SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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CWCAPITAL INVESTMENTS LLC and GALAXY ACQUISITION LLC,

Plaintiffs,

- v -

CWCAPITAL COLBALT VR LTD., OCH-ZIFF CAPITAL MANAGEMENT GROUP LLC, OZ MANAGEMENT L.P., OZ MASTER FUND, LTD., OZ ENHANCED MASTER FUND, LTD., OZ CREDIT OPPORTUNITIES MASTER FUND, LTD., OZ GC OPPORTUNITIES MASTER FUND, LTD., OZSC, L.P., CARBOLIC, LLC, OCH-ZIFF HOLDING CORPORATION, and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Defendants.

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INDEX NO. 652092/2018

MOTION DATE

MOTION SEQ. NO. 023 024 026

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 023) 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 662, 669, 745, 746, 747, 748, 749, 750, 751, 752, 770, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 868, 870, 871, 873, 874, 879, 881, 893, 894, 902, 908, 910

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 024) 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 663, 670, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 753, 754, 771, 863, 864, 865, 866, 867, 880, 895, 896, 900, 901, 909

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 026) 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 755, 756, 757, 758, 759, 760, 761, 762, 764

were read on this motion to/for PRECLUDE.

Plaintiff CWCapital Investments LLC (CWCI or Collateral Manager) brought this action in connection with a 2007 collateralized debt obligation (CDO) for which it was the collateral manager. The sole remaining claim in this action following defendants' motions to dismiss is the second cause of action, to the extent it is for breach of contract against the CDO's issuer, defendant CWCapital Cobalt VR Ltd. (Cobalt or Issuer).[1] (NYSCEF 236, September 23, 2019 Order;[2] NYSCEF 272, Appellate Division, First Department, April 9, 2020.) CWCI alleges in the amended complaint that Cobalt breached "Section 1 of the Collateral Management Agreement and Sections 7.11 and 7.16 of the Indenture" by exercising CWCI's "exclusive right to designate the [Controlling Class Representative (CCR)] and/or Directing Holder and to exercise any CCR Rights or Voting Rights with respect to the Collateral Debt Securities held by the CDO." (NYSCEF 87, amended complaint ¶ 177.)

CWCI (mot seq no. 023) and Cobalt (mot seq no. 024) now move for summary judgment. CWCI also moves to preclude the testimony of Matthew Tuten and Blair Wallace (mot seq no. 026.)

The prior decisions in this action provide a detailed background of the dispute. As such, the court presumes familiarity with the case and provides only a brief

[1] The OZ defendants were dismissed. (NYSCEF 878, August 10, 2024 Supplemental Order directing amendment of caption which has yet to be done); NYSCEF 272, April 9, 2020 Order; See *CWCapital Investments LLC v CWCapital Cobalt VR Ltd*., 182 AD3d 448 [1st Dept 2020].) The action was discontinued against Merrill Lynch, Pierce, Fenner & Smith Inc. (NYSCEF 210, January 25, 2019 Notice of Partial Discontinuance.)

[2] The court dismissed Galaxy from the Second Cause of Action. (NYSCEF 236, September 23, 2019 Order.) Plaintiffs did not appeal. (See *CWCapital Investments LLC v CWCapital Cobalt VR Ltd*., 182 AD3d 448, n. 2 [1st Dept 2020].)

statement of the facts as necessary for these motions. Any capitalized terms not defined are defined in, and are adopted from, the prior decisions.

I. Background

The CDO is governed by: (1) the Amended and Restated Indenture (Indenture [NYSCEF 583]), dated April 19, 2010, between Cobalt, as Issuer, and Wells Fargo Bank, N.A., as trustee (Trustee); and (2) the Collateral Management Agreement (CMA [NYSCEF 539]), dated November 16, 2007, between Cobalt, as Issuer, and CWCI, as Collateral Manager.

Pursuant to the Indenture, Cobalt "grant[ed] to the Trustee on behalf of and for the benefit and security of the Secured Parties . . . a continuing lien on, and security interest in, all the property of the Issuer, . . . the 'Collateral'," including "(a) the Collateral Debt Securities" and the "(e) Issuer's rights under the [CMA]." (NYSCEF 583, Indenture at 1-2, Granting Clause). As part of the Trustee's security interest in the CMA, Cobalt also assigned all of its rights under the CMA, including "the right to give all notices of termination and to take any legal action upon the breach of an obligation of the Collateral Manager" and "the right to do any and all other things whatsoever that the Co-Issuers is or may be entitled to do thereunder." (*Id.* § 15.01[a][i][iv].) The Trustee, then, granted Cobalt "a license to exercise all of [Cobalt's] rights pursuant to the [CMA]." (*Id.* [a][iv].) This license would "be automatically revoked upon the occurrence of an Event of Default." (*Id.*)

The Indenture contains numerous "covenants and agreements," all of which Cobalt made "for the benefit and security of the Secured Parties and the Trustee." (*Id.* at 1, Preliminary Statement.) "Secured Parties" is defined as, "[c]ollectively, the

Trustee, the Noteholders, . . . and the Collateral Manager." (*Id.* § 1.01 at 25.) The covenants that are pertinent here are as follows:

