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U.S. Bank N.A. v XXX
2021 NY Slip Op 50617(U)
Decided on June 28, 2021
Supreme Court, New York County
Reed, J.
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Decided on June 28, 2021

Supreme Court, New York County

**U.S. Bank National Association, Solely in its Capacity as Trustee of
Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd.,
and Triaxx Prime CDO 2007-1, Ltd., Plaintiff,**

against

XXX, Defendant.

650630/2021

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Robert R. Reed, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 16, 17 were read on this motion for MISC. SPECIAL PROCEEDINGS.

Petitioner U.S. Bank National Association (US Bank), solely in its capacity as Trustee under "(i) the Indenture, dated as of September 7, 2006, by and among its predecessor

LaSalle, Triaxx Prime CDO 2006-1, Ltd., as Issuer, and Triaxx Prime CDO 2006-1, LLC, as Co-Issuer (the "2006-1 Indenture"), (ii) the Indenture, dated as of December 14, 2006, by and among its predecessor LaSalle, Triaxx Prime CDO 2006-2, Ltd., as Issuer, and Triaxx Prime CDO 2006-2, LLC, as Co-Issuer (the "2006-2 Indenture"), and (iii) the Indenture, dated as of March 29, 2007, by and among its predecessor LaSalle, Triaxx Prime CDO 2007-1, Ltd., as Issuer, and Triaxx Prime CDO 2007-1, LLC, as Co-Issuer (the "2007-1 Indenture," and together with the 2006-1 Indenture and the 2006-2 Indenture, the "Indentures")," commenced this proceeding pursuant to CPLR Article 77 for judicial instruction (Petition, at 1 [NYSCEF Doc. No. 1]). In particular, petitioner seeks "judicial instructions concerning the proper timing of the distribution of certain collateral proceeds . . . "[FN1] (*id.*, ¶ 1). Two interested parties have also filed papers on this motion. Serengeti Asset Management LP (Serengeti) "holds Senior Notes (Class A-2 Notes and Class B Notes) issued pursuant" to the 2007-1 Indenture (Serengeti Statement, at 1 [NYSCEF Doc. No. 18]). Pacific Investment Management Company LLC (PIMCO) "is a Holder (or controls one or more Holders) of Class A-2 Notes under the 2006-2 Indenture and Class A-1T Notes and Class A-1D Notes under the 2007-1 Indenture, the most-senior classes of outstanding Notes in both Triaxx 2006-2 and Triaxx 2007-1" (PIMCO Statement, at 2 [NYSCEF Doc. No. 22]).

Petitioner "serves as both the Trustee and the Collateral Administrator for each of the Triaxx Prime CDO 2006-1, Ltd. transaction (Triaxx 2006-1), the Triaxx Prime CDO 2006-2, Ltd. transaction (Triaxx 2006-2), and the Triaxx Prime CDO 2007-1, Ltd. transaction (Triaxx 2007-1, and together with Triaxx 2006-1 and Triaxx 2006-2, the Triaxx CDOs)" (*id.*, ¶ 2). A collateral debt obligation (CDO) is an "investment structure that allows investors to purchase interests in the cash flows . . . generated from debt securities held in trust by a trustee" (*id.*, ¶ 11). The Triaxx CDOs are governed by the Indentures, Collateral Management Agreements (CMAs) and Collateral Administration Agreements (CAAs) (collectively, the "Governing Agreements") (*id.*, ¶ 2). Pursuant to certain court orders, the collateral manager of the Triaxx CDOs "has sold certain collateral of the Triaxx CDOs and remitted the proceeds of such sale (the "Sale Proceeds")" to US Bank (*id.*, ¶ 3). Petitioner asserts that it initially understood the Indentures to require petitioner to distribute the proceeds of such sales "on the immediately succeeding Distribution Date," whether it be a Monthly or Quarterly Distribution Date (*id.*, ¶ 4). The distinction between Monthly and Quarterly Distribution Dates is discussed below. Certain [*2]noteholders wrote to petitioner to insure that "the Sale Proceeds would be held until the next Quarterly Distribution Date," rather than being distributed on the next Distribution Date, which was a Monthly Distribution Date (*id.*, ¶ 6).

