UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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TRIAXX PRIME CDO 2006-1, LTD.,
TRIAXX PRIME CDO 2006-2, LTD., and
TRIAXX PRIME CDO 2007-1, LTD.,

Plaintiffs,

- against -

THE BANK OF NEW YORK MELLON and
U.S. BANK, NATIONAL ASSOCIATION,

Defendants.

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MEMORANDUM AND ORDER

16 Civ. 1597 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiffs Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1, Ltd. (together, "Triaxx" or the "CDO Issuers") bring this suit against defendants The Bank of New York Mellon ("BNYM") and U.S. Bank, National Association ("U.S. Bank"), the trustees for various residential mortgage-backed securities ("RMBS") trusts underlying the three collateralized debt obligations ("CDOs") at issue. In the first amended complaint, plaintiffs brought claims for breach of contract and breach of fiduciary duty. In their proposed second amended complaint, which was attached to the opposition briefing on the instant motion, plaintiffs abandoned the breach of fiduciary duty claim and added a claim for breach of duty to avoid conflicts. For the reasons set forth below, plaintiffs' contract claims are dismissed for lack

of standing, and plaintiffs' claims for breach of fiduciary duty are dismissed as abandoned. The plaintiffs are granted one final opportunity to file an amended complaint.

I. Background

As Judge Woods predicted, "This is not the first case involving RMBS trusts and the extent of a trustee's obligations; it will not be the last." Royal Park Investments SA/NV v. Bank of N.Y. Mellon As Tr., 14-cv-6502 (GHW), 2016 WL 899320, at *1 (S.D.N.Y. Mar. 2, 2016). For excellent background summaries on the structuring of RMBS trusts, see Phoenix Light SF Ltd. v. Deutsche Bank Nat'l Trust Co., 172 F. Supp. 3d 700, 705 (S.D.N.Y. 2016), and Fixed Income Shares: £Series M v. Citibank N.A., 130 F. Supp. 3d 842, 845-46 (S.D.N.Y. 2015).

The plaintiffs are three Cayman Islands corporations that were issuers of eponymous CDOs. Proposed Second Amended Complaint ("PSAC") ¶ 4, ECF No. 61-1; Marcucci Decl. Ex. B at 1; Ex. G at 1; Ex. H at 1, ECF No. 54. "A CDO issuer is an investment vehicle that bundles a variety of revenue-generating assets (the 'collateral' or 'underlying assets') and then sells pieces of the expected revenue to investors in the form of debt and equity securities (the CDO securities)." House of Europe Funding I, Ltd. v. Wells Fargo Bank, N.A., No. 13-cv-519 (RJS), 2014 WL 1383703, at *1 (S.D.N.Y. Mar. 31, 2014). The three

Triaxx CDOs are each governed by an indenture agreement (the "CDO Indentures") between a CDO Issuer and the trustee of the CDO indenture (the "CDO Indenture Trustee"), which, inter alia, transferred the CDO Issuers' property to the CDO Indenture Trustee and provided to the CDO Indenture Trustee certain rights and duties. Marcucci Decl. Exs. B, G, and H. The original CDO Indenture Trustee was LaSalle Bank; U.S. Bank subsequently succeeded LaSalle Bank and is the current CDO Indenture Trustee for each CDO. Mar. 1, 2017 Hr'g Tr. 3:3-6 ("Tr.").

In 2006 and 2007, the CDO Issuers purchased certificates issued by 53 RMBS trusts, which formed the corpus of the three CDOs. PSAC ¶ 1; Pls.' Opp'n Mem. of Law 10-11, ECF No. 60. Each of these 53 RMBS trusts is governed by its own Pooling and Servicing Agreement ("PSA"), and the PSAs set forth certain duties of the trustee of each RMBS trust (the "RMBS Trustee"). Id. ¶ 15. Of the 53 RMBS trusts at issue, U.S. Bank is RMBS Trustee for 39 trusts, and BNYM is RMBS Trustee for 14. Id. ¶ 3. Together the securities had a notional value of almost $5 billion. Id. ¶ 1. While U.S. Bank is both the CDO Indenture Trustee and an RMBS Trustee, the CDO Issuers sue U.S. Bank only in its capacity as RMBS Trustee.

