STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

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In the matter of the Trust Established under the Pooling and Service Agreement relating to the Wachovia Bank Commercial Mortgage Trust Commercial Mortgage Pass-Through Certificates, Series 2007-C30

Court File Nos.: 62-TR-CV-19-33
62-TR-CV-19-19
Case Type: Trust

**ORDER GRANTING SENIOR CERTIFICATE HOLDERS' MOTION FOR SUMMARY JUDGMENT AND DENYING JUNIOR CERTIFICATE HOLDERS' MOTION FOR SUMMARY JUDGMENT**

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This matter comes before the Court on motions for summary judgment in two related trust instruction proceedings. Trustee, U.S. Bank National Association, was represented by Michael McCarthy and Ana Chilingarishvili of the Maslon LLP law firm and Michael Kraut and Kevin Biron of the Morgan, Lewis & Bockius LLP law firm. Master Servicer, Wells Fargo Bank, N.A., was represented by Karla Vehrs and William Wassweiler of the Ballard Spahr LLP law firm and John Doherty of the Alston & Bird LLP law firm. Special Servicer, CWCapital Asset Management LLC, was represented by David Crosby, Thomas Nelson, and Adine Momoh of the Stinson LLP law firm and by Gregory Cross and Colleen Casse of the Venable LLP law firm. Subsequent Special Servicer, C-III Asset Management LLC, was represented by Elinor Murarova of the Duane Morris LLP law firm. Senior Certificate Holder, DW Partners LP, was represented by Mark Schroeder and Jeremy Schildcrout of the Taft Stettinius & Hollister LLP law firm. Senior Certificate Holders, Palomino Master Ltd. and Azteca Partners LLC, were represented by Norman Abramson and Jessica Kometz of the Bassford Remele law firm and by Thomas Redburn and Maya Ginsburg of the Lowenstein Sandler LLP law firm. Junior Certificate holders, CWCapital Cobalt Vr. Ltd. and Systed, LLC, were represented by John

Orenstein, Aaron Knoll and Holley Horrell of the Greene Espel PLLP law firm and by Jonathon Pickhardt and Rex Lee of the Quinn, Emanuel, Urgqhart & Sullivan LLP law firm. Junior Certificate Holders, Torchlight Value Fund LLC and Torchlight Opportunity Fund II, LLC, were represented by Arthur Boylan, Shannon Awsumb and Joseph Richie of the Anthony Ostlund Louwagie Dressen & Boylan, P.A. law firm.

Based upon the briefs and materials submitted and upon the files, records, and arguments of the parties, the Court makes the following findings, conclusions and order.

**UNDISPUTED FACTS**

62-TR-CV-19-19 is a trust instruction proceeding brought by U.S. Bank in its capacity as Trustee of the above-named Trust. Case 62-TR-CV-19-33 is a trust instruction proceeding brought by Wells Fargo in its capacity as Master Servicer of that same Trust. Both petitions are brought under Minnesota Statutes sections 501C.0201 et seq. The Court has in rem jurisdiction over the Trust and venue is proper because the Trustee, U.S. Bank, has a corporate trust office in Ramsey County.

In March of 2007, the Trust was created and was to be governed by a Pooling and Servicing Agreement dated March 1, 2007 (PSA). Section 11.04 of the PSA provides it is to be governed by the laws of the State of New York. Wachovia Commercial Mortgage Securities, Inc., deposited a pool of assets into the Trust, principally consisting of mortgage loans backed by mortgages on certain commercial real estate properties. In exchange, Wachovia received certificates of various classes described in the PSA and elsewhere. Wachovia sold the certificates to investors through underwriters.

The certificates carry varying priorities to principal and interest payments made on the commercial mortgages. Palomino Master Ltd., Azteca Partners LLC, and DW Partners LP are

Senior Certificate Holders, holding certificates of generally higher priority. CW Capital Cobalt Vr. Ltd, Systed, LLC, Torchlight Value Fund LLC, and Torchlight Opportunity Fund LLC are Junior Certificate Holders, holding certificates of generally lower priority.

