

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

DEUTSCHE BANK AG,

Plaintiff,

v.

BANK OF AMERICA, N.A.,

Defendant.

Civil Action No. 09-CV-9784-RWS

**DEUTSCHE BANK'S MEMORANDUM OF POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

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Deutsche Bank AG (“**DB**”) respectfully submits this Memorandum of Points and Authorities in Opposition to the Motion to Dismiss DB’s First Amended Complaint (the “**FAC**”) filed by Bank of America, N.A. (“**BoA**”).<sup>1</sup>

## **I. INTRODUCTION**

This is a breach of contract case between two sophisticated financial institutions. DB alleges that BoA failed to perform its contractual obligations as an indenture trustee/collateral agent/custodian/depository agent for a mortgage-backed commercial paper facility known as Ocala Funding LLC (“**Ocala**”) in which DB invested approximately \$1.2 billion. FAC ¶ 4. DB alleges that BoA had actual knowledge that Ocala’s sponsor, Taylor, Bean & Whitaker Mortgage Corp. (“**TBW**”), was draining Ocala’s funds for purposes unrelated to the purchase of mortgages in violation of the Ocala facility documents and that Ocala had long been rendered insolvent as a result. FAC ¶¶ 134-59. DB alleges that BoA failed to notify DB of these defaults or potential defaults as required by the Ocala facility documents. FAC ¶¶ 20, 67-71, 103-04.

BoA does not dispute that it was required to provide such notice, but instead asserts that exculpatory provisions relieve it from any liability for breach of this requirement. In particular, BoA claims that the Ocala facility documents provide that it is not liable for breach of its obligation to notify DB unless BoA was first provided formal written notice of default by TBW/Ocala or DB itself. BoA thus argues that protections the Ocala facility documents provided DB with one hand, they took away with the other.

BoA reaches this perverse result by conflating the standards that apply to trustees before and after events of default. In an attempt to nullify the effects of its pre-event of default contractual obligation to notify DB of *potential* defaults, BoA erroneously relies on an exculpatory provision

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<sup>1</sup> Citations to exhibits (“Ex.”) are to the Declaration of Richard St. John dated April 30, 2010, submitted by BoA.

that expressly applies only *after* an actual event of default has occurred. With respect to its post-event of default obligations, BoA then ignores language—in the very same allegedly exculpatory provision—expressly making BoA liable for negligently failing to give DB notice of an event of default, even in the absence of formal written notice.

BoA posits this contorted interpretation in a fruitless attempt to negate the legal effect of DB’s allegations regarding BoA’s actual knowledge of defaults or potential defaults at Ocala and to avoid discovery on this inherently factual issue. BoA states in its brief that it was not the “cop on the beat” for the Ocala facility, as if DB had alleged that BoA had a duty to patrol in Ocala, Florida or investigate TBW. Instead, DB alleges that BoA simply had to act on the actual knowledge it possessed and the plain written evidence in front of its face (much of which it even certified) demonstrating that TBW was misappropriating Ocala assets and that Ocala had become insolvent. FAC ¶¶ 83-97, 120-59.

BoA would like to make this case about fraud at TBW, as if that would vitiate DB’s contract claim. While a fraudulent scheme may have prompted TBW to loot Ocala assets and thereby cause it to become insolvent, it was BoA’s failure to perform its contractual duties that allowed TBW to operate Ocala in this unauthorized manner and that caused DB’s loss.

To be sure, DB understood that there were some risks associated with TBW that could not be mitigated by the presence of a trustee, such as fraud in TBW’s underwriting process that was hidden from the trustee or interest rate changes that reduced the value of Ocala mortgages. The risk that TBW would succeed in having BoA knowingly wire out Ocala funds for purposes unrelated to the purchase of mortgages and without providing Ocala with mortgages, however, was not one of those risks. FAC ¶¶ 9, 33, 115. Nor was the risk that TBW would operate Ocala in insolvency within the plain sight of, and indeed with written notice to, BoA. FAC ¶¶ 8, 33, 115. Nor was the risk that BoA, with knowledge of such activities, would fail to provide notice to the noteholders.

DB became aware of the factual support for its claim under the Ocala indenture—BoA’s actual knowledge of Ocala’s material breaches and insolvency—because of documents obtained only after it filed its original complaint last November. DB’s amended complaint now alleges that BoA had contemporaneous and actual knowledge of these breaches and insolvency. *See, e.g.*, FAC ¶¶ 83-97, 120-59. The simple force of these new allegations cannot be blunted by BoA’s overwrought rhetoric and hopelessly flawed view of the relevant Ocala contracts.

BoA’s reading of the Ocala facility documents—that BoA was required to mechanically comply with all TBW requests, no matter how improper, and that it has no liability for breaching its contractual and fiduciary obligations even where BoA obtained actual knowledge of a default or potential default—is flatly contradicted by the plain terms of the Ocala facility documents, and so must be rejected.

## **II. FACTUAL BACKGROUND**

### **A. The Ocala Facility and Notes.**

Ocala is a special purpose entity that was organized by TBW in 2005 and whose sole permitted purpose was the purchase and sale of mortgages backed by government-sponsored entities. FAC ¶ 2. Ocala was established by TBW to provide liquidity for TBW’s origination of mortgage loans that were to be sold to the Federal Home Loan Mortgage Corporation (“**Freddie Mac**”). FAC ¶ 32. Ocala issued secured liquidity notes in two series—Series 2005-1 Secured Liquidity Notes (the “**2005-1 Notes**”) and Series 2008-1 Secured Liquidity Notes (the “**2008-1 Notes**”). FAC ¶ 34. The 2005-1 Notes and 2008-1 Notes, collectively, will be referred to herein as the “**Ocala Notes**.” The Ocala Notes were to be fully secured at all times by a combination of cash and mortgages, all under the dominion and control of BoA, for the benefit of the holders of Ocala Notes. FAC ¶¶ 3, 7. DB purchased \$750 million of 2005-1 Notes on December 13, 2007. FAC ¶¶ 4, 36. On June 30, 2008, DB reinvested that \$750 million in 2008-1 Notes and purchased an

additional \$450 million of 2008-1 Notes, bringing DB’s total investment in Ocala Notes to \$1.2 billion. FAC ¶¶ 4, 111.

The Ocala Notes “rolled over” once per month (and, prior to June 30, 2008, more frequently) up to and through July 20, 2009. FAC ¶ 5. On each rollover date, provided that BoA certified the satisfaction of certain conditions, Ocala issued new Ocala Notes to DB. *Id.* The rollover could only occur if BoA certified that Ocala was solvent enough to issue the Ocala Notes. FAC ¶ 8.

Ocala was the simplest of corporate entities—its assets were cash and mortgages, and its liabilities were the Ocala Notes and subordinated notes totaling approximately \$1.75 billion. FAC ¶¶ 11, 12, 47, 124. The proceeds from the sale of Ocala Notes were to be used to purchase mortgages originated by TBW. FAC ¶ 40. Any mortgages thus acquired would constitute collateral securing the Ocala Notes. *Id.* Ocala would then sell the mortgages to Freddie Mac or other institutions that purchased mortgages, and the cash proceeds of such sales would also constitute collateral securing the Ocala Notes. *Id.* As long as certain other conditions were satisfied, the proceeds of such sales could be used by Ocala to purchase additional mortgages from TBW, and the cycle would begin anew. *Id.*

**B. BoA’s Various Responsibilities.**

BoA, in its various capacities, agreed to administer and regulate the flow of mortgages and cash in and out of Ocala, certify the solvency of Ocala prior to its issuance of Ocala Notes, promptly notify the Ocala Noteholders of any Event of Default or Potential Event of Default, and shut down the Ocala facility upon certain Events of Default. FAC ¶ 23. These responsibilities were set forth in the following agreements (collectively, the “**Ocala Facility Documents**”)<sup>2</sup>: the 2006

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<sup>2</sup> All references herein to the Base Indenture, Security Agreement, Depositary Agreement and Custodial Agreement refer to the versions of those agreements dated as of June 30, 2008. All

and 2008 Base Indentures, the 2005-1 Supplement, the 2008-1 Supplement, the 2006 and 2008 Security Agreements, the 2005-1 Depositary Agreement, the 2008-1 Depositary Agreement, and the 2006 and 2008 Custodial Agreements. FAC ¶¶ 37-39, 112-115.

1. **BoA's Duties as Indenture Trustee Under the Base Indenture.**

BoA served the role of Indenture Trustee under the Base Indenture. FAC ¶¶ 33, 112, 115. Prior to an Event of Default, this role required BoA to perform the express obligations in the Base Indenture. Ex. F1 § 10.1(b) at 54. Following an Event of Default, BoA was required to “exercise such of the rights and powers vested in it by this Base Indenture and the Facility Documents, and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the conduct of such person’s own affairs.” Ex. F1 § 10.1(a) at 54.

BoA’s most important pre-Event of Default obligation was the obligation under Section 10.4 of the Base Indenture to notify the Ocala Noteholders not only of any actual Event of Default, but also of any *Potential* Event of Default of which BoA had either written notice *or* actual knowledge. Ex. F1 § 10.4 at 57. This notice provision was critical for two reasons. First, it was the means through which the Ocala Noteholders would know of the need to instruct BoA to shut down the facility upon certain Events of Default that were not automatic. Second, it would alert Ocala Noteholders to events that had the potential to ripen into actual Events of Default, and so allow the Ocala Noteholders to take appropriate action and issue appropriate instructions to protect their investment. FAC ¶¶ 103-04, 201-02.

Section 9.1 of the Base Indenture defines two types of Events of Default. First, there were Events of Default that permitted, but did not require, the Indenture Trustee to declare the Ocala Notes due and payable and to instruct Ocala to cease its purchase of mortgages (the “**Discretionary**

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arguments made with respect to those agreements, however, apply equally to the 2006 versions of those agreements.

**Events of Default**”). Ex. F1 § 9.1(a)-(e), (g)-(j), (m), (s) at 48-50. One of these Discretionary Events of Default was Ocala’s breach of the Ocala Facility Documents in a manner that materially and adversely affected the interests of the Ocala Noteholders (such as requesting transfers of Ocala funds for unauthorized purposes) (each such breach, an “**Ocala Material Breach**”). Regardless of whether BoA exercised its discretion to shut down the facility, it was required to notify the Ocala Noteholders of any such Event of Default. Ex. F1 § 10.4 at 57.

Second, there were Events of Defaults that were so serious, such as Ocala’s insolvency, that BoA was *required* to declare the Ocala Notes due and payable and instruct Ocala to cease purchasing mortgages (each, a “**Mandatory Events of Default**”). Ex. F1 § 9.1(f), (k), (l), (q), (r) at 48-50; FAC ¶¶ 8, 64-65, 98, 125-26, 193. Once BoA had actual knowledge or written notice of the occurrence of one of these Mandatory Events of Default, BoA was required to notify the Ocala Noteholders, accelerate the maturity of the Ocala Notes, cease the purchase of mortgages by Ocala and wind down the Ocala facility by having Ocala’s remaining mortgages sold or securitized. Ex. F1 § 9.1 at 50; FAC ¶¶ 65, 67.