Petitioner seeks instruction to resolve whether "the Trustee is required to immediately disburse the Collateral Proceeds pursuant to the Priority of Payments waterfall on the immediately succeeding Distribution Date (regardless of whether it is a Monthly or Quarterly Distribution Date) or to retain the Collateral Proceeds for distribution on the next Quarterly Distribution Date" (*id.*, ¶ 28). Serengeti asserts that the Indentures require "Sale Proceeds to be deposited into Collection Accounts and applied on a Quarterly Distribution Date" (Serengeti Statement, at 9). In support of this assertion, Serengeti cites Section 12.1 (a) of the Indentures, which says that Sale Proceeds of Collateral Debt Securities Sold will be deposited "and applied on the Quarterly Distribution Date immediately succeeding the end of the Due Period" after which the proceeds were received (2007-1 Indenture § 12.1 [a] [NYSCEF Doc. No. 6]). Serengeti argues that this section is "apposite, unambiguous, and dispositive" in requiring that the Collateral Proceeds be distributed on Quarterly Distribution Dates (Serengeti Statement, at 10). Serengeti further argues that this requirement is supported by "materially identical language in the Offering Circular" that Serengeti received prior to purchasing the notes at issue (*id.*, at 12). PIMCO argues that the language of the Indentures "states that the Trustee is required to disburse Sale Proceeds on or before the succeeding Distribution Date, whether that date is a Monthly or Quarterly Distribution Date" (PIMCO Statement, at 5). PIMCO cites to Section 10.2 (g) of the Indenture, which states that the Trustee shall transfer to the Payment Account "on or prior to the Business Day prior to each Distribution Date, any amounts then held in the Collection Accounts" for distribution (2007-1 Indenture § 10.2 [g]). PIMCO argues that this section contains "mandatory language requiring the Trustee to transfer amounts in the Collection Account to the Payment Accounts for payment every month, rather than somehow waiting for a Quarterly Distribution Date" (PIMCO Statement, at 5). PIMCO further argues that the failure of subordinated noteholders to object to a prior distribution of Collateral Proceeds on a Monthly Distribution Date demonstrates "that the intent of the Indentures was to mandate distributions of Sale Proceeds on the immediately succeeding Distribution Date" (*id.*, at 8).

Background

Under the Indentures, "the Issuers issued certain Notes to investors . . . in various different classes, or tranches (Petition, ¶ 12). The CDOs "issued both Senior Notes (included Class A-1 Notes, Class A-2 Notes, and Class B Notes) and Junior Notes (included Class C Notes and Class X Notes)" (*id.*). The proceeds from these Notes were used "to purchase

securities and other assets (the "Collateral Debt Securities") (*id.*). The Issuers "granted the Collateral Debt Securities and other Collateral to the Trustee in order to secure the Issuers' obligations under the Indentures" (*id.*, ¶ 13). The Trustee "holds the Collateral on behalf of the Noteholders" and all "Collateral and the proceeds thereof are subject to security interests granted to the Trustee for the benefit of the Noteholders . . . thereby creating express trusts" (*id.*, ¶ 14).

As explained above, the Sale Proceeds (or Collateral Proceeds) from the sale of certain collateral of the Triaxx CDOS are remitted to US Bank (Petition, ¶ 3). "Any portion of Sales Proceeds which are attributable to accrued interest on the collateral sold is treated as "Interest Proceeds" under the Indentures; all other Sale Proceeds are treated as "Principal Proceeds" under the Indentures (*id.*). "Upon receipt of Interest Proceeds or Principal Proceeds which are Sale Proceeds, the Trustee deposits such amounts in the "Interest Collection Accounts" or the [*3]"Principal Collection Accounts" . . .," collectively, the "Collection Accounts" (*id.*, ¶ 4). US Bank is then "required to transfer all amounts on deposit in the Collection Accounts to the Payment Accounts" prior to the Distribution Date (*id.*).

Under the Indentures, Distribution Dates occur on both a monthly and a quarterly basis (Petition, ¶ 16). On each Distribution Date, US Bank "receives and distributes the available collateral proceeds payable in respect of such Collateral Debt Securities, including Interest Proceeds and Principal Proceeds, in accordance with the Priority of Payments waterfall" set forth in the Indentures (*id.*). For each Monthly Distribution Date, "a partial 'waterfall' is run under which Interest Proceeds and Principal Proceeds are only applied for limited, specified purposes" (*id.*, ¶ 17). On Monthly Distribution Dates,

"Interest Proceeds are used to pay accrued and unpaid interest on Class A-1 Notes, but not any other Senior or Junior Notes. Any remaining Interest Proceeds are then transferred back to the Interest Collection Accounts to be held for the next Distribution Date.