Petitioner U.S. Bank became Trustee in 2011 after acquiring certain securitization trust administration businesses from Bank of America, N.A. which had been the Trustee since March of 2009. Petitioner Wells Fargo is the Master Servicer of the Trust and also serves a number of other roles including Certificate Registrar, Custodian, Authenticating Agent, REMIC Administrator, Swap Agent, Trustee Agent, and Paying Agent. CWCapital Asset Management LLC (CWCAM) served as the Special Servicer of the Trust until January of 2019, when C-III Asset Management assumed that role.

The PSA requires generally that payments of principal and interest on the commercial real estate loans in the Trust, along with other amounts received in connection with Trust assets, must be distributed to certificate holders on specific distribution dates. Section 3.04(b) of the PSA establishes a separate, segregated, distribution account that is maintained by the Paying Agent (relevant to these matters – Wells Fargo). Before the distribution date, the Master Servicer (Wells Fargo) must deliver to the Paying Agent an aggregate amount of immediately available funds equal to that portion of the "Available Distribution Amount" for the distribution date.[1] Section 4.01 of the PSA sets forth a waterfall scheme establishing the distribution priority for the amount and the Paying Agent is required to distribute the funds in the distribution account to certificate holders according to the waterfall provision of the PSA.

Generally speaking, under the waterfall provision, funds are distributed in descending order of priority, with the most senior certificates with an outstanding balance receiving payment

[1] The PSA defines Available Distribution Amount as amounts on deposit in the Certificate and Distribution Accounts as of the close of business on the last day of the collection period. PSA §3.04(b), §401(a).

first, and then the next senior certificates receiving payment next and so on until the funds available for distribution on the distribution date have been exhausted. In addition, section 4.04(a) of the PSA allocates realized losses on trust assets on each distribution date. The realized losses are allocated to certificates in ascending order of priority with the losses allocated to the most junior certificates with an outstanding balance first until the principal balance of those junior certificates is zero. The realized losses are then allocated to the next most junior certificates with outstanding balances and so on until all realized losses as of the distribution date are fully allocated.

At its inception, in March 2007, the Trust held some 263 commercial mortgage loans with an aggregate principal balance of over $7 billion. Most of the loans had a ten-year term to maturity. Over time, as the loans matured or liquidated, the assets of the Trust declined significantly, as did the cash flows those assets generated. By December of 2018, the Trust had five assets of the original 263 and 1.46% of its original principal balance. The five remaining loans were under the supervision of the Special Servicer and were past their maturity dates.

The events that are the subject of the petitions began late in the life of the trust. On December 17, 2018, a distribution occurred. Three days later, Wells Fargo, received from Special Servicer, CWCAM, two officer's certificates directing that a total of $38 million be withheld from the December 17, 2018 distribution. The direction to withhold the funds related to funding of reserves for present and future indemnification obligations of the Trust. $28 million of the directed withholding related to litigation entitled *Taberna Realty Finance Trust v. CW Capital Asset Management LLC,* No. 651729/2016 (the One Congress action). $10 million of the directed withholding related to litigation entitled *In re Trusts Established under the Pooling and Servicing Agreements Related to the Wachovia Bank Commercial Trust*

*Commercial Pass-Through Certificates, Series 2007-C30*, No. 1:17-cv-01998-KPF (S.D.N.Y.)(the Stuy Town Action). The reserves were largely for exposure of potentially indemnified parties (including most prominently CWCAM as Special Servicer) as well as for fees and expenses of the litigation. Following receipt of the officer's certificates, Wells Fargo, acting in its role as Master Servicer, established litigation reserves in the total amount of $38 million and caused some amounts previously paid to Junior Certificate holders to be returned to the Trust and held in reserve. The parties to this litigation aptly refer to this action as a "clawback." As a consequence, the distribution to the Junior Certificate Holders was reduced by $38 million. Distribution payments to the Junior Certificate Holders were reduced to $66,782,695. The Junior Certificate were the only certificates affected by the reduction. Senior Certificate Holders were not impacted.