> "Section 7.11 Negative Covenants
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> ***
>
> "(b) Neither [Cobalt] nor the Trustee shall sell, transfer, exchange or otherwise dispose of Collateral, or enter into or engage in any business with respect to any part of the Collateral except as expressly permitted or required by this Indenture and the Collateral Management Agreement.
>
> ***
>
> "Section 7.15 No Other Business. [Cobalt] shall not engage in any business or activity other than issuing and selling the Notes pursuant to this Indenture, . . . and acquiring, owning, holding, selling, pledging, contracting for the management of and otherwise dealing with Collateral Debt Securities and other Collateral in connection therewith and such other activities which are necessary, required or advisable to accomplish the foregoing . . . .
>
> "Section 7.16 Compliance with Contractual Obligations. The Issuer agrees to perform all actions required to be performed by it, and to refrain from performing any actions prohibited under, the Collateral Management Agreement . . . ." (*Id.* §§ 7.11 [b], 7.15, 7.16 at 85 and 87.)

Pursuant to the CMA, CWCI was "appointed as the Issuer's exclusive agent to provide the Issuer with certain services in relation to the Collateral." (NYSCEF 539, CMA § 1.) The CMA contains an extensive list of "Management Services" that CWCI was to provide, including:

> "(r) exercising or waiving the rights, if any, of the Holder of any Class of Notes to (i) appoint or act as the 'controlling class representative' or 'directing holder' or 'operating advisor' or in similar capacity to terminate and/or appoint the special servicer or direct or consent to actions of the special servicer or the master servicer to the extent permitted by the applicable Underlying Instrument ('Control

> Rights'), or (ii) with respect to any Collateral Debt Security, the right to vote on, consent to or approve certain matters with respect to such Collateral Debt Security and/or the related Underlying Instrument ('Voting Rights"') on behalf of the Noteholders and the Trustee and, as it deems necessary, directing the Trustee with respect to the exercise or waiver of such Control Rights or Voting Rights on behalf of the Noteholders . . . ." (*Id.*)

Notably, "Underlying Instruments" is defined to include "[t]he pooling and servicing agreements . . . underlying the Collateral Debt Securities." (NYSCEF 583, Indenture at 27 [defining "Underlying Instruments"]; *see also* NYSCEF 539, CMA at 1 [stating that "(c)apitalized terms used [in the CMA] but not otherwise defined . . . shall have the respective meanings ascribed thereto in the Indenture"].) The PSAs set forth the terms for the operation of the subject CMBS Trusts, which issued the CMBS Bonds that form the CDO's collateral. (NYSCEF 87, amended complaint ¶¶ 57-58.) The PSAs for the five CMBS Trusts at issue each provide for the manner in which the CCR is to be selected. (S*ee* NYSCEF 623, C30 PSA § 3.25 [a] [stating that "the Holders (… or Certificate Owners) of Certificates representing more than 50% of the Class Principal Balance of the Controlling Class" have the power to select the CCR]; NYSCEF 636, C17 PSA § 3.25 [a] [same]; NYSCEF 637, C2 PSA at 32, 35 [stating that the Directing Holder is "the person selected by the Controlling Class Representative," which is "the Holder or Holders of greater than 50% of the Voting Rights assigned to the Controlling Class]; NYSCEF 638, C3 PSA at 26, 29 [same]; NYSCEF 639, LP5 PSA at 39 [stating that the CCR is "[t]he Controlling Class Certificateholder or its designee selected by more than 50% of the Controlling Class Certificateholders, by Certificate Balance"]).

In its role as the Collateral Manager, CWCI exercised Cobalt's control rights to appoint itself the CCR. Specifically, in notices appointing itself the CCR with respect to

each CMBS Trust, CWCI explained that it was doing so by virtue of Cobalt being the "the sole Controlling Certificateholder under the [subject] PSA." (*See e.g.* NYSCEF 630, March 10, 2010 notice appointing CCR for C30 Trust; NYSCEF 631, notice appointing CCR for, among others, (NYSCEF 635) C17 Trust, (NYSCEF 633) C2 Trust and LP5 Trust.)

In furtherance of the various "Management Services" the Collateral Manager was to provide, the CMA "appoint[ed] the Collateral Manager the Issuer's true and lawful agent and attorney-in-fact, with full power of substitution and full authority in the Issuer's name, place and stead and without any necessary further approval of the Issuer." (NYSCEF 539, CMA at 5/29.[3]) The power of attorney remained effective "until revoked by the Issuer in writing by virtue of the termination of this Agreement pursuant to Section 11." (*Id.*)

Pursuant to the CMA's termination provision, the Issuer could remove the Collateral Manager "for Cause . . . upon thirty (30) days' prior written notice at the direction of . . . (A) the Holders of at least 66-2/3% of the Aggregate Outstanding Amount of each Class of Notes . . . , and (B) the Holders of a majority of the Preferred Shares . . . ." (*Id.* § 11(a).) Notably, the CMA provides that "termination of the Collateral Manager will be automatic without any vote of the Holders or any notice required to be given to the Collateral Manager" only if the Collateral Manager becomes bankrupt. (*Id*.)

In June 2017, the CDO failed to make principal and interest payments and an event of default under the Indenture occurred. (NYSCEF 537, affirmation of Guangyu

[3] NYSCEF pagination.

Zhu[4] ¶¶ 11-12.) The default was never cured and the Trustee informed Cobalt of this fact in April 2018. (*See* NYSCEF 540, email from Trustee at Cobalt 00034392, 00034401.)

On April 20, 2018, Cobalt issued the Notice Letters, purporting to remove CWCI as the CCR and designating Carbolic LLC (Carbolic) as CWCI's replacement for the five CMBS Trusts at issue. (S*ee* NYSCEF 594-598, Notice Letters.) CWCI commenced this action on April 30, 2018. (NYSCEF 1, summons and complaint.)

On June 28, 2018, Cobalt commenced a related action, *CWCapital Cobalt Vr Ltd. v CWCapital Invs. LLC* (Sup Ct, NY County, June 28, 2018, index No. 653277/2018) (Related Cobalt Action), alleging that CWCI had engaged in self-dealing, by diverting hundreds of millions of dollars to its affiliates that should have gone to Cobalt. One of the claims sought a declaration that the appointment of Carbolic was valid and effective (Count VI) and another sought to permanently enjoin defendants to recognize Carbolic and to refrain from selling assets (Count VII). In connection with those claims, Cobalt moved for a preliminary injunction to prevent CWCI and its affiliate, CWCA, from selling certain commercial. In support of its contention that it had the authority to appoint a CCR, Cobalt directed the court to the briefs in support of the motions to dismiss in the instant action, even though those motions had not been fully briefed at that time. By decision and order dated July 31, 2018, this court declined the invitation and denied the motion for injunctive relief, in part, due to Cobalt's failure to establish likelihood of success on the merits. (*See* Related Cobalt Action, NYSCEF 96, decision and order denying preliminary injunction.)

[4] Zhu is CWCI's Managing Director ¶5.

The Notice Letters were never given effect. (*See* NYSCEF 142, Trustee's notice of dispute concerning the CCR). Cobalt withdrew the Notice Letters on January 2, 2019, explaining that CWCA had completed the disputed asset sales and that this led to the write down of three of the five CMBS Trusts and eliminated any of the control rights that Cobalt purported to act upon under the related PSAs. (NYSCEF 609, Cobalt's withdrawal of CCR notice.)

By decision and order dated January 22, 2019, the Appellate Division, First Department affirmed the denial of the preliminary injunction in the Related Cobalt Action, finding that Cobalt "did not establish a likelihood of success on the merits, because, even without addressing the various questions surrounding plaintiff's authority under the agreements, it did not take the requisite steps to remove and replace respondents as control class representative and special servicer under the indenture and collateral management agreement." (*CWCapital Cobalt VR Ltd. v CWCapital Invs. LLC*, 168 AD3d 567, 567-568 [1st Dept 2019].)

By stipulation dated February 1, 2019, Cobalt voluntarily discontinued with prejudice Counts VI and VII against CWCI and CWCA in the Related Cobalt Action. (Related Cobalt Action, NYSCEF 177.)

During discovery in this action and the Related Cobalt Action,[5] CWCI learned of several indemnification agreements that financed Cobalt's litigation against CWCI and CWCA. Two of these agreements are relevant here. On November 28, 2017, Carbolic, an OZ Mgmt affiliate, as well as PIMCO Global Credit Opportunity Master Fund LDC,

[5] Discovery Referee, Hon. Steve M. Gold (retired), oversaw discovery in both actions. (*See* NYSCEF 848, mem and order on cross-motions to compel.)

PIMCO Horseshoe Fund, LP, LVS II LLC, and PIMCO Tactical Opportunities Master Pund Ltd. (collectively, PIMCO) entered into an indemnification agreement with Cobalt (the First Indemnification Agreement) to facilitate Cobalt's litigation against CWCA and CWCI "for breaches of contractual, fiduciary and other duties arising under, among other sources, the CMA." (NYSCEF 591, First Indemnification Agreement.) After Carbolic withdrew from the First Indemnification Agreement on May 26, 2020 (*See* NYSCEF 555, notice concerning Issuer litigation at 3), PIMCO entered into a new indemnification agreement with Cobalt (Second Indemnification Agreement, together with the First Indemnification Agreement, the Indemnification Agreements), dated July 1, 2020. (NYSCEF 541, Second Indemnification Agreement.)

CWCI also learned that Cobalt had instructed the Trustee not to reimburse CWCI and CWCA for their litigation costs. In a November 20, 2018 email to Cobalt, the Trustee inquired whether it should pay legal bills that CWCI and CWCA had submitted in connection with the Related Cobalt Action. (NYSCEF 605, Trustee's November 20, 2018 email at Cobalt 00033980 at 8/11[6].) By letter dated December 7, 2018, Cobalt informed the Trustee that CWCI and CWCA were not entitled to reimbursement under the CMA's indemnification provision, because the Related Cobalt Action alleged misconduct by CWCI and CWCA. (NYSCEF 604, Cobalt's December 7, 2018 letter.)

The CMA's indemnification provision states, in pertinent part as follows:

> "(b) The Collateral Manager shall indemnify, defend and hold harmless the Issuer and each of its partners, shareholders, members, managers, officers, directors, employees, agents, accountants and attorneys (each, an 'Issuer Indemnified Party') from and against any claims that may be made against an Issuer Indemnified Party by third

[6] NYSCEF pagination.

> parties and any damages, losses, claims, liabilities, costs or expenses (including all reasonable legal and other expenses) which are incurred as a direct consequence of the Collateral Manager Breaches, except for liability to which such Issuer Indemnified Party would be subject by reason of willful misconduct, bad faith, gross negligence in the performance of, or reckless disregard of the obligations of the Issuer hereunder and under the terms of the Indenture.
>
> "(c) The Issuer shall reimburse, indemnify and hold harmless the Collateral Manager, its members, directors, officers, stockholders, partners, agents and employees and any Affiliate of the Collateral Manager and its directors, officers, stockholders, partners, members, agents, employees, accountants and attorneys (the Collateral Manager and such other persons collectively, the 'Collateral Manager Indemnified Parties') from any and all Liabilities, as are incurred in investigating, preparing, pursuing or defending any claim, action, proceeding or investigation (whether or not such Collateral Manager Indemnified Party is a party) caused by, or arising out of or in connection with this Agreement, the Indenture and the transactions contemplated hereby and thereby, including the issuance of the Notes, or any acts or omissions of any Collateral Manager Indemnified Parties except those that are the result of Collateral Manager Breaches. . . ." (NYSCEF 539, CMA § 12 [b], [c].)

The indemnification provision also requires the indemnitee, whether it be the Issuer or the Collateral Manager, to take various steps, including giving the indemnitor notice of any claims, cooperating with indemnitor's requests and giving indemnitor an opportunity to participate in the investigation, defense or settlement of the claim. (*Id.* § 12 [d].)

II. Analysis

The parties dispute whether the Notice Letters constituted a breach of the Indenture the CMA. They also dispute whether CWCI is entitled to summary judgment on its newly asserted claims that Cobalt breached the Indenture by entering the

Indemnification Agreements and that it breached the CMA by refusing to reimburse CWCI for its litigation expenses in the Related Cobalt Action.

Under CPLR 3212, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted].) Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted. (*See id*.) "New York courts routinely grant summary judgment where … summary resolution may be determined as a matter of law based on the plain language of the operative contracts." (*CNY Residential LLC v 68-70 Spring Partners, LLC*, 2024 NY Slip Op 30176[U], *8 [Sup Ct, NY County 2024] [citations omitted].)

A cause of action for breach of contract requires a plaintiff to demonstrate "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." (*Harris v Seward Park Hous. Corp*., 79 AD3d 425, 426 [1st Dept 2010].)

A. Breach of Contract Based on Cobalt's Issuance of the Notice Letters

CWCI contends that it is entitled to summary judgment, because, pursuant to section 1 of the CMA and sections 7.11 (b), 7.15 and 7.16 of the Indenture, Cobalt did not have the authority to exercise any of its control rights or voting rights with respect to the Collateral Debt Securities. Instead, CWCI argues, these rights were exclusively delegated to CWCI. Additionally, CWCI claims that the Notice Letters breached the CMA's termination provision (section 11), because CWCI's authority to exercise these

rights could only be removed in conjunction with its termination as Collateral Manager. Finally, CWCI maintains that Cobalt had no authority to send the Notice Letters, as its license to act had been automatically revoked due to the June 2017 event of default.

Cobalt contends that it is entitled to summary judgment, because CWCI cannot demonstrate that a breach occurred. Cobalt argues that its assignment of rights to the Trustee and the Trustee's license back concerned the CMA only and, as such, its right to appoint a CCR pursuant to the PSAs was unaffected by the revocation of its license under the CMA. Additionally, it argues that nothing in the CMA or the Indenture prohibits it from acting on its own behalf rather than through its exclusive agent, CWCI. Cobalt maintains that the plain language of section 1 of the CMA grants CWCI an exclusive agency rather than an exclusive right and that section 7.15 of the Indenture permits Cobalt to engage in "activities which are necessary, required, or advisable" in connection with "owning" and "dealing with" the CMBS Bonds, which includes the exercise of investor rights such as appointing a CCR. Cobalt points to CWCI's notices, appointing itself the CCR through the exercise of Cobalt's control rights under the PSAs, as evidence of Cobalt's ability to do so as principal. Finally, it argues that it is entitled to summary judgment dismissing CWCI's breach of contract claim, because CWCI cannot demonstrate any damages, as the Notice Letters were revoked without ever becoming effective.

The interpretation of an unambiguous contract is a question of law for the court (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 192 [1st Dept 1995]), as is the determination of whether a contract is ambiguous. (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990].) "[A] contract is ambiguous when read as a whole, [it] fails to

disclose its purpose and the parties' intent, or when specific language is susceptible of two reasonable interpretations." (*Georgia Malone & Co., Inc. v E & M Assoc.*, 163 AD3d 176, 185 [1st Dept 2018] [internal quotation marks and citations omitted].) Where a contract is unambiguous, there "[is] no need for the court to resort to parol evidence." (*JPMorgan Chase Bank v Lowell*, 309 AD2d 541, 542 [1st Dept 2003].)

"[T]he best evidence of what parties to a written agreement intend is what they say in their writing." (*Banco Espírito Santo, S.A. v Concessionária Do Rodoanel Oeste S.A.*, 100 AD3d 100, 106 [1st Dept 2012] [internal quotation marks and citation omitted].) "[A]greements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one." (*1471 Second Corp. v NAT of NY Corp.*, 162 AD3d 449, 450 [1st Dept 2018] [internal quotation marks and citations omitted].) The writing must be read as a whole, as its "meaning . . . may be distorted where undue force is given to single words or phrases." (*Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003] [internal quotation marks and citation omitted].) Additionally, in construing a contract, courts must "give[] effect to each and every part, so as not to render any provision meaningless or without force or effect." (*Western & S. Life Ins. Co. v U.S. Bank N.A.*, 209 AD3d 6, 13 [1st Dept 2022] [internal quotation marks and citations omitted].)

As a initial matter, neither the denial of the preliminary injunction nor Cobalt's voluntary discontinuance with prejudice of its claims for declaratory and injunctive relief in the Related Cobalt Action has any res judicata or collateral estoppel effect on whether Cobalt breached the CMA and the Indenture when it sent the Notice Letters.

First, “the various questions surrounding plaintiff's authority under the agreements” were not addressed when the court denied the preliminary injunction. (*CWCapital Cobalt VR Ltd.*, 168 AD3d at 568; *see Residential Bd. of Managers of the Columbia Condominium v Alden,* 178 AD2d 121, 122 [1st Dept 1991] [stating that the “function (of a preliminary injunction) is . . . to maintain the status quo until there can be a full hearing on the merits” (internal citation omitted)].) Second, the voluntary discontinuance of claims here is not grounds for collateral estoppel, as the issue of Cobalt’s authority was not “necessarily decided in a prior proceeding” after a “full and fair opportunity to contest the issue.” (*Matter of Hofmann*, 287 AD2d 119, 123 [1st Dept 2001] [internal quotation marks and citation omitted]; *see Color by Pergament, Inc. v O'Henry's Film Works, Inc.*, 278 AD2d 92, 94 [1st Dept 2000] [holding that the plaintiff was not collaterally estopped after a voluntary discontinuance of claims with prejudice in a prior arbitration, as this “(did) not constitute an adjudication on the merits”].) Finally, this claim for breach of the CMA and Indenture against Cobalt is distinct from Cobalt’s claims for declaratory judgment and injunctive relief, based on its control rights under the PSAs. (*See Singleton Mgt., Inc. v Compere*, 243 AD2d 213, 216 [1st Dept 1998] [explaining that there could be no claim preclusion following settlement and discontinuance with prejudice by the plaintiff in the prior action, as the claims were “wholly separate and distinct”].)

Here, CWCI demonstrates that the issuance of the Notice Letters constituted a breach of the Indenture and the CMA.

Under the plain language of the Indenture, Cobalt cannot “enter into or engage in any business with respect to any part of the Collateral except as expressly permitted or

required by this Indenture and the [CMA]." (NYSCEF 583, Indenture § 7.11 [b].) Cobalt is bound by this negative covenant, regardless of its rights under the PSAs as the owner of the CMBS Bonds. Similarly, it is of no moment that the June 2017 event of default revoked only its license to act under the CMA and not the PSAs. Cobalt remained bound by the Indenture's negative covenant to refrain from action with respect to the Collateral unless expressly permitted or required under the Indenture or the CMA. Here, neither the Indenture nor the CMA expressly permits or requires Cobalt to appoint the CCR. When these documents are read together and in their entirety, as required (*Matter of Westmoreland Coal Co.*, 100 NY2d at 358; *1471 Second Corp.*, 162 AD3d at 450), that task is unambiguously reserved to the Collateral Manager.

Cobalt correctly notes that section 7.15 describes the business that it is permitted to engage in with respect to the Collateral and that this includes "activities which are necessary, required, or advisable" in connection with "owning, holding . . . and otherwise dealing with the Collateral Debt Securities" (NYSCEF 583, Indenture § 7.15; *see also id.* § 7.11 [a] [xiii] [stating that clause (xiii) does not expand Cobalt's ability "to engage in any business or activities other than those specified in Section 7.15"].) However, in concluding that this includes the appointment of a CCR, Cobalt overlooks section 7.16, which provides that Cobalt must "perform all actions required to be performed by it, and to refrain from performing any actions prohibited under, the [CMA]" (*Id.* § 7.16.) The CMA, in turn, appoints the "Collateral Manager . . . as the Issuer's exclusive agent to provide the Issuer with certain services in relation to the Collateral," including exercising the Issuer's Control Rights "to the extent permitted by the applicable Underlying Instrument" (i.e. the PSAs). (NYSCEF 539, CMA § 1 [r]; *see*

NYSCEF 583, Indenture at 27 [defining "Underlying Instruments" to include PSAs].)[7] When read together, these provisions make clear that Cobalt designated CWCI to exercise its control rights under the PSAs and that only CWCI could do so.

To this Cobalt responds that, in section 1 of the CMA, the term "exclusive" modifies the term "agent," not the list of services that follows. As such, Cobalt contends, this creates an exclusive agency rather than an exclusive right. Under this reading, Cobalt need not rely on CWCI to appoint a CCR and may do so on its own behalf. Cobalt also contends that, in so doing, it did not violate the CMA's termination provision, because the First Department has already held that defendants did not breach their promises not the remove CWCI as the Collateral Manger by appointing Carbolic as the CCR. The First Department explained that "the role of the CCR is separate and distinct from the function of the collateral manager" and that "the CMA itself lists a host of services that the collateral manager must provide, separate and apart from those related to the CCR" (*CWCapital Inves. LLC v CWCapital Cobalt VR Ltd.*, 182 AD3d 448, 451 [1st Dept 2020]).

However, simply because the Notice Letters did not breach the termination provision, as they did not remove CWCI as Collateral Manager, does not mean that they did not breach the CMA read as a whole. Cobalt's interpretation impermissibly places

[7] In its decision and order dated September 23, 2019, the court noted the existence of "gaps in the applicable provisions and agreements," such as "the absence of any reference to formal procedures under the Indenture or CMA for resolving a conflict between the CCR/Special Servicer authorized by the Collateral Manager and a CCR appointed by interest holders with sufficient control rights" (NYSCEF 236, Sept. 23, 2019 decision and order at 10-11, 11 n 5). Upon a closer reading of the CMA, there is no ambiguity here, as the Collateral Manger's ability to appoint a CCR exists only "to the extent permitted by the applicable Underlying Instrument." (NYSCEF 539, CMA § 1 [r]).

undue emphasis on the phrase "exclusive agent" and renders section 11 meaningless. (*Matter of Westmoreland Coal Co.*, 100 NY2d at 358; *Western & S. Life Ins. Co.*, 209 AD3d at 13). Under this reading, Cobalt can simply sideline the Collateral Manager by choosing to exercise its principal's rights with respect to any and all of the "Management Services" listed in section 1. If this was the intention of the parties, it is unclear why section 11 makes the removal of the Collateral Manager so onerous. Termination must be for cause, with 30 days' prior written notice and requires the consent of at least two-thirds of the aggregate outstanding amount of the CDO Notes and a majority of the preferred shareholders. (NYSCEF 539, CMA § 11.) What is more, nothing in the CMA indicates that the Issuer may perform the duties of the Collateral Manger upon termination of the Collateral Manager. Rather, the CMA provides extensively for the prompt appointment of a Replacement Manger (*id.* § 11 [c]-[e]) and that "[n]o removal, termination or resignation of the Collateral Manager or termination of this Agreement shall be effective unless . . . [a Replacement Manager] has been appointed by the Issuer and has agreed in writing to assume all of the Collateral Manager's duties and obligations pursuant to this Agreement." (*Id.* § 11 [c].) In short, when read in its entirety, the CMA makes clear that the appointment of the CCR is reserved exclusively to the Collateral Manager.

Cobalt's attempts to demonstrate that its appointment of a CCR is consistent with other provisions of the CMA and the Indenture are equally unpersuasive. While some of the services that the Collateral Manger was required to provide involved "assisting" Cobalt (*see id.* § 1 [l], [o]), indicating that Cobalt was not entirely passive, there is no indication that Cobalt was expected to have any role in appointing a CCR. Likewise,

while Cobalt "agree[d] not to authorize or otherwise to permit (i) the Collateral Manager to act in contravention of its representations, warranties and agreements under the [CMA]" (NYSCEF 583, Indenture § 7.16) and to "use its best efforts to cause the Collateral Manager . . . to perform, all of its obligations and agreements contained in the [CMA]" (*id.* § 7.09 [b]), this did not require Cobalt to act in contravention of the Indenture and the CMA by assuming responsibilities contractually reserved for the Collateral Manger. For example, Cobalt could have pursued termination pursuant to section 11 of the CMA or, as it has in the Related Cobalt Action, pursued relief in court.

Finally, Cobalt's reliance on *Morpheus Capital Advisors LLC v UBS AG* (23 NY3d 528 [2014]) is misplaced. In *Morpheus*, the court held that a contract, providing for financial advisor and investment banking services in connection with the sale of certain assets, at most, created "an exclusive agency," because there was neither "an unequivocal expression of intent by its own terms or by necessary implication from its terms" to exclude the owner from his "inherent right" to dispose of his own property. (*Id.* at 535 [internal quotation marks and citation omitted].) Here, as discussed above, the Indenture and the CMA make clear that Cobalt's ability to act with respect to the Collateral is expressly limited. Moreover, unlike in *Morpheus*, Cobalt's rights with respect to the CMBS Bonds are necessarily curtailed "for benefit and security of the Secured Parties." (NYSCEF 583, Indenture at 1, Preliminary Statement, Granting Clause.)

For the foregoing reasons, Cobalt's issuance of the Notice Letters constitutes a breach of section 1 of the CMA and sections 7.11(b) and 7.16 of the Indenture.

Because Cobalt withdrew the Notice Letters without them ever being given effect (*see* NYSCEF 609, January 19, 2019 Letter), CWCI is unable to demonstrate damages flowing from this breach. However, this court has already explained that the lack of damages is not grounds for dismissal of the claim, "as '[n]ominal damages are always available in breach of contract actions' to, at least, vindicate a nonbreaching party's contractual rights." (NYSCEF 236, Sept. 23, 2019 decision and order at 15, quoting *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95-96 [1993]; *see NGM Mgt. Group, LLC v Bareburger Group, LLC*, 224 AD3d 600, 602 [1st Dept 2024] [denying summary judgment on a breach of contract claim, where there was a breach but "plaintiffs suffered no damages"].)

Accordingly, to the extent CWCI seeks summary judgment for breach of the CMA and the Indenture based on the Notice Letters, the motion is granted. Cobalt's motion for summary judgment is denied.

