

**Fixed Income Shares: Series M v Citibank, N. A.**

2017 NY Slip Op 31378(U)

June 27, 2017

Supreme Court, New York County

Docket Number: 653891/15

Judge: Charles E. Ramos

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

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FIXED INCOME SHARES: SERIES M; LVS II LLC;  
PCM FUND, INC.; PIMCO ABSOLUTE RETURN STRATEGY  
II MASTER FUND LDC; PIMCO ABSOLUTE RETURN  
STRATEGY III MASTER FUND LDC; PIMCO ABSOLUTE  
RETURN STRATEGY III OVERLAY MASTER FUND LTD.;  
PIMCO ABSOLUTE RETURN STRATEGY IV MASTER FUND  
LDC; PIMCO ABSOLUTE RETURN STRATEGY V MASTER  
FUND LDC; PIMCO BERMUDA TRUST II: PIMCO BERMUDA  
INCOME FUND (M); PIMCO CAYMAN SPC LIMITED: PIMCO  
CAYMAN JAPAN COREPLUS SEGREGATED PORTFOLIO; PIMCO  
DYNAMIC CREDIT INCOME FUND; PIMCO FUNDS: GLOBAL  
INVESTORS SERIES PLC, DIVERSIFIED INCOME FUND;  
PIMCO FUNDS: GLOBAL INVESTORS SERIES PLC, GLOBAL  
BOND FUND; PIMCO FUNDS: GLOBAL INVESTORS SERIES PLC,  
INCOME FUND; PIMCO FUNDS: GLOBAL INVESTORS SERIES PLC,  
UNCONSTRAINED BOND FUND; PIMCO FUNDS: PIMCO  
COMMODITIESPLUS STRATEGY FUND; PIMCO FUNDS: PIMCO  
COMMODITY REAL RETURN STRATEGY FUND®; PIMCO FUNDS:  
PIMCO DIVERSIFIED INCOME FUND; PIMCO FUNDS: PIMCO  
EMG INTL LOW VOLATILITY RAFI®-PLUS AR FUND; PIMCO  
FUNDS: PIMCO FLOATING INCOME FUND; PIMCO FUNDS:  
PIMCO FOREIGN BOND FUND (UNHEDGED); PIMCO FUNDS:  
PIMCO GLOBALADVANTAGE®STRATEGY BOND FUND; PIMCO  
FUNDS: PIMCO GLOBAL BOND FUND (UNHEDGED); PIMCO  
FUNDS: PIMCO FUNDS: PIMCO INTERNATIONAL STOCKSPLUS®  
AR STRATEGY FUND (U.S. DOLLARHEDGED); PIMCO FUNDS:  
PIMCO INVESTMENT GRADE CORPORATE BOND FUND; PIMCO  
FUNDS: PIMCO LOW DURATION FUND; PIMCO FUNDS: PIMCO  
MORTGAGE OPPORTUNITIES FUND; PIMCO FUNDS: PIMCO  
REAL RETURN FUND; PIMCO FUNDS: PIMCO SHORT-TERM  
FUND; PIMCO FUNDS: PIMCO TOTAL RETURN FUND; PIMCO  
FUNDS: PIMCO UNCONSTRAINED BOND FUND; PIMCO FUNDS:  
PIMCO WORLDWIDE FUNDAMENTAL ADVANTAGE AR STRATEGY  
FUND; PIMCO FUNDS: PRIVATE ACCOUNT PORTFOLIO  
SERIES EMERGING MARKETS PORTFOLIO; PIMCO FUNDS:  
PRIVATE ACCOUNT PORTFOLIO SERIES MORTGAGE PORTFOLIO;  
PIMCO FUNDS: PRIVATE ACCOUNT PORTFOLIO SERIES U.S.  
GOVERNMENT SECTOR PORTFOLIO; PIMCO MULTI-SECTOR  
STRATEGY FUND LTD.; PIMCO OFFSHORE FUNDS - PIMCO  
ABSOLUTE RETURN STRATEGY IV EFUND; PIMCO  
VARIABLE INSURANCE TRUST: PIMCO GLOBAL ADVANTAGE  
STRATEGY BOND PORTFOLIO; PIMCO VARIABLE INSURANCE  
TRUST: PIMCO GLOBAL BOND PORTFOLIO (UNHEDGED);  
PIMCO VARIABLE INSURANCE TRUST: PIMCO LOW  
DURATION PORTFOLIO; PIMCO VARIABLE INSURANCE  
TRUST: PIMCO TOTAL RETURN PORTFOLIO; CREF BOND  
MARKET ACCOUNT; CREF SOCIAL CHOICE ACCOUNT;