## 2. **BoA’s Duties as Collateral Agent Under the Security Agreement.**

The Security Agreement required BoA as Collateral Agent to occupy a central role with respect to the collateral securing DB’s investment. FAC ¶ 33. BoA as the Collateral Agent was the legal owner—for the benefit of the Secured Parties—of *all* of the mortgages purchased through the Ocala Facility and *all* of the cash generated by the sale of such mortgages. The Security Agreement clearly stated that DB, as a Secured Party, was to be the beneficial owner on behalf of whom BoA was required to hold the “Assigned Collateral.” Ex. A § 4.01 at 8 (assigning and granting a security interest in assets “for the benefit of the Secured Parties”). The Security Agreement explicitly provided that the relationship of BoA, as the Collateral Agent, and DB, as noteholder and a Secured Party, was that of “agent and principal.” Ex. A § 8.01 at 35-36.

The Security Agreement was unambiguous that BoA—not Ocala—had “*complete dominion and control*” of the cash collateral. Ex. A § 5.01 at 15 (emphasis added). The Security Agreement required BoA to establish and maintain, on behalf of the Secured Parties, a “Collateral Account,” and two separate sub-accounts for the two different series of Ocala Notes. *Id.* at 13. Ocala could *request* that BoA make withdrawals, but—critically—such requests could only be made “*in accordance with the terms of Section 5.03.*” *Id.* at 15 (emphasis added).

Section 5.03 of the Security Agreement established two “waterfalls” for withdrawals—one for withdrawals on monthly “Payment Dates” (Section 5.03(b)) and another for withdrawals on any other date (Section 5.03(a)). Ex. A § 5.03(a), (b) at 16-27. Each waterfall ranked allowable withdrawal purposes such that a higher priority obligation was entitled to full payment before any other, lower-priority allowable payment. *Id.* Both waterfalls provided protective measures against the improper depletion of assets: (i) with the exception of certain transfers of funds to specific accounts maintained by BoA, amounts payable to DB, or amounts payable to BoA itself, the only purpose for which Ocala could request that BoA withdraw funds “from the Series 2008-1 Collateral [was] . . . to purchase additional Series 2008-1 Mortgage Loans”; (ii) “no withdrawals from the Collateral Account [were to] be made on any day” to purchase additional mortgages unless Ocala’s assets exceeded its liabilities; and (iii) such withdrawals had to be made from the appropriate sub-accounts. Ex. A § 5.03(a), (b) at 20, 25-26. BoA thus was permitted to withdraw available Ocala funds for the purchase of mortgages only if Ocala was not insolvent. *Id.*

### **3. BoA’s Duties as Depository Agent Under the Depository Agreement.**

Prior to the issuance of Ocala Notes, BoA, as Depository Agent, was responsible for certifying (i) that BoA had all the necessary information regarding Ocala’s assets and liabilities to *certify* that Ocala’s assets exceeded the total amount of its outstanding debt and (ii) that Ocala’s assets, in fact, exceeded its debts. Ex. B § 4(d) at 6; FAC ¶ 33. This role was critical because the

Ocala facility could continue operating only so long as Ocala had enough assets to pay its outstanding debts, as certified by BoA, and was to be shut down upon Ocala's insolvency. FAC ¶ 8. The solvency condition under the Ocala Facility Documents is referred to as the "**Borrowing Base Condition**." Given the simplicity of Ocala, this calculation was quite straightforward—Ocala's cash and mortgages simply needed to exceed the amount of debt it was issuing. FAC ¶¶ 76-78. Ocala had only two kinds of debt—Ocala Notes with a face amount that varied between approximately \$962 million and approximately \$1.2 billion prior to June 30, 2008 and remained fixed at approximately \$1.68 billion on and following June 30, 2008, and subordinated notes with a face amount of \$67.5 million that remained fixed.<sup>3</sup> FAC ¶ 80.

#### 4. **BoA's Duties as Custodial Agent Under the Custodial Agreement.**

As Custodian, BoA assumed the responsibility, among others, to review loan files to ensure that they complied with the Ocala facility documents, and it was required to take possession of the mortgages and loan documents acquired by Ocala and hold them for the benefit of the Collateral Agent. Ex. D § 6(b)(i) at 4; FAC ¶ 33. BoA also was required to maintain a current list of loans so that the Collateral Agent and Ocala Noteholders would know at all times the nature and location of the collateral backing the Ocala Notes. Ex. D § 9 at 5; FAC ¶¶ 160-61.

#### C. **BoA's Knowing and False Certifications of the Borrowing Base Condition.**

On January 25, 2008, Matthew Smith, a BoA vice president and the BoA trust officer responsible for certifying Ocala's solvency, certified in writing that Ocala assets were only \$880 million, yet that Ocala would be issuing Ocala Notes in excess of \$1.4 billion, *i.e.*, that Ocala was insolvent. FAC ¶¶ 85-86. With this knowledge that Ocala was insolvent with a deficit of approximately \$600 million, BoA nonetheless certified the satisfaction of the Borrowing Base

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<sup>3</sup> Because the Ocala Noteholders had priority over the holders of subordinated notes, the Ocala Notes were *over*-collateralized by the amount of the subordinated notes.

Condition and permitted Ocala to issue Ocala Notes in an amount greater than Ocala's assets. *Id.* Even though BoA had actual knowledge that Ocala was insolvent and running a deficit that grew to at least approximately \$700 million, BoA continued to falsely certify the satisfaction of the Borrowing Base Condition at least beginning on January 25, 2008, and up to and through July 20, 2009, the last date on which the Ocala Notes rolled over. FAC ¶¶ 86-94, 120-129.

**D. BoA's Failures To Notify DB of Ocala's Insolvency.**

The insolvency of Ocala on each of the dates noted above constituted an Event of Default or Potential Event of Default under the Base Indenture. Ex. F1 § 9.1(f) at 48; FAC ¶¶ 20, 65, 98, 125, 193, 216. The continued operation of Ocala in the face of insolvency also constituted an Ocala Material Breach under the Base Indenture. Ex. F1 § 9.1(e) at 48; FAC ¶ 131-32. On each of these occasions, BoA was obligated under Sections 9.1 and 10.4 of the Base Indenture both to notify the Ocala Noteholders of these Events of Default and shut down the Ocala facility, but it failed to take either action. Ex. F1 §§ 9.1 at 50, 10.4 at 57; FAC ¶¶ 8, 20, 67, 86, 95, 103, 105, 107, 126, 201, 216-17, 220-21.

**E. BoA's Knowing Transfers of Funds from Ocala Accounts to Accounts Unrelated to the Purchase of Mortgages.**

Section 5.03 of the Security Agreement limited the use of Ocala funds to the purchase of mortgages. Ex. A § 5.03(a)(vii), (b)(ix) at 20, 25. From at least June 30, 2008 through August 3, 2009, BoA trust officers breached the Security Agreement by transferring more than \$3.8 billion from the Ocala Collateral Account and its sub-accounts pursuant to written requests from TBW that showed on their face destination accounts that were not connected with the purchase of mortgages. FAC ¶ 143. These breaches had a material and adverse effect on the Ocala Noteholders, and so constituted Events of Default or Potential Events of Default under Section 9.1 of the 2008 Base Indenture. Ex. F1 § 9.1(e) at 48; FAC ¶¶ 194, 200. In spite of actual knowledge of these transfers,

BoA failed to notify DB as required by Sections 9.1 and 10.4 of the Base Indenture. Ex. F1 §§ 9.1 at 50, 10.4 at 57; FAC ¶ 201.

**F. BoA's Misrepresentations as to the State of Ocala Collateral.**

As both Custodian and Collateral Agent, BoA was required to know at all times which mortgages it physically held at its facility, which mortgages had been delivered to third parties under bailment and which mortgages had been purchased by third parties. Ex. D §§ 6 at 3-4, 9 at 5; Ex. A § 7 at 35; FAC ¶ 160. From September 2008 to August 12, 2009, BoA provided DB with a daily report of all loans held for the benefit of Ocala (the "**BoA Loan Reports**"). FAC ¶ 162-63. Each of the BoA Loan Reports delivered to DB misrepresented that the Ocala facility was fully-collateralized with mortgages. FAC ¶ 166. BoA's false collateral reporting constituted a breach of BoA's express obligation under Section 9 of the 2008 Custodial Agreement, which required BoA to maintain a "list of all Mortgage Loans with respect to which the Custodian holds Mortgage Notes, Mortgages and Assignments of Mortgages pursuant to this Agreement." Ex. D § 9 at 5. BoA breached Section 9 by failing to maintain this list and providing DB with false and misleading BoA Loan Reports. FAC ¶ 163-66.

**G. The Collapse of TBW**

TBW stopped originating mortgages shortly after its offices were raided by law enforcement authorities on August 3, 2009, and Freddie Mac terminated TBW's eligibility to sell and service Freddie Mac loans. FAC ¶¶ 207-08. On August 10, 2009, BoA, at the request of DB and BNP Paribas Mortgage Corp. ("**BNP**"), the other holder of Ocala Notes, declared an Event of Default under the Base Indenture. Ocala has failed to pay DB the more than \$1.2 billion owed under the Ocala Notes that DB holds. FAC ¶ 214.

### **III. STANDARD OF REVIEW**

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) must be denied where, as here, the complaint “contain[s] sufficient factual matter . . . to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotations omitted). In evaluating a motion to dismiss a complaint pursuant to Rule 12(b)(6), the Court must take as true the facts alleged in the plaintiff’s complaint and draw all reasonable inferences in his favor. *W. Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18, 20 (2d Cir. 2004) (per curiam).

### **IV. THE COMPLAINT STATES A CLAIM FOR BREACH OF THE BASE INDENTURE AND BREACH OF FIDUCIARY DUTY.**

The amended complaint alleges that BoA had actual knowledge of Ocala’s insolvency and Ocala Material Breaches, all of which constituted Events of Default or Potential Events of Default and required BoA to take certain actions under the Base Indenture. FAC ¶¶ 103, 201. First, DB alleges that BoA breached its obligation under Section 10.4 of the Base Indenture to provide DB with notice of these Events of Default and Potential Events of Default. FAC ¶ 201. Second, because Ocala’s insolvency was a Mandatory Event of Default, once BoA had knowledge of this condition, it also was required to shut down the Ocala facility, but failed to do so. Ex. F1 § 9.1 at 48, 50. Finally, BoA’s fiduciary duties were triggered once it had actual knowledge or written notice of these Events of Default, and BoA breached these duties by failing to take reasonable and prudent steps to secure Ocala’s assets. FAC ¶ 283. BoA’s argument that it could not be liable for these breaches until it first received formal written notice fails as a basic matter of contract construction for the reasons set forth below.

**A. The Complaint States a Claim for Breach of BoA’s Obligation Under Section 10.4 To Notify DB of an Event of Default or Potential Event of Default.**

Section 10.4 of the Base Indenture states clearly and unequivocally that BoA was obligated to notify the Ocala Noteholders of any Event of Default or any event that had the potential to ripen into an Event of Default:

If an Event of Default or a Potential Event of Default occurs and is continuing and if a Trust Officer of the Indenture Trustee receives written notice *or has actual knowledge thereof*, the Indenture Trustee shall promptly provide . . . the Noteholders . . . with notice of such Event of Default or the Potential Event of Default.

