SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

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STS PARTNERS FUND, LP and BURGESS CREEK MASTER FUND LTD.,

Plaintiffs,

-against-

DEUTSCHE BANK SECURITIES, INC.; DEUTSCHE MORTGAGE SECURITIES, INC.; WELLS FARGO BANK, N.A., as Trustee,

Defendants.

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Index No. 653216/2014
Motion Seq. No 002, 003, 004
Motion Date: 2/19/2016

EILEEN BRANSTEN, J.:

Motion sequence numbers 002, 003 and 004 are consolidated for disposition.

In this action, the plaintiff investment funds allege that defendants wrongfully extinguished their contractual interests in two residential mortgage backed securities ("RMBS") trusts. Defendants Deutsche Bank Securities, Inc. ("DB Securities"), Deutsche Mortgage Securities, Inc. ("DB Mortgage") (together, the "DB Defendants") and Wells Fargo Bank, N.A. ("Wells Fargo" or the "Trustee"), move to dismiss the Supplemental Complaint[1] upon documentary evidence and for failure to state a claim.

[1] The action was commenced in October 2014 and the original complaint related to a single RMBS trust. The Supplemental Complaint was filed in November 2015 to include additional allegations after defendants terminated a second trust. By stipulation and order dated February 11, 2016, the Supplemental Complaint was deemed the operative pleading (Dkt. 179). As provided in the stipulation, the court has considered the original motion papers, the supplemental letter briefs and their attachments in determining the motions, and all those submissions shall be deemed part of the record.

The DB Defendants assert the additional ground that plaintiffs lack the capacity to sue. For the following reasons, the DB Defendants' motions are granted in their entirety, while Wells Fargo's motion is granted in part and denied in part.

I. Background[2]

A. *The Trusts*

This dispute centers on plaintiffs' investments in two trusts terminated by defendants – the 2007 RS-6 Trust (the "RS-6 Trust") and the Series 2007-RS-5 Trust (the "RS-5 Trust") (together, "the Trusts"). The Trusts were part of a series of trusts known as the Series 2007-RS Trusts (the "2007-RS Series") created in 2007.

The Trusts raised money by issuing and selling securities reflecting beneficial interests in the Trusts (the "Certificates") to investors ("Certificateholders") in four distinct classes: Class A-1, Class A-2, Class A- X and Class R. (Supp. Compl. ¶ 4). Defendant DB Mortgage, as Depositor under the Trusts, prepared Private Placement Memoranda ("PPMs") and caused the Trusts to issue the Certificates. *Id.* at ¶¶ 4, 38. Defendant DB Securities, a DB Mortgage affiliate, offered and sold the Class A-1, Class A-2 and Class A-X Certificates pursuant to PPMs dated December 20, 2007. *Id.* at ¶ 4.

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[2] The following facts are taken from the Supplemental Complaint ("Supp. Compl."), the governing transactional documents annexed thereto, and the additional submissions of the parties

The Trusts were governed by virtually identical trust agreements between defendants DB Mortgage and Wells Fargo, also dated December 20, 2007 (the "RS-6 Trust Agreement" (Supp. Compl., Ex. A) and the "RS-5 Trust Agreement" (Supp. Compl., Ex. B), together, the "Trust Agreements"). An amendment to the RS-6 Trust Agreement (the "RS-6 Amendment") was executed on or about September 12, 2014 (Supp. Compl., Ex. C) and an amendment to the RS-5 Trust Agreement (the "RS-5 Amendment") was executed on or about October 9, 2014 (Supp. Compl., Ex. D) (together, the "Trust Amendments")

DB Securities was the "Seller" under the Trust Agreements, the "Initial Purchaser" in the PPM, and a holder of Class A-1 and Class A-2 Certificates. (Supp. Compl. ¶ 30). The Trusts used the money they raised to acquire portfolios of RMBS-related assets. *Id.* at ¶ 36. The underlying RMBS for the RS-6 Trust and RS-5 Trust consisted, respectively, of 29 and 28 securities reflecting beneficial interests in RMBS backed by "Alt-A" collateral issued from 2005-2007. *Id.* at ¶ 36. The cash flows from the underlying RMBS were used primarily to make interest and principal payments to the Certificateholders. *Id.* at ¶ 36. Wells Fargo, as Trustee under the Trust Agreements, held and collected proceeds from the underlying RMBS, and distributed monies in the Trusts to Certificateholders pursuant to the terms of the Trust Agreements. *Id.* at ¶ 44.

Plaintiffs STS Partners Fund, LP ("STS") and Burgess Creek Master Fund Ltd. ("Burgess") together purchased 100% of the Class A-X Certificates in the RS-6 Trust on

April 23, 2014, and 100% of the Class A-X Certificates in the RS-5 Trust on May 7, 2014. *Id.* at ¶¶ 58, 60. STS held approximately 76% of the Certificates of the RS-6 Trust and approximately 87% of those in the RS-5 Trust, and Burgess held the remaining certificates. *Id.* at ¶¶ 28-29. The RS-6 Class A-X Certificates had a notional balance of approximately $370 million, approximately 42% of the balance at issuance, and the RS-5 Class A-X Certificates had a notional balance of approximately $408 million, approximately 51% of the balance at issuance. *Id.* at ¶¶ 5, 58, 60. The Class A-X Certificates entitled plaintiffs to receive monthly distributions of interest generated by the Trusts in excess of interest owed to the holders of the Class A-1 and A-2 Certificates Trusts (the "Class A-X Distribution Amount") which was calculated based on the principal balance of the Class A-1 and A-2 Certificates. *Id.* at ¶¶ 5, 6, 37, 58. Because the Class A-X Certificates were "interest-only" Certificates, their value depended on the performance of the mortgage loans underlying the securities held by the Trusts. *Id.* at ¶ 6. Their value was also tied to the continuing existence of the Trusts. *Id.* Plaintiffs allege that when they bought their Certificates, they analyzed both the potential performance of the underlying assets, and the possibility that those assets could be sold, or that the Trusts could be terminated. *Id.*

The Trusts authorized certain "Designated Entities" to act with respect to the Certificates. *Id.* at ¶ 42. Non-party AG Financial Products Inc. ("AGFP") was the Designated Entity for the Class A-1 Certificates at the time relevant to this dispute (*see*

Trust Amendments, signature pages). DB Securities was the Designated Entity for the Class A-2 and Class A-X Certificates. *Id.* DB Securities was the Holder of 100% of the Class A-1, Class A-2, and Class R Certificates. *See* Trusts, definition section; Trust Amendments, signature pages; Supp. Comp. ¶ 39. The Trusts conferred express third-party beneficiary status upon each Designated Entity for various purposes, including the rights to receive certain notices and reports. (Trusts Agreements, § 9.10).

B. *Trust Agreements*

The Trust Agreements provided for termination of the Trusts in several ways. Section 7.01(a) of the Trust Agreements provided for termination of the Trusts upon the consent of all the Certificateholders and payment of a contractually defined final distribution. Section 7.04 provided for periodic auctions of the underlying certificates commencing in December 2012, followed by termination of the Trusts if an auction were successful. That section required the participation of at least two qualified bidders, and mandated that the highest bid be equal or greater than the "Minimum Auction Call Amount" as defined in section 1.01. The Trustee was also required to obtain an accountant's written certification that an "IRR [Internal Rate of Return] Threshold" as defined in section 1.01 had been satisfied.