In May of 2019, C-III, by then acting as Special Servicer, issued an officer's certificate directing the Master Servicer to pay approximately $9 million to settle the One Congress action. With the settlement, approximately $17.5 million in unused funds became available to certificate holders. In addition, and separately, the $10 million set aside for the Stuy Town action also became available for distribution. As a result of the reserve funds becoming available, Junior Certificate Holders demanded the reserve funds be distributed as if they had been available to be distributed as of the December 2018 distribution date. *See* June 3, 2019 letter of Jonathon Pickhardt, counsel for Cobalt and Systed to counsel for Wells Fargo, the Master Servicer. In contrast, Senior Certificate Holders demanded the available reserve funds be distributed at the next distribution date in accordance with the general waterfall provision of the PSA. *See* June 21, 2019, Letter of Lawrence Rolnick, counsel for Senior Certificate Holders, Palomino and Azteca, to Wells Fargo, the Master Servicer. As of the date of the petitions, senior certificates

were the only outstanding certificates. As a result, Junior Certificate Holders would receive none of the reserved funds if the distribution were made per the Senior Certificate Holder's demand and according to the waterfall provision of the PSA, on the next available distribution date.

On May 17, 2019, U.S. Bank, as Trustee, filed a petition for instructions in this Court seeking an order confirming the reserves and confirming that establishing the reserves did not constitute an Event of Default under the PSA. *See* Petition in 62-TR-CV-19-19. On August 29, 2019, Wells Fargo, in its capacity as Master Servicer, filed a petition in this Court seeking confirmation that the reserved funds should be treated as a distribution in the normal course under the PSA and should be distributed pursuant to the general waterfall provision, section 4.01(a), of the PSA as of the next distribution date. *See* Petition in 62-TR-CV-19-33.

On May 24, 2019, the U.S. Bank petition was removed to the United States District Court for the District of Minnesota. On September 3, 2019, the Wells Fargo petition was removed to the United States District Court for the District of Minnesota. On October 5, 2021, the United States District Court for the District of Minnesota remanded the proceedings to this Court due to absence of diversity jurisdiction. *See In the Matter of the Trust Established Under the Pooling and Service Agreement Relating to the Wachovia Bank Commercial Mortgage Trust Commercial Mortgage Pass-Through Certificates, Series 2007-C30* No. 0:19-CV-02416-PJS-BRT Doc. 406, Order Dated October 5, 2021.

On March 24, 2022, this Court held a scheduling conference and set a briefing schedule for summary judgment motions. On July 28, 2022, the Court heard arguments on the motions and took them under advisement.

## CONCLUSIONS

This matter is before the Court on the separate, cross-motions for summary judgment filed or joined in by the Senior and Junior Certificate Holders. U.S. Bank, as trustee, filed a memorandum responding to the summary judgment motions.[2] Wells Fargo opposes the summary judgment motions of the junior certificate holders and supports the motions of the senior certificate holders. CWCAM opposes the summary judgment motions of the junior certificate holders and supports the position of U.S. Bank as trustee.

Summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01. "A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Summary judgment is improper when reasonable minds could differ and draw different conclusions from the evidence presented. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997); *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Strauss v. Thorne*, 490 N.W.2d 908, 911 (Minn. Ct. App. 1992).

A party opposing summary judgment may not rely merely on its pleadings but must present specific facts demonstrating there is a genuine issue of material fact. Minn. R. Civ. P.

[2] Neither U.S. Bank nor Wells Fargo have moved for summary judgment on their petitions. Under Minn. R. Civ. P. 56.06, after giving notice and a reasonable time to respond, the court may grant summary judgment to a non-movant. See Minn. R. Civ. P. 56.06(a). According to its terms Rule 56.06(a) is not applicable because the Court is not granting summary judgment to either U.S. Bank or to Wells Fargo, both non-movants. The Court's ruling does, however, fairly completely address the issues raised in the U.S. Bank and Wells Fargo petitions. Given that both U.S. Bank and Wells Fargo have fully briefed the issues involved, the Court believes both have had ample notice and opportunity to respond. In addition, the other responding parties have been fully apprised of U.S. Bank's and Wells Fargo's positions. Out of an abundance of caution, the Court's Order provides U.S. Bank and Wells Fargo the opportunity to submit proposed orders consistent with this memorandum and provides the parties an opportunity to respond to those proposed orders. Any concerns about notice and opportunity to be heard per Rule 56.06 are more than addressed by that additional opportunity.