Ex. F1 § 10.4 at 57 (emphasis added). BoA breached this provision by failing to notify DB of Ocala’s insolvency and numerous Ocala Material Breaches. FAC ¶¶ 103, 104, 198-202.

BoA does not, because it cannot, argue that DB has failed to allege that BoA had actual knowledge of Ocala’s insolvency and of these Ocala Material Breaches. Nor does it dispute that it owed DB a duty to notify under Section 10.4. Thus, BoA is reduced to arguing that even if it possessed this actual knowledge, it has no liability for its failure to take any action under the Base Indenture because BoA was not previously provided with formal written notice. BoA Br. at 25-30. This contorted reading must be rejected because it defies the plain meaning of Sections 10.1 and 10.4 and basic canons of contract construction.

**1. The Purported Exculpatory Language Relied on by BoA Expressly Applies Only *Following* an Event of Default and So Cannot Apply to BoA’s Obligations To Notify DB of *Potential* Events of Default.**

BoA relies almost exclusively on Section 10.1(a) to nullify the effect of Section 10.4 under the Base Indenture: “BoA shall have ‘no liability’ for such actions or inactions unless and until it receives ‘written notice’ of an Event of Default. . . . This unequivocal language is dispositive here.” BoA Br. at 25. In citing Section 10.1(a), BoA stunningly omits critical parts of the provision that make it clear that Section 10.1(a) applies only *after* an actual Event of Default has occurred and does not apply in the event of BoA’s negligence or willful misconduct:

*If an Event of Default has occurred and is continuing*, the Indenture Trustee shall exercise such of the rights and powers vested in it by this Base Indenture and the Facility Documents, and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the conduct of such person's own affairs; provided, however, that the Indenture Trustee shall have no liability in connection with any action or inaction taken, or not taken, by it *upon the deemed occurrence of an Event of Default* of which a Trust Officer has not received written notice; and provided, further, that the preceding sentence shall not have the effect of insulating the Indenture Trustee from liability arising out of the Indenture Trustee's negligence or willful misconduct.

Ex. F1 § 10.1(a) at 54 (emphases added). BoA thus relies on a provision that by its very terms applies only *if* an Event of Default has occurred and to action or inaction taken or not taken *upon* an Event of Default. It makes eminent sense that this exculpatory language would apply only after an Event of Default because at that point BoA would be subject to heightened fiduciary duties and a general standard of prudence, and so additional protections would be warranted.

Section 10.1(b), in contrast, establishes the standard of conduct for BoA *prior* to the occurrence of an Event of Default, namely to perform “those duties that are specifically set forth in this Base Indenture or the Facility Documents.” Ex. F1 § 10.1(b) at 54. The limitation of Section 10.1(a) regarding notice to the Indenture Trustee does not, and could not, apply to *Potential* Events of Default because Potential Events of Default, by definition, cover only circumstances in which the notice that would trigger an Event of Default has *not* been given—a Potential Event of Default is “any occurrence or event which, with the giving of notice, the passage of time or both, would constitute an Event of Default.” Ex. F2 at 24. Section 10.1(a) therefore simply does not apply for purposes of determining whether BoA met its obligations under Section 10.4 to provide notice of a Potential Event of Default. The correct standard to apply to BoA's conduct in this circumstance instead is Section 10.1(b), namely, whether BoA performed its express duties under the contract, and BoA is strictly liable for any breach of these duties as a matter of basic contract law. *See* Restatement (Second) of Contracts, ch. 11 introductory note, at 309 (1981) (“Contract liability is

strict liability. It is an accepted maxim that *pacta sunt servanda*, contracts are to be kept. The obligor is therefore liable in damages for breach of contract even if he is without fault.”).

Section 10.1(c), the only other provision cited by BoA to try to undo the effect of Section 10.4 expressly invokes the post-event of default negligence standard and so also applies only *following* an Event of Default. *See* Ex. F1 § 10.1(c) at 55. Furthermore, Section 10.1(c) only addresses circumstances under which BoA may be “charged with knowledge” of a default, a phrase commonly understood to refer to the imputation of constructive knowledge in circumstances where actual knowledge is absent. *See, e.g., Wash. Nat’l Ins. Co. v. Morgan Stanley & Co, Inc.*, No. 90 Civ. 3342, 1999 WL 451796, at \*9 (S.D.N.Y. July 2, 1999) (“However, the issue is whether WNIC can be charged with knowledge of these articles even if no one at WNIC actually read them.”).<sup>4</sup> Here, of course, DB has alleged that BoA had actual knowledge of the default, an allegation against which Section 10.1(c) provides no defense. In short, neither of the exculpatory provisions invoked by BoA relieves BoA of its express pre-Event of Default contractual obligation under Section 10.4 for which BoA was strictly liable to notify DB of Potential Events of Default.<sup>5</sup>

BoA cites cases for the general proposition that “the absence of prior notice to the Indenture Trustee” precludes liability for failure to act. BoA Br. at 29-30. General propositions, however, have no relevance to the textual analysis of the specific Base Indenture at issue in this case. What is

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<sup>4</sup> Not only does BoA’s contrary interpretation of Section 10.1(c) ignore the common meaning of the phrase “charged with knowledge,” but also it places Section 10.1(c) in direct opposition to Section 10.4, which by its express terms imposes a duty on BoA to act if a Trust Officer “has actual knowledge” of an Event of Default or Potential Event of Default. BoA’s attempt to nullify the effects of Section 10.4 is contrary to well-established principles of contract construction. *See Galli v. Metz*, 973 F.3d 145, 149 (2d Cir. 1992) (interpretations of contracts that render provisions nugatory are to be avoided).

<sup>5</sup> New York courts have recognized that, in the case of trust indentures, “a provision in the terms of the trust fixing a standard of care or skill lower than that which would otherwise be required of a trustee is strictly construed.” *N.Y. State Med. Care Facilities Fin. Agency v. Bank of Tokyo Trust Co.*, 621 N.Y.S.2d 466, 470 (Sup. Ct. 1994) (alteration and quotations omitted), *aff’d*, 629 N.Y.S.2d 3 (App. Div. 1995).

noteworthy about the cases cited by BoA is that, unlike the Base Indenture in this case, the indentures at issue in those cases did not include a provision requiring the trustee to notify the noteholders of *potential* events of default if the trustee obtained *actual* knowledge thereof.<sup>6</sup> Those cases thus are irrelevant for purposes of BoA's motion. In contrast, the only case in which a court appears to have considered an indenture containing provisions analogous to Section 10.4 is *In re National Century Financial Enterprises, Inc.*, No. 2:03-md-1565, 2006 WL 2849784 (S.D. Ohio Oct. 3, 2006) ("NCFE"). The indentures at issue in *NCFE*, as here, had provisions requiring the trustee to deliver notices once it had actual knowledge of a potential event of default. *Id.* at \*6. The *NCFE* court concluded that the issue of whether the trustee had actual knowledge of a potential event of default triggering an obligation to provide notice could not be resolved on a motion to dismiss. *Id.*

The importance of BoA's obligation to notify Ocala Noteholders of Potential Events of Default under Section 10.4 cannot be overstated because it was the means by which Ocala Noteholders, who depended on BoA for information about Ocala, would become aware of the need to deliver the written notice of an Event of Default that BoA claims is a prerequisite to its liability under Section 10.1(a). BoA's attempt to nullify the effect of Section 10.4 is contrary not only to the plain language of Section 10.1, but also to any reasonable interpretation of Section 10.4 in light of BoA's critical role as the Noteholders' gatekeeper of information about Ocala.<sup>7</sup>

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<sup>6</sup> For example, the *Argonaut* case, on which BoA relies heavily, BoA Br. at 29-30, stated explicitly that the indenture provided that it was only written notice, not actual knowledge of a default that would trigger the trustee's duties. *See Argonaut P'ship v. Bankers Tr. Co.*, No. 96 Civ. 1970, 2001 WL 585519, at \*2 (S.D.N.Y. May 30, 2001).

<sup>7</sup> A well-known treatise on corporate trust administration, cited by BoA in its prior moving brief, but conspicuously absent in its current brief, highlights this vital role to notify investors of potential defaults and the risks facing a trustee that fails to do so:

*The trustee should consider that the withholding of notice of technical default may result in preventing the holders from exercising their rights (e.g., declaring an Event of Default) and therefore it may be*

2. **The Purportedly Exculpatory Language in Section 10.1(a) Expressly Does Not Relieve BoA of Liability for Negligence or Misconduct in Failing To Notify DB of Actual Events of Default.**

Even the application of Section 10.1(a) upon an Event of Default provides no refuge for BoA because it expressly states that the written notice requirement “shall not have the effect of insulating the Indenture Trustee from liability arising out of the Indenture Trustee’s negligence or willful misconduct.” Ex. F1 § 10.1(a) at 54. In other words, BoA *will* be liable for action or inaction in the absence of written notice of an Event of Default where, as here, BoA acted without due care or engaged in misconduct.

DB alleges that BoA had actual knowledge of Ocala’s insolvency, a clear Event of Default, and of Ocala Material Breaches, which were, at the very least, Potential Events of Default, but failed to notify the Ocala Noteholders. FAC ¶¶ 94, 103, 105, 107, 125, 126, 198-202. Whether this failure to act constituted negligence or willful misconduct and therefore strips BoA of the exculpatory protections of Section 10.1(a) is quintessentially a question of fact that cannot be resolved on a motion to dismiss.

3. **The “Prevention Doctrine” Precludes BoA from Arguing that Its Performance Under Section 10.1(a) Is Excused.**

BoA’s argument that formal written notice was a condition precedent to its obligations under Section 10.1, BoA Br. at 28, is also precluded by the “prevention doctrine” because it was BoA’s own breach that caused the failure of this condition. *See Semi-Tech Litig. LLC v. Bankers Trust Co.*, 450 F.3d 121, 129 (2d Cir. 2006) (indenture trustee’s failure to inspect certificates may not excuse its failure to comply with the duty to give notice of defaults that would have been discovered

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*held accountable for any resultant loss. In a doubtful or borderline case, notice should be given. All facts should be investigated promptly and weighed carefully.*

Robert I. Landau & Romano I. Peluso, *Corporate Trust Administration and Management* 260 (6th ed. 2008) (emphasis added).

had the indenture trustee inspected the certificates); *Bank of N.Y. v. Tyco Int'l Group, S.A.*, 545 F. Supp. 2d 312, 324 n.81 (S.D.N.Y. 2008) (It has been “established for over a century that a party may not insist upon performance of a condition precedent when its non-performance has been caused by the party [it]self.” (internal quotations omitted)). As in *Semi-Tech*, BoA here may not insist on a written notice requirement where BoA’s own breaches were the cause of the failure of this requirement to be met. Had BoA notified DB of Ocala’s insolvency and Ocala Material Breaches, DB would have been able to provide BoA with notice confirming the Events of Default and instructing BoA to shut down the facility. BoA not only failed to alert DB of Events of Default or Potential Events of Default, as required by Section 10.4, it provided false affirmative assurances to DB to the contrary that the Ocala facility was fully collateralized. FAC ¶¶ 160-67. BoA, therefore, is barred from asserting the supposed condition precedent of formal written notice where BoA’s own breaches and affirmative misrepresentations prevented the satisfaction of this condition.