Principal Proceeds are first used to pay any accrued or unpaid interest on the Class A-1 Notes (to the extent Interest Proceeds were insufficient for such purposes), and any remaining Principal Proceeds are then used to paydown the principal balance of the Class A-1 Notes. Once the Class A-1 Notes are paid in full, these remaining Principal Proceeds will be returned to the Principal Collection Accounts for application on the next Distribution Date"

(*id.*) For each Quarterly Distribution Date, "a full waterfall is run under which Interest Proceeds and Principal Proceeds are only applied in respect of all outstanding obligations of the Issuers" (*id.*, ¶ 18). On Quarterly Distribution Dates,

"Interest Proceeds are applied to pay accrued and unpaid interest on the Class A-1 Notes, the Class A-2 Notes, and the Class B Notes. Thereafter, remaining Interest Proceeds are applied to either pay accrued or unpaid interest on other classes of Notes or, to the extent certain performance related tests are failing, to pay unpaid principal on the Class A-1 Notes, the class A-2 Notes, and the Class B Notes.

Principal Proceeds are first used to catch up on any unpaid interest on the Class A-1, Class A-2, and Class B Notes (to the extent Interest Proceeds were insufficient for such purposes), and thereafter are used to paydown the principal balance of the Class A-1 Notes, then the[] Class A-2 Notes, etc." (*id.*).

Certain of the Collateral Debt Securities deteriorated, "which resulted in their credit rating being downgraded" (Petition, ¶ 19). These were identified as Defaulted Securities, and some were identified as Defaulted Securities for over three years ("Three Year Defaulted Securities") (*id.*). A dispute arose as to whether these securities should be sold (*id.*). US Bank filed an action in the Southern District of New York, seeking a court determination of whether the Three Year Defaulted Securities in Triaxx 2006-1 were required to be sold (*id.*, ¶ 20; *see U.S. Bank N.A. v Triaxx Prime CDO 2006-1, Ltd.*, 2016 WL 3552272 [SD NY June 23, 2016], *affd* 687 Fed.Appx. 8 [2d Cir 2017] ["*US Bank v Triaxx 2006-1*"]). The SDNY Court granted a motion for summary judgment and required the sale of the Three Year Defaulted Securities (*US Bank v Triaxx 2006-1*, 2016 WL 3552272, at * 6). The Second Circuit reviewed the decision *de novo* and affirmed, finding that the language of the Governing Agreements "unambiguously requires Triaxx to sell Defaulted Securities within three years of the date they went into default" (*US Bank v Triaxx 2006-1*, 687 Fed.Appx., at 9). A similar action was filed concerning Three [*4]Year Defaulted Securities in Triaxx 2006-2 and Triaxx 2007-1, and the SDNY court reached the same conclusion (*U.S. Bank N.A. v Triaxx Asset Mgmt. LLC*, 2017 WL 3610584 [SD NY July 26, 2017]).

On or about January 6-7, 2021, "the Collateral Manager sold certain Collateral Debt Securities across all three Triaxx CDOs and transferred the proceeds (as previously defined, the "Sale Proceeds"), which collectively exceed \$100 million, to the Trustee for deposit into the Collection Accounts" (Petition, ¶ 26). Petitioner asserts that it "intended to distribute all proceeds from the sale of the Triaxx CDOs' collateral, including the Sale Proceeds, pursuant to the Priority of Payments waterfall on the immediately succeeding Distribution Date (a

Monthly Distribution Date) . . ." (*id.*, ¶ 27). US Bank asserts, however, that Serengeti wrote " 'to ensure' that the proceeds from this auction would be held until the next Quarterly Distribution Date. . ." (*id.*, ¶ 25). US Bank, then, brought this proceeding for judicial instruction.

The Indentures

As discussed above, each of the CDOs is to be read in accordance with the Governing Agreements: *to wit*, Indentures, Collateral Management Agreements, and Collateral Administration Agreements. The question of distribution of proceeds, however, "has arisen under the Indentures for the Triaxx CDOs. . ." [FN2] (Petition, ¶ 3). The parties are in agreement that the provisions relevant to the resolution of this inquiry are Sections 10.2 and 12.1. Also relevant is Section 11.1, which sets forth the payment waterfall described above.