56.03; *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998). The Court must view the facts in the light most favorable to the nonmoving party. *Id.* "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *DLH, Inc.*, 566 N.W.2d at 69 (quoting *Matsushita Elec. Indus. Co v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986)). Once the moving party has established a prima facie case that entitles it to summary judgment, the burden shifts to the nonmoving party to present specific facts that raise a genuine issue for trial. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001). A genuine issue of material fact exists when a fact may be reasonably resolved in favor of either party. *DLH, Inc.*, 566 N.W.2d at 69. However, there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue. *Id*. at 71. If any legitimate doubt exists as to the existence of a genuine issue of material fact, the doubt must be resolved in favor of finding that the fact issue exists. *See Poplinski v. Gialason*, 397 N.W.2d 412 (Minn. Ct. App. 1986). Applying the summary judgment standard, the Court makes the following rulings.

**I.**

It is undisputed that in the ordinary course of the Trust at issue in this case (like in most real estate backed securitization trusts), borrowers make payments on loans held by the trust to a master servicer which is responsible for servicing trust loans where the borrower is making timely and complete payments. The special servicer is responsible for servicing loans where the borrower falls behind in payments and is, or is about to be, in default. Funds collected from trust assets fund payment of the trust's operating expenses and liabilities as well as cash distributions to certificate holders.

Generally speaking, trust expenses have a higher priority than distributions to certificate holders. Put differently, certificate holders get their money only after the trust pays the expenses of the trust and liabilities to others, including those performing duties on behalf of the trust. For example, section 6.03 of the PSA provides that Trust fiduciaries (such as the Master Servicer and Special Servicer) "shall be indemnified and held harmless by the Trust Fund against any loss, liability, or reasonable expense incurred in connection with this Agreement or the Certificates … other than any loss, liability, or expense … incurred by reason of willful misfeasance, bad faith, or negligence in the performance of obligations or duties thereunder." Payment to satisfy an indemnification obligation under section 6.03, would have a higher priority than payment to be distributed to a certificate holder. As a result, a trust administrator may set aside funds for expected, future senior expenses of the trust. *See, e.g., In re JP Morgan Chase Bank, N.A.*, 996 N.Y.S.2d 816, 822 (N.Y. App. Div. 4th Dep't 2014); Restatement (Second) of Trusts §182 cmt. B ("The trustee can properly withhold a reasonable amount of income to meet present or anticipated expense which are properly chargeable to income.")

The PSA nowhere explicitly authorizes reservation of Trust funds. Yet, under New York law, which applies to the PSA, *see* PSA §11.04, a contract contains both its express provisions and any implied conditions necessary to effectuate the contracting parties' intent. "The aim is a practical interpretation of the expressions of the parties to the end that there be a realization of their reasonable expectation. Concordantly… not merely literal language, but whatever may be reasonably implied therefrom, must be taken into account." *See Sutton v. E. River Savings Bank*, 55 N.Y.2d 550, 555 (1982); *Madison Ave. Leasehold, LLC v. Madison Bentley Assocs.*, 30 A.D.3d 1, 9 ((1st Dep't 2006)).

Section 6.03 of the PSA provides the Master Servicer and the Special Servicer with broad rights of indemnification from the Trust fund. Those rights are senior to the rights of certificate holders to receive distribution payments. *See* PSA §1.01, §3.04, §3.05(a)(xiv), §4.01(a), §6.03. The right of indemnification is, however, nearly meaningless, unless Trust funds may be reserved to satisfy it. Absent such authority, indemnification rights, which are given priority, will be left unfunded by prior in time (and lower in priority) distribution of funds necessary to meet the indemnification obligation of the Trust. Implicit in the indemnification right and its higher priority is the ability to hold back and segregate funds necessary to meet the indemnification obligations of the PSA.[3]

The PSA also affords the Master Servicer and the Special Servicer broad authority and discretion in servicing and administering the trust, placing in them authority to "do or cause to be done any and all things in connection with such servicing and administration which it may deem necessary or desirable." PSA §3.01(b). This authority, along with the implicit powers necessary to carry out the PSA, provides the Master Servicer and the Special Servicer with the authority to create trust reserves to meet significant anticipated future trust expenses.