**4. Whether BoA Received Written Notice of Events of Default or Potential Events of Default Raises Factual Issues that Cannot Be Resolved on a Motion To Dismiss.**

To the extent that written notice of an Event of Default was required, DB has alleged that BoA received sufficient written notice. FAC ¶¶ 85-94, 120-133, 143-150. In particular, DB alleges that BoA received numerous borrowing base certificates evidencing Ocala’s insolvency and various requests for transfers that constituted written notice of Ocala Material Breaches. *Id.* BoA argues that the borrowing base certificates cannot constitute written notice because “written notice” under the Base Indenture can mean only formal written notice. BoA Br. 30-33.

BoA’s argument, however, is belied by the definitions of “written” and “notice[]” in the Base Indenture. *See* Ex. F2 at 44; Ex. F1 at 65-66. Schedule I to the Base Indenture states that “written” merely “means any form of written communication, including, without limitation, by means of telex, telecopier device, computer, telegraph or cable.” Ex. F2 at 44. Section 13.1 of the

Base Indenture, entitled “Notices,” states only that notice to the Indenture Trustee must be delivered to its Chicago address (defined in Section 13.1 to include the e-mail address m.smith@lasallepts.com). Ex. F1 at 66. Significantly, the Base Indenture does not specify the required content of a notice. “Written notice” under the Base Indenture thus includes any e-mail or facsimile communication delivered to the facsimile number or e-mail address specified in Section 13.1 of the Base Indenture. Ex. F1 at 65-66.

The Second Circuit has made it clear that a trustee may not impose any notice requirement higher than that set forth explicitly in the indenture. *Meckel v. Cont’l Res. Co.*, 758 F.2d 811, 815 (2d Cir. 1985) (“The indenture provided that notice be given by first-class, postage prepaid mail. That is all the law required Citibank to do.”). To impose the additional requirement that written notice take the form of BoA’s idealized formal written notice impermissibly inserts additional terms in the Base Indenture. *See Petracca v. Petracca*, 756 N.Y.S.2d 587, 588 (App. Div. 2003) (noting that “[a] court may not write into a contract conditions the parties did not include by adding . . . terms under the guise of construction” and finding that a letter constituted notice of termination).

DB alleges that the borrowing base certificates were delivered to the representative of BoA in accordance with Section 13.1 of the Base Indenture. *See* FAC ¶¶ 83-88, 120-28. While BoA points to the notice delivered by DB to BoA on August 5, 2009 as a “model of what one would expect such ‘written notice’ to be,” BoA Br. at 33, that is irrelevant for purposes of determining whether the borrowing base certificates actually delivered to BoA satisfied the “written notice” requirement under the Base Indenture. *See Page Mill Asset Mgmt. v. Credit Suisse First Boston Corp.*, No. 98 Civ. 6907, 2000 WL 335557, at \*5 (S.D.N.Y. Mar. 30, 2000) (concluding that duty to provide reasonable notice does *not* apply where indenture contains “notice provision” describing in detail how notice was to be provided).

Whether the borrowing base certificates constituted sufficient written notice under the Base Indenture is, at minimum, an issue of fact. *See generally DeLago v. Robert Plan Corp.*, No. 04 Civ. 3193, 2006 WL 489845 (S.D.N.Y. Feb. 26, 2006) (whether letters constituted written notice of default under terms of promissory notes could not be decided as matter of law). BoA’s own framing of the question—whether the borrowing base certificates constitute written notice *as a matter of law*, BoA Br. at 30—and its cited authority make it clear that a determination on this issue, while perhaps appropriate on a motion for summary judgment, is not appropriate on a motion to dismiss.<sup>8</sup>

**B. The Complaint States a Claim for Breach of Section 9.1 of the Base Indenture Because BoA Had a Clear and Unequivocal Obligation To Shut Down the Ocala Facility.**

DB alleges that the insolvency of Ocala was a Mandatory Event of Default under Section 9.1(f) of the Base Indenture that triggered BoA’s obligation under Section 9.1 to shut down the Ocala facility. FAC ¶¶ 63, 67; Ex. F1 § 9.1 at 48-50. DB alleges that BoA, with knowledge that an Event of Default under Section 9.1(f) (*i.e.*, Ocala’s insolvency) had occurred, breached its duty to perform the obligations set forth in sub-clauses (i)-(iii) of Section 9.1 (collectively, the “**Shut Down Clause**”). FAC ¶¶ 86, 98-102, 131, 193-197; Ex. F1 § 9.1 at 50. BoA concedes that the insolvency of Ocala is an Event of Default under Section 9.1 of the Base Indenture that automatically triggers the acceleration of the Ocala Notes. BoA Br. at 29. But, familiarly, BoA argues that it has no liability for its failure to perform the obligations in the Shut Down Clause, even if BoA has actual knowledge of Ocala’s insolvency, because Section 10.1(a) requires that BoA first have formal written notice. BoA Br. at 28-29. BoA’s argument, however, directly contradicts the plain language and any reasonable reading of the controlling paragraph of Section 9.1.

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<sup>8</sup> *See, e.g., UBS Capital Americas II, LLC v. Highpoint Telecomm. Inc.*, No. 01 Civ. 8113, 2002 WL 377537, at \*4 (S.D.N.Y. Mar. 8, 2002) (substantial compliance with written notice requirement determined at summary judgment stage).

The phrase “Notwithstanding anything in this Base Indenture to the contrary” precedes the Shutdown Clause and makes clear that no other provisions of the Base Indenture, including 10.1(a), can contradict its terms. Ex. Fl § 9.1 at 50. Courts in the Second Circuit repeatedly have rejected attempts to nullify the preeminence of a “notwithstanding anything to the contrary” provision. *See, e.g. Int’l Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 90-91 (2d Cir. N.Y. 2002) (“[T]he FC&S clause begins with the phrase ‘[n]otwithstanding anything herein contained to the contrary’ . . . Such language means that the FC&S clause *trumps* any other provisions of the IINA Policy. . . . The FC&S clause by its terms overrides any inconsistent language elsewhere in the IINA Policy.” (emphasis added)).<sup>9</sup> The Shut Down Clause is clear on its face that if BoA had actual knowledge of Ocala’s insolvency, it was required to instruct Ocala to cease the purchase of mortgages, notify TBW of the Event of Default and otherwise wind down the Ocala facility in accordance with the Base Indenture. *Id.*

In sum, the unequivocal and legally preeminent language of the controlling paragraph of Section 9.1 required BoA to perform the obligations set forth in the Shut Down Clause once it had actual knowledge of a Mandatory Event of Default. BoA’s argument that no liability could attach under Section 9.1 without written notice contradicts this clear language, and so must be rejected.<sup>10</sup>

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<sup>9</sup> *See also N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, 266 F.3d 112, 125 (2d Cir. 2001) (“additional ‘notwithstanding anything contained herein’ language *plainly* supersedes the broader Policy provisions” (emphasis added)); *L&B 57th St., Inc. v. E.M. Blanchard, Inc.*, 143 F.3d 88, 93 (2d Cir. 1998) (“Because . . . clause provides that its application is ‘notwithstanding anything herein to the contrary,’ it *trumps* the clause guaranteeing the payment of attorney’s fees and other expenses.” (emphasis added)).

<sup>10</sup> Even if the written notice requirement in Section 10.1(a) somehow applied to BoA’s obligations under the Shut Down Clause, BoA’s negligence or willful misconduct and the prevention doctrine, as discussed in Parts IV.A.2 and 3 *supra*, preclude BoA from asserting lack of notice where its own breach of Section 10.4 caused the lack of notice.

**C. The Complaint States a Claim for Breach of Fiduciary Duty.**

BoA argues that DB's claim for breach of fiduciary duty should be dismissed because "under the specialized law relating to Indenture Trustees, no fiduciary duties can be implied outside the terms of the Indenture" and because the claim is barred by the absence of "written notice" to BoA of an Event of Default. BoA Br. at 34. BoA's statement of the law relating to indenture trustees is accurate only prior to an Event of Default. After an Event of Default, "it is clear that the indenture trustee's obligations come more closely to resemble those of an ordinary fiduciary, regardless of any limitations or exculpatory provisions contained in the indenture." *Beck v. Mfrs. Hanover Trust Co.*, 632 N.Y.S.2d 520, 527 (App. Div. 1995).

DB has adequately pleaded the required elements of a breach of fiduciary duty claim: (1) the existence of a fiduciary relationship between BoA and DB, and (2) BoA's breach of its fiduciary duty. FAC ¶¶ 25, 46, 108, 110, 281-285; *see also Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs.*, 388 F. Supp. 2d 292, 304 (S.D.N.Y. 2005) (stating elements). BoA cites two cases for the proposition that prior to receipt of a contractually-sufficient notice of an Event of Default, an indenture trustee is still subject only to contractual duties. BoA Br. at 35. That case law is inapplicable to the instant Indenture, which clearly states that, at a minimum, BoA had to act upon of an Event of Default if it had "actual knowledge" of the event. Ex. F1 § 10.4 at 57; *see also* Parts IV.A, IV.B, *supra*. The amended complaint alleges "actual knowledge." FAC ¶¶ 103, 201. Moreover, BoA's argument fails on its own terms: even if written notice were required for BoA to be charged with knowledge of an Event of Default, the borrowing base certificates that BoA received demonstrating Ocala's insolvency fulfill the requirement for written notice under the Indenture. *See* Part IV.A.4, IV.B, *supra*. Finally, any lack of written notice is attributable to BoA's breach of Section 10.4 of the Indenture and cannot constitute an excuse for its abject performance as a fiduciary. *See* Part IV.A.3, *supra*.

V. **THE AMENDED COMPLAINT STATES A CLAIM FOR BREACH OF THE SECURITY AGREEMENT.**

As set forth in its recitals, the Security Agreement existed “for the purpose of, among other things, securing and providing for the repayment of all amounts” owing to the Ocala Noteholders. Ex. A at 1; FAC ¶¶ 23, 33, 44. This purpose was to be accomplished, in significant part, through the appointment of a Collateral Agent who would exercise legal ownership and actual control of all the collateral as an agent of DB. BoA assumed that role, and with it certain contractual responsibilities that were critical to safeguarding the collateral backing DB’s investment. FAC ¶¶ 12, 23, 33. BoA breached virtually every one of those responsibilities.

A. **BoA Violated the Security Agreement by Transferring Funds for Prohibited Purposes.**

The plain language of the Security Agreement imposed on BoA a duty not to withdraw funds from the Collateral Account at Ocala’s request if Ocala’s request was inconsistent with relevant provisions of the Security Agreement, particularly Sections 5.01 and 5.03. Ex. A § 5.01 at 13-15 (establishing BoA’s “dominion and control” over, and Ocala’s authority to “*request* withdrawals” from, the Collateral Account (emphasis added)); § 5.03 at 16-27 (establishing waterfalls of priority for the uses of funds in the Collateral Account). The Security Agreement authorized BoA to honor *requests* by Ocala for withdrawals from the Collateral Account only if the requests were “in accordance with the terms of Section 5.03.” Ex. A § 5.01 at 15. Yet BoA repeatedly made withdrawals at the request of Ocala that—on the face of the withdrawal requests themselves—were unrelated to any permissible purpose under Section 5.03. FAC ¶¶ 143-150. By honoring withdrawal requests made by Ocala that were *not* in accordance with the terms of Section 5.03, BoA breached the Security Agreement.

