2017 WL 1345598, at *4 (N.Y. Sup Ct. Apr. 12, 2017) ("'Shall' indicates a determination, promise, or inevitability").

Other provisions of the agreements underscore the affirmative nature of the Issuer's obligation. *See JA Apparel Corp. v. Abboud*, 568 F.3d 390, 396 (2d Cir. 2009) (In interpreting a contract under New York law, "the court is to consider its particular words not in isolation but in the light of the obligation as a whole and the intention of the parties as manifested thereby") (quotations and alterations omitted). Having obtained Goldman Sachs's agreement to provide "information and calculations" confirming the Eligibility Criteria (Pet. Ex. 2c § 7(c)), the Issuer, among other things, appointed US Bank as the Collateral Administrator to verify compliance with the Criteria, and to monitor the Collateral Securities (*see*, *e.g.*, *id.* § 7(a)). These safeguards help to ensure that the Issuer purchases only Eligible Collateral. *See Zodiac Enters. v. Am. Broad. Cos.*, 81 A.D.2d 337, 338 (N.Y. App. Div. 1981) ("the language used in a contract must be interpreted in the context of the whole agreement").[5]

[5] Contrary to Goldman Sachs's suggestion, there are numerous grounds, including equitable estoppel, barring Goldman Sachs from terminating the Credit Default Swap by inducing the Issuer to violate the Eligibility Criteria. *See*, *e.g.*, *757 3rd Ave. Associates, LLC v. Patel*, 117 A.D.3d 451, 453 (N.Y. App. Div. 2014) (equitable estoppel requires precisely the elements present here: "(1) Conduct which amounts to a false representation or concealment of material

The Issuer's breach of its obligations in the Credit Default Swap is plainly an Event of Default under Section 5.1(d) of the Indenture. (Indenture § 5.1(d) ("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 in this Indenture . . . or in any . . . other writing delivered pursuant [to the Indenture] or in connection [with the Indenture]").) The other Event of Default requirements have likewise been satisfied: Astra, which holds over 47% of the Notes, gave the Notice of Default and identified the Ineligible Securities, as well as the Eligibility Criteria they breached. (Indenture § 5.1(d) ("written notice thereof shall have been given . . . to the Issuers and the Trustee . . . by the Holders of at least 25% of the Aggregate USD Equivalent Outstanding Amount of the Notes, specifying such default, breach or failure and requiring it to be remedied and stating that such notice is a "Notice of Default" hereunder").) And, as shown, the Eligibility Criteria violations were material and have not been cured. (*Supra* at 12-14.)

Accordingly, there is an Event of Default under Credit Default Swap *and* the Indenture.

II. The Trustee Can Terminate The Credit Default Swap Even If The Event Of Default Exists Under The Credit Default Swap But Not The Indenture

As shown, the Issuer's purchase of Ineligible Collateral is an Event of Default under the Indenture. In any case, an Event of Default under the Credit Default Swap is all that is required for the Trustee to terminate the Credit Default Swap.

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facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts."); *Shondel J. v. Mark D.*, 7 N.Y.3d 320, 326 (N.Y. 2006) ("The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness.").

The Indenture requires the Issuer to enforce Goldman Sachs's obligation under the Credit Default Swap at the "request" of the majority of Noteholders. (Indenture § 5.19(a).) The Indenture expressly authorizes the Trustee to do so "on behalf of the Issuer" (*id.*), regardless of whether there is an Event of Default under the Indenture. (*Id.* §5.19(b) (permitting the Trustee to terminate the Credit Default Swap upon the "occurrence of any event that gives rise to the right of the Issuer to terminate the Credit Default Swap.")) The Issuer explicitly confirmed as much in its letter to Astra. (Itkin Aff. Ex. C at 1 (asserting that the "Confirmation was the subject of the Grant[] in the Indenture," and thus, "the Issuer has no right to enforce" it.)

The Petition suggests a potential inconsistency between Sections 5.19 and 15.1 of the Indenture governing the Trustee's authority to act upon an Event of Default under the Credit Default Swap. (Pet. ¶¶ 60-63.) There is none, as Section 5.19 specifically addresses the instant scenario. *See Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 46 (N.Y. 1956) ("if there is a perceived "inconsistency between a specific provision and a general provision of a contract . . . the specific provision controls.")

Section 5.19 of the Indenture – aptly entitled "Performance and Enforcement of Certain Obligations" – specifically addresses the circumstances where, as here, the Trustee can enforce the Issuer's rights against Goldman Sachs as the Protection Buyer under the Credit Default Swap. (Indenture § 5.19.) By contrast, Section 15.1 provides a general discussion of the Issuer's assignment of its rights to the Trustee. (*Id.* § 15.1.) The Credit Default Swap echoes this interplay, as it expressly authorizes the Trustee to enforce the Credit Default Swap "on behalf of the holders of the Notes," separate and apart from acknowledging the assignment described in Section 15.1 of the Indenture. (Pet. Ex. 2b § 5.2(iv).) As confirmed by the Issuer, the more specific Section 5.19 controls over the more general Section 15.1.

Accordingly, the Trustee should terminate the Credit Default Swap even if the purchase of Ineligible Securities is an Event of Default under the Swap but not the Indenture.

III. 90.06% Of Noteholders Support Terminating The Credit Default Swap

On August 24, 2018, in response to the Trustee's request to the Court concerning the instruction from other Noteholders, Astra asked the Trustee to send notice to all Noteholders soliciting their vote with respect to declaring an Event of Default under the Credit Default Swap and terminating the Credit Default Swap. The Trustee sent the requested notice on August 28, 2018. On September 18, 2018, the Trustee confirmed that 90.06% of the Noteholders (including Astra) voted "in favor of declaring an Event of Default under the Credit Default Swap and in favor of terminating the Credit Default Swap." (Itkin Aff. Ex. D.) Notwithstanding Goldman Sachs's contortions, this plainly answers the third question raised in the Petition.

Goldman Sachs's parade of pretexts for why the vote should not count is meritless. A "request from a Majority" is all that the Indenture requires (Indenture § 5.19(a)), and the affirmative vote of 90.06% indisputably qualifies. Indeed, US Bank has used virtually identical solicitations to obtain instructions from noteholders in a wide variety of matters.

Moreover, the 90.06% vote alone is sufficient for the Trustee to take action to protect the Noteholders' rights under its post-Event of Default prudent person duties. (Indenture § 6.1(b); *see also* Trust Indenture Act, 15 U.S.C. § 77ooo(c) (trustee must exercise or use its judgment "as a prudent man would exercise or use under the circumstances in the conduct of his own affairs" following a default)); *accord Magten Asset Mgmt. Corp. v. Bank of N.Y.*, 2007 WL 1326795, at *7 (N.Y. Sup. Ct. May 8, 2007) ("After a default, the trustee is under an enforceable obligation to act prudently to preserve the trust assets for the benefit of the investors.").

IV. Noteholders Should Recover The Protection Payments They Made To Goldman Sachs While It Was Violating The Eligibility Criteria

Under the agreements, the remedy for Goldman Sachs's violation of the Eligibility Criteria is straightforward: the Credit Default Swap is terminated, and the Notes are redeemed. (Indenture § 9.5; Pet. Ex. 2a § 6(a).) The remedy should be exercised as of the date of Goldman Sachs's earliest violation, and no later than 2013, to account for the fact that Goldman Sachs deprived Noteholders of their ability to terminate the transaction at that date. *See*, *e.g.*, *Siegel v. Laric Entertainment Corp.*, 307 A.D.2d 861, 863 (N.Y. App. Div. 2003) (holding that interest should have been awarded since breach because "damages awarded in breach of contract actions are ordinarily ascertained as of the date of the breach.").

None of Goldman Sachs's objections have merit. *First*, Goldman Sachs cannot contend that the conditions precedent to the Event of Default have not been met, nor argue that the Noteholders somehow waived the Event of Default. (Indenture § 5.12 ("No delay or omission of the Trustee or of any Holder to exercise any right or remedy accruing upon any Event of Default shall impair any such right or remedy or constitute a waiver of any such Event of Default or an acquiescence therein.")); *see also MHR Capital Partners LP v. Presstek, Inc.*, 12 N.Y.3d 640, 646 (N.Y. 2009) (a "party to a contract cannot rely on the failure of another to perform a condition precedent where he has frustrated or prevented the occurrence of the condition").

Second, Goldman Sachs cannot contend that Noteholders had any obligation to police compliance with the Eligibility Criteria. Indeed, the Noteholders had no reason to suspect, much less any ability to uncover, the Eligibility Criteria violations from the bare information they receive in the Trustee's monthly reports. Instead, they relied on Goldman Sachs to comply with the Eligibility Criteria as the Protection Buyer and to certify compliance by providing "the relevant information and calculation" it used as Calculation Agent. (Pet. Ex. 2c §§ 5, 7(c)); *see*

also DDJ Mgmt., LLC v. Rhone Group L.L.C., 15 N.Y.3d 147, 154 (N.Y. 2010) (Where, as here, a party "has taken reasonable steps to protect itself against deception, it should not be denied recovery merely because hindsight suggests that it might have been possible to detect the fraud when it occurred. In particular, where a plaintiff has gone to the trouble to insist on a written representation that certain facts are true, it will often be justified in accepting that representation rather than making its own inquiry.").

Third, Goldman Sachs cannot contend that it should be entitled to keep the ill-gotten gains it generated by violating the Eligibility Criteria and misleading Noteholders. New York's settled principles of law and equity are to the contrary. *See*, *e.g.*, *Topps Co. v. Cadbury Stani S.A.I.C.*, 380 F. Supp. 2d 250, 261 n.11 (S.D.N.Y. 2005) (restitution damages include "any benefit which the non-breaching party bestowed on the breaching party."); *see also Y.J.D. Rest. Supply Co. v. Dib*, 98 Misc.2d 462, 464 (N.Y. Sup. Ct. 1979) ("No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own inequity, or to acquire property by his own crime."); *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir. 1965) ("[I]t is simple equity that a wrongdoer should disgorge his fraudulent enrichment.") (quotations omitted).

The Trustee should thus enforce the agreements as written and restore to the Noteholders the benefits they conferred upon Goldman Sachs – *i.e.*, over $124 million in protection payments and $70 million in ill-gotten gains – while Goldman Sachs was committing its violations and preventing Noteholders from terminating the Abacus CDO. In the meantime, to prevent further losses to Noteholders, the Trustee should escrow any protection payments that may come due to Goldman Sachs and stop the corresponding write-downs of the Notes pending this proceeding.

CONCLUSION

For the foregoing reasons, which Astra will prove at trial, Astra respectfully submits that the Court should:

a) Instruct the Trustee that the purchase of Ineligible Securities is an Event of Default under the Credit Default Swap and the Indenture;

b) Instruct the Trustee to terminate the Credit Default Swap, write up the Notes by an amount determined at trial but no less than $124 million, and proceed with Mandatory Redemption under Section 9.5 of the Indenture;

c) Instruct the Trustee to escrow protection payments and stop any write-downs of the Notes pending this proceeding; and

d) Grant such other and further relief as the Court deems just and proper.

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Respectfully submitted,

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The undersigned hereby acknowledges that costs, disbursements, and reasonable attorneys' fees may be awarded pursuant to Minn. Stat. § 549.211 to any party against whom any allegations in this pleading are asserted.

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