Article X of the Indenture is entitled "Accounts, Accountings and Releases" and Section 10.2 is entitled "Principal Collection Account; Interest Collection Account; Custodial Account; Quarterly Interest Reserve Account; Synthetic Security Counterparty Account; Synthetic Security Issuer Account; Class A-1D Noteholder Prefunding Account; Interest Reserve Account; Hedge Reserve Amount." Section 10.2 (a) states, in relevant part: "The Trustee shall, prior to the Closing Date, cause to be established a segregated Securities Account which shall be designated as the 'Interest Collection Account', . . . into which the Trustee shall from time to time, subject to Section 10.8(d) hereof, deposit all Interest Proceeds" Section 10.2 (c) states, in relevant part: "The Trustee shall, prior to the Closing Date, cause to be established a segregated Securities Account which shall be designated as the 'Principal Collection Account', . . . into which . . . the Trustee shall from time to time, subject to Section 10.8(d) hereof, deposit all Principal Proceeds." Section 10.2 (e) states, in relevant part:

"All Distributions, any deposit required pursuant to Section 10.2(f) hereof and . . . any net proceeds from the sale or disposition of a Collateral Debt Security or Equity Security received by the Trustee shall be immediately deposited into the Interest Collection Account or the Principal Collection Account, as the case may be. Subject to Sections 10.2(g) and 11.2 hereof, all amounts deposited in the Collection Accounts . . . shall be held by the Trustee in the Collection Accounts as part of the Collateral subject to disbursement and withdrawal as provided in this Section 10.2. The Trustee shall invest [*5]all funds received into the Collection

Accounts during a Due Period and amounts received in Prior Due periods and retained in the Collection Accounts in Eligible Investments in accordance with section 10.2(f) hereof."

Section 10.2 (f) states, in relevant part:

"[T]he Issuer shall at times direct the Trustee to, and upon receipt of such Issuer Order, the Trustee shall, invest and reinvest the funds held in the Accounts (other than the Payment Account and the Custodial Account) in Eligible Investments maturing not later than the earlier of (i) 30 days after the date of such investment, or (ii) the Business Day immediately preceding the next Quarterly Distribution Date or, in the case of the Interest Collection Account and the Principal Collection Account, the next Distribution Date"

Section 10.2 (g) states, in relevant part:

"The Trustee shall transfer to the Payment Account for application pursuant to Section 11.1(a) hereof . . . on or prior to the Business Day prior to each Distribution Date, any amounts then held in the Collection Accounts (other than Sale Proceeds of Credit Improved Securities, Credit Risk Securities and Discretionary Sales that the Issuer is entitled to reinvest in accordance with the Eligibility Criteria and the conditions specified in Article XII, which may be retained in the Collection Accounts for subsequent reinvestment, if the Issuer so elects) other than Interest Proceeds or Principal Proceeds received after the end of the Due Period with respect to such Distribution Date."

Article XII is entitled "Purchase and Sale of Collateral Debt Securities; Substitution" and Section 12.1 is entitled "Sale of Collateral Debt Securities; Reinvestment." Section 12.1 (a) states, in relevant part:

"All Sale Proceeds of any Collateral Debt Securities Sold by the Issuer in accordance with this Section 12.1 and not reinvested in substitute Collateral Debt Securities pursuant to Section 12.2 will be deposited in the Interest Collection Account or the Principal Collection Account, as the case may be, in accordance with Sections 10.2(a) and 10.2(c) hereof and applied on the Quarterly Distribution Date immediately succeeding the end of the Due Period after the Due Period in which they were received in accordance with the Priority of Payments or as otherwise required by Article IX. Sale Proceeds consisting of accrued interest may be applied, in the Collateral Manager's discretion (i) to purchase accrued interest on substitute Collateral Debt Securities in accordance with the Eligibility Criteria . . . or (ii) deposited into the Interest Collection Account."

Serengeti, in support of its contention that the Collateral Proceeds should be distributed quarterly, argues that "Section 12.1(a) requires Sale Proceeds to be deposited into Collection Accounts and applied on a Quarterly Distribution Date[;] Serengeti's interpretation of the Indenture honors this plain language and effectuates other Indenture terms" (Serengeti Statement, at 9). Serengeti further argues that Section 12.1 (a) "contains no limiting reference to 'Section 10.2(g),' or to a 'Payment Account,' or to monthly 'Distribution Date'" that might otherwise support a contrary interpretation (*id.*). Serengeti points to Section 12.1 (a) (i), which says that uninvested Sale Proceeds "will be transferred on the immediately succeeding Distribution Date to the Payment Account" to show that the drafters intentionally wrote that the Sale Proceeds should be applied on a Quarterly Distribution Date (*id.*, at 10). Serengeti also asserts that, had the drafters intended the Collateral Proceeds to be transferred to the Payment Accounts pursuant to Section 10.2 (g), they would have referenced that section (*id.*, at 11).