BoA knew that the requests from TBW were not in accordance with Section 5.03 for two reasons. First, BoA knew there was only a single account to which money could be transferred if

the purpose was to purchase mortgages. FAC ¶ 51. BoA knew this because (1) the Ocala Facility Documents required that all mortgages Ocala considered for purchase first had to be delivered to and reviewed by BoA as Custodian, and (2) those mortgages delivered to BoA were accompanied by bailee letters that expressly directed payment be made to a single account—the Colonial IFA Account.<sup>11</sup> *Id.* The import of these factual allegations is that BoA knew that the hundreds of millions of dollars that Ocala was requesting that BoA wire out of the Collateral Account to non-BoA accounts other than the Colonial IFA Account could not be going toward the purchase of mortgages. Second, the transfer requests made by Ocala explicitly identified recipient accounts that could not conceivably have been related to the purchase of mortgages by Ocala or to any other purpose permitted under Section 5.03. *See* FAC ¶¶ 143, 146, 147, 150. For example, BoA transferred approximately \$837 million pursuant to transfer requests from TBW that showed the recipient account to be Freddie Mac custodial accounts with no connection to the purchase of mortgages. FAC ¶ 143.

Faced with strong factual allegations regarding BoA’s actual knowledge of the impropriety of the TBW transfer requests, BoA takes the extreme position that not only did it have no duty to reject withdrawal requests from TBW that violated the Security Agreement—it was affirmatively required under Section 5.03 to comply with such requests. *See* BoA Br. at 39-40. To the contrary, Section 5.03 only required BoA to “promptly comply with any such *approved* instructions made by the Issuer . . . *in accordance with the provisions of the foregoing paragraphs* [of Section 5.03],” which limit the purposes for which and the conditions under which withdrawals could be made.

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<sup>11</sup> BoA suggests that the impact of this allegation is somehow lessened if DB does not have “contractual rights under the Colonial Bailee letters themselves.” BoA Br. at 43. Again, BoA is evading the point. The relevance of this allegation is that, as a factual matter, BoA knew from the Colonial Bailee letters that there was only one account to which funds could be transferred if the purpose of the withdrawal was to purchase mortgages.

Nothing in the Security Agreement permitted, let alone required, BoA to comply with requests it was aware violated the limitations of the Security Agreement.

Further seeking to exculpate itself from responsibility, BoA points to Section 8.01 of the Security Agreement, which provides that BoA “shall be entitled to rely, and shall be fully protected in such reliance” on any “communication [or] direction” as long as the communication or direction is “reasonably believed by [BoA] in its professional judgment to be genuine and correct and to have been signed or sent by the proper Person or Persons.” Ex. A § 8.01 at 37; *see* BoA Br. at 41. To the extent that BoA could rely on Ocala’s instructions under Section 8.01, however, this reliance was justified only *so long as* BoA reasonably believed in its professional judgment that those instructions were correct. Whether BoA had a reasonable belief as to the correctness and appropriateness of the instructions made by Ocala is a question of fact that cannot be determined on a motion to dismiss.<sup>12</sup>

In short, DB has alleged facts more than sufficient to show that BoA knew that the requests it was receiving from Ocala to withdraw funds from the Collateral Account were not “in accordance with Section 5.03” and thus not in accordance with the provision of Section 5.01 limiting the withdrawals that BoA could make at Ocala’s request. The inappropriateness of the requests was

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<sup>12</sup> The two cases BoA cites as supposedly construing provisions similar to Section 8.01 “to confine the limited duties of banks in similar transactions” are not at all analogous to the instant case. In *Banco Espanol de Credito v. Sec. Pac. Nat’l Bank*, 763 F. Supp. 36 (S.D.N.Y. 1991), the court held only that a bank party was under no general duty to “volunteer[] matters coming to its attention that arguably might seem negative in respect to [an issuer’s] creditworthiness.” *Id.* at 44. DB’s claim under the Security Agreement has nothing to do with whether BoA should have “volunteered” something that came to its attention that did not rise to the level of default yet “might seem negative” about Ocala. In *Bayerische Hypo-Und Vereinsbank AG v. Banca Nazionale Del Lavoro, S.p.A. (In re Enron Corp.)*, 292 B.R. 752 (Bankr. S.D.N.Y. 2003), the court held only that a bank party was under no general duty to investigate and discover various failings by Enron. *Id.* at 770. In that case, the bank was not actually aware of two facts that the court held it was under “no obligation to discover,” *id.*, and the facts in question only “became known in the course of events subsequent to Enron’s bankruptcy filing,” at which point the bank was powerless to act, *id.* By contrast, DB has alleged that BoA had actual knowledge that Ocala’s withdrawals were improper, an allegation that must be presumed true for purposes of BoA’s motion to dismiss.

evident on their face. As a direct consequence of making those withdrawals, BoA depleted the collateral that was to be held by it to support Ocala's obligations under the Ocala Notes.

**BoA Violated the Security Agreement by Transferring Funds at Ocala's Request Following Events of Default and When the Borrowing Base Condition Was Not Satisfied.**

The Security Agreement imposed on BoA a duty that “*no withdrawals from the Collateral Account shall be made* on any day . . . unless [the Borrowing Base Condition] is satisfied.” Ex. A § 5.03(a), (b) at 20, 26 (emphasis added). Nor could any withdrawals be made if an Event of Default had occurred and was continuing. *Id.* at 16, 21. The FAC is replete with factual allegations establishing that the Borrowing Base Condition was not satisfied for a period of many months and that Ocala had become insolvent (constituting an Event of Default) as early as January 25, 2008, and that BoA was aware of these facts. FAC ¶¶ 83-97, 120-133. BoA nonetheless continued to conduct hundreds of millions of dollars of withdrawals of cash from the Collateral Account in clear violation of its duties under Section 5.03 of the Security Agreement. FAC ¶¶ 83-97, 120-133, 159.<sup>13</sup>

BoA's argument that all duties with respect to transfers under Section 5.03 applied to Ocala, and not to BoA, contradicts the plain language of the Security Agreement. The Security Agreement clearly establishes that BoA as Collateral Agent was the only party that could “*make withdrawals*” from the Collateral Account. Ex. A § 5.01 at 15 (emphasis added). Ocala had only the ability to “*request withdrawals*” by the Collateral Agent for the limited purposes set forth in the Section 5.03 waterfalls. *Id.* (emphasis added). But the relevant language in Section 5.03 mandates that “*no withdrawals from the Collateral Account shall be made*” if the Borrowing Base condition is not met. Ex. A § 5.03(a), (b) at 20, 26 (emphases added). Given that BoA was the only party under the

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<sup>13</sup> Whether BoA did so intentionally or unintentionally, willfully or inadvertently, the act of doing so was a breach of its obligations. *See* Restatement (Second) of Contracts, ch. 11 introductory note, at 309 (1981).

Security Agreement authorized to make withdrawals from the Collateral Account, there is no intelligible reading of Section 5.03 that could assign to any party other than BoA the responsibility that “no withdrawals from the Collateral Account shall be made” while the Borrowing Base Condition was not satisfied. *Id.*

The remaining provisions of the Security Agreement that BoA cites in an attempt to shake off this responsibility are irrelevant. The provision that withdrawal requests received from Ocala are “effective on receipt,” and that BoA shall comply with them “promptly,” BoA Br. at 45-46, does not relieve BoA from the requirement to comply only with withdrawal requests “made in accordance with the provisions of . . . Section 5.03.” *See* Part V.A, *supra*. BoA further cites the provision of the Security Agreement stating that BoA is subject only to obligations “for which express provision is made herein.” BoA Br. at 45. The Security Agreement, of course, expressly provides that “no withdrawals from the Collateral Account shall be made” to purchase mortgages unless the Borrowing Base Condition is satisfied and no Event of Default has occurred, and it is that express duty that BoA violated. Ex. A § 5.03(a), (b) at 16, 20, 21, 26.

BoA also argues that the “structure” of the Security Agreement and other Ocala Facility Documents somehow relieves BoA of its express contractual duty not to make withdrawals from the Collateral Account if the Borrowing Base Condition is not satisfied. BoA Br. at 46-47. But, if anything, the structure of the Ocala facility only validates the point that it was entirely proper and appropriate for BoA to be the party to confirm the Borrowing Base Condition. BoA was intimately familiar with the Borrowing Base Condition in its role as Depositary, and it also had access to all information necessary to calculate the Borrowing Base Condition: (1) as Collateral Agent, BoA had legal ownership of all of the collateral and actual possession and control of the cash collateral, (2) as

Custodian under the Custodial Agreement, BoA had actual possession of the mortgage collateral,<sup>14</sup> and (3) as Depository Agent under the Depository Agreement and Indenture Trustee under the Base Indenture, BoA was aware of Ocala's outstanding note obligations.

Finally, BoA argues that under the Security Agreement, it was entitled to rely on "communications" or "directions" from TBW or Ocala. BoA Br. at 47. But, as discussed in Part V.A *supra*, whether BoA actually "believed in its professional judgment" that instructions from Ocala were "correct," and whether any such belief could be deemed "reasonable," are at best questions of fact that are not appropriate for resolution on a motion to dismiss.

C. **BoA Violated the Security Agreement by Failing To Segregate Collateral To Protect the Separate Investors.**

The Security Agreement required BoA to establish and maintain separate "sub-accounts thereof for each of the Series 2005-1 Purchased Assets and the Series 2008-1 Purchased Assets." Ex. A § 5.01 at 13-14. With respect to withdrawals, the waterfall provisions of Section 5.03 of the Security Agreement expressly required that funds for certain purposes be drawn from the appropriate sub-accounts; most importantly, withdrawals for the purchase of Series 2008-1 Mortgages were required to be made from the Series 2008-1 sub-account, while withdrawals for the

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<sup>14</sup> BoA does not (and could not) seriously contend otherwise. Instead, BoA merely argues that BoA at any given time might not have *all* the mortgage collateral within its physical custody because the Custodial Agreement provided limited circumstances under which BoA could transfer mortgages "out of the program for possible purchase." BoA Br. at 46. In fact, the provision of the Custodial Agreement BoA cites—Section 6(d)—is not related to "possible purchase" of mortgages and actually illustrates the lengths to which the Ocala Facility Documents went to keep mortgages within BoA's control. Section 6(d) of the Custodial Agreement authorizes (but does not require) BoA to release mortgages upon request by the *Servicer*, but only if BoA as Collateral Agent countersigns the request, and requires return of the mortgages to the Custodian within 15 days. Ex. D § 6(d) at 5. And regardless of whether limited circumstances existed in which BoA might be authorized to temporarily release physical custody of the mortgage loans committed to it as Custodian, Section 9 of the Custodial Agreement required BoA to maintain a "list of all Mortgage Loans with respect to which the Custodian holds Mortgage Notes, Mortgages and Assignments of Mortgages pursuant to this Agreement." Ex. D § 9 at 5.

purchase of Series 2005-1 Mortgages were required to be made from the Series 2005-1 sub-account. Ex. A § 5.03(a)(vii)(a), (b)(ix)(a) at 20, 25; FAC ¶ 188.