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA; TIAA-CREF BOND FUND; TIAA-CREF BOND PLUS FUND; PRUDENTIAL RETIREMENT INSURANCE AND ANNUITY COMPANY; THE GIBRALTAR LIFE INSURANCE COMPANY, LTD.; THE PRUDENTIAL SERIES FUND; TRANSAMERICA LIFE INSURANCE COMPANY; TRANSAMERICA PREMIER LIFE INSURANCE COMPANY; KORE ADVISORS LP; SEALINK FUNDING LIMITED,

Index No. 653891/15

Plaintiffs,

-against-

CITIBANK, N.A.,

Defendant.

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**Hon. C. E. Ramos, J.S.C.:**

Defendant Citibank, N.A. (Citibank or Trustee) moves to dismiss the amended proposed class action complaint (Complaint) pursuant to CPLR 3211 (a)(7).

**Background**

The facts set forth herein are taken from the Complaint, and are assumed to be true for purposes of disposition.

Plaintiffs are certificate holders (Certificateholders) of the residential mortgage-backed securities (RMBS) trusts listed in Exhibit 1 attached to the Complaint. Citibank is the Trustee for over a hundred RMBS trusts originally securitized by more than \$69 billion of mortgage loans, including the twenty-five trusts (Trusts) at issue in this action. The Trusts were securitized between 2004 and 2007, collateralized with loans worth more than \$13.8 billion at the time of securitization.

Pursuant to its Pooling and Services Agreement (PSA), the Trusts issued mortgage certificates, consisting of classes of Certificateholders that receive distributions from the interest and principal payments on the underlying payments.

Citibank's contractual duties to act on behalf of the Trusts and their Certificateholders are set forth in the PSA. Plaintiffs allege that Citibank failed to discharge its duties and obligations in order to protect its own business interests. Citibank purportedly ignored pervasive and systematic deficiencies in the underlying loan pools and the servicing of those loans, and has unreasonably failed to take any action to remedy those deficiencies.

Specifically, Plaintiffs allege that Citibank breached the contractual representations and warranties contained in the PSA by failing to monitor the Trusts' poor performance, including early payment defaults, spiraling defaults, delinquencies and foreclosures. Citibank also allegedly had "intimate knowledge" of the sellers' systematic deficient underwriting practices through its financing, purchasing, securitization, and servicing of the sellers' loans.

Citibank allegedly received written notice of these rampant breaches of representations and warranties in its capacity as Trustee to other RMBS trusts, and had awareness of private and public enforcement proceedings which exposed the sellers'

systematic abandonment of stated underwriting guidelines, including litigation involving the Trusts or targeting Citibank, yet failed to declare an event of default, as defined in the PSA, which would have expanded Citibank's duties to the Trustees and Certificateholders.

Under Section 2.03(c) of the PSA, the Trustee is obligated to give prompt notice of breaches of representations and warranties made by the seller, and to act with respect to the breach by repairing, substituting, or curing the defective loan (Haupt Aff., Ex. 2, § 2.03[c])

Plaintiffs assert causes of action for breach of contract, breach of fiduciary duty, and breach of the covenant of good faith and fair dealing (pled in the alternative to breach of contract).

#### **Discussion**

Citibank moves to dismiss the Complaint because plaintiffs fail to state a claim, largely based on the First Department's recent decision in *Commerce Bank v The Bank of New York Mellon* (141 AD3d 413 [1st Dept 2016]).

In deciding a motion to dismiss under CPLR 3211 (a)(7), the pleadings are afforded a liberal construction and plaintiffs are afforded the benefit of every possible favorable inference (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]).

This Court notes at the outset that the PSA contains a condition precedent to instituting a suit, set forth in section 10.08, which provides, in relevant part, that:

No Certificateholder shall have any right ...to institute any suit, action, or proceeding in equity or at law upon or under with respect to this Agreement unless such Holder previously shall have given to the Trustee a written notice of an Event of Default and of the continuance thereof..., and unless the Holders of Certificates evidencing not less than 25% of the Voting Rights...shall also have made written request to the Trustee to institute such action, suit or proceeding in its own name as Trustee hereunder...

(Haupt Aff., Ex. 2, § 10.08).

It is unclear from the record whether the Certificateholders complied with this condition precedent prior to instituting this action.

### **I. Breach of Contract**

According to the Complaint, Citibank's contractual obligations fall into two categories: (I) obligations prior to an event of default and (ii) obligations after an event of default.

#### **A. Breach of Contract - Obligations prior to an Event of Default**

Plaintiffs allege that Citibank materially breached the PSA by failing to: (I) ensure delivery of the mortgage loan files; (ii) provide prompt written notice to all parties to the PSA and related responsible parties of breaches of the sellers' mortgage loan representations and warranties, upon Citibank's discovery of

such breaches; (iii) enforce the sellers' obligations to repurchase, substitute, or cure such defective mortgage loans; and (iv) to provide notice of and take steps to remedy the servicers' failure to perform their obligations under the PSA, including the failure to declare an event of default (Complaint, ¶ 360).

With respect to Citibank's alleged failure to ensure delivery of the mortgage loan files, Plaintiffs rely on section 2.01(c) of the PSA, which provides, in relevant part, "in connection with the transfer and assignment... the Depositor has delivered or caused to be delivered to the Trustee for the benefit of the Certificateholder" mortgage loan files (Houpt Aff., Ex. 2, § 2.01[c]).

To the extent that the claim is based on the Trustee's initial failure to deliver mortgage loan files at or near the time the Trusts closed, it is time-barred under a six-year statute of limitations (*MTG Enterprises, Inc. v Berkowitz*, 182 AD2d 388 [1st Dept 1992]).

Thereafter, it is alleged that the servicers of the Trusts engaged in "robo-signing" on a widespread basis when the missing documents were needed to foreclose on the properties underlying the mortgage loans which eventually increased the cost of

foreclosure and called into question the validity and priority of the Trusts' liens (Complaint, ¶ 311).

Under Section 8.01 of the PSA, the Trustee is obligated to examine any resolutions, certificates, statements, opinions, reports, documents...or other instruments provided to him to ensure they are in proper form," although the Trustee is "not responsible for the accuracy or content of any such resolution...or other instrument" (Haupt Aff., Ex. 2, § 8.01).

The robo-signing portion of the claim is not time barred and sufficiently states a claim (*See generally Phoenix Light SF LTD. v Bank of NY Mellon*, 2015 WL 5710645, \*5-6 [SDNY 2015]).

The next alleged breach is with respect to Citibank's alleged knowledge and/or willful blindness of discovery of the breaches of representations and warranties. Citibank's duties with respect to discovery of representations and warranties are outlined in Section 2.03(c) of the PSA, which provides, in relevant part:

Upon discovery by any of the parties hereto of a breach of a representation and warranty made pursuant to Section 2.03...that materially and adversely affects the interests of the Certificateholders in the Mortgage Loan, the party discovering such breach shall give prompt notice thereof to the other parties," and provides for a 90-day cure period.

(Haupt Aff., Ex. 2, § 2.03 [c]).



Schedules II-A through Schedules III-D annexed to the PSA outline the specific representations and warranties made by Countrywide Home Loans Servicing LP ("Countrywide Servicing") as Master Servicer, Park Granada LLC ("Granada"), Park Monaco Inc. ("Monaco"), Park Sienna LLC ("Sienna"), and Countrywide Home Loans, Inc. ("Countrywide"), as sellers, CWALT, Inc. ("CWALT"), as depositor, and the Bank of New York ("BNY") as Trustee relating to their authority to enter into the PSA.

Schedules III-A through III-D contain additional representations and warranties, and provide that no initial mortgage loan had a loan-to-value ratio at origination in excess of 100 percent, all payments due with respect to each initial mortgage loan have been made, in addition to each mortgage loan's compliance with applicable laws, that the origination and underwriting practices were legal, prudent, and customary, the validity of liens on the mortgaged property, the lack of any apparent monetary default, and the presence of good title prior to assignment of the relevant loans (Haupt Aff., Ex. 2, Sched. III-A-III-D).

In their Complaint, Plaintiffs allege numerous breaches of the representations and warranties relating to underwriting guidelines, payment defaults, mortgage defaults, defective loans, the title, priority and enforceability of the liens securing the mortgage loans, loan-to-value ratios, owner occupancy status, and

borrower credit scores (Complaint, ¶¶ 159-187, 198, 205, 208, 213).

According to Plaintiffs, Citibank discovered these breaches through its preparation of final certifications and document exception reports (Complaint, ¶¶ 309-311). In addition, Plaintiffs allege that Citibank had knowledge of these breaches through its monitoring of the Trust's performance through servicing data, published remittance reports, and continuous interaction with credit rating agencies, ongoing litigation involving the Trusts, and due diligence and loan file reviews, which confirmed breaches of underwriting guidelines (Complaint, ¶¶ 297-300).

Plaintiffs further maintain that Citibank repeatedly received written notice from monoline insurers, investors, and other stakeholders concerning breaches by these same sellers in its capacity as Trustee to other trusts (Complaint, ¶¶ 232-44). Based on this information, Plaintiffs allege that Citibank had actual knowledge of specific breaches of representations and warranties which would have ripened into an event of default if left unremedied, yet failed to give notice to the other parties to the PSA thereof pursuant to Section 2.03(c).

Plaintiffs clearly allege that Citibank had knowledge of breaches of representations and warranties as a result of its

preparation of final certificates, document exception reports, monitoring of trust performance, and regular interaction with credit rating agencies. The allegation that the Trustee knew of these breaches of representations and warranties and failed to take the appropriate action is sufficient at the pleading stage (*cf. Commerce Bank v The Bank of New York Mellon*, 141 AD3d 413 [1st Dept 2016]).

**B. Breach of contract - Event of Default duties**

The final alleged breaching act is Citibank's purported failure to provide notice of an event of default, as set forth in part, in PSA § 8.01, which requires the Trustee "to exercise such of the rights and powers vested in it by [the PSA], 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 affairs" (Haupt Aff., Ex. 2, § 8.01).

Section 10.05(a) of the PSA provides, in relevant part, that the "Trustee shall use its best efforts to promptly provide notice to each Rating Agency with respect to each of the following of which it has actual knowledge...: (3) the occurrence of any event of default that has not been cured" (Haupt Aff., Ex. 2, § 10.05[a]).

Section 8.02(viii) of the PSA provides that the Trustee "shall not be deemed to have knowledge of an event of default

until a Responsible Officer of the Trustee shall have received written notice thereof" (Houpt Aff., Ex. 2, § 8.02[viii]).

Section 7.03(b) of the PSA provides that "within 60 days after the occurrence of any event of default, the Trustee shall transmit by mail to all Certificateholders notice of each such event of default hereunder known to the "Trustee" (Houpt Aff., Ex. 2, § 7.03[b]).

The last relevant provision of the PSA is Section 7.01, which provides, in relevant part, that an event of default occurs when:

Any failure by the Master Servicer to observe or perform in any material respect any other of the covenants or agreements on the part of the Master Servicer contained in this Agreement, which failure materially affects the rights of Certificateholders, that failure continues unremedied for a period of 60 days after the date on which written notice of such failures shall have been given to the Master Servicer by the Trustee or the Depositor, or to the Master Servicer and the Trustee by the Holders of Certificates evidencing not less than 25% of the Voting Rights evidenced by the Certificates.

(Houpt Aff., Ex. 2, § 7.01[ii]).

Plaintiffs allege that Citibank and its responsible officers had knowledge of alleged material breaches of representations and warranties through public reports, lawsuits, exception reports, remittance reports, and the increasing delinquency and loss rates for the Trusts, but failed to declare an event of default (Complaint, ¶ 365). Plaintiffs claim that once a responsible

officer of Citibank gained knowledge of an occurrence of an event of default, it was obligated under Section 8.01 of the PSA to promptly provide written notice to the responsible servicer and demand that such breach be remedied within the specified time period, using the same degree of care and skill as a prudent person would under the circumstances.

In support of its motion to dismiss, Citibank argues that Plaintiffs' claim that Citibank failed to act with the requisite degree of care fails because such duties are triggered only upon Citibank having "known" about an event of default (Haupt Aff., Ex. 2, § 8.01).

Plaintiffs fail to plead that Citibank breached its contractual duty to provide notice of an event of default, which is triggered upon the receipt by a responsible officer of Citibank of "written notice" of an event of default (Haupt Aff., Ex. 2, § 8.02 [viii]). The Trustee is not bound "to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report...or other paper or document, unless requested in writing to do so by the Holders of Certificates evidencing not less than 25% of the Voting Rights" (Haupt Aff., Ex. 2, § 8.02[iv]).

Plaintiffs fail to allege that any of Citibank's responsible officers received written notice of an event of default or a

request in writing to investigate, which triggers its duty to give notice to the Certificateholders (Haupt Aff., Ex. 2, § 8.02[viii]). General knowledge, under the express terms of the PSA, is simply insufficient (*accord Commerce Bank*, 141 AD3d 141 ["no notice, no knowledge, and therefore no duty to nose to the source"]; *BlackRock Allocation Target Shares: Series S. Portfolio v Wells Fargo Bank, National Association*, 2017 WL 1194683 [SDNY 2017]) (internal quotations omitted).

## II. Implied Covenant of Good Faith and Fair Dealing

Nonetheless, Plaintiffs have sufficiently stated a claim for breach of the implied covenant of good faith and fair dealing. Under the implied covenant of good faith and fair dealing, a party cannot "rely on the non-occurrence of a condition precedent if, as plaintiffs allege, he was instrumental in preventing or frustrating its occurrence" (*Merzon v Lefkowitz*, 289 AD2d 142 [1st Dept 2001]). Thus, a failure of a condition cannot serve as a defense, where "the party resisting the contractual obligation has affirmatively acted to obviate its fulfillment" (*Trade & Industry Corp. (USA), Inc. v Euro Brokers Inv. Corp.*, 222 AD2d 364, 368 [1st Dept 1995]). Moreover, it is implied in this obligation that "no party will do anything to destroy or injure the right of another party under the contract" to enjoy the

fruits of the bargain (*Ellenberg Morgan Corp. v Hard Rock Café Associates*, 116 AD2d 266 [1st Dept 1986]).

Plaintiffs have alleged that, despite knowledge of rampant breaches of representations and warranties that would give rise to an event of default and the authority to act, Citibank failed to take appropriate action to fulfill its contractual obligations by providing notice to the Certificateholders, set forth in PSA section 2.03(c) (Haupt Aff., Ex. 2, § 2.03[c]), which would have ripened into an event of default if left unremedied. Plaintiffs maintain that, even if Citibank's express duty to provide written notice of an event of default was not triggered by the required demand, Citibank cannot rely on its own failure to give notice of the underlying defaults to escape its contractual obligations. That would reward Citibank for its failure by depriving the Certificateholders of their rights upon the declaration of an event of default.

To the extent that the Certificateholders allege that circumstances that would give rise to an event of default were actually known to Citibank, but that Citibank failed to act, in bad faith, Plaintiffs have adequately stated a claim for breach of the implied covenant of good faith and fair dealing. Whether Citibank had actual knowledge of material breaches of the representations and warranties but failed to provide written

notice to the Certificateholders can only be determined after discovery and trial or dispositive motion.

Citibank correctly recites the law in that an implied covenant cannot create additional duties that would be inconsistent with unambiguous contractual terms (*Murphy v American Home Prods. Corp.*, 58 NY2d 293 [1983]; *1357 Tarrytown Rd. Auto, LLC v Granite Props.*, 142 AD3d 976 [2d Dept 2016]). However, Plaintiffs' claim seeks to ensure that Citibank reasonably and in good faith performed its contractual duties so as to preserve Plaintiffs' rights under the PSA, rather than in a manner that frustrated plaintiffs' entitlement to receive the fruits of its bargain (*See Bostwick v Credit Agricole Corporate*, 149 AD3d 655 [1st Dept 2017]; *Frydman v Credit Suisse First Boston Corp.*, 272 AD2d 236 [1st Dept 2000]).

### III. Breach of Fiduciary Duty

Plaintiffs maintain that their breach of fiduciary duty claims are proper, as they have successfully established that Citibank breached legal duties independent of the PSA.

In opposition, Citibank asserts that Plaintiffs' tort claims are duplicative of the breach of contract claims and are barred by the economic loss rule, which limits Plaintiffs' remedies to those set forth in the parties' contract.



Courts have consistently held that prior to an event of default, an "indenture trustee's duty is governed by the terms of the indenture with two exceptions: a trustee must still [I] avoid conflicts of interest, and [ii] perform all basic non-discretionary, ministerial tasks with due care (*Millennium Partners, L.P. v U.S. Bank Nat. Ass'n*, 2013 WL 1655990 \*3 [SDNY 2013]; *Ellington Credit Fund, Ltd. v Select Portfolio Servicing, Inc.*, 837 FSupp2d 162, 191-92 [SDNY 2011], *LNC Inv., Inc. v First Fidelity Bank, Nat. Ass'n*, 953 FSupp 1333, 1347 [SDNY 1996]).

**A. Breach of Fiduciary Duty - Post-Event of Default Duties**

The occurrence of an event of default triggers heightened fiduciary duties for indentured trustees (Haupt Aff., Ex. B, § 8.01[i]). After an event of default, "an indenture trustee's fiduciary duties expand under the New York common law such that fidelity to the terms of an indenture does not immunize an indenture trustee against claims that the trustee has acted in a manner inconsistent with his or her fiduciary duty of undivided loyalty to trust beneficiaries" (*BlackRock Allocation Target Shares: Series S. Portfolio v Wells Fargo Bank, Nat'l Assoc.*, 2017 WL 1194683 [SDNY 2017]) (internal quotations omitted).

Plaintiffs allege that after an event of default, Citibank's duties expanded to include a fiduciary duty owed to the Certificateholders, and that Citibank was obligated to promptly

enforce the originators and sponsors' obligation to cure, repurchase or substitute mortgage loans with defective mortgage files. In addition, Plaintiffs allege that Citibank failed to provide notice to the Certificateholders of the breaches or of its intention to not enforce the sponsors' obligation to cure, or to bring an action against sellers of the Trusts.

The terms of the PSA clearly limit Citibank's duties to those specifically set forth in the PSA, requiring the Trustee to use the "same degree of care and skill...as a prudent person would exercise under the circumstances (Houpt Aff., Ex. B, § 8.01[i]). Section 8.01(I) of the PSA provides that "no implied covenants or obligations shall be read into this Agreement against the Trustee," unless an event of default has been declared (Houpt Aff., Ex. B, § 8.01[i]).

Even if the Court were to find that Plaintiffs adequately stated a claim for breach of post event of default duties, it is ultimately barred by the economic loss doctrine, as it is duplicative of the remedy sought in Plaintiffs' breach of contract claims and ultimately seeks damages which flow from the violations of the PSA (*BlackRock Allocation Target Shares: Series S. Portfolio*, 2017 WL 1194683, at \*13, 15-16).

Further, Plaintiffs' claims based on Citibank's failure to perform ministerial acts with due care do not state a claim for

breach of fiduciary duty under New York law, and can only be properly pled as a negligence claim (*Id.*, at \*12).

**B. Breach of Fiduciary Duty - Conflict of Interest**

In the Complaint, Plaintiffs allege that Citibank, as Trustee, had certain extracontractual duties, including the duty to give Certificateholders their undivided loyalty to act without self-interest (Complaint, ¶ 377). Plaintiffs maintain that despite Citibank's knowledge of the Sellers' breach of representations and warranties, it failed to act in a manner that would require the sellers to cure, because of its economic ties to the sellers (Complaint, ¶ 382). Plaintiffs assert that absent that conflict of interest, Citibank would have enforced the Sellers' repurchase obligations and ensured compliance with industry standards (Complaint, ¶ 383).

In contrast, Citibank asserts that Plaintiffs fail to allege a "quid pro quo" relationship establishing a conflict of interest. Citibank alleges that Plaintiffs' conflict of interest claim fails absent evidence of a party that Citibank should have sued and an additional securization in which that party was able to retaliate against Citibank, thereby preventing it from taking further action.

"[T]he existence of a conflict of interest cannot be inferred solely from a relationship between an issuer and an

indenture trustee that is mutually beneficial and increasingly lucrative" (*Commerce Bank v the Bank of N.Y. Mellon*, 141 AD3d 413, 416 [1st Dept 2016]), citing *Royal Park Ins. SA/NV v HSBC Bank USA, N.A.*, 109 FSupp3d 587, 598 [SDNY 2015]) (internal quotations omitted).

Here, Plaintiff has clearly alleged the existence of a relationship between Citibank, as Trustee, and the Sellers. However, just as in *Commerce Bank*, 141 AD3d 413, Plaintiffs' allegations of a conflict of interest are entirely conclusory, with no specific contention that Citibank financially benefitted from its decision to not enforce the Sellers' repurchase obligations and to ensure compliance with custom and standard practice of prudent mortgage servicers. Likewise, Plaintiffs have failed to identify a specific servicer that Citibank financially benefitted from or securitizations that could have retaliated against Citibank.

Absent allegations that Citibank personally benefitted from its failure to act, Plaintiffs' claim for breach of fiduciary duty under a conflict of interest theory cannot stand (accord *Royal Park Investments SA/NV v HSBC Bank USA, Nat. Assoc.*, 109 FSupp3d 587, 598 [SDNY 2015]; *BlackRock Allocation Target Shares: Series S. Portfolio*, 2017 WL 1194683, at \*12).

Accordingly, it is hereby

ORDERED that Citibank's motion to dismiss is granted in part, to the extent of severing and dismissing the second and third causes of action breach of fiduciary duty and the first cause of action for breach of contract for failure to give notice of an event of default; and it is further

ORDERED that Citibank shall serve an answer to the amended complaint within 30 days of entry of this order with notice of entry.

Dated: June 27, 2017

ENTER:

J.S.C.