Sections 2.05(i) and (ii) of the Trust Agreements prohibited the Trustee disposing of any Trust assets, or dissolving or liquidating the Trusts, except as permitted by the

terms of the agreements. Section 9.01(a) permitted DB Mortgage and Wells Fargo to amend the agreements at any time, without the consent of the Certificateholders, so long as the consent of the Designated Entities was obtained. Under that section, the right to amend included the power "to add any provisions to or change in any manner or eliminate any of the provisions of this Agreement or to modify in any manner the rights of the holders of the Offered Certificates or any Designated Entity." However, section 9.01(b) required the Trustee to first obtain an opinion of counsel as to the permissibility and tax consequences of the amendments, and certain representations from the rating agencies concerning the effect of the amendment on the certificates' ratings.

Section 9.02 set forth a "no action" clause which prohibited any certificateholders from commencing an action under the Trust Agreements unless they held at least 25% of the voting rights and made a prior written demand upon the Trustee. That section also provided that "no one or more Holders of Certificates shall have any right in any manner whatsoever by virtue of any provision of this Agreement to affect, disturb or prejudice the rights of the Holders of any other of such Certificates, or to obtain or seek to obtain priority over or preference to any other such Holder, or to enforce any right under this Agreement, except in the manner herein provided and for the equal, ratable and common benefit of all Certificateholders."

Plaintiffs received their first monthly Class A-X Distribution Amount from the RS-6 Trust on or about April 28, 2014, and received appropriate distributions through

August 2014. (Supp. Compl. ¶ 59). However, plaintiffs allege that because the interest payments to the A-X certificate holders represented lost value on the underlying assets, defendants thereafter executed the Trust Amendments in order to wipe out the Class A-X Certificates and realize the full value of the Trusts for themselves. *Id.* at ¶ 62.

Specifically, Section 2 of the September 12, 2014 RS-6 Amendment altered the auction provisions set forth in Section 7.04(a) of the RS-6 Trust Agreement, and replaced them with a new procedure for a "Discretionary Auction" that permitted DB Securities to bid on and acquire the Underlying RMBS regardless of whether other bids from qualified bidders had been received. Section 2 of also replaced the RS-6 Trust Agreement's requirement that any auction provide "cash payment in full for the purchase price to the Trustee," *see* RS-6 Trust Agreement § 7.04(a)(iv), with a process that permitted DB Securities to acquire the underlying RMBS, in whole or in part, by applying the amount of certain distributions owed to it. Section 3 of the Amendment provided that the auction would occur by noon on the date of execution of the RS-6 Amendment and the distribution of the proceeds would follow on that date.

C. *Termination of the RS-6 Trust*

The Amendment terminated the RS-6 Trust. (Supp. Compl. at ¶ 63). Among other things, the Amendment expressly required that the Trustee prepare and deliver a "termination notice" to DB Mortgage, and "notify the Rating Agencies . . . of such final

payment and termination." The Amendment also provided that "neither [DB Mortgage] nor the Trustee shall have any further obligations thereunder with respect to the Certificates or the underlying [RMBS] except those that expressly survive termination of this Trust Agreement." (RS-6 Amendment § 2(f)).

Plaintiffs first learned of defendants' actions through a September 22, 2014 "Mandatory Domestic Corporate Action Notice" sent by Wells Fargo to their investment advisor and general partner, non-party Deer Park Road Corporation ("Deer Park"). (Supp. Compl. at ¶¶ 33, 71). The notice purported to declare a "Full Call" on the Certificates, and stated that redemption proceeds "will be credited" to plaintiffs' accounts on the redemption date of September 12, 2014 – a date ten days earlier than the notice. *Id.* at ¶¶ 16, 71. The notice did not advise plaintiffs of the RS-6 Amendment. *Id.* at ¶ 71.

On September 24, 2014, Deer Park wrote to Wells Fargo on Plaintiffs' behalf to object to the termination of the RS-6 Trust and assert that plaintiffs had not consented to it. *Id.* at ¶ 72. On September 29, 2014, Wells Fargo responded by informing plaintiffs of the RS-6 Amendment, notifying them that an auction been conducted, that the RS-6 Trust had been terminated and that plaintiffs would receive nothing in connection with the September 12, 2014 distribution. *Id.* at ¶¶ 73. Plaintiffs also did not receive the Class A-X Distribution Amount for interest accruing between August 28 and September 27, 2014. *Id.* at ¶ 76. However, DB Securities received a substantial sum after it acquired and/or liquidated the Underlying RMBS without paying Minimum Auction Call Amount. *Id.* at

¶¶ 74. Both DB Mortgage and the Trustee received substantial payments and benefits in connection with the termination, including, among other things, all of their unpaid fees, expenses and indemnity amounts. *Id.*

Plaintiffs originally commenced this action on October 22, 2014 to seek recovery in connection with defendants' termination of the RS-6 Trust.

D. *Termination of the RS-5 Trust*

On or about October 9, 2015, defendants terminated the RS-5 Trust by way of a Discretionary Auction authorized by the RS-5 Amendment. *Id.* at ¶ 78. Like the RS-6 Amendment, the RS-5 allowed DB Securities to acquire the Underlying RMBS without competing bids or a cash payment, and extinguished plaintiffs' contractual rights and the value of the Class A-X Certificates. (Supp. Compl. ¶ 78.)

However, unlike the RS-6 Amendment, the RS-5 Amendment eliminated the requirement in Section 7.01 of its corresponding trust agreement that all certificateholders consent to termination, substituting a requirement that only "the Designated Entities" consent. *Id.* at ¶ 84. It also relieved the Trustee of the obligation to notify certificateholders in advance of a termination; to declare a Final Distribution Date for surrendering the Class A-X Certificates; and to make a final distribution. *Id.* at ¶ 85. Finally, in addition to the unpaid fees, expenses and indemnity amounts awarded to the Trustee by the RS-6 Amendment, the RS-5 Amendment included processing fees and

collection fees, and a payment calculated as a percentage (30 basis points) of the RS-5 Trust's assets. *Id.* at ¶ 88.

On October 29, 2015, Deer Park received a monthly report from the Trustee indicating that plaintiffs' investment in the RS-5 Trust had been rendered worthless. *Id.* at ¶ 89. Several days later, the Trustee confirmed that the RS-5 Trust had terminated in connection with a Discretionary Auction. *Id.* Plaintiffs received no distribution from the Trust, and received none of the proceeds from the auction. *Id.* Plaintiffs contend DB Securities later received substantial profits by marketing the Underlying RMBS in another auction. *Id.*

E. *The Instant Action*

Plaintiffs filed the Supplemental Complaint to recover damages from the allegedly unlawful termination of both trusts on November 19, 2015. The complaint sets forth eight causes of action. The first through third assert claims for breach of contract against DB Securities, DB Mortgage and Wells Fargo, respectively. (Supp. Compl. at ¶¶ 107-128.) The fourth cause of action is for tortious interference with contract against DB Securities. *Id.* at ¶¶ 129-135. The fifth cause of action charges the DB Defendants with unjust enrichment. *Id.* at ¶¶ 136-142. The sixth cause of action alleges that Wells Fargo breached its fiduciary duty, *id.* at ¶¶ 143-147, and the seventh asserts that the DB Defendants aided and abetted that breach. *Id.* at ¶¶ 148-152. The eighth cause of action,

for breach of the covenant of good faith and fair dealing, is asserted against all defendants. *Id.* at ¶¶ 153-164.