DB does not contend, as BoA suggests, merely that “funds from the DB sub-account were used to purchase loans for the benefit of BNP, and *vice versa*.” BoA Br. at 47. To the contrary, DB has pled on information and belief that there was “no meaningful attempt to segregate either mortgages purchased or the proceeds from the sale of mortgages.” FAC ¶ 190.

BoA contends that it cannot be held responsible for failing to segregate collateral because that responsibility belonged to Ocala, not BoA. BoA Br. at 48-49. But DB’s claim in this regard arises under the Security Agreement, wherein BoA and Ocala *jointly agreed* that funds would be deposited in the appropriate sub-accounts. Ex. A § 5.01 at 13-14. Similarly, the Security Agreement permitted BoA to withdraw funds at Ocala’s request only in accordance with Section 5.03, which required funds be withdrawn from the appropriate sub-account. Ex. A § 5.03(a)(vii), (b)(ix) at 20, 25; FAC ¶¶ 190-91. Thus, at a minimum, BoA violated its duties under the Security Agreement by effectuating withdrawals from the general Collateral Account that were required to be made instead from the appropriate sub-account. More significantly, BoA’s failure to make even a minimal effort to ensure that the collateral was properly segregated has rendered it unable to carry out its duties as Collateral Agent to distribute the collateral pursuant to Section 2 of the Security Agreement following BoA’s belated declaration of an Event of Default in August 2009. Ex. A § 2 at 2-5; FAC ¶ 191.

**D. BoA Violated the Security Agreement by Acting on Requests from Unauthorized Personnel.**

BoA concedes that it constitutes a breach by BoA of Section 5.03 of the Security Agreement for BoA to effectuate a withdrawal at the request of anyone not properly identified as an Issuer Agent on an Incumbency Certificate. BoA Br. at 52. BoA also appears to concede that the facts alleged in the amended complaint are adequate to establish that such a breach occurred. *Id.* BoA

nonetheless argues that DB cannot sustain a claim for breach of contract on this basis because DB has failed to plead “any facts showing that this claimed breach was material, or that it caused any loss to Plaintiffs.” BoA Br. at 51. Given that BoA has not even attempted to contest that DB’s factual allegations are sufficient to establish liability by BoA for breach, BoA’s argument at best boils down to a premature question about what damages DB might be able to obtain (nominal or actual).<sup>15</sup> Even were that an appropriate question for the Court to reach before discovery, it is not a question that could under any circumstances result in outright dismissal of DB’s breach of contract claim.<sup>16</sup>

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<sup>15</sup> BoA relies on *Semi-Tech Litig., LLC v. Bankers Trust Co.*, 353 F. Supp. 2d 460 (S.D.N.Y. 2005), but what *Semi-Tech* demonstrates beyond question is that BoA may not prevail on such an argument to dismiss a claim for breach of contract. *Semi-Tech* was not resolved on a motion to dismiss; to the contrary, there was voluminous discovery, and only after evidence had been developed and presented on a motion for summary judgment and an opposition thereto was the court in a position to resolve questions of but-for causation. *See id.* at 484-87. The court’s analysis, in which it had to consider counterfactual questions of what the defendant would have done but for the breach, demonstrates precisely why a plaintiff must be permitted to develop a factual record on such issues before findings can be made. Nothing in *Semi-Tech* supports the approach BoA suggests—namely, that the court may rule in favor of BoA on the basis of speculation offered by BoA as to what TBW or Ocala might have done in a counterfactual world without first permitting DB to take depositions and otherwise obtain evidence on the question. Most importantly, however, the court in *Semi-Tech* denied the defendant’s motion for summary judgment on the breach of contract claim and entered judgment for the plaintiff (albeit for nominal damages only) despite finding that the plaintiff failed to prove but-for causation relating to the actual damages it had claimed. *See id.* at 487.

<sup>16</sup> In the cases from this District that BoA cites as granting motions to dismiss for failure to plead but-for causation, the causes of action dismissed on that basis were not claims of breach of contract. Rather, they were tort claims for which (1) nominal damages are not available and (2) the relevant question of causation was directly related to liability and not damages, *i.e.*, whether a defendant’s tortious conduct was the but-for cause of a breach of contract by another party. *See RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 410 (S.D.N.Y. 2009) (dismissing claims for tortious interference with contract, tortious interference with prospective business advantage); *Granite Partners, L.P. v. Bear, Stearns & Co.*, 17 F. Supp. 2d 275, 292-95 (S.D.N.Y. 1998) (Sweet, J.) (dismissing claims for tortious interference with contract). In the cases from the New York Appellate Division that BoA cites for the same principle, the courts either cited multiple reasons for dismissing the breach of contract claims, including that no underlying breach was properly alleged, *see Gordon v. Dino De Laurentiis Corp.*, 529 N.Y.S.2d 777, 779 (App. Div. 1988), or instead focused on the elements of legal malpractice and mentioned breach of contract only as an afterthought, *see Weiner v. Hershman & Leicher, P.C.*, 669 N.Y.S.2d 583 (App. Div. 1998). To the extent either of the New York Appellate Division cases could be read as holding that actual

**E. BoA Violated the Security Agreement by Failing To Perform the Obligations Required of It Upon an Event of Default.**

Upon the occurrence of an Event of Default, Sections 6.01 and 6.02 of the Security Agreement imposed a number of additional duties on BoA in its role as Collateral Agent. Ex. A § 6.01 at 32-33. BoA had longstanding awareness that Ocala was insolvent and that an Event of Default was therefore ongoing under Section 9.1(f) of the Base Indenture. Ex. F § 9.1 at 48; FAC ¶¶ 85-104, 120-30. Just as BoA disregarded its resulting duties to take action under the Base Indenture, BoA failed both to (1) cease making withdrawals requested by Ocala, and (2) distribute the Deposited Funds in the Collateral Account to the Ocala Noteholders as required under the Security Agreement. Ex. A §§ 6.01, 6.02. BoA's sole argument in opposition to this claim is, yet again, its reliance on the exculpatory provision in Section 10.1 of the Base Indenture regarding written notice. BoA Br. at 53-53. To the extent this provision applies, however, it applies only to BoA as Indenture Trustee, not to BoA as Collateral Agent under the Security Agreement.

Moreover, the Security Agreement expressly provides that written notice of an Event of Default need not be provided if BoA has knowledge thereof through one of its officers: “[t]he Collateral Agent shall be entitled to assume that no Indenture Event of Default under the Indenture shall have occurred and be continuing, *unless* an officer of the Collateral Agent charged by the Collateral Agent with the administration of any of its obligations under this Agreement or with knowledge of and familiarity with the Collateral Agent's obligations under this Agreement *has actual knowledge thereof*.” Ex. A § 8.01 at 37 (emphases added). DB alleges that trust officers of BoA in charge of administering BoA's obligations under the Security Agreement had actual

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damages and but-for causation thereof are essential elements of a breach of contract action in New York, they are in direct contravention of controlling law from the New York Court of Appeals that a plaintiff who proves breach of contract may recover nominal damages. *See Semi-Tech Litig., LLC*, 353 F. Supp. 2d at 487 & n.128 (citing *Kronos, Inc. v. AVX Corp.*, 612 N.E.2d 289 (N.Y. 1993); *Ely-Cruikshank Co. v. Bank of Montreal*, 615 N.E.2d 985 (N.Y. 1993)).

knowledge of Events of Default, including insolvency. FAC ¶¶ 85, 88, 143, 146-47. DB thus has stated a claim for breach of Sections 6.01 and 6.02 of the Security Agreement.

**VI. DB HAS STANDING TO PURSUE CLAIMS UNDER THE DEPOSITARY AND CUSTODIAL AGREEMENTS.**

BoA argues that only BoA as Indenture Trustee and Collateral Agent, respectively, was expressly named as a third-party beneficiary of the Depository and Custodial Agreements, and so DB has no standing to enforce rights under those agreements. BoA Br. at 61. The unstated premise of BoA's argument is that BoA, as Indenture Trustee or Collateral Agent, has some interest in these agreements separate and apart from DB's interest. As Indenture Trustee and Collateral Agent, however, BoA was acting as DB's trustee/agent, so any benefit accruing nominally to BoA in these roles was by definition a benefit to the Ocala Noteholders.<sup>17</sup> Where a trustee or agent is prevented from enforcing such a benefit due to a conflict, as in this case, the law is clear that a beneficiary, such as DB, may step in and enforce the contractual rights of the trustee or agent.

**A. DB as *Cestuis que trustent* Is Entitled To Enforce Provisions of the Depository and Custodial Agreements Intended To Benefit the Ocala Noteholders.**

Under BoA's view, the Ocala Noteholders do not enjoy the benefits of the Depository Agreement and the Custodial Agreement because only BoA, as Indenture Trustee and Collateral Agent, respectively, could possibly enforce the agreements against BoA, as the Depository Agent and Custodian, respectively, and BoA obviously cannot sue itself. The well-established principle of *Cestuis que trustent*, however, provides the answer to the obvious absurdity raised by BoA's

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<sup>17</sup> An indenture trustee's interest in the enforcement of provisions in facility documents arises out of the indenture trustee's role as proxy/agent for the debt holders, as the indenture trustee's entire *raison d'être* is to protect the interests of the debt holders. See Landau & Peluso, *supra*, at 87 ("The trustee's active and vigilant administration is necessary at all times to ensure, if possible, that there is no default, or, if default occurs, that the bondholders will have the security for which they bargained from which to recover.").

position.<sup>18</sup> Under this principle, a beneficiary may step into the shoes of its trustee in cases such as this where the trustee is incapable of acting to enforce a beneficiary's rights:

Where a claim exists in favor of the trust (properly speaking, of the trustees in their trust capacity) against third persons and the trustees are under a duty to enforce that claim and have improperly and unjustifiably failed to do so, the beneficiaries may bring a suit on behalf of the trust, analogous to stockholders' derivative suits on behalf of a corporation.

*Velez v. Feinstein*, 451 N.Y.S.2d 110, 114 (App. Div. 1982). Nor does a beneficiary seeking to exercise its rights as *Cestuis que trustent* need to make a demand where it would be futile to do so. *See id.* at 115-16. As courts have recognized, the most obvious example of where a demand would be patently futile is where a fiduciary would be forced to sue itself. *Riviera Congress Assocs. v. Yassky*, 223 N.E.2d 876, 880 (N.Y. 1966) ("Since [Syndicate's] general partners will not sue [for rent] because they are the very persons who would be liable for payment of the rent, the limited partners, as *Cestuis que trustent*, should be permitted to initiate the necessary legal proceedings on behalf of the Syndicate."); *see also Sterling Fed. Bank v. Credit Suisse First Boston Corp.*, No. 07-C-2922, 2008 WL 4924926, at \*10 (N.D. Ill. Nov. 14, 2008) (demand deemed futile because "a demand on the Trustee to sue DLJ would have been tantamount to asking the Trustee to bring a suit against itself").

Accordingly, DB may step into BoA's shoes and assert any rights BoA has as Indenture Trustee under the Depositary Agreement and as Collateral Agent under the Custodial Agreement.