B. Additional Breaches of the Indenture and the CMA

CWCI also seeks summary judgment on claims for breaches of the Indenture and the CMA that it learned of during discovery, namely, that Cobalt: (1) executed the First Indemnification Agreement; (2) executed the Second Indemnification Agreement; and (3) instructed the Trustee not to reimburse CWCI's defense costs and fees in the Related Cobalt Action.

The parties dispute whether CWCI is entitled to raise these claims on summary judgment, as it failed to amend the amended complaint to include them. As concerns the merits of these claims, the parties dispute whether: (1) the Indemnification Agreements violated various provisions of the Indenture; (2) Cobalt was permitted to

enter into the Indemnification Agreements when it was in default; and (3) the alleged breaches resulted in recoverable damages. The parties also dispute whether section 12 (c) of the CMA contemplates indemnification of intraparty claims and whether CWCI may seek indemnification prior to any resolution of the Related Cobalt Action.

"[T]he general rule is that summary judgment will not be granted based upon a cause of action or a defense that has not been pleaded" (*Moscato v City of New York (Parks Dept.)*, 183 AD2d 599, 601 [1st Dept 1992] [internal citation omitted]; *see Demetriades v Royal Abstract Deferred, LLC*, 159 AD3d 501, 503 [1st Dept 2018], lv denied 32 NY3d 1191 [2019].) However, "it is also true that summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice" (*Weinstock v Handler*, 254 AD2d 165, 166 [1st Dept 1998] [internal citation omitted]; *see Alonso v Reed Elsevier, PLC*, 187 AD3d 427, 429 [1st Dept 2020]).

Here, the claims concerning the Indemnification Agreements are raised for the first time on the motion for summary judgment. Nothing in the amended complaint or the parties' discovery indicates that Cobalt was on notice of CWCI's intention to assert a claim for breach of the Indenture based these agreements or that Cobalt had meaningful discovery on those claims. On the contrary, it appears that these agreements were raised exclusively in connection with CWCI's affirmative defenses in the Related Cobalt Action. (*see* NYSCEF 854, Jan. 21, 2022 tr of cross-motions to compel at 215:19-217:6 [Judge Gold stating that the Second Indemnification Agreement, much like the three previously produced indemnification agreements, is relevant to whether PIMCO is controlling the litigation, which relates to CWCI's

affirmative defenses]; NYSCEF 850, Jan. 28, 2022 tr of cross-motions to compel at 275:20-276:5; 276:18-277:13 [Cobalt stating that it produced the Second Indemnification Agreement, but vehemently denying that the agreement supports CWCI's unclean hands or estoppel arguments]; NYSCEF 848, mem and order on cross-motions to compel at 27 [discussing how PIMCO's involvement in the litigations is relevant to CWCI's affirmative defenses to Cobalt's claims].) As the Indemnification Agreements have never been part of this litigation, CWCI may not raise these unpleaded claims for the first time on summary judgment. (*See Valentine v 2147 Second Ave. LLC*, 203 AD3d 531, 531 [1st Dept 2022] [affirming denial of summary judgment, where "plaintiff had never properly asserted the claim"]; *cf Monaco v New York Univ.*, 204 AD3d 51, 64 [1st Dept 2022] [agreeing that a breach of contract claim was not a new theory raised for the first time on summary judgment, "because the parties had litigated the merits of this claim extensively throughout the course of (the) litigation"].)

In any event, the only damages that CWCI seeks in connection with these claims is its litigation expenses in the Related Cobalt Action. (*See* NYSCEF 868, CWCI reply brief at 11-12; NYSCEF 590, affirmation of Bruce Cunningham ¶¶ 3, 4]). As the First Department has already explained, such damages are not recoverable. (*CWCapital Inves. LLC*., 182 AD3d at 453-454.)

As concerns CWCI's claim that Cobalt instructed the Trustee to refuse reimbursement of CWCI's litigation expenses in the Related Cobalt Action, Cobalt has been on notice of this claim for some time. In its brief in support of its motion to compel, CWCI expressly stated that it had uncovered evidence that "further supports CWCI's

damages claims with respect to Count 2 (claim for breach of the CMA)," explaining that Cobalt's instruction to the Trustee not to reimburse CWCI breached section 12 (c) of the CMA's "clear and unambiguous language . . . entitling CWCI to indemnification." (NYSCEF 849, CWCI's brief in support of motion to compel at 7-8). CWCI repeated this position during the argument on the motion. (NYSCEF 850, Jan. 28, 2022 tr of cross-motions to compel at 373:19-374:1 [stating that "the nonpayment of reimbursement of CWCI's legal fees at the instruction of Cobalt is right at one of (CWCI's) claims" and that "(CWCI was) seeking recovery of damages for that"].) In his memorandum and order dated March 9, 2022, resolving the motion to compel, Judge Gold summarized CWCI's claims, stating that CWCI "contend[s] that Cobalt breached the [CMA] by attempting to replace CWCI as CCR . . . and by directing the Indenture Trustee not to reimburse CWCI for legal fees incurred in connection with these pending lawsuits." (NYSCEF 848, mem and order on cross-motions to compel at 4.) CWCI also provided an amended and supplemented response to Cobalt's interrogatories, dated August 30, 2021, identifying the documents in which Cobalt instructed Wells Fargo to deny CWCI's request for reimbursement. (NYSCEF 851, amended and supplemented response by CWCI to Cobalt's interrogatories at 10 -11 [identifying documents Cobalt 00033974, Cobalt 00033982 and Cobalt 00026554 (NYSCEF 604, 605), among others, which contained instruction not to reimburse CWCI].) Moreover, Cobalt has had an opportunity to conduct discovery "concerning legal fees or costs incurred by CWCI as the Collateral Manager in [the Related Cobalt Action], including the amounts of those fees that were reimbursed and the source of the reimbursement." (NYSCEF 852, notice of deposition on CWCI in the Related Cobalt Action at 9.) As there is no surprise or