The CDO Issuers allege that U.S. Bank and BNYM, as RMBS Trustees, breached four contractual duties set forth in the PSAs as follows.

First, RMBS trust documents typically include representations and warranties ("R&Ws") by the loan sellers attesting to the quality and characteristics of the mortgages, including compliance with underwriting standards, owner occupancy statistics, appraisal procedures, and loan-to-value ratios, as well as "an agreement to cure, substitute, or repurchase mortgages that do not comply with those R&Ws." PSAC ¶¶ 12, 45. The plaintiffs allege that when an RMBS Trustee discovers a breach of an R&W of an underlying loan, the RMBS Trustee has (1) a duty to provide notice of the breach to all parties and (2) a duty to effect seller obligations to cure, substitute, or repurchase the loan. Id. ¶ 119.

Additionally, the plaintiffs allege that after an Event of Default ("EOD") occurs, the RMBS Trustees' duties expand to include (1) a duty to give notice of the EOD to the servicer and the certificateholders, id. ¶¶ 120-21, 125, and (2) a duty to exercise their vested rights and powers in the degree of care and skill that a prudent person would, id. ¶¶ 122-24.

The plaintiffs claim that breaches of R&Ws occurred as well as EODs, and that the RMBS Trustees failed to perform their associated contractual duties. Consequently, the plaintiffs allege that the defendants are liable to them for $371 million. Id. ¶ 171. The RMBS Trustees move to dismiss the claims on a number of grounds; we need only to address standing.

II. Legal Standard

"The district courts of the United States . . . are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005) (internal quotation marks omitted). Consequently, "any person invoking the power of a federal court must demonstrate standing to do so." Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013).

"At the motion to dismiss stage, [a] Plaintiff 'must allege facts that affirmatively and plausibly suggest that it has standing to sue.'" Cortlandt St. Recovery Corp. v. Deutsche Bank AG, London Branch, No. 12-cv-9351 (JPO), 2013 WL 3762882, at *1 (S.D.N.Y. July 18, 2013) (quoting Amidax Trading Grp. v. S. W.I.F.T. SCRL, 671 F.3d 140, 145 (2d Cir. 2011)). "In resolving a motion to dismiss under Rule 12(b)(1), the district court must take all uncontroverted facts in the complaint . . . as true, and draw all reasonable inferences in favor of the party asserting jurisdiction. But where jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits." Tandon v. Captain's Cove Marina of Bridgeport, Inc., 752 F.3d 239, 243 (2d Cir. 2014) (internal quotation marks and citations omitted).

III. Discussion

1. Breach of Contract Claims

U.S. Bank argues that the plaintiffs lack standing to pursue their contract claims because they assigned away their right to do so in the CDO Indentures. After oral argument, BNYM submitted a letter stating that a holding on these standing grounds would have the effect of dismissing the claims against BNYM as well. Houpt Letter, ECF No. 84.

Each CDO Indenture's Granting Clause states:

> The Issuer [i.e., Plaintiff] hereby Grants to the [CDO Indenture] Trustee . . . all of its right, title and interest in, to and under, in each case, whether now owned or existing, or hereafter acquired or arising, all accounts, general intangibles, chattel paper, instruments, securities, investment property and any and all other property (other than Excepted Property[1]) of any type or nature owned by it, including . . . the Collateral Debt Securities . . . .

Marcucci Decl. Ex. B at 1; Ex. G at 1; Ex. H at 1.[2] The "Collateral Debt Securities" include the RMBS at issue. E.g.,

[1] "Excepted Property" is defined as "(a) the U.S. $250 representing a profit fee to the owners of the Issuer's ordinary shares, together with, in each case, any interest accruing thereon and the bank account in which such Cash is held and (b) the membership interests of the Co-Issuer and any assets of the Co-Issuer." E.g., Marcucci Decl. Ex. B at 20. The plaintiffs do not allege that the RMBS trusts are "Excepted Property."