**B. The Ocala Noteholders Were the Intended Beneficiaries of BoA's Obligation To Certify the Borrowing Base Condition Under Section 4(d) of the Depositary Agreement.**

BoA asserts that the certification of the Borrowing Base Condition by the Depositary Agent required by Section 4(d) was not an obligation intended to benefit the Indenture Trustee or

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<sup>18</sup> Though the FAC explicitly referenced this principle, FAC ¶¶ 246, 252, BoA's motion simply ignores it.

presumably the Ocala Noteholders. BoA Br. at 61. However, given BoA’s view that only three parties could enforce the obligations of the Depositary Agreement—the Depositary Agent, Ocala or the Indenture Trustee, *id.*—there could be no beneficiary of this provision *other* than the Indenture Trustee. Since Section 4(d) imposes obligations on *Ocala* to prepare certain financial information and on the *Depositary Agent* to certify this financial information, the only party left for whom these obligations could be a benefit is the Indenture Trustee and, derivatively, the Ocala Noteholders. As a practical matter, the whole point of a borrowing base condition, such as Section 4(d), is to protect the debt holders by preventing a borrower from borrowing more than an amount that is properly collateralized. Section 4(d) therefore unquestionably was intended to provide a benefit to the Indenture Trustee and the Ocala Noteholders.

C. **The Ocala Noteholders Are the Intended Beneficiaries of the Custodian’s Obligations Under the Custodial Agreement and Have Standing To Enforce Those Rights.**

BoA spends most of its argument on standing under the Custodial Agreement discussing a red herring—the significance of the Swap Counterparties’ status as third-party beneficiaries. *Id.* at 53-66. At no point, however, does BoA address the pertinent issue, *i.e.*, whether the Ocala Noteholders were the intended beneficiaries of provisions of the Custodial Agreement. BoA avoids this with good reason because the recitals to the Custodial Agreement make it abundantly clear that the Noteholders *are* the beneficiaries: “The Custodian acknowledges and agrees that all of the rights of the Issuer under this Agreement are being assigned to the Collateral Agent *for the benefit of the Secured Parties.*” Ex. D at 2 (emphasis added). This express intent on the part of the Custodian to confer a benefit upon the Collateral Agent and the Secured Parties (*i.e.*, the Ocala Noteholders) clearly and unequivocally establishes that the Collateral Agent and Ocala Noteholders are intended third-party beneficiaries. *See Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 485 N.E.2d 208, 212 (N.Y. 1985) (“circumstances indicate that the promisee intends to give the

beneficiary the benefit of the promised performance” (quoting Restatement (Second) of Contracts § 302(1)(b) (1981))).

Accordingly, DB, as a Secured Party, has the right to enforce the Custodian’s obligations under the Custodial Agreement, including its obligation to maintain custody and control of mortgages and lists of Ocala loans. Ex. D §§ 6-9 at 3-5; FAC ¶¶ 160-167. DB and the other Ocala Noteholders also have the right as *Cestuis que trustent* to enforce any rights BoA as the Collateral Agent may have under the Custodial Agreement.

**VII. THE ROLLOVER OF OCALA NOTES DID NOT EXTINGUISH EXISTING CLAIMS UNDER THE OCALA FACILITY DOCUMENTS.**

At the tail end of its brief, BoA argues that DB’s claims against BoA for injuries and events occurring before July 20, 2009 were extinguished when the Ocala Notes rolled over on that date. BoA Br. at 75-77. This argument simply misconstrues DB’s claims. DB is not suing BoA for Ocala’s failure to pay the principal due on the Ocala Notes themselves. Rather, DB is suing BoA for its breaches of the Ocala Facility Documents that resulted in the loss of the collateral that was supposed to be backing the Ocala Notes. BoA’s argument—that DB may not bring suit to recover on Ocala Notes dated prior to July 20, 2009 because DB’s claims under those Ocala Notes have been extinguished—is thus irrelevant. It is also unsupported by the authority cited by BoA.<sup>19</sup> Those cases stand only for the proposition that a noteholder who is paid in full may not sue the borrower for breaches of the note or undertakings made by the borrower to support the note. *See*

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<sup>19</sup> The cases cited by BoA involved non-recurring debt obligations that were extinguished and whose governing documents expired or terminated upon payment at final maturity. *See Green v. Foley*, 856 F.2d 660 (4th Cir. 1988) (non-recurring bank notes); *Bank of Lexington v. Jack Adams Aircraft Sales, Inc.*, 570 F.2d 1220 (5th Cir. 1978) (non-recurring aircraft mortgage); *In re Paradis’ Estate*, 186 A. 672 (Me. 1936) (a single issuance of commercial paper); *Great W. Bank v. Kong*, 108 Cal. Rptr. 2d 266 (Ct. App. 2001) (single commercial mortgage); *Caplan v. Unimax Holdings Corp.*, 591 N.Y.S.2d 28 (App. Div. 1992) (single debenture).

*e.g.*, 83 N.Y. Jur. 2d *Payment and Tender* § 141 (West 2010) (legally sufficient tender discharges collateral undertakings by the borrower, such as mortgages, liens and pledges).

In this case, DB is not suing in respect of related undertakings made by Ocala in connection with issuance of the Ocala Notes. Rather, DB alleges that *BoA*'s breaches of the Ocala Facility Documents caused Ocala to lose the cash and mortgages that would have been available to repay the principal due on the Ocala Notes issued on July 20, 2009 and that this loss of collateral proximately caused the Ocala Notes to lose their value.<sup>20</sup> FAC ¶¶ 197, 218, 222, 231, 243, 249, 255, 262, 270. The Ocala Facility Documents under which DB has brought its claims remained in full force and effect continuously from DB's first investment in December 2007 through July 20, 2009. FAC ¶ 37, 112. The rollover of Ocala Notes on each rollover date had no effect on accrued claims against BoA in its various roles, and, in fact, was premised on BoA's continued performance of its various duties under the Ocala Facility Agreements. FAC ¶¶ 97, 133.

Moreover, DB alleges that BoA's continuing breaches of the Ocala Agreements *on* July 20, 2009—the failure to notify the Ocala Noteholders of Events of Default or Potential Events of Default as required by the Base Indenture, the false certification of the Borrowing Base Condition on July 20, 2009, the improper issuance of Ocala Notes, the failure to shut down the Ocala facility and the breach of its fiduciary duties—caused DB to roll over its investment in Ocala Notes and thereby proximately caused DB's loss. FAC ¶¶ 129-133, 193-202.

In light of these allegations, there is thus no basis at this stage for excluding events or injuries occurring prior to July 20, 2009. At best, BoA's facile attempt to wipe the contractual slate

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<sup>20</sup> The importance of BoA's continuing role in protecting the collateral that would ultimately be needed to pay off the last maturing Ocala Notes was underscored by a July 13, 2009 report issued by Moody's Investors Service that explained: "Ocala's noteholders benefit from a security interest in all the assets of Ocala. A security interest is important in an extendible note program where repayment at legal final maturity depends on the proceeds from the sale or amortization of the collateral." Ex. T. at 3.

clean prior to July 20, 2009 raises questions of causation that cannot be resolved on a motion to dismiss.<sup>21</sup>

### **VIII. THE COMPLAINT STATES A CLAIM UNDER THE 2006 OCALA AGREEMENTS.**

BoA argues that claims may not be brought under the 2006 Ocala Agreements because they were superseded by the 2008 Ocala Agreements, on the theory that any superseding agreement with a merger clause necessarily releases all claims under the prior agreements. BoA Br. at 78. This misstates the law in New York, which presumes that claims under a superseded contract are *not* released absent an express waiver or release in the superseding contract. The absence of any such express intent in the 2008 Ocala Agreements therefore means that claims that had accrued under the 2006 Ocala Agreements were not released.

#### **A. Claims Under a Superseded Agreement Are Released Only If the Superseding Agreement Expresses an Intent To Release Such Claims.**

BoA relies on cases arising in the context of a settlement agreement, where prior claims and causes of action are being expressly discharged or satisfied as part of a settlement.<sup>22</sup> The bulk of BoA's authority for its argument therefore stands for the uncontroversial proposition that claims released as part of a settlement transaction presumptively stay released. BoA does not, and cannot, however, point to any case that holds that all superseding agreements containing merger clauses

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<sup>21</sup> See *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258, 271-72 (S.D.N.Y. 2004) (whether there is a causal connection between alleged contract breaches and damages are questions to be addressed at summary judgment or at trial, not on a motion to dismiss).

<sup>22</sup> See, e.g., *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 1000 (N.Y. 1993) (court rejected prior claims because “[s]trong policy considerations favor the enforcement of settlement agreements”); *Frank Felix Assocs. Ltd. v. Austin Drugs Inc.*, 111 F.3d 284, 287 n.1 (2d Cir. 1997) (settlement agreement); *Health-Chem Corp. v. Baker*, 915 F.2d 805, 808, 811 (2d Cir. 1990) (settlement agreement contemplating release of prior claims); *Grant v. Nat’l Eng’g Search*, No. 01-CV-6610, 2002 WL 31012152 (W.D.N.Y. Aug. 19, 2002) (agreement with explicit release of claims); *C3 Media & Mktg. Group v. Firstgate Internet*, 419 F. Supp. 2d 419, 435 (S.D.N.Y. 2005) (“Separation Agreement demonstrates a clear intent to extinguish existing claims.”).

serve to release all claims under the prior agreements. This is because New York law requires that a modified or substituted contract contain an express provision releasing or waiving all prior claims, defenses or causes of action arising from the prior contract. *See e.g., GMC v. Fiat S.p.A*, 678 F. Supp. 2d 141, 148 (S.D.N.Y. 2009) (noting that, under New York law, merger clause did not extinguish arbitration claim under prior agreement), *reconsideration denied*, No. 08 Civ. 4999 (DAB), 2009 WL 5088739 (S.D.N.Y. Dec. 17, 2009); *Air Support Int'l, Inc. v. Atlas Air, Inc.*, 54 F. Supp. 2d 158, 166 (E.D.N.Y. 1999) (“Although the Second Contract superseded any other existing agreements between the parties, absent an express release provision in the Second Contract, Air Support has not waived, released or relinquished any legal claims which arose out of prior agreements.”).

In short, legal claims existing under a contract survive the amendment and restatement of the contract unless the parties expressly waive or release those claims.

**B. The 2008 Ocala Agreements Do Not Expressly Waive or Release the Claims of Noteholders Under the 2006 Ocala Agreements.**

The 2008 Ocala Agreements do not contemplate the discharge, satisfaction or release of any then-existing causes of action under the 2006 Ocala Agreements, and so those causes of action survived. The 2008 Security Agreement and 2008 Custodial Agreement contain typical integration clauses, Ex. A § 10.14 at 45; Ex. D § 21(d) at 15, but neither contains any reference to claims, defenses or causes of action arising under the 2006 Ocala Agreements. Neither the 2008 Base Indenture nor the 2008-1 Depositary Agreement contains even an integration clause, much less an explicit waiver or release. The New York Court of Appeals expressly has rejected general merger clauses as the sole basis for asserting the release of contractual claims under superseded contracts. *Primex Int'l Corp. v. Wal-Mart Stores, Inc.*, 679 N.E.2d 624, 626-27 (N.Y. 1997) (“the language of the merger clause was insufficient to establish any intent of the parties to revoke retroactively their contractual obligations”). The general merger provisions in the 2008 Security Agreement and 2008

Custodial Agreement thus are insufficient to establish any intent to revoke then-existing causes of action. Moreover, the absence of any other provision in any of the 2008 Ocala Agreements reflecting the intent of the parties to release causes of action existing as of June 30, 2008 is dispositive—those causes of action survived.

**IX. DB HAS STATED A CLAIM FOR INDEMNIFICATION UNDER THE SECURITY, DEPOSITARY AND CUSTODIAL AGREEMENTS.**

BoA argues that the Court should dismiss DB’s indemnification claim because the only reasonable interpretation of the indemnification provisions of the Security, Depositary and Custodial Agreements precludes coverage of first-party losses (as opposed to losses DB might sustain if sued by a third party based on BoA’s conduct). BoA Br. at 67-69. With respect to the Depositary and Custodial Agreements, BoA further argues that they cannot reasonably be read to extend to the investment losses that DB suffered in its capacity as a noteholder. *See* BoA Br. at 67. These two arguments must fail on a motion to dismiss because the indemnity provisions in the Ocala Agreements, as reasonably construed, cover DB’s own investment losses.

An indemnification agreement does not need to expressly reference first-party claims in order to cover them. Where, as here, the intention to indemnify first-party claims can be “clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances,” courts applying New York law will enforce that intention. *Pfizer, Inc. v. Stryker Corp.*, 348 F. Supp. 2d 131, 146 (S.D.N.Y. 2004) (quoting *Hooper Assocs. v. AGS Computers*, 548 N.E.2d 903, 905 (N.Y. 1989)).<sup>23</sup>

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<sup>23</sup> BoA argues that, in order to find that an indemnification provision covers first-party claims, the court must conclude that the contract makes it “unmistakably clear” that was the intent of the parties. *See* BoA Br. at 68. The cases upon which BoA relies in support of that standard—*Hooper* and its progeny—arose in the context of a party seeking an award of attorney’s fees, a pursuit which “is contrary to the well-understood rule that parties are responsible for their own attorney’s fees,” making courts reluctant to infer intent. *Hooper*, 548 N.E.2d at 905. This lawsuit is distinguishable because there is no rule that parties are responsible for their own losses when another party breaches a contract.

**A. DB Is Indemnified Under the Security and Depositary Agreements.**

Each of the indemnity sections of the Security and Depositary Agreements is structured so that a broad sentence obligating BoA to “indemnify and hold harmless” DB against “any and all claims [and] losses” is followed by a more specific sentence directly addressing only third-party claims. Ex. A § 8.05 at 40; Ex. B § 8(g) at 11. If the first sentence of these provisions were solely about third-party claims, then the language in the second sentence regarding such claims would be mere “surplusage.” *Pfizer*, 348 F. Supp. 2d at 146 (finding structure of agreement indicated intent to indemnify for costs relating to first-party claims). The first sentence, therefore, cannot reasonably be interpreted as being so narrow and instead must encompass actions for first-party losses.<sup>24</sup> See *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 179 (2d Cir. 2005) (where “language limiting indemnification to third-party actions appear[s] in only one of two key sentences in an indemnity clause, [then] the more expansive sentence encompass[e]s . . . suits on the contract between the parties”) (summarizing *Sagittarius Broad. Corp. v. Evergreen Media Corp.*, 663 N.Y.S.2d 160 (App. Div. 1997)).

This reading is supported by cases from this District examining indemnification agreements with notice-of-claim and assumption-of-defense obligations like those in the second sentence of the instant indemnity sections, the only logical application of which is to third-party suits. The courts in *Pfizer* and *Promuto v. Waste Management, Inc.* concluded that any explicit reference to third-party claims in the description of these obligations was superfluous unless it was intended to create a distinction with other provisions of the indemnification agreement. *Pfizer*, 348 F. Supp. 2d at

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<sup>24</sup> The title of Security Agreement Section 8.05, “Indemnification of Third Party Claims,” is not evidence of an intent to cover only third-party claims. The Security Agreement expressly states: “Section headings used in this Agreement are for convenience only and shall not affect the construction of this Agreement.” Ex. A § 10.11 at 44. Similarly titled indemnification provisions have been held to cover first-party claims. See *DLJ Mortg. Capital, Inc. v. Fairmont Funding, Ltd.*, No. 0600714/2007, 2008 WL 347767 (N.Y. Sup. Ct. Jan. 28, 2008) (table) (interpreting section of purchase agreement entitled “Indemnification: Third Party Claims”).

146; *Promuto v. Waste Mgmt., Inc.*, 44 F. Supp. 2d 628, 651-52 (S.D.N.Y. 1999) (mem.). Those other provisions were then held to reach first-party claims.<sup>25</sup>

The indemnity sections of the Security and Depositary Agreements are distinguishable from the indemnification contract in *Hooper*, upon which BoA relies. See BoA Br. at 75. In this case, unlike in *Hooper*, the notice-of-claim and assumption-of-defense requirements applying to third-party suits do not refer back to previous language promising indemnification of “any and all” claims. Ex. A § 8.05 at 40; Ex. B § 8(g) at 11. Therefore, in contrast to the agreement in *Hooper*, these sections “evinced[] a clear intent to distinguish between inter-party claims and third-party claims, with the notice and assumption of defense provisions applying exclusively to the latter.” *Promuto*, 44 F. Supp. 2d at 651-52 (distinguishing *Hooper*); see also *DLJ Mortg. Capital, Inc. v. Fairmont Funding, Ltd.*, 2008 WL 347767 (N.Y. Sup. Ct. Jan. 28, 2008) (table) (same).

BoA’s other argument on the Depositary Agreement—that DB does not and cannot assert Ocala losses as a basis for indemnity, BoA Br. at 72—misconstrues DB’s allegations and the meaning of Section 8(g). Ex. B § 8(g) at 11. DB has in fact alleged that Ocala sustained losses in the form of the loss of the collateral backing the Ocala Notes. FAC ¶¶ 200, 255. Section 8(g), in

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<sup>25</sup> See also *Mid-Hudson*, 418 F.3d at 178-79 (analyzing distinctions between two indemnification clauses in a contract and concluding that one encompasses suits between the parties and the other does not); *E\*Trade Fin. Corp. v. Deutsche Bank AG*, 631 F. Supp. 2d 313, 391-92 (S.D.N.Y. 2009) (Sweet, J.) (finding indemnification provision whose language was “amenable” to the interpretation that it applied exclusively to third-party claims was properly understood in conjunction with another provision of the agreement to unambiguously contemplate first-party claims), *aff’d*, No. 09-3029-cv, 2010 WL 1196814, at \*3-4 (2d Cir. Mar. 30, 2010); *DLJ Mortg. Capital, Inc.*, 2008 WL 347767 (concluding that first two sentences of indemnification agreement provided that defendant must indemnify plaintiff for inter-party litigation where remainder of paragraph contained particular references to third-party claims). BoA obscures the significance of the structure of the indemnification provisions in the Security and Depositary Agreements by citing only the first sentence of those agreements. BoA Br. at 71-72, 74-75. BoA also relies upon a footnote in a decision that pre-dates *Pfizer* and *Promuto* to argue that the “better-reasoned authority” found that “line of cases ‘unpersuasive.’” BoA Br. at 71 n.20 (citing *Sequa Corp. v. Gelmin*, 851 F. Supp. 106, 111 n.7 (S.D.N.Y. 1994)). Rather, the willingness of courts in this District to depart from *Sequa* indicates that it is the less persuasive case.

recognition that losses to Ocala necessarily flow through to the Ocala Noteholders, plainly provides that DB may recover these losses from BoA to the extent they were caused by BoA's negligence. BoA's contrary reading allows for no circumstances under which DB, although indemnified for "any and all . . . losses," could bring an indemnity claim. *See* BoA Br. at 72. Courts refuse to construe indemnification provisions to prevent parties from bringing any of the claims they might have anticipated at the time the contract was executed. *See, e.g., Breed, Abbott & Morgan v. Hulko*, 541 N.E.2d 402, 403 (N.Y. 1989) (mem.) (holding that indemnification provision covered first-party claims because "it is difficult, if not impossible, to ascertain for what it was that the parties had agreed to indemnify" if not claims by contracting parties). BoA has thus failed to carry its burden of demonstrating that the indemnity sections of the Security and Depositary Agreements could not reasonably be interpreted to cover DB's losses passed through from Ocala.

**B. DB Is Indemnified Under the Custodial Agreement.**

The language in the Custodial Agreement expressly holding each indemnified party harmless from any and all losses resulting from BoA's "breach of its obligations" under the contract is not susceptible to any interpretation other than coverage of first-party losses. Ex. D § 17 at 9; *see also Diagnostic Imaging Servs. v. N.Y. Musculo-Skeletal*, No. 0603122/2005, 2007 WL 2175648 (N.Y. Sup. Ct. Apr. 18, 2007) (interpreting language providing indemnification for breaches of agreement and deciding that it "unequivocally refers to contract claims between the parties themselves"); *Star Diamond Group, Inc. v. CoMac Int'l, N.V.*, 747 N.Y.S.2d 467, 468 (App. Div. 2002) (permitting first-party indemnification claim for breach of contract losses). There are no third parties with standing to bring a claim against the indemnified parties for BoA's breaches of the Custodial Agreement. When an indemnification provision lists a cause of action unlikely to be

brought by third parties, courts have found that it necessarily covers first-party claims.<sup>26</sup> *See, e.g., Pfizer*, 348 F. Supp. 2d at 146; *Promuto*, 44 F. Supp. 2d at 652; *Breed*, 541 N.E. at 403.

BoA’s alternate argument—that the Custodial Agreement only indemnifies DB in its capacity as a Swap Counterparty—is belied by the language in Section 17 extending indemnification to the covered parties’ “respective Affiliates, their respective directors, officers, trustees, employees and agents and their respective successors and assigns.” Ex. D § 17 at 9. This language clearly implies that Section 17 was intended to cover indemnified parties in other than their named capacities and raises a question of fact as to whether it covers DB as a Noteholder. *See Crouse v. Hellman Constr. Co.*, 832 N.Y.S.2d 564, 565 (App. Div. 2007) (finding issue of fact regarding scope of indemnity agreement that covered not only subcontractor but “affiliates” precluded summary judgment). BoA thus has not carried its burden of demonstrating as a matter of law that the indemnity provision in the Custodial Agreement excludes coverage of damages flowing from BoA’s custodial breaches.

## **X. CONCLUSION**

For the reasons set forth above, BoA’s motion to dismiss should be denied in full.

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<sup>26</sup> BoA cites cases for the proposition that the phrase “imposed on, incurred by or asserted against” most naturally refers to third-party claims, but those cases either did not interpret that language or did not find it dispositive. BoA Br. at 70; *see, e.g., Bridgestone/Firestone Inc., v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 21 (2d Cir. 1996) (construing indemnification provision pertaining to claims “asserted due or arising out of”). By contrast, in *Robbins v. Profile Records, Inc.*, 698 N.Y.S.2d 638 (App. Div. 1999) (mem.), the court found that an agreement indemnifying against fees “incurred by or asserted against” the plaintiff “unequivocally” referred to claims between the parties themselves. *Id.* at 639 (quotations omitted).

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 4, 2010, a true and correct copy of the foregoing Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss was filed and served electronically via ECF on the following:

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