Indeed, evidence in this case is undisputed that custom and practice in the industry is to create reserves if necessary for future trust expenses. *See* Report of Thomas Nealon at 1; Nealon Dep. Tr. at 19-21, 94, 125-26, 150-151; Report of Thomas Ruffing, 59-62, Ruffing Dep. Tr. at 188-189; James Arnoff Report at ¶8, Arnoff Dep. Tr. at 52, 76-80, 84-85. Practice in this very case proceeded according to industry custom. CWCAM, C-III, Wells Fargo, and the Trustee have all requested reserves for anticipated legal expenses. Awsumb Ex. 31 (Wells Fargo email

[3] The Trustee also notes, and the Court fully accepts, that without the ability to set aside litigation or indemnification reserves, Trust litigation strategy could be detrimentally influenced. That is, the Trust may be overly inclined to settle when it is in a strong cash flow position and overly inclined not to settle when it is in a weak cash flow position. No different than other enterprises, that is one reason why reserves are taken.

attaching January 2020 officer's certificates by all four parties.) *See also*, Nealon Report at 28 ("The establishment of reserves/holdbacks is a very important aspect of the CMBS industry that is essential in order to ensure sufficient funds are available to pay all costs, claims and/or expenses of a CMBS trust."). The undisputed evidence is that the industry operates on an understanding that reserves must be taken in certain circumstances in order to ensure higher priority expenses are met.

The Junior Certificate Holders object to the reserves taken in this case as unsupported by the PSA and also, even if supported, as unauthorized by that language. For example, the Junior Certificate Holders object that the reserves in this case are unauthorized because they were created at the "pool-level." That is, the reserves were not tied to or taken from revenue generated by a specific loan – a so-called "loan-level" reserve. In this case, the loans relating to the reserves had been liquidated and were no longer generating revenue. Yet, the Trust's obligation to indemnify or to pay or reimburse is not tied only to assets or cash flows from assets remaining in the Trust. The Trust in this case was not obligated to pay only expenses from specific proceeds somehow tied to those expenses.[4] Those acting on behalf of the Trust are authorized to take "necessary or desirable" steps in connection with servicing and administration of the Trust as a whole. The PSA does not prohibit reserves that are unrelatable to or supported by funding from a specific Trust asset. Reserving general Trust funds may be both necessary and desirable.

In addition, the Junior Certificate Holders claim the reserves were improper because insufficient analysis was done to calculate anticipated expenses or liabilities and to determine

[4] Similarly, Cobalt also contends that the Stuy Town reserve violated the PSA because it was not funded by all five Stuy Town trusts. Yet, as special servicer for the Trust, CWCAM had a right of indemnification that ran to the Trust with the Trust having a right of reimbursement from the other four Trusts. The PSA did not require CWCAM to seek or obtain funding from the other four trusts. *See* Shelvin Tr. At 120.

whether the reserves were necessary. Yet, the evidence of record shows that CWCAM consulted with its counsel to estimate the required reserve amount, seeking an estimate of its exposure, past-payments, and going forward expenses. Iannarone Dep. Tr. at 80, 89, 93. The Junior Certificate Holders identify no other more accurate or reliable source of information that could have been consulted and, in any event, the Court notes that businesses routinely rely on counsel for such estimates in establishing reserves against litigation risk.

The Junior Certificate Holders also object that the reserves were unnecessary because the Trust had sufficient assets and cash flows to sustain its ongoing obligation and that insufficient analysis was done to determine whether the remaining cash flows would be sufficient to meet the Trust's obligations. Yet, no provision of the PSA requires such analysis, and, in any event, the Trust was not in a position to predict with any kind of certainty when remaining assets would be liquidated and whether remaining assets would generate sufficient future cash flow. In light of those facts, it was both desirable and necessary to take action to ensure sufficient cash flow to be able to meet its potential indemnification obligations.