In support of its claims, the Supplemental Complaint relies on a number of matters extrinsic to the trust-related transactions. In addition to alleging that Wells Fargo had financial conflicts of interest arising from certain payments it received in connection with the transactions, plaintiffs allege the Trustee's independent judgment was affected by its relationship with Deutsche Bank AG, an affiliate of the DB Defendants. *Id.* at ¶¶ 1, 92. Plaintiffs assert that Deutsche Bank and Wells Fargo are two of the world's largest sponsors and trustees of RMBS trusts, and have served as trustees for thousands of them, each routinely acting as trustee for trusts sponsored or controlled by the other. *Id.* at ¶ 92. Further, Deutsche Bank and Wells Fargo are co-defendants in numerous parallel lawsuits arising out of their alleged failure to discharge their duties as trustees for hundreds of RMBS trusts. *Id.* at ¶ 93. The two banks affirmatively coordinate their defenses and share legal counsel in those actions. *Id.*

Finally, plaintiffs contend that defendants have wrongfully terminated, by similar amendments, other trusts in the 2007-RS Series, including the Series 2007 RS-3 Trust (the "RS-3 Trust") and Series 2007 RS-4 trust (the "RS-4 Trust"). Plaintiffs assert that those trusts are governed by virtually identical agreements which require consent of all certificateholders. With respect to the RS-3 Trust, however, defendants allegedly paid the certificateholders $33 million, representing the fair value of the certificates, despite

having amended the trust to eliminate the necessity of the certificateholders' consent to termination.

II. Discussion

For the following reasons, defendants' motions to dismiss the Supplemental Complaint are granted as to the Deutsche Bank Defendants, and granted in part and denied in part as to defendant Wells Fargo.

A. *The Deutsche Bank Defendants' Motion to Dismiss*

1. Standing

As a threshold matter, the Deutsche Bank defendants' argue that plaintiffs lack standing to sue by virtue of the "no action" clause set forth in section 9.02 of the Trust Agreements. That section provides, as relevant here:

> Subject to Section 9.10 hereof, no Certificateholder or Designated Entity shall have any right by virtue of any provision of this Agreement to institute any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, unless such Certificateholder or Designated Entity previously shall have given to the Trustee a written notice of default and of the continuance thereof, as hereinbefore provided, and such Certificateholder or Designated Entity holds at least 25% of the Voting Rights and shall have made written request upon the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder and shall have offered to the Trustee such reasonable indemnity as it may require against the costs, expenses and liabilities to be incurred therein or thereby, and the Trustee, for fifteen (15) days after its receipt of such notice,

> request and offer of indemnity, shall have neglected or refused to institute any such action, suit or proceeding.[3]

Defendants contend that because the plaintiffs' Class A-X Certificates have no voting rights, plaintiffs have failed to meet the 25% threshold set forth as a condition precedent to suit in section 9.02. Plaintiffs do not dispute that their Certificates lack voting rights, but argue that the no-action clause is inapplicable because the Trusts have terminated their claims implicate the Trustee, and there is no trustee with standing to bring the claims.

As the Court of Appeals has observed, "generally a no-action clause prevents minority securityholders from pursuing litigation against the issuer, in favor of a single action initiated by a Trustee upon request of a majority of the securityholders." *Quadrant Structured Products Co. v. Vertin*, 23 N.Y.3d 549, 565 (2014). Such provisions serve "to protect issuers from the expense involved in defending [individual] lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and its creditors . . . [and to] protect[ ] against the risk of strike suits." *Quadrant*, 23 N.Y.3d at 565; *see also Walnut Place LLC v. Countrywide Home Loans, Inc.*, 2012 WL 1138863, at *3 (Sup. Ct. N.Y. Cnty. 2012) *aff'd*, 96 A.D.3d 684 (1st Dep't 2012). However, "no-action clauses are to be construed strictly and thus read narrowly . . . to give effect to the precise words and language used." *Quadrant*, 23 N.Y.3d at 560. As with all

[3] Language substantially similar to section 9.02 has apparently been part of the boilerplate of no-action clauses for over 100 years, *see, e.g.*, *Kissel v. Chicago & Eastern Illinois R.R. Co.*, 126 A.D. 852 (1st Dep't 1908).

contracts, "where the language of the contract is clear [the court must] rely on the terms of the document to give effect to the parties' intent." *Id.* at 564.

Compliance with the percentage participation requirement of a no-action clause can only be excused where it has been rendered factually impossible, or somehow prevented by the party seeking to enforce the clause. *See, e.g., Campbell v. Hudson & Manhattan R. Co.*, 277 A.D. 731, 736 (1st Dep't 1951) (failure to allege a request by 25% of bondholders was excused because it was impossible to locate them); *Sterling Federal Bank, F.S.B. v. Credit Suisse First Boston Corp.*, 2008 WL 4924926 at *11, 14 (N.D. Ill. Nov. 14, 2008) (compliance with 25% voting rights requirement excused where trustee allegedly failed to respond to plaintiffs' requests for information regarding other certificateholders); *see also Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684, 685 (1st Dep't 2012) ("the 'prevention/impossibility' doctrine, upon which plaintiffs' argument relies, only applies, where, unlike here, nonperformance of a condition precedent was caused by the party insisting that the condition be satisfied"), *citing Ellenberg Morgan Corp. v. Hard Rock Café Assoc.*, 116 A.D.2d 266, 271 (1st Dep't 1986).

The language of the Trusts clearly prohibits "any suit, action or proceeding in equity or at law upon or under or with respect to this Agreement, unless . . . such Certificateholder . . . holds at least 25% of the Voting Rights." Plaintiffs have failed to meet the percentage threshold simply because they elected to purchase certificates that

lacked voting rights.[4] Their argument that the termination of the Trusts excuses compliance is without merit. Notwithstanding the termination of the Trusts, plaintiffs' action is still an action "with respect to [those] agreements."

A non-action clause applies to bar suits even where they are brought by former stakeholders in a particular instrument, and plaintiffs may not attempt to invoke their rights thereunder while selectively ignoring other relevant contractual limitations. In *Bank of N.Y. v. Battery Park City Auth.*, 251 A.D.2d 211 (1st Dep't 1998), for example, the plaintiffs were former bondholders who contended that a no-action clause did not bar their claim for the higher interest they would have received had the bonds not been wrongfully redeemed. In dismissing the action, the First Department noted that "[p]laintiffs' contention that the clause does not apply to former bondholders whose interests have been redeemed flies in the face of their attempt to enforce the bond resolution." *See also Emmet & Co., Inc. v. Catholic Health East*, 114 A.D.3d 605, 605

[4] The court also notes that section 9.02 requires that the certificateholders give the trustee a "written notice of default and of the continuance thereof." Plaintiffs did not do so here, and probably could not have because defendants' actions did not constitute a "default" within the meaning of the Trusts. The section imposes a limitation on the events for which the certificateholders can obtain relief, and plaintiffs' inability to assert a claim falling within those parameters does not excuse compliance. *See Ace Sec. Corp. v. DB Structured Products, Inc.*, 112 A.D.3d 522, 523 (1st Dep't 2013), *aff'd* 25 N.Y.3d 581 (2015) (no-action clause deprived plaintiffs of standing where pooling and servicing agreement did not authorize certificate holders to provide notices of "default" in connection with the sponsor's breaches of the representations); *Walnut Place LLC v. Countrywide Home Loans, Inc.*, 96 A.D.3d 684 , 685 (1st Dep't 2012). (plaintiffs lacked standing where they did not allege a default by the master servicer as required by the no-action clause).

(1st Dep't 2014) ("Plaintiffs' status as former bondholders does not render the 'no action' clauses of the indentures governing the bonds inapplicable to them").

In view of their lack of the requisite voting rights, plaintiffs do not dispute that the no-action clause would have precluded them from challenging the termination of the Trusts while they were still in existence. Plaintiffs cannot assert that they were somehow invested with more rights by virtue of their dissolution, and their reliance on *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 176 (S.D.N.Y. 2011) is misplaced. In that case, the court found that "[n]o-action clauses do not bar a plaintiff who alleges that it was fraudulently induced to purchase or sell its certificates", *Ellington*, 837 F. Supp.2d at 185, a claim that is not asserted by plaintiffs here. Further, in *Ellington* the plaintiffs had bought out the interests any certificateholders who might have needed protection from frivolous litigation. The court's observation that "there is no longer a Trustee (or even a trust) through whom such a dispute could be channeled," *id.*, was at best dicta, and to the extent it is contrary to those New York state authorities which preclude a party from avoiding a no-action clause contained in the same agreement sought to be enforced, it must be disregarded.

Plaintiffs nevertheless contend that the language of the last sentence of the no-action clause affords them standing as third-party beneficiaries, insofar as it provides that "[e]ach and every Certificateholder and the Trustee shall be entitled to such relief as can be given either at law or in equity." (Trusts § 9.02). However, the beginning of that same

sentence states that such relief is specifically tied to "the protection and enforcement of the provisions of this Section." Accordingly, it merely commits the certificateholders to the procedures set forth in the no-action clause, reinforcing the promise that they will not seek to affect, disturb, or prejudice each other's rights "except in the manner herein provided."

Moreover, section 9.02 is made expressly subject to section 9.10, which states:

> Third Party Beneficiaries. Notwithstanding anything herein to the contrary (including without limitation Section 9.02 hereof), each Designated Entity shall be an express third-party beneficiary of this Agreement to the extent of each such entity's express rights to receive any notices and reports under this Agreement or any other express rights of a Designated Entity explicitly stated in this Agreement, and each shall have the right to enforce its rights under this Agreement as if it were a party hereto.

The Trusts thus conferred express third-party beneficiary status solely upon the Designated Entities, bestowing upon them the status of parties for the purposes of enforcement of their rights and specifically exempting them from the constraints of the no-action clause of section 9.02. The exclusion of plaintiffs from the third-party beneficiary provision defeats their right to claim similar status. *See, e.g., Quadrant,* 23 N.Y.3d at 560 ("Even where there is ambiguity, if parties to a contract omit terms—particularly, terms that are readily found in other, similar contracts—the inescapable conclusion is that the parties intended the omission . . . [t]he maxim *expressio unius est exclusio alterius*, as used in the interpretation of contracts, supports precisely this conclusion"). Notwithstanding the fact that plaintiffs were entitled to

certain benefits under the Trusts, such as interest payments, they remain bound by the enforcement restrictions imposed by the Trusts, including the no-action clause.

Plaintiffs correctly note that a no-action clause may not apply where the trustee's own conduct is challenged, as the trustee may not be expected to sue itself. *Quadrant*, 23 N.Y.3d at 566. However, the Trustee here has not invoked section 9.02 or sought dismissal based on lack of standing. The claims against the Trustee are severable from those against the certificateholders. *See, e.g., Sterling Fed. Bank, F.S.B. v. DLJ Mortgage Capital, Inc.*, 2010 WL 3324705, at *5 (N.D. Ill. Aug. 20, 2010) ('There is an important difference between asking the trustee to sue itself—an "absurd" requirement that we presume the parties did not intend—and asking it to sue a third party, even when the investor alleges wrongdoing by the trustee"). Accordingly, the certificateholders are still entitled to the protection of that provision.

2. Breach of Contract

As noted above, the no-action clause bars all causes of action asserted against the DB Defendants. However, for the sake of completeness, the court will discuss the merits of all of the remaining claims against them. Some of the claims cannot be resolved on the pleadings and are thus relevant to the Wells Fargo's potential liability, as well as to the DB Defendants' liability should the no-action clause ever be found to be ineffective. Specifically, while the defendants acted within their authority in amending the Trusts,

their compliance with the Trusts and the amended instruments may have been deficient in some respects.

i. *Compliance with Section 9.01*

Plaintiffs allege that DB Mortgage – together with Wells Fargo – breached the Trust Agreements by executing the Amendments, selling the Trusts' assets and terminating the Trusts. Defendants respond that it acted within the broad authority conferred by section 9.01 of each Trust. That section provides, in pertinent part:

> This Agreement may be amended from time to time by the Depositor [DB Mortgage] and the Trustee [Wells Fargo] . . . without the consent of any of the Certificateholders but with the prior written consent of each Designated Entity . . . (iv) to make any other provisions with respect to matters or questions arising under this Agreement which shall not be inconsistent with the provisions herein or (v) to add any provisions to or change in any manner or eliminate any of the provisions of this Agreement or to modify in any manner the rights of the holders of the Offered Certificates or any Designated Entity.

This power was circumscribed by subsection (b), which prohibits the Trustee from consenting to any amendment unless it first receives (1) an opinion of counsel that the amendment complies with the Trust Agreements and met certain tax and REMIC requirements, and (2) written confirmation by the Rating Agencies that the ratings of the Certificates will not be negatively affected. This written confirmation requirement could be waived at the option of the Designated Entities. The Amendments were executed in September and October 2014 by the necessary parties: DB Mortgage, Wells Fargo, AGFP

and DB Securities as the Designated Entities with respect to each class of Certificate. The Trustee received the required opinion letters and waived the confirmation by the agencies.

DB Mortgage thus complied with all that was required by section 9.01. "A contractual provision that is clear on its face must be enforced according to the plain meaning of its terms." *Bank of New York Mellon v. WMC Mortgage, LLC*, 136 A.D.3d 1, 6 (1st Dep't 2015) (internal quotations and citations omitted). This rule applies "with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople." *Ashwood Capital, Inc. v. OTG Mgmt., Inc.*, 99 A.D.3d 1, 7 (1st Dep't 2012); *TAG 380, LLC v. ComMet 380*, Inc., 10 N.Y.3d 507, 513 (2008). A party may not rewrite a contract simply because, in hindsight, it dislikes the terms. *Ambac Assurance Corp. v. EMC Mortgage LLC*, 121 A.D.3d 514 (1st Dep't 2014). However unfavorable plaintiffs may consider the terms of the governing agreements, in amending them the defendants acted within the broad scope of authority granted by the Trusts.

Plaintiffs nevertheless raise on a number of principles of contractual construction in favor of a different result. Plaintiffs first argue that section 9.01 of the Trust Agreement is silent with respect to terminating the Trusts, and did not expressly permit defendants to terminate them. However, in view of defendants' sweeping power "to add any provisions to or change in any manner or eliminate any of the provisions of this

Agreement or to modify in any manner the rights of the holders of the Offered Certificates or any Designated Entity" (emphasis supplied), an express grant to alter the termination provisions was unnecessary. To the contrary, that power could only have been checked by a specific provision forbidding amendment of the termination procedures.

Plaintiff err in suggesting that 9.01(a)(iv) was such a limitation. That subsection defines defendants' power to address "matters or questions" which might arise under the existing terms of the agreement. The condition that such provisions "shall not be inconsistent with the provisions herein," read in proper context, merely requires that in addressing those issues, defendants avoid creating conflicts between all other remaining contractual terms. It cannot reasonably be read as restricting the parties' power to amend as provided in subsection (v), as every amendment could be viewed as "inconsistent" in some way with the original, unchanged agreement. Further, the Trusts use of the disjunctive "or" before subsection (v) establishes that it was to be interpreted separately from, and not modified by, subsection (iv).

This analysis also defeats plaintiffs' next contention that defendants' exercise of the amendment powers was inconsistent with other sections of the Trusts. Specifically, plaintiffs argue that it conflicts with section 7.01 (requiring the "consent of all of the Certificateholders" to terminate the Trust)[5]; with section 2.05(i) (prohibiting the sale or

[5] Unlike RS-5, the the RS-6 Trust was not amended to eliminate the section 7.01 consent of certificateholders requirement.

disposition of Trust Assets "except as expressly provided in this Agreement"); with section 2.05(ii) (prohibiting the dissolution or liquidation of the Trust "other than as permitted by the Agreement"); and with section 9.02 (prohibiting prejudicial or preferential actions against certificateholders). Under Section 9.01(a)(v), defendants were free to eliminate or modify any of those sections, notwithstanding the effect on any certificateholder's rights. Additionally, as to the two subsections of section 2.05, amendment was either "provided in" or "permitted by" the Agreement in section 9.01(a)(v).

ii. *Opinion of Counsel and Communications With Rating Agencies*

Plaintiffs' claim that defendants failed to comply with the section 9.01(b) requirements regarding an Opinion of Counsel and communications with the rating agencies overstates the burdens imposed by that provision. That subsection provides:

> (b) [T]he Trustee shall not consent to or enter into any amendment to this Agreement unless it shall have first received:
>
> (i) an Opinion of Counsel (provided by the Person requesting such amendment) to the effect that such amendment (A) is permitted by, and complies with the provisions of, this Agreement, (B) will not result in the imposition of any tax on any Trust REMIC pursuant to the REMIC Provisions and (C) will not cause any Trust REMIC to fail to qualify as a REMIC at any time that any Certificates are outstanding and
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> (ii) written confirmation to the Trustee by the Rating Agencies that such amendment will not result in the withdrawal, downgrade or qualification of

> the then current rating assigned to Offered Certificates by the Rating Agencies;
>
> provided, however, that if the Rating Agencies shall acknowledge in writing any proposed amendment to this Agreement but such acknowledgment shall fail to contain confirmation to the Trustee by the Rating Agencies that such amendment will not result in the withdrawal, downgrade or qualification of the then-current rating assigned to the Offered Certificates by the Rating Agencies, then the requirement set forth in clause (ii) above shall not be required to be met as to the Rating Agencies if prior to the Trustee's entering into such amendment, the Trustee shall have first received (x) such written acknowledgment of the Rating Agencies and (y) consent to such amendment by each Designated Entity, which consent shall acknowledge the failure of the Rating Agencies to have confirmed that such amendment will not result in the withdrawal, downgrade or qualification of the then-current rating assigned to the Offered Certificates by the Rating Agencies.

As to the opinion of counsel, the Trusts require no more than that the Trustee receive a letter which tracks the language of subsection (b)(i). The Trustee received such letters, and each one confirmed that counsel read the relevant provisions of the Trusts and concluded that defendants' actions were in compliance. (Affirmation of Jayant W. Tambe, Ex. D; February 12, 2016 Ltr. from Jayant W. Tambe, Ex. 9). The Trustee also affirmed in each Amendment that it received them.

Although plaintiffs object to the letters as "boilerplate," the section does not require a legal treatise or compel the court to evaluate the quality of counsel's analysis. Further, under section 6.02(a)(i) of the Trusts, the Trustee may "rely conclusively upon and shall be protected in acting or refraining from acting upon any . . . opinion . . . reasonably believed by it to be genuine and to have been signed or presented by the proper party or parties." And under section 6.02(a)(ii), "[t]he Trustee may consult with

counsel of its selection and the written advice of such counsel or any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by it hereunder in good faith."

In any event, plaintiffs' true objection to the letters is not as to their form or level of detail, but rather to their ultimate conclusions. The Supplemental Complaint makes it clear that no letter could be satisfactory to plaintiffs: "any opinion of counsel that the Amendments were permitted by and complied with the provisions above would be illegitimate and provably false." (Supp. Compl. ¶ 95). However, whether defendants' conduct in terminating the Trusts was proper is the very question presented herein. If, in fact, the opinion letters were wrong in their conclusions, the court would be constrained to deny the motions. The cases cited by plaintiffs are inapposite, as they address, in the limited context of determining the willfulness of a patent infringement, whether the defendant reasonably relied on counsel's advice. *See Exo-Pro, Inc. v. Seirus Innovative Accessories, Inc.*, 2008 WL 4878513, at *3-*4 (E.D.N.Y. Feb. 19, 2008); *Johnson & Johnson v. Guidant Corp.*, 2014 WL 3728598, at *19 (S.D.N.Y. July 7, 2014).

Plaintiffs similarly misread section 9.01 in suggesting that it requires that Trustee to seek and obtain the consent and approval of the rating agencies. It merely requires the Trustee to receive acknowledgment of the Amendments from the agencies, coupled with a consent from the Designated Entities that acknowledged the agencies' failure to give certain assurances. Defendants satisfied those requirements. *See* Tambe Affirm., Ex. 8 &

2/12/16 Tambe letter, Ex. 10 (rating agency acknowledgments); Amendments, Sections 4(A) and (B) (Trustee and Designated Entity acknowledgments). Plaintiffs' objection that it was actually the Designated Entities that procured the acknowledgments is thus immaterial. Notwithstanding plaintiffs' speculation to the contrary, the documentary evidence, in the form of e-mail correspondence, sufficiently establishes that the agencies received the Amendments in question. *See, e.g., MCAP Robeson Apartments Ltd. Partnership v. Munimae TE Bond Subsidiary, LLC*, 136 A.D.3d 602, 603 (1st Dep't 2016).

iii. *Consent*

However, with respect to the RS-6 Trust, plaintiffs note that the corresponding Amendment did not eliminate the requirements under section 7.01 that all certificateholders consent to a termination. Defendants counter that section 7.03 of both Trusts provide that "[n]otwithstanding Section 7.01 hereof, in the event that any right to purchase the remaining Underlying Mortgage Loans and retire the remaining Underlying Certificates is exercised, [the Trust] shall be terminated in its entirety." Accordingly, defendants contend that the Trusts excused certificateholder consent and provided for termination where, as in an auction, a right to purchase the assets was pursued.

As plaintiffs point out, section 7.04(a) calls for an auction of the Underlying Certificates, whereas section 7.03 anticipates the purchase of the Underlying Mortgages. Under section 1.01, the definition of Underlying Mortgages is as follows:

> With respect to each Underlying Trust, the fixed-rate, adjustable-rate and hybrid adjustable-rate, one- to four-family residential first lien mortgage loans related to the Underlying Certificates constituting a portion of the assets of such trust. For clarification, any reference herein to Underlying Mortgage Loans that are "related" to the Underlying Certificates shall be a reference to the group of mortgage loans related to the Underlying Certificates included among the assets of the related Underlying Trust that issued such Underlying Certificates.

From this language, it appears that the Underlying Mortgages and the Underlying Certificates, while "related," are not identical. For whatever reason, the pre-amendment Trusts require consent for the sale of one, but not the other. If, in fact, there is no material difference between the disposition of the Certificates and the Mortgage, it may be that certificateholder consent may be excused. However, neither party has elaborated on this point, and extrinsic or expert evidence regarding custom and practice in the financial industry may be needed to determine the issue.

iv. *Auctions*

Plaintiffs further argue that defendants failed to comply with the process for the auctions set forth in each Amendment. This is also an issue that cannot be decided at this stage of the action. Section 2(f) of the RS-6 Amendment and section 2(k) of the RS-5

Amendment each required the Trustee to obtain price equal or greater than the "Minimum Auction Call Amount" and then subtract from that amount and deposit into the "Reserve Account" an amount equal to the "IRR [Internal Rate of Return] Threshold." Each Trust defined the Minimum Auction Call Amount as follows:

> With respect to any Auction Date and the applicable Auction, the sum of (i) all amounts due to the Trustee including all unpaid fees, expenses and indemnity amounts payable in accordance with Section 3.02, (ii) (a) 100% of the aggregate Certificate Principal Balance of the Class A-I Certificates and the Class A-2 Certificates plus (b) accrued and unpaid interest on the Class A-I Certificates and the Class A-2 Certificates (including any Unpaid Interest Shortfall Amount with respect thereto) to, but excluding, the applicable Auction Date, (iii) any unpaid Basis Risk Shortfalls payable to the Class A-I Certificates and the Class A-2 Certificates, (iv) an amount equal to the IRR Threshold and (v) an amount equal to all fees and expenses incurred by DBSI in connection with the Auction, including all fees and expenses of the Redemption Accountant and legal counsel as reported by DBSI and the Redemption Accountant to the Trustee.

With respect to the IRR and the IRR Threshold, the Trusts set for the following definitions:

> Internal Rate of Return or IRR: The simple annual rate (computed on the basis of a 360- day year assuming twelve 30-day months) that, when used to discount all of the payments made (including those payments already made or to be made on the date of determination) by the Trustee to the holders of the Class A-X Certificates as distributions in respect of the Class A-X Certificates, results in a present value at the Closing Date that is equal to the IRR Threshold.
>
> IRR Threshold: An amount equal to an amount that when added to the aggregate amount of all distributions made to the Class A-X Certificates from the Closing Date to the Auction Date would generate an IRR on the Class A-X Certificates of at least 10%, assuming a valuation of the Class A-

X Certificates as of the Closing Date of $6,416,959.63 [$8,569,750.96 in the RS-5 Trust].

Defendants claim that the Minimum Auction Call Amount was received, but that Plaintiffs were entitled to no distributions from the auction because the IRR Thresholds for each Trust had previously been reached and paid to them. However, other than two accountants' letters purportedly reflecting that the IRR Threshold amounts were met, *see* Tambe Affirm., Ex. 6 and 2/12/16 Tambe letter, Ex. 12, defendants do not adequately explain or document the transactions alleged. It is not obvious from the complicated and somewhat opaque sections of the Trusts cited precisely what plaintiffs were entitled to receive from the Trusts and why it was limited to the IRR Threshold. Nor have defendants identified the amount of the Minimum Auction Call Amount or its payment, or provided evidence of its payment or the other deposits and distributions associated with the auction. Counsel's averments are not the sort of proof sufficient for judgment based upon documentary evidence under CPLR 3211(a)(1). *See, e.g., Mamoon v. Dot Net Inc.,* 135 A.D.3d 656, 657 (1st Dep't 2016) ("an affidavit—let alone an affirmation – is not documentary evidence" under 3211[a][1]); *Wamco XVII Ltd. v. Chestnut Estates Dev. Corp.*, 251 A.D.2d 888, 889 (3d Dep't 1998) "[A]bsent supporting documentary evidence or an explanation as to how the total amount of debt was calculated, conclusory allegations as to the amount due are insufficient to sustain this burden . . . particularly where, as here, those allegations are made by one lacking personal knowledge of the

relevant facts, solely on the basis of documents that are not before the court") (internal citations and quotations omitted).

That being said, plaintiffs seemingly agree (or at least do not specifically dispute) that if a proper auction had occurred, they would not have been entitled to any distribution in view of the prior satisfaction of the IRR Threshold. If that is the case, then, as defendants argue, the size of the Minimum Auction Call Amount would be irrelevant. Plaintiffs' primary objective in challenging the auctions appears to be the reinstatement of the monthly interest distributions they had been receiving while the Trusts were in existence. However, judgment must be withheld pending competent testimony from an accounting or other expert in transactions of this nature who can provide a clear and systematic account of the mechanics and operation of the Trusts' provisions and the entitlements flowing therefrom.

v. *Other Arguments*

As against DB Securities, plaintiffs base their contract claim, in part, upon another clause in section 9.02 which provides that "[n]o Certificateholder shall have any right to . . . in any manner otherwise control the operation and management of the Trust Fund, or the obligations of the parties hereto . . . nor shall any Certificateholder be under any liability to any third person by reason of any action taken by the parties to this Agreement pursuant to any provision hereof." Plaintiffs that assert DB Securities' role in the

amendment process prejudiced their rights, and that the immunity to liability from "third persons" does not apply to their rights as certificateholders. However, DB Securities was not a party to the Trusts and consequently cannot be liable for a breach, notwithstanding that it was also a certificateholder, a Designated Entity, and an express third-party beneficiary, *see N.F. Gozo Corp. v. Kiselman*, 38 Misc.3d 48, 51 (2d Dep't 2012) ("While the status of an intended third-party beneficiary gives that individual a right to sue on a contract to which that individual is not a party, this status does not confer upon one of the parties to the agreement the right to sue the third-party"). Furthermore, although plaintiffs and DB Securities were all certificateholders, as to each other they were also third persons.

Plaintiffs also contend that DB Securities should face liability under the Trusts because it was a signatory to the contemporaneously executed Asset Sale Agreement and a Certificate Purchaser Agreement. However, plaintiffs are not suing under any provisions of those contracts and they are not mentioned in complaint. Nor do plaintiffs suggest how the terms of those contracts are related to the provisions of the Trusts that they contend that DB Securities breached. *Compare Sec. Corp. v. DB Structured Prod. Inc.*, 2014 WL 4785503, at *3-4 (Sup. Ct, N.Y. Co. 2014) (contemporaneous Pooling Service Agreement which defendant did not sign could be used to interpret Mortgage Loan Purchase Agreement under which defendant was sued and was a party).

3. Breach of Covenant of Good Faith and Fair Dealing

A claim for breach of the implied covenant of good faith and fair dealing arises "when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." *Jaffe v. Paramount Communc'n, Inc.*, 222 A.D.2d 17, 22–23 (1st Dep't 1996); *see Peter R. Friedman, Ltd. v. Tishman Speyer Hudson Ltd. P'ship*, 107 A.D.3d 569, 570 (1st Dep't 2013); *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 252 (1st Dep't 2003). "Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion." *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995); *Peacock v. Herald Sq. Loft Corp.*, 67 A.D.3d 442, 443 (1st Dep't 2009). However, a good faith claim is deficient where it is "premised on the same conduct that underlies the breach of contract cause of action" and is "intrinsically tied to the damages allegedly resulting from a breach of the contract." *MBIA Ins. Corp. v. Merrill Lynch*, 81 A.D.3d 419, 420 (1st Dep't 2011) (internal quotations and citations omitted). Moreover, "the covenant of good faith and fair dealing . . . cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights." *Fesseha v. TD Waterhouse Inv. Servs.*, 305 A.D.2d 268, 268 (1st Dep't 2003).

Plaintiffs' breach of the covenant claim asserts that "DB Mortgage intentionally and purposefully applied the provisions of the Trust Agreement – in a manner inconsistent with

the reasonable expectations of the parties – to strip Plaintiffs of their absolute right to consent to the termination of the Trust, among other contractual rights." (Supp. Compl. ¶ 159). In their brief, plaintiffs additionally claim that defendants' alleged failure to provide "legitimate" legal opinions and rating agency approvals violated the covenant. These allegations merely restate plaintiffs' claim that defendants breached the Trusts by executing the Amendments. To permit plaintiffs to invoke the covenant would nullify defendants' unambiguous right to "eliminate any of the provisions of this Agreement or to modify in any manner the rights of the holders of the Offered." (Trusts § 9.01). Insofar as "[a] party has an absolute, unqualified right to terminate a contract on notice pursuant to an unconditional termination clause without court inquiry into whether the termination was activated by an ulterior motive," *Big Apple Car, Inc. v. City of New York*, 204 A.D.2d 109, 111 (1st Dep't 1994); *see Triton Partners LLC v. Prudential Sec.*, 301 A.D.2d 411, 411 (1st Dep't 2003), defendants were entitled to exercise their unqualified right to terminate some, but not all, of plaintiffs' contractual rights without judicial interference. *See also Phoenix Capital Invs. LLC v. Ellington Mgmt. Grp.*, LLC, 51 A.D.3d 549, 550 (1st Dep't 2008) (no implied covenant claim where defendant "acted entirely within the agreement termination provision" despite the fact that delayed timing of the termination deprived plaintiff of finder's fee); *Fesseha*, 305 A.D.2d at 268 (no implied covenant claim where broker exercised unconditional right to liquidate securities in account "when it deem[ed] it necessary for its protection").

In view of that unlimited power, defendants did not frustrate plaintiffs' "reasonable expectations," as plaintiffs had no such expectation that their right to consent could remain absolute. Nor did defendants attempt to "circumvent" plaintiffs' rights by illicit means. Rather, defendants eliminated their rights by amendment as expressly permitted by the Trusts.

4. Tortious Interference with Contract

Plaintiffs allege that DB Securities "intentionally and improperly procured breaches of Section 7.01 and Section 9.01 of the Trust Agreements, among other contractual provisions, by causing the Trustee and DB Mortgage to execute the Amendments and terminate the Trusts." To establish a claim of tortious interference with contract, "the plaintiff must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages." *AREP Fifty-Seventh, LLC v. PMGP Assocs, L.P.*, 115 A.D.3d 402, 402 (1st Dep't 2014), *citing White Plains Coat & Apron Co. Inc. v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007) (internal quotations omitted). However, such a claim is not cognizable unless the defendant is a stranger to the contract. *See Ashby v. ALM Media*, LLC, 110 A.D.3d 459, 459 (1st Dep't 2013). DB Securities, although not a party to the Trusts, was an express third-party beneficiary and Designated Entity with defined rights pursuant to the agreements.

5. Unjust Enrichment

An unjust enrichment claim fails where there is an express contract covering the subject matter of the dispute. *Am. Media, Inc. v. Bainbridge & Knight Labs., LLC*, 135 A.D.3d 477, 477 (1st Dep't 2016); *Allenby, LLC v. Credit Suisse, AG*, 134 A.D.3d 577, 579 (1st Dep't 2015). The Trusts clearly govern all aspects of the parties' rights and plaintiffs raise no meaningful opposing arguments. Their attempt to plead the cause of action in the alternative must be rejected, as that procedure is available only where "there is a bona fide dispute as to the existence of a contract or where the contract does not cover the dispute in issue." *Joseph Sternberg, Inc. v. Walber 36th St. Assocs*, 187 A.D.2d 225, 228 (1st Dep't 1993). No such dispute exists here.

B. *Defendant Wells Fargo's Motion to Dismiss*

1. Breach of Contract / Implied Covenant

Wells Fargo joins in and incorporates by reference the DB Defendants' arguments for dismissal of the breach of contract and breach of the implied covenant of good faith. Unlike the DB Defendants, however, Wells Fargo does not assert that the no-action clause deprives plaintiffs of standing. Accordingly, as discussed above, the breach of contract claims against the Trustee survive to a limited extent. With respect to the RS-6 Trust, plaintiffs may pursue a claim based upon the Trustee's role in terminating that trust without the consent of all certificateholders. Additionally, with respect to both Trusts, plaintiffs

may challenge the Trustee's conduct of the Discretionary Auctions, including whether it received the Minimum Call Auction Amount and whether it paid plaintiffs all sale distributions, if any, to which they were due.

However, plaintiffs' suggestion they have a claim grounded in section 9.02 is rejected. That section does not impose any obligations upon the Trustee but only upon the certificateholders in connection with the no action clause. Plaintiffs have not pointed to any language binding the Trustee or otherwise disputed the limitations of its unambiguous language. Additionally, the implied covenant claim must be dismissed for the reasons stated above in connection with the DB Defendants' motion to dismiss. It is additionally barred by section 6.01(e)(i) of the Trusts, which provide that "no implied covenants or obligations shall be read into this Agreements against the Trustee."

2. Breach of Fiduciary Duty

Plaintiffs allege that Wells Fargo breached its fiduciary duty by executing the Amendments to terminate Trusts. It contends that the Trustee received fees, payments and other benefits for doing so that it would not have otherwise gotten, including indemnification agreements and, with respect to the RS-5 Trust, "an additional inducement, calculated as a percentage (30 basis points) of the RS-5 Trust's assets." Plaintiffs also allege that Wells Fargo "was conflicted from exercising independent judgment regarding the Amendments given its extensive common interests with Deutsche Bank as RMBS sponsors

and trustees." (Supp. Compl. ¶ 92). The complaint further notes that Deutsche Bank and Wells Fargo are co-defendants, and coordinated their defenses, in various other actions alleging that they failed to discharge their duties as trustees. *Id.* at ¶ 93. Additionally, plaintiffs assert that Wells Fargo failed to make certain interest payments due between August and September 2014 and did not alert plaintiffs to a "full call" that supposedly occurred on September 12. This claim is dismissed.