[2] U.S. Bank also relies on the portion of the Granting Clause that states, "[T]he Issuer does hereby constitute and irrevocably appoint the [CDO Indenture] Trustee the true and lawful attorney of the Issuer, with full power (in the name of the Issuer or otherwise), to exercise all rights of the Issuer . . . and to file any claims or take any action or institute any proceedings which the [CDO Indenture] Trustee may deem to be necessary or advisable . . . ." Marcucci Decl. Ex. B at 2; Ex. G at 2; Ex. H at 2-3. However, this language merely provides a power of attorney, which in itself is not sufficient to assign a claim. Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 17 (2d Cir. 1997) ("The grant of a power of attorney, however, is not the equivalent of an assignment of ownership; and,

Calamari Decl. Ex. 4 at 11, ECF No. 62 ("'Collateral Debt Security' means (i) any Residential Mortgage-Backed Security, (ii) any Synthetic Security each Reference Obligation of which, and each Deliverable Obligation under which, is a Residential Mortgage-Backed Security or (iii) any Deliverable Obligation that is a Residential Mortgage-Backed Security that would qualify to be included as a Collateral Debt Security hereunder if purchased directly by the Issuer."). Furthermore, the word "Grant" is defined as "to grant, bargain, sell, warrant, alienate, remise, demise, release, convey, assign, transfer, mortgage, pledge, grant and create a security interest in and right of set-off against, deposit, set over, and confirm. A Grant of . . . any . . . instrument, shall include all rights, powers and options (but none of the obligations) of the granting party thereunder, including the immediate continuing right to . . . exercise all rights and options, to bring Proceedings in the name of the granting party or otherwise . . . ." E.g., Marcucci Decl. Ex. B at 22.

Each CDO Issuer's "Grant" of "all of its right, title and interest" in "any and all . . . property" is broad enough to include the transfer of the right to bring contract claims relating to any "instruments [and] securities . . . including . . . the Collateral Debt Securities . . . ." See Banque Arabe et

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standing alone, a power of attorney does not enable the grantee to bring suit in his own name.").

Internaitonale D'Investissement v. Maryland Nat'l Bank, 57 F.3d 146, 151 (2d Cir. 1995) (because the assignment "clearly transferred [the assignor's] rights and interests" in the agreement, it transferred "any claims grounded in contract" relating to that agreement). The judges in two other Southern District cases came to the same conclusion when grappling with almost identical indenture language. In Phoenix Light SF Ltd. v. U.S. Bank National Ass'n, No. 14-cv-10116 (KBF), 2015 WL 2359358 (S.D.N.Y. May 18, 2015), Judge Forrest held that an indenture granting away "all . . . right, title and interest" in the underlying assets contractually barred a CDO issuer's claim because "[a]ssignment of 'all . . . right, title and interest' in the [RMBS] certificates -- and the conveyance to the [Indenture] trustee of the 'full power' to file actions as it deems necessary or advisable -- constitutes a full assignment of the right to commence litigation as well as the discretion as to when any such suit should be brought. . . . A full assignment of this type divests plaintiffs of any rights they otherwise may have had to commence litigation on their own behalf." Id. at *2. Likewise, in House of Europe Funding I, Ltd. v. Wells Fargo Bank, N.A., No. 13-cv-519 (RJS), 2014 WL 1383703 (S.D.N.Y. Mar. 31, 2014), Judge Sullivan held that an indenture granting away "all . . . right, title and interest" in two contracts contractually barred a CDO issuer's claim relating to those

contracts because "[a] party that has assigned away its rights under a contract lacks standing to sue for breach of that contract." Id. at *15-16; see also Nat'l Credit Union Admin. Bd. v. U.S. Bank, Nat'l Ass'n, No. 14-cv-9928 (KBF), 2016 WL 796850, at *8 (S.D.N.Y. Feb. 25, 2016) ("The conveyance itself is broad in scope and effect, providing that 'Each Seller' conveys, transfers and assigns, without recourse, all of its rights, title in and to 'the portion of the Trust Estate consisting of such Seller's portion of the Underlying Securities.' . . . In short, the Sellers conveyed in toto all interest that they had or had ever had in the Underlying Securities.").