Finally, the Junior Certificate Holders characterize the reserves as impermissible advances or as CWCAM expenses for which it is not entitled to indemnification. As to the impermissible advance argument, no funds were advanced to CWCAM. The Master Servicer set aside reserves in the Trust accounts that the Master Servicer and not CWCAM controlled. No funds would or could be distributed from those accounts until a loss, a liability, or an expense was incurred. There is a distinction between setting aside money for a purpose and actually paying money for that purpose. Setting aside a reserve is not an advancement of funds. *Cf. United States v. Weisman*, 1997 WL 539774 at 10 (S.D.N.Y. 1997)(advancement involves an extension of credit because the indemnified party actually receives the money). Under the PSA

"Servicing Advances" include "all customary, reasonable and necessary 'out of pocket' costs and expenses incurred by or on behalf of the Master Servicer, the Special Servicer, or the Trustee in connection with the servicing of a Mortgage Loan or a Companion Loan … or in connection with the administration of any related REO property." The reserves taken in this case are in no sense reimbursements to the Master Servicer or Special Servicer for "out of pocket" expenses incurred by them. The reserves are not reimbursements at all, but rather a retention of funds within the Trust against potential future expenses. The funds stood as a prudent set aside against CWCAM's potential future liability and the Trust's obligation to indemnify for that liability as well as against attorneys fees and litigation expenses. It may well be that in the event the reserves would be expended in a manner that would qualify them to be Servicing Advances under the PSA, but that does not transform the reserves into "Servicing Advances" at the time they were taken.

The Junior Certificate Holders spill considerable ink characterizing how the reserved funds would have been treated under the PSA if they had actually been expended for their reserved purpose. *See, e.g.*, Reply Memorandum in Support of Motion for Summary Judgment filed July 14, 2022, at 20-22 (Servicing Advances and not Additional Trust Fund Expenses); 22 (Stuy Town reserve is a Servicing Advance). But the reserve taken is not an incurred expense or a reimbursement, it is a contingency. The reserve functions to retain money within the Trust in order to meet potential future expenses. If those expenses are actually paid, they may become characterized under the PSA as Servicing Advances, Additional Trust Fund Expenses, or something else. The eventual characterization may have an impact on the distribution available to various classes of certificate holders at the time. The reserves do not, however, assume the character of an actual expenditure, reimbursement, or advance until they cease being properly

characterized as reserves. If, as in this case, a portion of the reserved funds is never actually expended for its reserved purpose, it will never become characterized under the PSA as some form of Trust expense but will instead become funds of the Trust available for distribution to certificate holders on the next distribution date.

As to the impermissible indemnification contention, the general indemnification obligation of section 6.03 of the PSA exempts any liability "which would otherwise be imposed by reason of misfeasance, bad faith, or negligence in the performance of obligations or duties hereunder or negligent disregard of such obligations and duties." The Junior Certificate Holders claim the reserve was somehow improper because CWCAM, the Special Servicer, ultimately engaged in conduct that would exempt it from indemnification under section 6.03. Yet, the purpose of this trust instruction proceeding is not to resolve any contest of rights between CWCAM and the Trust or the Junior Certificate Holders. The purpose is to determine whether the Master Servicer and the Special Servicer could appropriately set aside reserves. Whether Special Servicer CWCAM is ultimately found to be entitled to indemnification is a different question from whether it is necessary or desirable to set aside funds to cover litigation expenses and potential exposure.

In the final analysis, the Special Servicer and the Master Servicer had an obligation to ensure the Trust could meet its obligations going forward. Determining when establishment of reserves is prudent and necessary is left under the PSA to the Special Servicer and the Master Servicer.[5] The check the PSA provides on the exercise of that authority is that it provides certain

[5] The Trustee contends, and the Court agrees, that section 7.05 of the PSA is inapplicable. The section only applies "during the continuance of an event of default." The Court has found, *supra*, that establishing a reserve did not violate the PSA and therefore does not constitute an event of default, continuing or otherwise. Moreover, even if that were not the case, the last sentence of section 7.05 provides that "Under no circumstances shall the rights provided to the Trustee under this Section 7.05 be construed as a duty or obligation of the Trustee." Thus, establishing the reserve, even if considered an Event of Default, triggered no duty or obligation on the part of the Trustee to take any action to protect the interests of or to enforce the rights and remedies of certificate holders.

certificate holders the ability to remove and replace the Special Servicer. The Court notes that, in this case, such removal and replacement actually occurred, but that the replacement Special Servicer, C-III, took no immediate action in eliminating the reserves, strongly suggesting to the Court that CWCAM's initial judgment that the reserves were necessary and supported under the PSA.

In short, establishing the reserves was within the authority of the Master Servicer and Special Servicer under the PSA. It did not constitute an event of default. The Trustee has satisfied any and all applicable duties of the Trustee under the PSA in connection with the reserved amounts and shall not be subject to liability relating to the reserved amounts.

**II.**

The Junior Certificate Holders also contend they are entitled to the remainder of the reserved Trust funds. More specifically, they contend that the creation of the litigation reserves triggered an Event of Default under section 7.01(a)(i) of the PSA. The section says that an Event of Default occurs when there is a failure by the Master Servicer to either "deposit into the Certificate Account" or "remit to the Paying Agent for deposit into the Distribution Account" any amount "required to be so deposited or remitted by it under this Agreement." The Junior Certificate Holders, therefore, view the clawback creating the reserves to have been an Event of Default that should be remedied by directing "the Trustee, the Master Servicers, and/or the Paying Agent immediately distribute all available amounts to the affected junior certificateholders until they are repaid in full on the $38 million improperly diverted from them to the December 2018 reserves." Junior Certificate Holders' Memorandum in Support of Summary Judgment filed May 5, 2022, at 63. Yet, the as Court has found *supra*, the clawback and establishment of the litigation reserves was authorized under the PSA. The funds held in

reserve were not funds the Master Servicer was required to either deposit into the Certificate Account or to remit to the Paying Agent under the PSA. There is simply no Event of Default to remedy and no duty on the part of the Trustee with respect to an Event of Default to act.

It is also true that proceedings under the Minnesota trust instructions statutes are equitable in nature and that the statutes allow courts to fashion remedies they feel are "appropriate." *See* Minn. Stat. §501C.0204(1)("Upon the hearing of a petition under the district court's in rem jurisdiction, the Court shall make an order it considers appropriate.") Thus, the Court likely possesses authority to put certificate holders in a position they would have been absent an improper distribution. *See, e.g., In re RIJ Revocable Trust Agreement Dated March 16, 2006*, 2014 WL 684698 at 6 (Minn. App. 2014).

In this case, however, there was nothing inappropriate or improper in the actions of the Special Servicer in issuing the officer's certificate or in the actions of the Master Servicer in relying upon the officer's certificate and establishing reserves in the amount of $38 million through clawback of funds previously distributed. Junior Certificate Holders knew or should have known they purchased shares in a Trust with indemnification obligations and other expenses and that those obligations and expenses carried a higher priority than distributions to certificate holders. Junior Certificate Holders also knew that the PSA allocates realized losses on trust assets to certificates in ascending order of priority with the losses allocated to the most junior certificates with an outstanding balance first until the principal balance of those junior certificates is zero. In other words, setting aside reserves to meet likely Trust expenses would cause both a reduction in the funds distributed to the certificate holders and would increase the likelihood that allocation of realized losses would reduce the principal balance of certain junior

certificates to zero, reducing the chances of receiving future distribution of previously reserved Trust funds.

In summary, the structure of the Trust, the documents establishing and regulating it, and the certificate priority allowed for reserves to be taken as in this case. Equity should not intervene to restructure a highly structured transaction to award the Junior Certificate Holders Trust funds to which they were never entitled.

**ORDER**

1. The motions of the Junior Certificate Holders, Torchlight Value Fund, LLC, Torchlight Debt Opportunity Fund II LLC, and Cobalt Vr. Ltd., for summary judgment are DENIED.
2. The motions of Senior Certificate Holders, DW Partners LP, Palomino Master Ltd., and Azteca Partners LLC, for summary judgment are GRANTED.
3. Petitioner in 62-TR-CV-19-19, U.S. Bank National Association, shall file with the Court and serve upon the other parties, within 21 days, a proposed order relating to its petition (including award of any attorneys fees and costs associated with the petition) and consistent with this memorandum and order.
4. Petitioner in 62-TR-CV-19-33, Wells Fargo Bank, N.A., shall file with the Court and serve upon the other parties, within 21 days, a proposed order relating to its petition (including award of any attorneys fees and costs associated with the petition) and consistent with this memorandum and order.
5. Any party wishing to object to the proposed orders of Petitioners must do so by filing any objections and the basis therefore, not to exceed 15 pages in length, within 14 days of Petitioners' filings with the Court.

BY THE COURT:

Dated: _____

Diamond, Patrick (Judge)
Oct 26 2022 11:29 AM

Patrick C. Diamond
Judge of District Court