PIMCO argues that Section 10.2 (g) "is explicit in its instructions" and that its "use of the word 'shall' constitutes mandatory language requiring the Trustee to transfer amounts in the Collection Account to the Payment Accounts for payment every month, rather than somehow waiting for a Quarterly Distribution Date" (PIMCO Statement, at 5). PIMCO further argues that Section 12.1 (a) "is not mandatory" because "[t]he lead-in to Section 12.1(a) provides that it applies '[e]xcept as otherwise expressly permitted or required by this Indenture'" and, therefore, "Section 12.1(a) must cede to the mandatory language in Section 10.2(g)" (*id.*). PIMCO asserts that "nothing in the text of Section 12.1 itself precludes Sales Proceeds from being disbursed on a Monthly Distribution Date, nor does Section 12.1 ever mention that the Trustee can retain funds pending distribution by way of a 'hold back'" (*id.*, at 6). PIMCO further asserts that the interpretation that Collateral Proceeds must be disbursed on the next succeeding Distribution Date is support by Section 10.2 (g), "which contains a carve-out that permits the Trustee to retain funds solely for the purpose of reinvestment" and, according to PIMCO, "[t]here is no dispute that the Reinvestment Period for the Triaxx CDOs lapsed many years ago . . ." (*id.* [emphasis omitted]).

Discussion

As an initial matter, the court finds that a proceeding under CPLR Article 77 is appropriate. Pursuant to CPLR 7701, and subject to certain exceptions not at issue here, a

special proceeding under Article 77 "may be brought to determine a matter relating to any express trust. . . ." "Permissible uses of Article 77 are broadly construed to cover any matter of interest to trustees, beneficiaries or adverse claimants concerning the trust. Such proceedings are used by trustees to obtain instruction as to whether a future course of conduct is proper, and by trustees (and beneficiaries) to obtain interpretations of the meaning of trust documents" (*BlackRock Financial Management Inc. v Segregated Account of Ambac Assur. Corp.*, 673 F3d 169, 174 [2d Cir 2012] [internal quotation marks and citation omitted]). Because this proceeding was brought by the trustee to determine the propriety of a future course of action, and because the beneficiaries are seeking to obtain interpretation of the Indentures for the purpose of the payments at issue, an Article 77 proceeding is appropriate.

Under settled principles of contract interpretation, "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]). A contract "will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose[;] [t]he meaning of a writing may be distorted where undue force is given to single words or phrases" (*Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003] [internal quotation marks and citation omitted]). A court should "construe the agreement[] so as to give full meaning and effect to the material provisions[;] [a] reading of the contract should not render any portion meaningless" (*Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007] [internal quotation marks and citations omitted]). "All parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency" (*National Conversion Corp. v Cedar Bldg. Corp.*, 23 NY2d 621, 625 [1969]). "Courts may not, through their interpretation of a contract, add or excise terms or distort the meaning of any particular words or phrases, thereby creating a new contract under the guise of interpreting the parties' own agreements" (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017]).

"Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its [*6]purpose and the parties' intent, or where its terms are subject to more than one reasonable interpretation" (*Universal American Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015] [internal quotation marks and citations omitted]). "Whether or not a writing is ambiguous is a question of law to be resolved by the courts" (*W.W.W. Assoc., Inc.*, 77 NY2d at 162). "To determine whether a writing is unambiguous, language should not be read in isolation because the contract must be considered as a whole" (*Brad H. v City of New*

[York](#), 17 NY3d 180, 185 [2011]). "The entire contract must be reviewed and particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby[;] [f]orm should not prevail over substance and a sensible meaning of words should be sought" ([Riverside South Planning Corp. v CRP/Extell Riverside, L.P.](#), 13 NY3d 398, 404 [2009] [internal quotation marks and citation omitted]). "Extrinsic evidence of the parties' intent may only be considered if the agreement is ambiguous . . ." ([Greenfield v Philles Records, Inc.](#), 98 NY2d 562, 569 [2002]).

