BoA relies on two cases for the proposition that prior to receipt of a contractually-sufficient notice of an Event of Default, "the duties of an indenture trustee are strictly defined and limited to the terms of the indenture." Elliott Assocs. v. J. Henry Schroder Bank & Trust Co., 838 F.2d 66, 71 (2d Cir. 1988); see also Meckel, 758 F.2d at 816. These cases are inapposite here, however, in light of Plaintiffs' allegation that BoA had to act upon an Event of Default if it had "actual knowledge" of the event and that BoA had such knowledge. Furthermore, for the reasons discussed above, BoA's receipt of the Borrowing Base Certificates may in fact satisfy the "written notice" requirements of the Base Indenture and upon which BoA relies.

After an event of default, the indenture trustee's fiduciary duties expand by operation of New York common law, LNC Invs., Inc. v. First Fid. Bank, N.A., 935 F. Supp. 1333, 1347-48 (S.D.N.Y. 1996), 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," and "the indenture trustee's obligations come more closely to resemble those of an ordinary fiduciary, regardless of any

limitations or exculpatory provisions contained in the indenture," Beck, 632 N.Y.S.2d at 520, 527-28.

Accordingly, DB and BNP have adequately pleaded the existence of a fiduciary relationship between BoA and DB and BNP, as noteholders, and have also adequately pleaded BoA's breach of that fiduciary duty. See Lumbermens Mut. Cas. Co. v. Franey Muha Alliant Ins. Servs., 388 F. Supp. 2d 292, 304 (S.D.N.Y. 2005) (stating elements).

BoA's motion to dismiss this claim is denied.

D. DB's Claims under the Prior Version of the Base Indenture and Other Facility Documents Fail as a Matter of Law

In addition to its claims under the current version of the Base Indenture, DB also seeks relief under the prior, superseded version of the Base Indenture and other Facility Documents, on the theory that the new agreements do not expressly release claims under the old ones. However, under New York an agreement that expressly supersedes earlier versions is dispositive even absent such an express release provision. In L-3 Communications Corp. v. OSI Systems, Inc., No. 02 Civ. 9144, 2004 WL 42276 (S.D.N.Y. Jan. 8, 2004), the court held that a

claim under an earlier agreement was barred by language in the new agreement stating that the parties "desire to amend and restate the [original agreement] in its entirety." Id. at *9 n.7. The 2008 Ocala agreements contain nearly identical integration language, indicating the parties' intent to replace the prior agreements with the updated versions. (See BoA Mem. 79.)

The cases cited by DB are inapposite. Primex Int'l Corp. v. Wal-Mart Stores, Inc., 657 N.Y.S.2d 385, 387-88 (1997), and General Motors Corp. v. Fiat S.p.A, 678 F. Supp. 2d 141, 148 (S.D.N.Y. 2009), both turn on arbitration clauses in older agreements that expressly bound the parties even after superseding agreements were signed. Those cases also involved forum selection, rather than claims for breach of the old agreements. In Air Support Int'l, Inc. v. Atlas Air, Inc., 54 F. Supp. 2d 158, 163 (E.D.N.Y. 1999), the new contract had "superseding" language but did not amend and restate the old contract.

DB's claim that the rule cited by BoA applies only to settlement contracts is wrong. See L-3, 2004 WL 42276, at *9 (letter of intent regarding joint bid for acquisition); In re Estate of Kneznek, 727 N.Y.S.2d 180, 181 (2001) (trust

agreement); Citigifts, Inc. v. Pechnik, 492 N.Y.S.2d 752, 753 (1985), aff'd mem., 500 N.Y.S.2d 643 (1986) (contract for sale of business).

Accordingly, DB's claims under the prior version of the Base Indenture and its claims under the prior versions of the other Facility Documents are dismissed.

V. THE AMENDED COMPLAINTS STATE A CLAIM FOR BREACH OF THE SECURITY AGREEMENT

Plaintiffs allege that from at least January 25, 2008 through August 3, 2009, BoA trust officers breached the Security Agreement by improperly transferring more than $3.8 billion from the Ocala Collateral Account and its sub-accounts pursuant to written requests from TBW that showed on their face destination accounts that were not connected with the purchase of mortgages. Plaintiffs further allege that TBW would submit wire transfer requests to BoA for its "review and approval" and BoA would transfer funds out of the Collateral Account after sending TBW an email saying its request was "[a]pproved." (BNP AC ¶¶ 111-12; DB AC ¶ 143.)

Plaintiffs claim that this conduct constituted a breach of BoA's duties as Collateral Agent under the Security Agreement, because BoA failed to "secure and protect" the Ocala assets over which it had "complete dominion and control" on behalf of Plaintiffs, as noteholders. See Security Agreement § 5.01. Plaintiffs contend that the Security Agreement required BoA, as Collateral Agent, to use reasonable care in the custody and preservation of the Ocala assets held as collateral, and that BoA failed to do so. See id. § 6.02. As a result, BoA failed to satisfy its obligation under the Security Agreement to "secur[e] and provid[e] for the repayment of all amounts at any time and from time to time owing by the Issuer" to Plaintiffs. Id. at 1.

Specifically, Plaintiffs allege that the following conduct by BoA constituted breaches of its duties as Collateral Agent under the Security Agreement:

- BoA transferred funds from the Collateral Account for improper purposes (i.e., it allowed transfers for the purchase of "wet" mortgage loans) and failed to ensure the funds withdrawn or transferred matched the mortgage loans actually purchased (see BNP AC ¶ 156(i); DB AC ¶ 238);

- BoA failed to evaluate Ocala's assets and liabilities to ensure that the Borrowing Base Condition was satisfied prior to making requested transfers and transferred funds after an Event of Default had occurred, namely Ocala had become insolvent (see BNP AC ¶ 156(ii); DB AC ¶ 239);
- BoA failed to implement post-Event of Default procedures, such as paying out all collateral to interested parties, including Plaintiffs (see BNP AC ¶¶ 11, 117-18; DB AC ¶ 242);
- BoA failed to segregate Ocala's mortgages and cash and failed to segregate collateral into the proper sub-accounts for each series of notes (see BNP AC ¶ 156(iii); DB AC ¶ 240);
- BoA failed to perfect security interests in mortgage loans (see BNP AC ¶ 56(iv); DB AC ¶ 237); and
- BoA impermissibly acted on requests from unauthorized personnel (see BNP AC ¶ 153; DB AC ¶¶ 141, 241).

Citing Section 8.01, BoA contends that these alleged duties are not expressly provided for in the Security Agreement and therefore do not apply to BoA, which "shall not have any duty, except as expressly provided herein." (BoA Reply 18-19.) BoA also argues that, to the extent such duties exist anywhere

in the Security Agreement, they were "assigned squarely to either Ocala or TBW, and BoA expressly has no duty to monitor TBW's or Ocala's compliance with these requirements." (BoA Mem. 37.)

A. The Amended Complaints State a Claim that BoA Breached the Security Agreement by Transferring Funds for Prohibited Purposes

Plaintiffs allege that Sections 5.01 and 5.03 of the Security Agreement require BoA to monitor Ocala's requests to ensure they comply with the Security Agreement and Facility Documents. Section 5.01 permits only the Collateral Agent to "make" withdrawals from the Collateral Account, and only allows Ocala (as well as BoA as Indenture Trustee or Depositary) to "request" withdrawals "in accordance with the terms of Section 5.03." Security Agreement § 5.01. Section 5.03 of the Security Agreement allows Ocala to "instruct according to the Facility Documents the Collateral Agent to withdraw, or order the transfer of" funds but such instructions must be "approved instructions" and must in BoA's "professional judgment" be "genuine and correct." Id. §§ 5.01, 5.03 & 8.01. Nonetheless, according to the Amended Complaints, BoA repeatedly made withdrawals at the request of Ocala that were unrelated to any permissible purpose under Section 5.03. (See DB AC ¶¶ 143-50.)

BoA contends that the Security Agreement says the opposite, specifically that Ocala "shall on any given day . . . instruct the Collateral Agent to withdraw, or order the transfer of" funds in the Collateral Account "for the following purposes in the following order of priority," and that such instructions are deemed "effective upon receipt" and BoA "shall promptly comply with any such approved instructions." Security Agreement § 5.03. BoA focuses on the terms "shall instruct" and the language indicating that such instructions are ""effective upon receipt" and directing BoA to comply "promptly" as evidence that BoA did not have any duty to monitor transfer requests, and interprets the word "approved" to mean that the request must have been approved by Ocala. (BoA Reply 24.)

However, Section 5.01 does not characterize "requests" from Ocala as irrefutable orders or instructions that BoA was obligated to obey without review. Indeed, the requirement that BoA had to approve instructions suggests that its obligation to "promptly follow" payment instructions did not require automatic compliance. Section 5.03 instructs that payment requests by Ocala may be approved only: (i) when there is no Event of Default; (ii) where the request is made "according to the Facility Documents" for specifically enumerated "purposes" in

the "order of priority" dictated by Section 5.03, which includes the purchase of additional mortgage loans; and (iii) where the Borrowing Base Condition is met.

Not only does the Security Agreement give BoA the right and obligation to reject transfer requests inconsistent with the purposes set forth in Section 5.03, but, according to Plaintiffs, it also provides BoA time to monitor and evaluate transfer requests, by stating that "any withdrawal and transfer pursuant to an instruction received prior to 2:00 p.m. New York City time on any day shall be made on such day." Plaintiffs contend that this provision builds in minimum of four hours for BoA to confirm the propriety of any instruction and to honor such an "approved" instruction, because payment for the purchase of new mortgages was not due until 6:00 p.m., under Section 2.4 of the Purchase Agreement, a related Facility Document. Finally, that any withdrawal or transfer instruction was "effective upon receipt" does not mean BoA had no discretion, but rather that BoA's duties – to review the request and then, if approved, to honor the request, in compliance with Sections 5.01 and 5.03 – were triggered upon receipt of the instruction. See, e.g., Profit v. Baum, No. 3:96CV1205 JCH, 2000 WL 502697, at *7 (D. Conn. Mar. 21, 2000) ("effective upon receipt" clause determined when receiving party's duty was triggered).

Plaintiffs also note that BoA's position that it had no duty or time to review Ocala's transfer requests to make sure they were for approved transactions is contradicted by Ocala's and BoA's contemporaneous conduct during the existence of the Facility. As alleged in the Amended Complaints, Ocala initiated a transfer request by requesting BoA's "review and approval" of a wire transfer, which BoA regularly "[a]pproved." (See BNP AC ¶¶ 111-12.)

Plaintiffs have alleged that BoA knew the requests from TBW were not in accordance with Section 5.03 for two reasons. First, as discussed above, BoA had actual knowledge of Ocala's insolvency, an Event of Default, at least as early as January 25, 2008, and therefore each of BoA's transfers from the Collateral Account violated Section 5.03.

Second, Section 5.03 only allows BoA to disburse funds for specifically enumerated purposes, including the purchase of new mortgage loans, and BoA's transfers to accounts designated for purposes other than the purchase of new mortgages violated this requirement. (See BNP AC ¶¶ 122-27.) As a related point, Plaintiffs allege that BoA received withdrawal and transfer requests from unauthorized persons and complied with those

requests in contravention of its obligation under Section 5.03 not to effectuate a withdrawal at the request of anyone not properly identified as an Issuer Agent.[7] BoA does not deny that this was required, nor does it argue that the facts alleged in the Amended Complaints are inadequate to establish a breach. Instead, BoA argues that such a breach is immaterial and did not cause any "plausible" harm to Plaintiffs. (BoA Mem. 51-53; BoA Reply 30-31.) Accepting Plaintiffs allegations as true, however, the fact that BoA effectuated withdrawals from unauthorized individuals in the course of TBW's fraud, which ultimately led to the draining of value from the Collateral Account, makes the materiality of this breach a factual question not appropriate for resolution at this stage. The question of what damages, if any, Plaintiffs are entitled to as a result of this alleged breach is also not appropriate for resolution on a motion to dismiss.

Plaintiffs have also alleged that BoA transferred funds without taking any steps to verify that the Borrowing Base Condition had been satisfied. Section 5.03 provides that "no withdrawals from the Collateral Account shall be made" unless the Borrowing Base Condition is met, plainly refuting BoA's

[7] In addition, Section 8.01 required BoA to comply with Ocala's requests only where it "reasonably believe[s] . . . in its professional judgment" such instructions are "genuine and correct" and "signed or sent by the proper Person or Persons."

assertion that it was not required to verify satisfaction of the borrowing base test.

While BoA attempts to make light of the distinction between Ocala's ability to "request" withdrawals and BoA's authorization to "make" withdrawals, such a distinction is consistent with BoA's having an obligation to review Ocala's requests and to ensure that they conformed to the requirements of Section 5.03.

Plaintiffs claim that the Security Agreement expressly requires BoA to control and reconcile the Collateral Account is bolstered by Section 6.02, which explicitly invokes U.C.C. Section 9-207, and requires BoA to use reasonable care in the custody and preservation of the Collateral Account and the assets held therein as collateral. Section 6.02's requirement of reasonable care in preserving the collateral, and Section 8.01's requirement that BoA comply only with requests BoA "reasonably believed by it in its professional judgment to be genuine and correct," and thus made "in accordance with Section 5.03," appears to have mandated that BoA monitor and control the assets and the accounts, including monitoring Ocala's and TBW's requests to determine the purposes for which the requested funds would be used to ensure, among other things, that no collateral

left the Collateral Account without being replaced by other collateral of at least equal value.

The fact that BoA was obligated to certify the Borrowing Base Certificates each time Plaintiffs rolled their notes contradicts BoA's suggestion that only TBW and Ocala could know "precisely what assets were owned by Ocala on that date and the precise status of the outstanding mortgage loans." (BoA Mem. 46.) Plaintiffs have alleged that BoA received detailed reports from TBW about the mortgages that it was holding and that BoA had actual control over the collateral in the Collateral Account. Also, to the extent loans that were supposed to be held in the Collateral Account as collateral were out on bailee letter, BoA had a duty to track those bailee letters under Section 6.02 of the Security Agreement and Sections 6 and 8 of the Custodial Agreement, thus enabling it to ensure satisfaction of the Borrowing Base Condition.

Finally, BoA argues that Section 8.01 evidences the intent to exempt it from the obligations under Section 5.03. Section 8.01 provides as follows:

> The Collateral Agent shall be entitled to assume that no Indenture Event of Default under the Indenture shall have occurred and be continuing, unless an officer of the Collateral Agent charged by the Collateral Agent with the administration of any of its

> obligations under this Agreement or with knowledge of and familiarity with the Collateral Agent's obligations under this Agreement has actual knowledge thereof. . . .

As discussed above, however, the fact that BoA had "actual knowledge" of Ocala's insolvency bars it from relying on this provision and assuming the absence of an Event of Default.

Accordingly, Plaintiffs have stated a plausible claim that BoA breached the Security Agreement by transferring funds from the Collateral Account for improper purposes.

B. Plaintiffs State a Plausible Claim for Breach of the Security Agreement Based on BoA's Improper Post-Event of Default Conduct and Failure to Confirm the Borrowing Base Condition

Section 5.03 of the Security Agreement provides that "no withdrawals from the Collateral Account shall be made on any day . . . unless [the Borrowing Base Condition] is satisfied." Similarly, the Security Agreement prevents BoA from making a withdrawal or transfer if an Event of Default had occurred and was continuing. Id. § 5.03. Sections 6.01 and 6.02 of the Security Agreement also imposed additional duties on BoA upon the occurrence of an Event of Default, including the obligation to (1) cease making withdrawals requested by Ocala, and (2) distribute the funds in the Collateral Account to the Plaintiffs

and other holders of Ocala Notes. These obligations mirror the obligations of BoA, as Indenture Trustee, under Section 9.1(f) of the Base Indenture. Plaintiffs claim that BoA breached each of these duties.

As set forth above, Plaintiffs have alleged repeatedly in their Amended Complaints that the Borrowing Base Condition was not satisfied for a period of many months and that Ocala had become insolvent, constituting an Event of Default, as early as January 25, 2008. Plaintiffs have also alleged that although BoA was aware of these facts, it nonetheless made hundreds of millions of dollars of withdrawals and transfers of cash from the Collateral Account in violation of its duties under Section 5.03. (See, e.g., DB AC ¶¶ 83-97, 120-133, 159.)

BoA argues that all duties with respect to transfers and withdrawals under Section 5.03, including the duty to confirm that Ocala satisfied the Borrowing Base Condition and was not insolvent, applied to Ocala, and not to BoA. However, the language of the Security Agreement assigns the power to "make withdrawals" to BoA, as Collateral Agent, as distinct from Ocala's right to "request withdrawals." As discussed above, the relevant language in Section 5.03 mandates that "no withdrawals from the Collateral Account shall be made" if the Borrowing Base

condition is not met. Given that BoA was the only party under the Security Agreement authorized to make withdrawals from the Collateral Account, Plaintiffs' reading of Section 5.03, assigning the obligation to ensure that the Borrowing Base Condition was satisfied to BoA is correct.

For the reasons discussed above, none of the provisions cited by BoA containing language such as "effective on receipt" and requiring "prompt[]" compliance relieve BoA of its duty to confirm satisfaction of the borrowing base test. BoA also cites the provision of the Security Agreement stating that it is subject only to obligations "for which express provision is made herein." (BoA Mem. 45.) However, the Security Agreement expressly provides that "no withdrawals from the Collateral Account shall be made" to purchase mortgages unless the Borrowing Base Condition is satisfied and no Event of Default has occurred, and it is that express duty that Plaintiffs allege BoA has violated. See Security Agreement § 5.03(a), (b).

The structure of the Ocala facility is consistent with interpreting the Security Agreement as imposing on BoA the duty to confirm the Borrowing Base Condition. As Collateral Agent, BoA had legal ownership of all of the collateral and actual possession and control of the cash collateral. As Custodian

under the Custodial Agreement, BoA had actual possession of the mortgage collateral. Finally, as Depositary Agent under the Depositary Agreement and Indenture Trustee under the Base Indenture, BoA was aware of Ocala's outstanding note obligations.

As set forth above, BoA's argument that it was entitled to rely on "communications" or "directions" from TBW or Ocala does not bear on whether Plaintiffs have stated a claim, because whether BoA actually and/or reasonably "believed in its professional judgment" that the instructions it received were "correct," are questions of fact that are not appropriate for resolution on a motion to dismiss.

In response to Plaintiffs' claim that BoA failed to implement post-Event of Default actions, BoA argues that the language in Section 8.01 upon which Plaintiffs rely is an exculpatory provision that does not create a duty to act. (See BoA Reply 29-30.) However, it is not the language of Section 8.01 that established BoA's duty to implement the post-Event of Default actions, but rather the "waterfall" payment provision of Section 2 and the language in Section 5.03 requiring that further transfers be barred. Accepting Plaintiffs' factual assertions as true for purposes of this motion, trust officers

at BoA had actual knowledge of Ocala's insolvency and, therefore, BoA was obligated to take steps to shut down the Facility and was precluded from relying on the exculpatory language of Section 8.01.

C. The Amended Complaints also State a Claim that BoA Failed to Properly Segregate Collateral

The Security Agreement required BoA to establish and maintain separate "sub-accounts thereof for each of the Series 2005-1 Purchased Assets and the Series 2008-1 Purchased Assets," and that such assets "shall be deposited in the sub-account of the Collateral Account." Security Agreement § 5.01. The waterfall provisions of Section 5.03 required that withdrawals for the purchase of Series 2008-1 Mortgages were to be made only from the Series 2008-1 sub-account and withdrawals for the purchase of Series 2005-1 Mortgages were to be made only from the Series 2005-1 sub-account. Id. § 5.03(a)(vii)(a), (b)(ix)(a). Plaintiffs allege that not only did BoA allow improper withdrawals from each sub-account for improper purposes, but that there was "no meaningful attempt to segregate either mortgages purchased or the proceeds from the sale of mortgages." (DB AC ¶ 190.)

BoA does not deny that funds were improperly segregated or not segregated at all, but contends that it cannot be held responsible for failing to segregate collateral because that responsibility belonged to Ocala. (BoA Mem. 48-49.) However, Section 5.01 imposed the obligation to deposit funds in the proper sub-accounts on both Ocala and BoA, and permitted BoA to withdraw funds at Ocala's request only in accordance with Section 5.03, which required that funds be withdrawn from the appropriate sub-account. The fact that Ocala may also have had a duty to segregate the funds among the sub-accounts does not relieve BoA of its responsibility.

BoA argues that Section 8.01's bar on any implied duties on BoA means that BoA did not breach any duties by failing to properly segregate collateral. However, Section 8.01 provides that the collateral need not be segregated "except to the extent required by law or the specific provisions hereof."[8]

Finally, BoA contends that the phrase "shall be deposited in the sub-account" in Section 5.01 does not state

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[8] Not only was the segregation of collateral into sub-accounts required under the provisions of the Security Agreement, it was also mandated by federal law. See 12 C.F.R. § 9.13(b) ("Separation of fiduciary assets. A national bank shall keep the assets of fiduciary accounts separate from the assets of the bank. A national bank shall keep the assets of each fiduciary account separate from all other accounts or shall identify the investments as the property of a particular account, except as provided in § 9.18.").

which party is responsible for making such deposits, and that accordingly BoA cannot be deemed responsible for the segregation of such deposits, because the duty is not expressly provided for in the Security Agreement. However, in light of BoA's express obligations to secure and protect the collateral and to ensure that any withdrawals be made for proper purposes from proper sub-accounts, it is unclear whether the parties intended that BoA should also be responsible for ensuring that assets be deposited into the correct sub-accounts.

At a minimum, Plaintiffs have alleged a plausible claim for breach based on BoA's effectuating withdrawals from the general Collateral Account that were required to be made instead from the appropriate sub-account. More generally, accepting Plaintiffs' allegations as true, BoA's failure to ensure that the collateral was properly segregated constituted a breach of its duties as Collateral Agent.

Accordingly, BoA's motion to dismiss Plaintiffs' claims under the Security Agreement is denied.

VI. PLAINTIFFS LACK STANDING UNDER THE DEPOSITARY AND CUSTODIAL AGREEMENTS AND THE MARCH 2009 LETTER

To state a claim for breach of contract or for indemnification, a claimant must show either that it is a party to the relevant agreement or that the contracting parties intended the claimant to be a third-party beneficiary with enforcement rights. See Binghamton Masonic Temple Inc. v. City of Binghamton, 623 N.Y.S.2d 357, 360-61 (1995). Where a claimant is neither a party nor named as a third-party beneficiary, and where the operative contract expressly negates any intent to allow enforcement by unidentified third parties, the claimant is barred from enforcing a claim under that contract. India.Com, Inc. v. Dalal, 412 F.3d 315, 321 (2d Cir. 2005).

A. Plaintiffs Lack Standing to Sue for Breach of the Depositary Agreement

Plaintiffs allege that BoA breached the Depositary Agreement by certifying documents that it received from TBW on Ocala's behalf and that allegedly contained false statements of Ocala's collateral and by issuing new notes pursuant to such documents. (DB AC ¶¶ 120-30, 254; BNP AC ¶¶ 134-46.) BoA contends that Plaintiffs lack standing to bring claims under this agreement, because they are "neither parties to, nor third-

party beneficiaries of, the Depositary Agreement, which contains an express provision disclaiming any intent by the contracting parties to permit enforcement by non-parties." (BoA Mem. 57.)

Section 15 provides that "no Person not a party to this Agreement shall be deemed to be a third-party beneficiary hereof nor shall any Person be empowered to enforce the provisions of this Agreement," except for the Indenture Trustee or the respective "permitted" successors or assigns of the parties and the Indenture Trustee.

Plaintiffs concede that the only parties to the Depositary Agreement are Ocala and BoA, as Depositary, and that BoA as Indenture Trustee is the only named third-party beneficiary. Nonetheless, they claim that one of the primary purposes of the Facility Documents – to protect holders of the Ocala Notes – would be undermined if they are unable to enforce the Depositary Agreement or any Facility Documents that impacted their interests in the Ocala facility.

As BoA points out, however, not all of the Facility Documents related to, or created rights for, Ocala noteholders. The Depositary Agreement embodies the respective obligations between Ocala and BoA, as Depositary and as Indenture Trustee.

On its face it does not permit enforcement by Plaintiffs. The Base Indenture and Security Agreement, by contrast, do explicitly create rights for Plaintiffs, as noteholders, and allow enforcement through third-party beneficiary provisions.

Plaintiffs seek to enforce the Depositary Agreement by asserting two forms of substitute standing, in which they seek to step into the shoes of BoA, which is a named third-party beneficiary in its status as Indenture Trustee. First, the BNP Plaintiffs assert "derivative" standing "through BoA." (BNP Opp. 31-32.) Second, DB argues that it may step into the Indenture Trustee's shoes pursuant to the doctrine of Cestuis que trustent. (DB Opp. 32.) Both Plaintiffs rely on what the BNP Plaintiffs refer to as "no action" cases, in which courts have waived demand requirements in derivative suits and similar actions.

Although the BNP Plaintiffs call their action "derivative," and the Cestuis que trustent cases cited by DB involve derivative claims in which a beneficiary steps into the shoes of a trustee incapable of acting on behalf of the trust, see Riviera Cong. Assocs. v. Yassky, 18 N.Y.2d 540, 547 (1966); Velez v. Feinstein, 451 N.Y.S.2d 110, 115 (App. Div. 1982), neither the BNP Plaintiffs nor DB are suing for the benefit of a

trust or other entity. They are suing for their own losses. Their claims are not derivative and, as such, the analogy to derivative claims, in which a party may pursue a claim belonging to someone else, does not apply to the claims at issue here.

All of the "no action" cases cited by Plaintiffs address the issue of whether a pre-suit demand clause barred the action or whether some exception to the demand requirement, such as futility, was present. See, e.g., Cruden v. Bank of N.Y., 957 F.2d 961, 967-68 (2d Cir. 1992); In re New York Hous. Dev. Corp., No. 86-CV-3274, 1987 WL 494921, at *9 (S.D.N.Y. May 11, 1987); Gould v. J. Henry Schroder Bank & Trust Co., 433 N.Y.S.2d 32, 33-34 (App. Div. 1980); Sterling Fed. Bank v. Credit Suisse First Boston Corp., No. 07-C-2922, 2008 WL 4924926, at *11 (N.D. Ill. Nov. 14, 2008). These cases are inapposite because Plaintiffs' claims under the Depositary Agreement are not, in fact, derivative claims, and the provision in Section 15 barring enforcement by unidentified third parties is not a "no-action" clause.

DB attempts to analogize BoA's duties as Indenture Trustee to those of an ordinary trustee. However, unlike an ordinary trustee, an Indenture Trustee is not subject to the duty of "undivided loyalty" that gives rise to the Cestuis que

trustent standing upon which DB seeks to rely. See Elliott Assocs., 838 F.2d at 71 ("an indenture trustee is more like a stakeholder" (emphasis omitted)). Because an indenture trustee's interests are not identical to the noteholders' interests, it does not follow that rights assigned to an indenture trustee were intended to be enforced by noteholders. See id.

Plaintiffs also asserts that the indemnification clause in Section 8(g) of the Depositary Agreement, which provides for indemnification of "Secured Parties," defined to include noteholders, gives them third-party beneficiary rights, despite the express preclusion of such rights in Section 15. They argue that a contrary reading allows for no circumstances under which Plaintiffs, although indemnified for "any and all . . . losses," could bring an indemnity claim. However, any indemnification to which Plaintiffs would be entitled could be sought only by a party with standing to enforce the provision, standing which Plaintiffs do not have. See Control Data Sys., Inc. v. Computer Power Group, Ltd., No. 94 Civ. 5396, 1998 WL 178775, at *2-3 (S.D.N.Y. Apr. 15, 1998). Under New York law, contracting parties may simultaneously elect to confer a benefit or right upon a third party and to limit that right, including by limiting the third party's enforcement powers. See, e.g., Consol. Edison, Inc. v. Ne. Utils., 426 F.3d 524, 528 (2d Cir.

2005) (although contract "clearly created a third-party right" inuring to the benefit of shareholders, that right was limited by other express terms, including one restricting third-party enforcement).

The indemnification clause explicitly covers only costs, judgments, and other losses "that the Issuer may sustain." Depositary Agreement § 8(g). Plaintiffs have alleged that Ocala sustained losses in the form of the loss of the collateral backing the Ocala Notes. (DB AC ¶¶ 200, 255.) Further, Plaintiffs argue that Section 8(g), in recognition that losses to Ocala necessarily flow through to the Ocala noteholders, plainly provides that Plaintiffs may recover these losses from BoA to the extent they were caused by BoA's negligence. However, Section 8(g) requires any indemnification claim for costs sustained by the Issuer to be joined by Ocala, a party to the action, or another entity entitled to pursue a claim on its behalf. Plaintiffs may bring a claim for losses caused by BoA's negligence under the Security Agreement or the Base Indenture, as to both of which they have standing, but not pursuant to the indemnification provision of the Depositary Agreement.

The parties undoubtedly knew how to confer standing Plaintiffs in different capacities when they wished to do so. Section 10.08 of the Security Agreement, for example, provides that "the Indenture Trustee and the holders of the Notes" are "expressly declared to be third-party beneficiaries hereof." Elsewhere in the Facility Documents, including the corresponding provision of the Depositary Agreement, the parties intentionally distinguished between the Indenture Trustee and the noteholders and treated them separately. See, e.g., Depositary Agreement § 15. Deliberate choices by "sophisticated, counseled parties dealing at arm's length" in a "multimillion dollar transaction" must be given effect. Chimart Assocs. v. Paul, 66 N.Y.2d 570, 574-75 (1986). This is particularly true when the controlling agreement contains an integration clause specifying that the written document is the "entire agreement" between the parties on the subject. See Depositary Agreement § 23.

Accordingly, because Plaintiffs are neither parties nor named third-party beneficiaries of the Depositary Agreement, and because the Depositary Agreement expressly negates any intent to allow enforcement by unidentified third parties, their claims are barred under New York law. The "negating clause" is a "decisive" bar to such enforcement, particularly where, as here, the contract also contains a prohibition on assignment. See

India.Com, 412 F.3d at 321; Nepco Forged Prods., Inc. v. Consol. Edison Co., 99 A.D.2d 508, 508 (N.Y. 1984) (provision "expressly negating an intent to permit enforcement by third parties" is "decisive").

B. The BNP Plaintiffs Lack Standing to Sue under the March 2009 Letter

The BNP Plaintiffs also claim that BoA is liable under the March 2009 Letter for losses they incurred as a result of BoA's allegedly negligent breach of the Depositary Agreement. They characterize the March 2009 Letter as a separate and independently enforceable agreement, rather than an amendment to the Depositary Agreement. (See BNP Opp. 38.)

BoA contends that the BNP Plaintiffs lack standing to sue under the March 2009 Letter for two reasons: (1) despite the BNP Plaintiffs' characterization of the letter as a separate agreement, it is in fact a legally ineffective amendment of the Depositary Agreement; and (2) even if it were a valid amendment, it does not purport to alter Section 15 of the Depositary Agreement disclaiming any intent to create third-party beneficiary rights and prohibiting assignment, nor does it

purport to elevate either BNP Plaintiff to the status of a third-party beneficiary of the Depositary Agreement.

Section 13 of the Depositary Agreement states that "[n]o amendment, modification, termination or waiver of any provision of this Agreement shall be effective unless the same shall be (i) in writing and signed by all of the parties hereto and (ii) accompanied by the written confirmation of each Rating Agency that same will not result in a reduction or withdrawal of its then current rating, if any, of the Short Term Notes." BNP has not alleged satisfaction of either condition to render the March 2009 Letter an effective amendment. The letter was not signed by Ocala, which is a party to the Depositary Agreement, and there is no claim or evidence of any sign-off by the Rating Agencies. Where a contract provides a procedure for amending contract provisions, that procedure must be followed to execute a valid amendment. See, e.g., Deutsche Bank AG v. JPMorgan Chase Bank, No. 04 Civ. 7192, 2007 WL 2823129, at *23-*24 (S.D.N.Y. Sept. 27, 2007), aff'd, 331 Fed. Appx. 39 (2d Cir. 2009) (where contract provides that no amendment is valid "unless in writing and signed" by certain required parties, the absence of such signatures invalidated a purported amendment); John St. Leasehold LLC v. F.D.I.C., 196 F.3d 379, 382 (2d Cir. 1999) (New

York law enforces contractual requirements that amendments be in writing and signed by the parties).

In response, the BNP Plaintiffs argue that the document need only be signed "by the party against whom enforcement is sought." (BNP Opp. 38 n.30.) Thus, according to the BNP Plaintiffs, all that is needed is BoA's signature, because BoA is the only party to the March 2009 Letter against which enforcement is sought. They also argue that the lack of Rating Agency confirmation is irrelevant because BoA's subsequent performance clearly refers to the March 2009 Letter and such "partial performance renders an amendment valid." (Id.) However, all of the cases on which the BNP Plaintiffs rely concern only the statutory requirement for amendments to agreements that contain a prohibition against oral modifications. See Karel v. Clark, 514 N.Y.S.2d 766, 767 (App. Div. 1987); DFI Commc'ns, Inc. v. Greenberg, 363 N.E.2d 312, 314-16 (N.Y. 1977); Fairchild Warehouse Assocs., LLC v. United Bank of Kuwait, PLC, 727 N.Y.S.2d 153, 153 (App. Div. 2001). In none of the cases did the court refuse to enforce express requirements for amendments. See, e.g., GLC Securityholder LLC v. Goldman, Sachs & Co., 74 A.D.3d 611, 612 (N.Y. App. Div. 2010) ("There is no merit to plaintiff's argument that the provision of the indenture barring oral modifications authorizes

amendments to be made by any writing signed by the party to be charged.")

The BNP Plaintiffs' argument that the March 2009 Letter is a separate agreement fails because the letter, on its face, purports to enforce obligations and assert rights created by the Depositary Agreement – specifically, the letter provides for indemnification for claims of wrongdoing "in the performance of [BoA's] duties under the Depositary Agreement." Any such expansion of the rights and obligations set forth in the Depositary Agreement could only be accomplished through a valid amendment of the Depositary Agreement under Section 13.[9]

Regardless of whether the March 2009 Letter is a valid amendment or expansion of the Depositary Agreement, the letter does not purport to amend Section 15, which precludes BNP and BNPP from suing as third-party beneficiaries or in any other capacity. On its face, it contains an agreement by BoA to expand

[9] BoA argues that the integration clause of the Depositary Agreement, Section 23, also precludes any expansion of the Depositary Agreement other than in accordance with the "signed written amendment" requirement of Section 13. However, integration clauses only apply to preclude alleged agreements made prior to the signing of the contract containing the integration clause, not those made subsequent to the written contract. Getty Ref. & Mktg. v. Linden Maint. Corp., 562 N.Y.S.2d 721, 722 (N.Y. App. Div. 1990) ("[n]either the parol evidence rule nor the merger clause of the underlying contract prohibits proof of a subsequent additional agreement or of a subsequent modification of the original agreement"); Vysovsky v. Glassman, No. 01-Civ-2531, 2007 WL 3130562, at *7 (S.D.N.Y. Oct. 23, 2007) (integration clause in Subscription Agreement did not bar the enforcement of oral contracts negotiated after the signing of the agreement).

indemnification coverage to include losses incurred by the BNPP, as opposed to covering only losses suffered by Ocala. It does not, however, expand the list of entities that may enforce the Depositary Agreement as third party beneficiaries to include BNP. See Control Data, 1998 WL 178775, at *2-*3.

Furthermore, even if the BNP Plaintiffs could bring a claim for indemnification under the March 2009 Letter, the language of the indemnification clause is limited to claims brought by third-parties, not claims by the indemnitee against the indemnitor. New York law construes indemnity clauses not to cover claims by the indemnitee against the indemnitor unless the coverage language indicates an "unmistakably clear" intent to include such claims, Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 21 (2d Cir. 1996), or is "exclusively or unequivocally referable to claims between the parties themselves," Hooper Assoc., Ltd. v. AGS Computers, Inc., 549 N.Y.S.2d 365, 367 (1986). Here, no such "unmistakably clear" language "exclusively or unequivocally" includes such claims.

The language in the letter closely parallels that in Hooper, where the court found dispositive the requirement that the plaintiff "'promptly notify' defendant of 'any claim or litigation to which the indemnity set forth . . . shall apply'"

and that the defendant "'assume the defense of any such claim.'" 549 N.Y.S.2d at 367. The March 2009 Letter contains similar language, with the additional requirement that BoA to give notice to the BNP Plaintiffs of any covered claims, which indicates that it was not intended to cover a claim by the BNP Plaintiffs against BoA.

The BNP Plaintiffs contend that the clear purpose of the March 2009 Letter was to expand indemnification to cover not just Ocala's losses, but losses incurred by the BNP Plaintiffs as well, and that it must therefore cover first-party claims. Although the letter may have been intended to correct the problem that the Depositary Agreement covers only Ocala's losses, under New York law the language in the March 2009 Letter still covers only claims by third parties, not claims between indemnitor and indemnitee. See id. Even if the letter added indemnification for the losses incurred by the BNP Plaintiffs, it did not expand the types of claims that might be covered to include first-party claims.

The BNP Plaintiffs contend that this reading is unintelligible because there could be no conceivable third-party claim. However, the Swap Counterparty indemnitees could face suits by noteholders, subordinated noteholders, or Ocala, among

others. The fact that BNP, as noteholder, would be unlikely to sue its affiliate, BNPP, as Swap Counterparty, does not affect this analysis, because they are formally distinct entities and because other noteholders, such as DB, could sue BNPP.[10]

C. Plaintiffs Lack Standing to Sue for Breach of the Custodial Agreement

Plaintiffs allege that BoA breached the Custodial Agreement by failing to maintain adequate controls over loans removed from Ocala's Custodial Account. (BNP AC ¶¶ 187-89; DB AC ¶¶ 266-68.) BoA contends that, as with the Depositary Agreement, Plaintiffs lack standing to bring claims under the Custodial Agreement.

The Custodial Agreement does not identify Ocala noteholders as parties or third-party beneficiaries, and only names BoA, as Collateral Agent, and the Swap Counterparties as the intended third-party beneficiaries with enforcement rights. See Custodial Agreement §§ 20, 25. To surmount this obstacle,

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[10] The March 2009 Letter does not cover any losses incurred before its execution. "[I]n the absence of language to the contrary, an indemnity clause will not be construed to cover an injury or loss occurring before it becomes effective." 23 N.Y. Jur. Contribution § 72; see also Quality King Distribs., Inc. v. E&M ESR, Inc., 827 N.Y.S.2d 700, 703 (App. Div. 2007); Beckford v. City of New York, 689 N.Y.S.2d 98 (App. Div. 1999). Here, there is no "language to the contrary," and the letter speaks in the present tense and refers to losses the BNP Plaintiffs "may sustain."

Plaintiffs again argue that they may step into the shoes of BoA, as Collateral Agent, and enforce the Custodial Agreement. (See BNP Opp. 31-32; DB Opp. 31-32.) These arguments fail for the reasons set forth above with respect to BoA as Indenture Trustee under the Depositary Agreement.

BNP suggests that BNPP, its parent company, a Swap Counterparty and third-party beneficiary under the Custodial Agreement, and now a Plaintiff, may pursue a claim for losses on behalf of its noteholder affiliate, BNP, which is not a third-party beneficiary. (BNP Opp. 37-38.) DB also appears to rely to some extent on its status as Swap Counterparty, but has backed away from this argument in its opposition brief. (DB Opp. 33.) The BNP Plaintiffs cite Control Data, which does not support its argument. The court there held that, although it was the "clear intent" of the parties that one party would indemnify the other party and its subsidiaries for certain liabilities, an action brought by such a subsidiary was barred by an express provision precluding third-party enforcement. 1998 WL 178775, at *2-*3. The court noted that indemnity for the subsidiary would have to be sought by an entity that was a party to the contract. Id. Here, by contrast, nothing in the Custodial Agreement expresses the "clear intent" to entitle BNPP to sue for noteholder losses, or more generally to entitle Swap Counterparties to sue for

losses they or their affiliates may have suffered in capacities other than as Swap Counterparties.

The Facility Documents contemplate different roles for noteholders and Swap Counterparties, and the Base Indenture and Security Agreement demonstrate that the parties knew how to specify noteholder standing when they wished to do so. See Security Agreement § 10.08; Base Indenture § 9.7. Although Plaintiffs or their affiliates served as both noteholders and Swap Counterparties, this was not a function of the Facility Documents, but rather of DB's and BNP's decisions to invest in the facility. Plaintiffs do not have standing under Section 25, which is limited to Swap Counterparties, as opposed to noteholders, which is the only capacity in which DB and BNP claim to have suffered loss and are suing. Plaintiffs have not alleged any injury that they suffered as Swap Counterparties and the Swap Counterparties cannot enforce the Custodial Agreement on behalf of the noteholders.

This is consistent with the rule in New York that parties can be beneficiaries of or stand in privity to a contract in one, but not all, capacities. See, e.g., Manley v. AmBase Corp., 337 F.3d 237, 245 (2d Cir. 2003) (clause indemnifying attorney in his individual capacity does not apply

to claims against him in his professional capacity); Kirby v. Coastal Sales Ass'n, Inc., 82 F. Supp. 2d 193, 197-98 (S.D.N.Y. 2000) (a party that signs a contract in his capacity as corporate officer may not sue on the contract in his individual capacity); Bank of N.Y. v. River Terrace Assocs., LLC, 23 A.D.3d 308, 310 (N.Y. 2005) (bank could not sue under an indemnity agreement for losses it incurred when acting on its own behalf, when the agreement indemnified bank only for acts undertaken in its capacity as agent for other banks).

DB argues that its standing rests not on its status as a Swap Counterparty, but on the following language from a recital in the Custodial Agreement: "The Custodian acknowledges and agrees that all of the rights of the Issuer under this Agreement are being assigned to the Collateral Agent for the benefit of the Secured Parties." Custodial Agreement at 2.

This language assigning Ocala's rights "to the Collateral Agent for the benefit of the Secured Parties" appears again in Section 3 of the Custodial Agreement. In both instances, the language is to be interpreted "[i]n accordance with Section 20," which states that "all the rights of the Issuer under this Agreement have been assigned to the Collateral Agent for the benefit of the Secured Parties pursuant to the

Security Agreement." The recital thus records the fact that there is a separate agreement, namely the Security Agreement, under which the Issuer has assigned rights to the Collateral Agent for the benefit of the Secured Parties. It does not convert the Secured Parties into third party beneficiaries of the Custodial Agreement.

Furthermore, the Custodial Agreement has two third-party beneficiary clauses that name, respectively, the Collateral Agent and the Swap Counterparties, not noteholders such as DB and BNP. Id. §§ 20, 23. The fact that DB and BNP are referenced as incidental beneficiaries in the language cited above does not, by itself, confer a right to enforce the contract in light of the provisions explicitly identifying third-party beneficiaries and delineating their rights. Status as a third-party beneficiary does not imply standing to enforce every promise within a contract, including those not made for that party's benefit. See Coal. of 9/11 Families, Inc. v. Rampe, No. 04 Civ. 6941, 2005 WL 323747, at *2 (S.D.N.Y. Feb. 8, 2005) ("[T]hird parties may sue to enforce rights or obtain benefits under a contract only to the extent that the contracting parties specifically intended to provide the third parties with such rights or benefits."); Nationwide Auction Co. v. Lynn, No. 90 Civ. 7643, 1996 WL 148489, at *11 (S.D.N.Y. Apr. 1, 1996) ("To

allow a third party to enforce a promise of which it was not an intended beneficiary would run contrary to well-settled law.").

VII. PLAINTIFFS FAIL TO STATE A CLAIM FOR INDEMNIFICATION

Plaintiffs have alleged claims for indemnification for the first-party investment losses they suffered as noteholders by virtue of alleged breaches of duty by BoA. (See DB AC ¶¶ 274-75, 279-80; BNP AC ¶¶ 163, 173, 175, 198.) These claims are brought under the Security, Collateral, and Depositary Agreements, and in the March 2009 Letter specific to the BNP Plaintiffs.

Under New York law, indemnification clauses "must be strictly construed so as not to read into [them] any obligations the parties never intended to assume." Haynes v. Kleinewefers and Lembo Corp., 921 F.2d 453, 456 (2d Cir. 1990). A party seeking contractual indemnification must show a specific intent to allow that party to recover under the clause. See Bank of N.Y., 23 A.D.3d at 310. Where the indemnity clause extends only to a plaintiff's actions in a specific capacity or to specific types of losses, that limitation will be given effect. Id.; see also TIC Holdings, LLC v. HR Software Acquisitions Group, Inc., 301 A.D.2d 414, 415 (N.Y. 2003).

Further, as set forth above, indemnification clauses are not construed to cover first-party claims unless the contract makes it "unmistakably clear" that the parties intended so to provide. See Bridgestone/Firestone, 98 F.3d at 21 (absent "unmistakably clear" language extending indemnification to claims between indemnitor and indemnitee, provision must be construed as limited to actions brought by third parties against the indemnitee). Unless the indemnification clause refers "exclusively or unequivocally" to claims between the indemnitor and indemnitee, the court "must find the agreement to be lacking evidence of the required intent" to cover such claims. Sequa Corp. v. Gelmin, 851 F. Supp. 106, 110-11 (S.D.N.Y. 1994) (dismissing first-party "indemnity" claims); Bourne Co. v. MPL Commc'ns, Inc., 751 F. Supp. 55, 57-58 (S.D.N.Y. 1990) (same); see also GEM Advisors, Inc. v. Corporación Sidenor, S.A., No. 06 Civ. 5693, 2009 WL 3459187, at *16 (S.D.N.Y. Oct. 27, 2009) (indemnification clause will not be construed to cover suits between indemnitor and indemnitee unless the parties "explicitly provide" such coverage).

This rule is consistent with the general view of indemnity under New York law as a mechanism that enables a party liable on a third-party claim, the indemnitee, to shift that

loss to another, the indemnitor. See Mas v. Two Bridges Assocs., 75 N.Y.2d 680, 690 (1990) (indemnity means that "a party held legally liable to plaintiff shifts the entire loss to another"); Weissman v. Sinorm Deli, Inc., 88 N.Y.2d 437, 446 (1996) ("In an indemnification the entire loss is shifted from the person who has been compelled to pay (the indemnitee) to another upon the imposition of a contingent liability."). Accordingly, the default presumption in New York courts is that indemnification involves liabilities, losses, or claims associated with third-party suits, rather than contractual damages or losses between the contracting parties themselves. See, e.g., Madeira v. Affordable Hous. Found., Inc., 323 Fed. Appx. 89, 91 (2d Cir. 2009) (contractual right to indemnification accrues only when the "indemnified party has satisfied the judgment, i.e., suffered a loss").

As discussed above, the indemnification clause in the Custodial Agreement does not extend to noteholders such as Plaintiffs, and the Depositary Agreement indemnification clause covers only losses suffered by Ocala, not losses suffered by Plaintiffs or other noteholders. Also, as discussed above, the March 2009 Letter is not a proper amendment of the Depositary Agreement and, even if it were proper, it does not contain language demonstrating an "unmistakably clear" intent to cover

first-party losses of the sort that Plaintiffs allege here. Bridgestone/Firestone, 98 F.3d at 20-21. Nor is the indemnification language in the March 2009 Letter "exclusively or unequivocally referable to claims between the parties themselves." Hooper, 549 N.Y.S.2d at 367.

Plaintiffs' remaining indemnification claims fail because none of the indemnification clauses contains language demonstrating an "unmistakably clear" intent to cover first-party losses.

A. Plaintiffs' Indemnification Claims under the Custodial Agreement Fail

Section 17, the indemnification provision of the Custodial Agreement, does not cover claims by Plaintiffs in their capacity as noteholders. Even if Plaintiffs had standing to enforce Section 17, their claims fail because the language of the provision does not cover first-party claims by the indemnitee against the indemnitor.

Section 17 of the Custodial Agreement provides for indemnification of "the Issuer, the Seller, the Servicer, each Swap Counterparty, their respective Affiliates, their respective

directors, officers, trustees, employees and agents." Plaintiffs construe the references to "Affiliates" to include them, as noteholders who are affiliated with Swap Counterparties. However, Plaintiffs are suing in their capacity as noteholders, a capacity that the parties specifically chose not to cover in this provision and in the Custodial Agreement generally. There is no support in the Custodial Agreement or the law for the proposition that a party to an indemnity provision could recover losses sustained in an entirely different capacity from the one for which indemnity was extended. Not surprisingly, New York law forbids such a result, holding that when contracting parties specify a right to sue in one capacity, no right to sue in another capacity should be implied. See, e.g., Manley, 337 F.3d at 245; Kirby, 82 F. Supp. 2d at 197; Bank of New York, 23 A.D.3d at 310.

The contracting parties' consistent description of duties and rights owed to entities by reference to their capacities, such "Noteholder" or "Swap Counterparty" or "Seller," as opposed to simply using the entities' proper names, is consistent with the intention to keep those capacities separate. See Compania de Vapores Arauco Panamena S.A. v. Moore-McCormack Lines, 91 F. Supp. 545, 549 (E.D.N.Y. 1950) (finding the fact that multiple contracts were made, and that the

defendant assumed multiple capacities to be "evidence of an intention to keep its functions separate").

Moreover, Plaintiffs' argument that the "Affiliates" language implied an intention to cover indemnified parties in capacities other than those specified fails for two reasons. First, it is inconsistent with the rule of construction that indemnification provisions "must be strictly construed so as not to read into [them] any obligations the parties never intended to assume." Haynes, 921 F.2d at 456. Second, it contravenes the requirement in Section 19(a) of the Custodial Agreement that "[t]he Custodian shall have no duties or responsibilities except those that are specifically set forth herein."

The BNP Plaintiffs also argue that the reference to "Affiliates" in Section 17 would be meaningless if read to cover only losses to BNPP as "Swap Counterparty," but not investment losses to its affiliate, BNP, as noteholder. This argument fails because BNPP still is trying to recover losses to its affiliate that are unrelated to its capacity as Swap Counterparty.

Nonetheless, as explained above, even if the indemnification provision applied to Plaintiffs, in their capacities as noteholders, their claims against BoA would not be

covered. See Bridgestone/Firestone, 98 F.3d at 21; Hooper, 549 N.Y.S.2d at 367.

Plaintiffs argue that because the clause provides indemnity for losses from BoA's misconduct or breaches of the Custodial Agreement, and because no third party could sue an indemnified party for such transgressions by BoA, the clause "is not susceptible to any interpretation other than coverage of first-party losses." (DB Opp. 41; see also BNP Opp. 35.) As discussed above, there are "conceivable" suits that could be brought against a Swap Counterparty for which it might seek indemnity from the Custodian, including a suit brought by noteholders – DB could sue BNPP, or BNP could sue DB, for example – or subordinated noteholders, or third parties who did business with the facility and might sue the facility and related parties for their losses.

Finally, Plaintiffs contend that the reference to "all losses" in the indemnification provision means that it must cover first-party losses. (See BNP Opp. 36-37.) This argument ignores the rule requiring that the intention to cover first-party losses must be "unmistakably clear," even in a provision that states that it covers "all losses." Hooper, 549 N.Y.S.2d at 367; Bridgestone/Firestone, 98 F.3d at 21. The cases cited by

the BNP Plaintiffs do not alter this conclusion, as in each of those cases, the indemnitee brought a cross-claim or counterclaim against the indemnitor only after the indemnitee was sued by a third-party in order to recover judgment losses. Hogeland v. Sibley, 397 N.Y.S.2d 602, 604 (1977); Levine v. Shell Oil Co., 321 N.Y.S.2d 81, 83 (1971).

The indemnity clause in the Custodial Agreement is not, as the BNP Plaintiffs assert, similar to those found to cover first-party claims in the cases cited by the BNP Plaintiffs. See E*Trade Fin. Corp. v. Deutsche Bank AG, 631 F. Supp. 2d 313, 391-92 (S.D.N.Y. 2009) (indemnity clause "[r]ead alone" might cover only third-party claims, but other contract language "unambiguously contemplate[d] direct actions between the parties" and directed that all such claims "be resolved within the framework" of the indemnity clause); Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp., 418 F.3d 168, 178 (2d Cir. 2005) (where contract contained two nearly identical indemnity clauses, only one of which contained language limiting coverage to losses from indemnitor's negligence, clear intent of the second was not to include such an exception); see also Promuto v. Waste Mgmt., Inc., 44 F. Supp. 2d 628, 650 (S.D.N.Y. 1999); Pfizer, Inc. v. Stryker Corp., 348 F. Supp. 2d 131, 146 (S.D.N.Y. 2004).

For these reasons, Plaintiffs' indemnification claims under the Custodial Agreement are dismissed.

B. Plaintiffs' Indemnification Claims under the Depositary and Security Agreements Fail

As set forth above, Plaintiffs lack standing to pursue claims for indemnification under the Depositary Agreement. However, even assuming Plaintiffs could bring such a claim, the fact that the operative indemnification clause in the Depositary Agreement does not explicitly demonstrate an intention to cover first-party claims between indemnitee and indemnitor is fatal. The claims under the Security Agreement suffer from the same flaw.

Plaintiffs contend that the references to third-party claims in the Depositary and Security Agreements make it "unmistakably clear" that the respective indemnification provisions were meant to cover first-party claims as well as third-party claims. Their reliance on Promuto, 44 F. Supp. 2d at 650, and Pfizer, 348 F. Supp. 2d at 146, is misplaced. In Pfizer, the court reasoned that, because the agreement included two sets of procedures for notice of claims, only one of which

addressed third-party claims, the other would be surplusage unless construed to refer to first-party claims. Here, however, the agreements each establish only one notice of claims procedure. See Depositary Agreement § 8(g); Security Agreement § 8.05. Thus, the fact that the single notice provision in each Agreement references claims by a "third party" actually strengthens the point that the indemnification provisions in the Agreements cover only third-party claims. See Sequa, 851 F. Supp. at 111.

In Sequa, where the notice and assumption of defense clause applied only to "actions by third-parties," the court rejected the argument that an indemnification clause expressed the parties' intent to cover both first- and third-party claims. Id. at 111 n.7. In that case, the plaintiff made a surplusage argument similar to the argument offered by Plaintiffs in this case, but the court rejected it, noting that the clause referenced a set of recoverable events, including "actions, suits, costs, expense, and disbursements," and that the reference to "actions by third-parties" did not distinguish "third-party" claims, but rather "actions" as opposed to other sorts of claims. Id. at 111 n.7, 108 n.2. The recoverable items here include "claims, losses, penalties," etc., so the reference to notice and assumption of defense as regards a "claim . . .

made by a third party" is best read as apply when a third-party recoverable entails notice and assumption of defense, namely, when there is a "claim" by a third-party. Cf. Promuto, 44 F. Supp. 2d at 650-51 (third-party notice provision applied to "third-party claims" and claims were not a subset of the recoverables in indemnification clause).

Accordingly, the fact that third party actions are explicitly referenced in the indemnification provision does not amount to language that demonstrates an "unmistakably clear" intent to cover first-party losses. Bridgestone/Firestone, 98 F.3d at 20-21; Hooper, 549 N.Y.S.2d at 367; Sequa, 851 F. Supp. at 111 n.7.

VIII. PLAINTIFFS LACK STANDING TO SUE BASED ON OCALA NOTES ISSUED BEFORE JULY 20, 2009

BoA argues that even if it breached the Facility Documents between January 25, 2008 and July 20, 2009, it cannot be liable for those breaches because Plaintiffs received full payment on the Ocala Notes each time they were rolled over. Thus, BoA argues, Plaintiffs lack standing to bring a claim based on events prior to the issuance of the July 20, 2009 Ocala

Notes, because their status as noteholders has expired as to all Ocala Notes prior to those issued on July 20, 2009.

The authorities cited by BoA stand for the proposition that a noteholder who is paid in full may not sue the borrower for breaches of the note or undertakings made by the borrower to support the note. See e.g., 83 N.Y. Jur. 2d Payment and Tender § 141 (West 2010) (legally sufficient tender discharges collateral undertakings by the borrower, such as mortgages, liens and pledges); In re Paradis' Estate, 186 A. 672, 675 (Me. 1936) ("When commercial paper is paid by the party whose debt it appears to be, it becomes functus officio, commercially dead.").

Plaintiffs argue that they are not suing BoA for Ocala's failure to pay the principal due on the Ocala Notes themselves or in respect of related undertakings made by Ocala in connection with issuance of the Ocala Notes. Rather, they are suing for BoA's alleged breaches of the Facility Documents that resulted in the loss of the collateral that was supposed to be backing the Ocala Notes. Plaintiffs contend that BoA executed the Facility Documents on June 30, 2008, and those documents still govern and control BoA's duties and responsibilities to Ocala and the noteholders, that such duties did not cease on repayment of a particular note issue and begin anew on the

issuance of new notes and that, for this reason, BoA did not enter into new Facility Documents for each roll of the notes. For this reason, Plaintiffs contend that BoA's argument that "payment of the earlier notes extinguished any related contract claims as a matter of law" misses the point.[11]

DB has alleged that BoA's breaches of the Facility Documents caused Ocala to lose the cash and mortgages that would have been available to repay the principal due on the Ocala Notes issued on July 20, 2009, and that this loss of collateral proximately caused the Ocala Notes to lose their value. Based on this allegation, each rollover of Ocala Notes did not extinguish claims on those notes because each rollover was premised on BoA's continued performance of its duties under the Facility Documents. DB has also alleged that BoA's breaches of the Facility Documents on July 20, 2009 caused it to roll over its investment in Ocala Notes and thereby proximately caused its loss.

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[11] Plaintiffs argue that the cases cited by BoA also miss the point, as each involved non-recurring debt obligations that were extinguished and whose governing documents expired or terminated upon payment at final maturity. See Green v. Foley, 856 F.2d 660 (4th Cir. 1988) (non-recurring bank notes); Bank of Lexington v. Jack Adams Aircraft Sales, Inc., 570 F.2d 1220 (5th Cir. 1978) (non-recurring aircraft mortgage); In re Paradis' Estate, 186 A. 672 (Me. 1936) (a single issuance of commercial paper); Great W. Bank v. Kong, 108 Cal. Rptr. 2d 266 (Ct. App. 2001) (single commercial mortgage); Caplan v. Unimax Holdings Corp., 188 A.D.2d 325, 325 (N.Y. App. Div. 1992) (single debenture).

However, even Plaintiffs have acknowledged that each new issuance of Ocala Notes was a "separate transaction." (See BNP AC ¶ 42; DB AC ¶ 5.) Accordingly, BoA contends that they were not revolving or "recurring" debt obligations, and that the situation is no different from one where a noteholder whose note was repaid decided not to reinvest, and a new noteholder purchased a later issue of notes. In that case, the new noteholder could not sue for a breach that occurred before it purchased the new notes. Thus, according to BoA, the fortuity that Plaintiffs were both the new and the old noteholders is irrelevant.

Plaintiffs' standing to sue under the Base Indenture and Security Agreement derives from their third-party beneficiary status as "Noteholders." For this reason, Plaintiffs' status as noteholders, and their resulting standing to sue for breaches while they held the notes, was legally extinguished each time they received payment in full on their notes. See 70 C.J.S. Payment § 32 (payment "extinguishes the debt for which it is presented"). Plaintiffs could not have retained noteholder status after the attendant Ocala Notes were paid and extinguished and only obtained noteholder status again upon the acquisition of the new Ocala Notes. See Caplan v. Unimax Holding Corp., 188 A.D.2d 325, 325 (N.Y. App. Div. 1992).

DB's argument that BoA's alleged breaches "caused DB to roll over its investment in the Ocala Notes," (DB Opp. 35) suggests that DB might have been fraudulently induced into rolling over its notes and acquiring new notes, but it has not pleaded such a claim in its Amended Complaint.

Finally, Plaintiffs argue that any breaches by BoA prior to July 20, 2009 and BoA's knowledge of Ocala's insolvency during the lifetime of the Facility are evidentiary and/or causation issues that cannot be determined on a motion to dismiss. In re Morgan Stanley ERISA Litig., No. 07 Civ. 11285, 2009 WL 5947139, at *15 (S.D.N.Y. Dec. 9, 2009) (Generally, "loss causation is an issue of fact and is thus not properly considered at this early stage in the proceeding" (quotation marks omitted)); see also Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc., 341 F. Supp. 2d 258, 271-72 (S.D.N.Y. 2004) (whether there is a causal connection between alleged contract breaches and damages are questions to be addressed at summary judgment or at trial, not on a motion to dismiss).

However, this is an issue of standing, rather than causation or evidence, and is therefore properly raised and

resolved at this stage. See Wolfson v. Conolog Corp., No. 08 Civ. 3790, 2009 WL 465621, at *3 (S.D.N.Y. Feb. 25, 2009).

Plaintiffs therefore lack standing to bring claims based upon Ocala Notes issued prior to July 20, 2009.

IX. BNPP IS NOT A PROPER PARTY TO THIS ACTION

The claims of BNPP, which was added to the Amended Complaint filed by the BNP Parties, fail as a matter of law because BNPP has not alleged that it suffered any injury in its capacity as Swap Counterparty or otherwise. Nor can BNPP sue for injuries suffered by its subsidiary, BNP. See, e.g., Hudson Optical Corp. v. Cabot Safety Corp., No. 97-9046, 1998 WL 642471, at *3 (2d Cir. Mar. 25, 1998) (unpublished) (holding that a parent corporation lacks standing to sue for injuries allegedly sustained by its subsidiary); Alexander & Alexander of N.Y. Inc. v. Fritzen, 495 N.Y.S.2d 386, 388 (1985) ("[O]ne corporation will generally not have the legal standing to exercise the rights of other associated corporations."), aff'd, 68 N.Y.2d 968 (1986); see also Diesel Sys., Ltd. v. Yip Shing Diesel Eng'g Co., 861 F. Supp. 179, 181 (E.D.N.Y. 1994) ("A corporation does not have standing to assert claims belonging to

a related corporation, simply because their business is intertwined.").

BNPP's claim for breach of fiduciary duty also fails because BNPP does not allege any fiduciary duty owed to it by BoA, a breach of any such duty, or damages directly caused by such a breach. See Daly v. Kochanowicz, 67 A.D.3d 78, 95 (N.Y. 2009). The Amended Complaint merely states that "Bank of America owed [BNP] and the other Noteholders" a duty to act as a prudent person would in the conduct of his own affairs. (BNP AC ¶ 209.)

Because BNPP has not alleged any injury to itself, it lacks standing and its claims are therefore dismissed.

X. CONCLUSION

Based upon the foregoing, Defendant's motion is granted as to the claims for breach of the Depositary Agreement, Custodial Agreement, and March 2009 Letter, the claims of DB based upon prior versions of the Facility Documents, the claims for indemnification, the claims relating to Ocala Notes issued prior to July 20, 2009, and all of BNPP's claims, and denied as to all remaining claims.

It is so ordered.

New York, NY
March 23, 2011

ROBERT W. SWEET
U.S.D.J.