prejudice to Cobalt, the court considers the indemnification claim. (*see Weinstock*, 254 AD2d at 166.)

The Court of Appeals has rejected the notion "that broadly worded indemnification provisions by their nature are intended to cover attorney's fees in direct party actions," as "the indemnity clause must be strictly construed to avoid reading into the contract a duty which the parties did not intend to be assumed" and the indemnification of direct party claims is contrary to the American Rule, which states that parties are responsible for their own attorney's fees. (*Sage Sys., Inc. v Liss*, 39 NY3d 27, 31-32 [2022] [interna quotation marks and citations omitted].) The "Court's exacting standard [requires] that the agreement must contain 'unmistakably clear' language of the parties' intent to encompass such actions." (*Id.* at 31, quoting *Hooper Assoc. v AGS Computers, Inc.*, 74 NY2d 487, 492 [1989].)

Here, the plain language of section 12 (c) does not provide for indemnification of intraparty claims. Section 12 (c) of the CMA provides that the Issuer will indemnify the Collateral Manger "from any and all Liabilities, as are incurred in investigating, preparing, pursuing or defending any claim, action, proceeding or investigation . . . caused by, or arising out of or in connection with this Agreement, the Indenture and the transactions contemplated hereby and thereby." (NYSCEF 539, CMA § 12 [c].) This language echoes the broad indemnification clause in *Hooper*, which was found to contain nothing that was "exclusively or unequivocally referable to claims between the parties themselves or [to] support an inference that defendant promised to indemnify plaintiff for counsel fees in an action on the contract." (*Hooper Assoc., Ltd.*, 74 NY2d at, 492 [1989].) The additional provisions of section 12 (d)— requiring the indemnitee,

among other things, to give written notice to the indemnitor of any claim (NYSCEF 539, CMA § 12 [d] [i]) and to afford the indemnitor the opportunity "to participate in the investigation, defense and settlement of such claim" (*id.* § 12 [d] [iv])— also mirror the provisions that the court in *Hooper* found to be contrary to an intention to indemnify intraparty claims. The court explained that to hold otherwise "would render these provisions meaningless because the requirement of notice and assumption of the defense has no logical application to a suit between the parties." (*Hooper Assoc.*, 74 NY2d at 492-493; *see Needham & Co., LLC v UPHealth Holdings, Inc.*, 212 AD3d 561, 561-562 [1st Dept 2023] [finding no explicit requirement to indemnify intraparty claims, where the contract required "indemnitee . . . to give the indemnitor . . . notice of any action for which it (sought) indemnification, and permit(ed) the indemnitor to assume the indemnitee's defense"].) Therefore, nothing in section 12 (c) or the CMA read as a whole makes it explicitly clear that the parties intended to indemnify the Collateral Manager for claims brought by the Issuer.

To the extent that CWCI contends that the parties' intention to indemnify it for all claims, including intraparty claims, is made clear by the breadth of its right to indemnification for "any claim" (NYSCEF 539, CMA § 12 [c]), as compared to the more limited right to indemnification that Cobalt has for claims brought by "third-parties" (*id.*§ 12 [b]), this is a misreading on section 12 (b). Section 12 (b) does not limit Cobalt to indemnification against third-party claims. Rather, it provides for indemnification "from and against *any claims* that may be made . . . by third parties ***and*** *any* . . . *claims*, liabilities, costs or expenses (including all reasonable legal and other expenses) which

are incurred as a direct consequence of the Collateral Manager Breaches." (*Id.* § 12 [b] [emphasis added].)

Consequently, CWCI is not entitled to indemnification of its attorneys' fees and costs in the Related Cobalt Action.

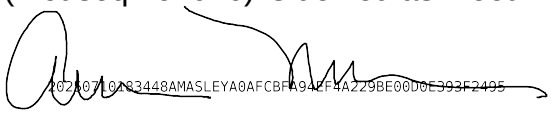
Based on the foregoing, the court does not address the parties' remaining contentions and the case is dismissed. Likewise, CWCI's motion to preclude the testimony of Matthew Tuten and Blair Wallace, (mot seq no. 026) is moot, but will be addressed in the Related Cobalt Action.

Accordingly, it is hereby

ORDERED that the defendant's motion for summary judgment (mot seq no. 024) is denied; and it is further

ORDERED that the plaintiff's motion for summary judgment (mot seq no. 023) on the second cause of action is granted, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the sum of $1 in nominal damages with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that CWCI's motion to preclude (mot seq no. 026) is denied as moot.



7/10/2025
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[X]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**