Plaintiffs make several arguments in response, but none are persuasive. First, they argue that notwithstanding the CDO Indentures, the Collateral Management Agreement for each CDO grants to the Collateral Manager the right to sue on the underlying collateral. The Collateral Management Agreements include the following language:

> The Collateral Manager is hereby appointed as the Issuer's agent to provide the Issuer with the services specified herein. . . .
>
> (d) The Collateral Manager shall, *subject to and in accordance with the Indenture* and this Agreement, take on behalf of the Issuer or direct the Trustee to take [various enumerated] actions . . . [including] exercis[ing] any other rights or remedies with respect to such Collateral Debt Security, Equity Security or Eligible Investment as provided in the related Underlying Instruments or tak[ing] any other action

> consistent with the terms of the Indenture which the Collateral Manager reasonably believes to be in the best interests of the Noteholders. . . .
>
> (p) In furtherance of the foregoing, the Issuer hereby appoints the Collateral Manager the Issuer's true and lawful agent and attorney-in-fact, with full power of substitution and full authority in the Issuer's name, place and stead and without any necessary further approval of the Issuer . . . .

Calamari Decl. Ex. 1 § 2; Ex. 2 § 2; Ex. 3 § 2 (emphasis added). But the Collateral Management Agreements do not alter the analysis. The Collateral Manager as the CDO Issuers' agent has rights no greater than its principals. Indeed, the provisions on which the plaintiffs rely are expressly "subject to . . . the Indenture," which assigned all right, title, and interest in the Issuers' property to the CDO Indenture Trustee, *supra*.

Second, plaintiffs argue that a "waiver and estoppel" applies because U.S. Bank was aware of, and did not object to, three other legal proceedings where the Triaxx CDOs litigated in their own names. Pls.' Opp'n Mem. of Law 13. As U.S. Bank points out, whatever estoppel argument can be raised -- whether judicial estoppel, equitable estoppel, or collateral estoppel -- "in each case the party who is to be estopped must have asserted a fact or claim, or made a promise, that another party relied on, that a court relied on, or that a court adjudicated and then later attempted to take a contradictory stance in that or another proceeding." Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 395-96 (2d Cir. 2011) (internal quotation marks and

alteration omitted). Here, U.S. Bank is not alleged to have made any affirmative statement that the Triaxx CDOs have standing to litigate in their own names. Consequently, plaintiffs have provided no basis for the Court to hold that U.S. Bank is estopped from challenging the plaintiffs' standing to sue on breach of contract claims.

Third, plaintiffs argue that under Judge Forrest's approach in Phoenix Light, the Collateral Manager's August 2016 demand on U.S. Bank (as CDO Indenture Trustee) to assign the claims back to the Triaxx CDOs cures the standing problem. Pls.' Opp'n Mem. of Law 13-14; see Phoenix Light SF Ltd. v. U.S. Bank Nat'l Ass'n, No. 14-cv-10116 (KBF), 2016 WL 1169515 (S.D.N.Y. Mar. 22, 2016). But a key step in Phoenix Light was that the plaintiffs in that case actually received the assignment from the indenture trustees. See id. at *7. Here, U.S. Bank (as CDO Indenture Trustee) has not assigned the claims back to the plaintiffs; nor does it appear that it is contractually required to do so unless the demand comes from the "Majority of the Controlling Class" of noteholders (as defined in the CDO Indentures). See Marcucci Decl. Ex. B § 5.13; Tr. 35:15-36:21.

Fourth, in a footnote the plaintiffs argue that CDO issuers simply retain standing to sue as the injured parties. Pls.' Opp'n Mem. of Law 12 n.8; see Tr. 39:15-40:16. For this argument plaintiffs rely on the portion of Judge Sullivan's

opinion in House of Europe Funding I, Ltd., 2014 WL 1383703, which states, "As a New York court has observed, a CDO issuer like HOE I owns the underlying assets and is therefore injured by actions that adversely affect the underlying assets." Id. at *11 (citing Hildene Capital Mgmt., LLC v. Bank of N.Y. Mellon, 105 A.D.3d 436, 963 N.Y.S.2d 38, 40 (N.Y. App. Div. 1st Dep't 2013)). We do not accept plaintiffs' broad reading or application of this statement, which was only made in that case in the course of rejecting the "contention that an entity that holds assets strictly for the benefit of investors cannot suffer an actual injury." House of Europe Funding I, Ltd., 2014 WL 1383703, at *11. It did not create a rule that a CDO issuer retains the right to bring suit regardless of what a governing indenture may say. Indeed, as discussed *supra*, Judge Sullivan held in the very same opinion that the CDO issuer lacked standing to bring suit under contracts that had been assigned away. Id. at *15-16.