The duties of a trustee under a corporate indenture are narrowly circumscribed under New York law. As the Court of Appeals has noted, "[t]he corporate trustee has very little in common with the ordinary trustee . . . The trustee under a corporate indenture . . . has his [or her] rights and duties defined, not by the fiduciary relationship, but exclusively by the terms of the agreement . . . [h]is [or her] status is more that of a stakeholder than one of a trustee." *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 11 N.Y.3d 146, 156 (2008) (quotations and citations omitted). "A trust indenture is a contract, and under New York law interpretation of indenture provisions is a matter of basic contract law." *Quadrant Structured Products Co. v. Vertin*, 23 N.Y.3d 549, 559 (2014)(quotations and citations omitted).

Prior to a default under the agreement, the trustee's extra-contractual duties are limited to avoiding conflicts of interest, and performing basic, non-discretionary, ministerial tasks with due care. *AG Capital*, 11 N.Y.3d at 157. However, these two obligations "are not construed as fiduciary duties, but as obligations whose breach may

subject the trustee to tort liability." *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 192 (S.D.N.Y. 2011) (quotations and citations omitted). After a default, "[t]he trustee is not required to act beyond his contractually conferred rights and powers, but must, as prudence dictates, exercise those singularly conferred prerogatives in order to secure the basic purpose of any trust indenture, the repayment of the underlying obligation." *Beck v. Manufacturers Hanover Trust Co.*, 218 A.D.2d 1, 13 (1st Dep't 1995).

As relevant to this action, section 6 of the Trusts define the scope of Wells Fargo's obligations as Trustee. Section 6.01 states that "[t]he Trustee undertakes to perform such duties and only such duties as are specifically set forth in this Agreement . . . Any permissive right of the Trustee enumerated in this Agreement shall not be construed as a duty." Section 6.01(a) requires the Trustee to examine all resolutions, statements, opinions and other documents furnished to it to determine whether they "conform on their face to the requirements of this Agreement" but does not require it to confirm the accuracy of the facts therein. Finally, section 6.01(e)(i) provides:

> (e) No provision of this Agreement shall be construed to relieve the Trustee from liability for its own gross negligence, bad faith, willful misconduct; provided, however, that:
>
> (i) The duties and obligations of the Trustee shall be determined solely by the express provisions of this Agreement, the Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth in this Agreement, no implied covenants or obligations shall be read into this Agreement against the Trustee and, in the absence of bad faith on the part of the Trustee, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon any certificates or opinions furnished to the Trustee conform to the requirements of this Agreement . . .

As noted, New York law does not impose common law fiduciary duties upon a trustee such as Wells Fargo, and plaintiffs have not identified any language in the Trusts that do so. Nevertheless, the parties debate whether the Wells Fargo is subject to any form of extra-contractual tort liability arising from the alleged conflicts of interests with Deutsche Bank or from its asserted failure to perform certain ministerial duties. Although the complaint does not specifically plead a "default" under the Trusts, they also contest whether such an event occurred that which triggered a heightened duty running from the Wells Fargo to plaintiffs.

With respect to the conflict of interest question, Wells Fargo contends that the unpaid fees, expenses and indemnity amounts it received in connection with the Amendments and Discretionary Auction were pre-existing entitlements under the Trusts. It argues that the provision of a benefit already owed to a trustee under an agreement does not give rise to a conflict of interest, *see CFIP Master Fund, Ltd. v. Citibank, N.A.*, 738 F.Supp. 2d 450, 457 (S.D.N.Y. 2010), *Matter of Bank of Mellon*, 2014 WL 1057187 (Sup. Ct. N.Y. Co. 2014), *aff'd in relevant part* 127 A.D.3d 120 (1st Dep't 2015), and that it would have received the same benefits even had it rejected the Amendments. The Trustee maintains that this is true even with respect to the 30 basis point payment pursuant to the RS-5 Amendment, which counsel contends "simply made the Trustee whole for the loss of "float" resulting from the amendment's requirement that auction proceeds be immediately distributed." The Trustee further argues that its ongoing

relationships and repeat business with Deutsche Bank are insufficient to establish a conflict.

Whether an indemnification agreement and other benefits give rise to a conflict of interest would ordinarily require witness and expert testimony as to the practice in the industry, *see., e.g. CFIP*, 738 F.Supp. 2d at 475. However, plaintiffs have not explained how the amounts it received due to the Amendments were different from those it was already entitled to under the original Trusts, other than to characterize them as "additional" and suggest that whether the Trustee received an extra benefit is a factual question. Nor do plaintiffs specifically address counsel's explanation of the basis point payment. Plaintiffs repeat their allegations regarding the status of Deutsche Bank and Wells Fargo as co-defendants in other RMBS litigation, but do not demonstrate how that relationship creates a specific conflict between the parties to the Trusts. The one case cite in favor of its argument relating to the conflict of interest question, *Hildene Capital Mgmt., LLC v. Friedman, Billings, Ramsey Grp., Inc.*, 2012 WL 3542196 (S.D.N.Y. 2012), involved a trustee that served as trustee to two different entities on different sides of a transaction.

Accordingly, even putting aside the principle that a conflict of interest does not implicate a fiduciary duty, *AG Capital*, 11 N.Y.3d at 167, plaintiffs have not established a conflict. However, assuming they have, the question remains how the trustee could be charged with improperly favoring defendants if, in fact, they had an absolute right to

amend and terminate the Trusts. The Trustee would simply not be in a position to protect the rights of plaintiffs to continued interest payments or a distribution from the sale if such rights did not exist.

In the final analysis, plaintiffs' argument is that the Trustee breached its fiduciary duty because the Trusts expressly prohibited its conduct. As noted, questions do remain as to whether the trustee improperly permitted the termination of the RS-6 Trust without consent, and whether, if so, plaintiffs might have been entitled to some distribution from the disposition of the assets, or the continuation of interest payments. However, if that is the case, then the fiduciary claim is duplicative of the breach of contract claim. This applies to plaintiffs' remaining arguments regarding the alleged ministerial failure to pay interest in August/September 2014, and the alleged "Event of Default" which "may have occurred when the Trust failed to pay" that interest.6 In view of this determination, the cause of action against the DB Defendants for aiding and abetting a breach of fiduciary duty would also fail to state a claim.

C. *DB Defendants' Motion for a Stay of Discovery*

In view of the dismissal of the action as against the DB Defendants, their motion for a stay of discovery and a protective order is moot.

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[6] Defendants argue that the August/September interest was not paid because the RS-6 Trust was terminated a day before the distribution was due, a contention that plaintiffs do not dispute or address other than to repeat that the termination was in breach of the Trust.

III. **Conclusion**

Accordingly, it is hereby

ORDERED that defendants Deutsche Bank Securities, Inc. and Deutsche Mortgage Securities, Inc.'s motion to dismiss is granted, and the Supplemental Complaint is dismissed with costs and disbursement to defendants as taxed by the Clerk of the Court, upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendants, and it is further

ORDERED that the DB Defendants' motion for a protective order and to stay discovery is denied as moot; and it is further

ORDERED defendant Well Fargo Bank, N.A.'s motion to dismiss is granted as to all claims except the third cause of action for breach contract, and it is further

ORDERED that Defendant Wells Fargo Bank, N.A. is directed to serve an answer to the Supplemental Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for Plaintiffs and Defendant Well Fargo Bank, N.A. are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on August 23, 2016.

Dated: New York, New York
June 21, 2016

Hon. Eileen Bransten, J.S.C.