In interpreting the relevant provisions of the Indentures, the court relies on the definitions in the Indenture for Due Period, Quarterly Distribution Date, and Quarterly Distribution Period. Due Period is defined, in relevant part, as:

"(1) with respect to any Quarterly Distribution Date, each period from, and including, the 26th day of the calendar month preceding the immediately preceding Quarterly Distribution Date to, and including, the 25th day of the calendar month preceding such Quarterly Distribution Date . . . and (2) with respect to any Distribution Date that is not a Quarterly Distribution Date, each period from, and including, the 26th day of the calendar month preceding the immediately preceding Distribution Date to, and including, the 25th day of the calendar month preceding such Distribution Date The 'Quarterly Distribution Date' relating to any Due Period shall be the Quarterly Distribution Date that next succeeds the last day of such Due Period. The 'Distribution Date' (other than a Quarterly Distribution Date) relating to any Due Period shall be the Distribution Date that next succeeds the last day of such Due Period"

(2007-1 Indenture, at 20). Quarterly Distribution Date is defined, in relevant part, as "the second day of January, April, July and October of each year . . . [t]he 'Due Period' relating to any Quarterly Distribution Date shall be the Due Period that immediately precedes such Quarterly Distribution Date" (*id.*, at 40). Quarterly Distribution Period is defined, in relevant part, as "each period from but excluding a Quarterly Distribution Date to and including the next succeeding Quarterly Distribution Date . . ." (*id.*).

The Disbursement of Payments requires that, "[o]n each Distribution Date . . . Interest Proceeds with respect to the Due Period will be applied in the order of priority" set forth in the Indenture (2007-1 Indenture § 11.1 [a] [i]). The Disbursement of Payments similarly requires that "Principal Proceeds . . . with respect to the related Due Period . . . be distributed in the order of priority" set forth in the Indenture. (*Id.*, § 11.1 [a] [ii]). As defined above, the Due Period for a Monthly Distribution Date is from the 26th day of the month preceding the

preceding Distribution Date, through and including the 25th day of the month preceding the Monthly Distribution Date. The Due Period for a Quarterly Distribution Date is from the 26th day of the month preceding the preceding Quarterly Distribution Date, through and including the 25th day of the month preceding the Quarterly Distribution Date. A Quarterly Due Period will, therefore, overlap with two Monthly Due Periods. For example, the Due Period for a Quarterly Distribution Date in July extends from March 26th, through and including June 25th. The Due [*7]Period for a Monthly Distribution Date in May extends from March 26th, through and including April 25th; the Due Period for a Monthly Distribution Date in June extends from April 26th, through and including May 25th.

Pursuant to Section 10.2 (g), the Trustee transfers to the Payment Account "on or prior to the Business Day prior to each Distribution Date, any amounts held in the Collection Accounts. . . other than Interest Proceeds or Principal Proceeds received after the end of the Due Period with respect to such Distribution Date." These funds are moved to the Payment Account "for application pursuant to Section 11.1(a) . . ." (*id.*) Section 11.1 (a) applies funds "with respect to the Due Period" for each Disbursement Date, which limits the funds moved to the Payment Account pursuant to Section 10.2 (g) to those from the relevant Due Period. Because a Quarterly Due Period overlaps with two Monthly Due Periods, funds must necessarily be segregated for application on either a Monthly Distribution Date or a Quarterly Distribution Date. If all of the funds held in the Collection Accounts were moved to the Payment Account and distributed on every Distribution Date, the Quarterly Distribution date would effectively run for one month, rather than the defined three-month period, as the funds from the prior two months would have been distributed on the Monthly Distribution Dates within that Quarterly Due Period. Funds received for application on a Quarterly Distribution Date therefore must be stored in the Interest Collection Account and the Principal Collection Account and not moved to the Payment Account for application on a Monthly Distribution Date.

Because the Quarterly Due Period runs for three months and the Collection Accounts can retain the relevant funds for the entirety of the Quarterly Due Period, certain funds have been denoted for application on Quarterly Distribution Dates. Section 12.2 (a) specifically states that "Sale Proceeds of any Collateral Debt Securities sold by the Issuer in accordance with this Section 12.1 . . . will be deposited in the Interest Collection Account of the Principal Collection Account, as the case may be . . . and applied on the Quarterly Distribution Date immediately succeeding the end of the Due Period after the Due Period in which they were

received" The Collateral Proceeds are specifically designated to be distributed on a Quarterly Distribution Date. Because amounts in the Collection Accounts are only to be moved to the Payment Account for distribution with respect to the applicable Due Period, the Collateral Proceeds are to remain in the Collection Accounts until the Quarterly Distribution Date. The court finds that the contract is not ambiguous and that this reading of the contract gives force and effect to each provision.

This finding is not changed by the parties' extra-contractual contentions. The court is not persuaded that the Offering Circular should be considered in the matter at hand. Because the court has not found ambiguity in the contract, extrinsic evidence should not be considered (*Greenfield*, 98 NY2d at 569). *Serengeti* cites several cases that stand for the proposition that various prospectuses can be considered in construing contract meanings (*see e.g. Wells Fargo Bank, N.A. v ESM Fund I, LP*, 785 F.Supp.2d 188, 195 [SD NY 2011] [referencing "governing documents," a "Free Writing Prospectus," and a "Prospectus Supplement"]). These precedents permit courts to consider governing documents to an agreement when interpreting the meaning of a contract. The Offering Circular, however, cannot be considered a governing document, because, as discussed above, the governing agreements for the Triaxx CDOs are the Indentures, Collateral Management Agreements, and Collateral Administration Agreements (*see* Petition, at 2). Similarly unpersuasive is *Serengeti's* contention that the Offering Circular is "part of a single transaction and is properly read and interpreted with the Indenture" (*Serengeti* Statement, at 13 [*8][internal quotation marks omitted]). Under New York law, "[i]n the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eye of the law, one instrument" (*Oak Hill Capital Partners, L.P. v Cuti*, 148 AD3d 504, 504 [1st Dept 2017] [internal quotation marks and citation omitted]). The Offering Circular is not an executed instrument, nor is it an instrument between the same parties. Because the Offering Circular is not an instrument of the contract, it constitutes extrinsic evidence that the court will not consider. The court notes, in any event, that the Offering Circular largely tracks the language of all of the provisions considered above (*compare* Offering Circular, at 177 and 184 *with* 2007-1 Indenture §§ 12.1 [a] and 10.2 [g], respectively). Even if the Offering Circular could properly be considered in this matter, it would not add support to either party's contentions.

Similarly unavailing is PIMCO's argument that the failure of subordinated noteholders to object to a previous distribution of Collateral Proceeds on a Monthly Distribution Date supports its position. In September 2017, Collateral Proceeds were distributed in Triaxx 2006-2 and Triaxx 2007-1 on a Monthly Distribution Date (PIMCO Statement, at 7). PIMCO asserts that "neither [Serengeti] nor any other noteholder objected to a monthly distribution of the Sale Proceeds" (*id.*). Serengeti argues that it did not object because "whether the proceeds from the 2007-1 Sale were distributed on a [M]onthly Distribution Date or Quarterly Distribution Date was irrelevant to the amounts that Serengeti actually received from the CDO . . ." (Serengeti Response Statement, at 5-6 [NYSCEF Doc. No. 27]). Under New York law, where, as here, a court finds that a contract is unambiguous, there is "no occasion to consider parol evidence of the parties' course of conduct" ([*National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 33 AD3d 570, 571 \[1st Dept 2006\]](#)). Even if the court were able to look at the parties' course of conduct, Serengeti's conduct in a single event is insufficient to establish a course of conduct, particularly where the incentive to act present in the matter at hand was absent in the prior event.

The court, therefore, determines that the Collateral Proceeds from the sale of Collateral Debt securities are required to be distributed on Quarterly Distribution Dates.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Collateral Proceeds from the sale of Collateral Debt Securities are to be — and shall be — distributed on Quarterly Distribution Dates.

DATE 6/28/2021

Footnotes

Footnote 1: Proper notice of this proceeding was given as required by the Order to Show Cause, dated February 1, 2021 (Order to Show Cause [NYSCEF Doc. No. 16]; *see* Aff. of Service [NYSCEF Doc. No. 17]).

Footnote 2: Petitioner asserts, and the interested parties do not dispute, that the "terms of the Indentures, CMAs, and CAAs are substantially identical across the three Triaxx CDOs" (Petition, ¶ 2). The court's own reading confirms that the relevant terms are substantially identical. Because the interested parties are both Noteholders under the 2007-1 Indenture, this

decision will quote from that Indenture for common provisions (*see* 2007-1 Indenture, [NYSCEF Doc. No. 6]).

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