Finally, the plaintiffs argue that U.S. Bank's position creates the absurd result that only U.S. Bank (as CDO Indenture Trustee) may decide to sue U.S. Bank (as RMBS Trustee), which would shield U.S. Bank from any litigation relating to these CDOs. The Court's holding does not create this result, for two reasons. First, U.S. Bank is open to suits from other plaintiffs or through other avenues. For example, as noted

above, a "Majority of the Controlling Class" could direct U.S. Bank (as CDO Indenture Trustee) to assign the claims back to the plaintiffs or to someone else. Or, as counsel for plaintiffs and U.S. Bank agreed, the certificateholders of an RMBS trust could bring suit against the relevant RMBS Trustee. Tr. 33:2-5; 52:12-53:12.[3] In other words, even if the language of the CDO Indentures means that the CDO Issuers have granted away their contract claims at this stage, it does not follow that the RMBS Trustees are immune from suit. Second, and importantly, the plaintiffs appear to have retained standing to sue the RMBS Trustees on tort claims arising outside of the contracts. Under New York law, tort claims do not transfer with a broad assignment of rights; they only transfer with an express assignment of those claims. Dexia SA/NV v. Morgan Stanley, 135 A.D.3d 497, 497, 22 N.Y.S.3d 833 (N.Y. App. Div. 1st Dep't 2016) (one plaintiff's "agreement to deliver 'all right, title and interest' in the RMBS to the [other] plaintiffs did not include fraud claims, since [the first plaintiff] only assigned rights in the subject securities without explicitly referencing any related tort claims or the overall transaction . . . ."), leave to appeal denied, 28 N.Y.3d 903, 63 N.E.3d 71 (2016); see also

[3] While the discussion at oral argument was in the context of no-action clauses pertaining to 10 trusts, plaintiffs' counsel's broader answer about avenues for recovery pertained to all 53 trusts: "There are 53 trusts, and they have different provisions. . . . So it's hard for me to give a one-size-fits-all answer. But could some form of litigation be pursued in some manner other than this, I think the answer is yes to that." Tr. 52:16-21.

Commonwealth of Pa. Pub. Sch. Employees' Retirement Sys. v. Morgan Stanley & Co., 25 N.Y.3d 543, 550, 35 N.E.3d 481 (2015) ("[W]here an assignment of . . . tort claims is intended in conjunction with the conveyance of a contract or note, there must be some language -- although no specific words are required -- that evinces that intent and effectuates the transfer of such rights."); State of Cal. Pub. Employees' Retirement Sys. v. Sherman & Sterling, 95 N.Y.2d 427, 432-36, 741 N.E.2d 101 (2000).

Given that the CDO Issuers' grant of "all of [their] right, title and interest" did not explicitly reference any related tort claims, at this time (without the benefit of specific briefing) it appears that they have retained their standing to bring extracontractual tort claims. In so stating, the Court does not intend to suggest that any extracontractual tort claims would or would not survive a motion to dismiss on other grounds. Additionally, the Court leaves open the possibility that briefing on an amended complaint (see *infra*) may clarify the issue.

2. Breach of Fiduciary Duty Claims

As plaintiffs' counsel agreed at oral argument, the plaintiffs have abandoned their breach of fiduciary duty claims. Tr. 26:14-20. Therefore, those claims are dismissed.

IV. Conclusion

The plaintiffs' contract claims against the defendants are dismissed for lack of standing, and the plaintiffs' breach of fiduciary duty claims are dismissed as abandoned. The plaintiffs are granted leave to file an amended complaint within 30 days from the date of this Memorandum and Order. If plaintiffs wish to assert contract claims in the amended complaint, the plaintiffs must also explain how they have cured the standing issues identified herein. This is the plaintiffs' final opportunity to amend the complaint; no subsequent amendments will be permitted.

This Memorandum and Order resolves docket entries 49 and 53.

SO ORDERED.

Dated: New York, New York
March 21, 2017

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE