SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN PART 3
Justice

Index Number : 600319/2010
JPMORGAN CHASE BANK N A
vs
LOUTIT, JUDITH F
Sequence Number : 004
DISMISS ACTION

INDEX NO. 600319/2010
MOTION DATE 5/15/12
MOTION SEQ. NO. 004
MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1-12-13

EILEEN BRANSTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

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JPMORGAN CHASE BANK, N.A., and
J.P. MORGAN SECURITIES INC.,

Plaintiffs,

-against-

Index No.: 600319/2010
Mot. Seq. No.: 004
Motion Date:5/15/2012

JUDITH F. LOUTIT and NORTHERN TRUST COMPANY, AS CO-TRUSTEES of the James R. Loutit Irrevocable Trust f/b/o James F.R. Loutit dated December 21, 1976, the James R. Loutit Irrevocable Trust f/b/o Douglas McLeod Loutit dated December 21, 1976, and the James R. Loutit Irrevocable Trust – 1978 f/b/o Christopher Cameron Loutit,

NORTHERN TRUST COMPANY, AS SOLE TRUSTEE of the James R. Loutit Qualified Annuity Trust – 2007, dated May 16, 2007, The James R. Loutit Qualified Annuity Trust No. 2 – dated November 29, 2007, the James R. Loutit Qualified Annuity Trust No. 3 – dated September 5, 2008,

JAMES R. LOUTIT, AS SOLE TRUSTEE of the James Robson Loutit Revocable Living Trust dated April 29, 1976, as amended and restated,

CHRISTOPHER C. LOUTIT, AS SOLE TRUSTEE of the Christopher C. Loutit Revocable Living Trust dated July 12, 1997, as amended and restated,

JAMES R. LOUTIT, JAMES F.R. LOUTIT, CHRISTOPHER C. LOUTIT and DOUGLAS MCLEOD LOUTIT,

Defendants.

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JUDITH F. LOUTIT AS CO-TRUSTEE of the James R. Loutit Irrevocable Trust f/b/o James F.R. Loutit dated December 21, 1976, the James R. Loutit Irrevocable Trust f/b/o Douglas McLeod Loutit dated December 21 1976, and the James R. Loutit Irrevocable Trust – 1978 f/b/o Christopher Cameron Loutit,

JAMES R. LOUTIT, AS SOLE TRUSTEE of the James Robson Loutit Revocable Living Trust dated April 29, 1976, as amended and restated,

CHRISTOPHER C. LOUTIT, AS SOLE TRUSTEE of the Christopher C. Loutit Revocable Living Trust dated July 12, 1997, as amended and restated,

DOUGLAS M. LOUTIT, AS SOLE TRUSTEE of Douglas McLeod Trust – 1988 dated December 21, 1988,

JAMES R. LOUTIT, JAMES F.R. LOUTIT, CHRISTOPHER C. LOUTIT and DOUGLAS MCLEOD LOUTIT,

Counterclaim Plaintiffs,

-against-

JPMORGAN CHASE BANK, N.A.,

Counterclaim Defendant.

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BRANSTEN, J.

Plaintiff and Counterclaim Defendant JPMorgan Chase Bank, N.A. ("JPMorgan") moves pursuant to CPLR 3211(a)(1) and (7) to dismiss the counterclaims asserted by Judith F. Loutit as Co-Trustee of the James R. Loutit Irrevocable Trust f/b/o James F.R. Loutit dated December 21, 1976 ("James Loutit's Irrevocable Trust"), the James R. Loutit Irrevocable Trust f/b/o Douglas McLeod Loutit dated December 21, 1976 ("Doug Loutit's Irrevocable Trust"), and the James R. Loutit Irrevocable Trust – 1978 f/b/o Christopher Cameron Loutit ("Chris Loutit's Irrevocable Trust"), James R. Loutit ("Bob Loutit"), as Sole Trustee of the James Robson Loutit Revocable Living Trust dated April 29, 1976 ("Bob Loutit's Revocable Trust"), Christopher C. Loutit, as Sole Trustee of the Christopher C. Loutit Revocable Living Trust dated July 12, 1997, as amended and restated ("Chris Loutit's Revocable Trust"), Douglas M. Loutit, as Sole Trustee of the Douglas McLeod Trust – 1988 dated December 21, 1988 ("Doug Loutit's Revocable Trust"), James R. Loutit, James F.R. Loutit, Christopher C. Loutit and Douglas McLeod Loutit (collectively "Counterclaim Plaintiffs" or the "Loutits"). The Loutits oppose.

I. BACKGROUND

Between 1976 and 1978, Bob Loutit formed six trusts funded primarily with AIG stock which Bob Loutit had inherited from his father. Affidavit of Damian R. Cavaleri in Opposition to Motion to Dismiss ("Cavaleri Aff."), Ex. B. ("Answer"), ¶ 224. These trusts were Bob Loutit's Revocable Trust, James Loutit's Irrevocable Trust, Doug Loutit's

Irrevocable Trust, Doug Loutit's Revocable Trust, Chris Loutit's Irrevocable Trust and Chris Loutit's Revocable Trust (collectively, the "Trusts").[1] Answer, ¶ 224.

As the Loutits were not sophisticated investors, they hired a professional wealth management company to serve as trustees of their respective trusts. *Id.* at ¶ 225. Bob Loutit remained co-trustee of Bob Loutit's Revocable Trust. *Id.* Judith Loutit, Bob Loutit's wife, remained co-trustee of James, Doug and Chris Loutit's Irrevocable Trusts. *Id.* at ¶ 226.

In 2006, the Loutits hired JPMorgan to manage the Trusts. *Id.* at ¶ 227. At that time, the Trusts had a combined market value of $56 million. *Id.* at ¶ 234. The Trusts contained 313,666 shares of AIG stock worth $66 per share. *Id.* at ¶ 234. AIG shares comprised approximately 36% of the value of the Trusts. *Id.*

When the Loutits hired JPMorgan, JPMorgan opined that the Trusts' holdings were overly concentrated in AIG stock. *Id.* at ¶ 235. JPMorgan suggested diversifying the Trusts' holdings over time. *Id.* at ¶ 236.

On July 11, 2006, JPMorgan and Judith Loutit executed the Fiduciary Portfolio Asset Allocation Guidelines for each Trust (the "Guidelines"). *Id.* at ¶ 239. The Guidelines for Bob Loutit's Revocable Trust, as well as James, Doug and Chris Loutit's Irrevocable Trusts state that "[t]he asset allocation herein excludes the existing concentrated exposure to [AIG]. Trustees agree that AIG will be phased out over time, with proceeds being deployed as described herein." *Id.*

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[1] The operative agreements creating the Trusts are collectively referred to as the "Trust Documents."

In May of 2007, the Bob Loutit created a grantor annuity trust with the assistance of JPMorgan ("GRAT I"). *Id.* at ¶ 256. The purpose of a GRAT is to reduce the gift tax burden on investments which are to be passed on to a beneficiary and which appreciate in value over time. The GRAT was funded with 51,954 AIG shares from Bob's Revocable Trust. *Id.* at ¶ 257. In November 2007, the price of AIG shares fell, which defeated the purpose of the GRAT I. Bob Loutit and JPMorgan then created a second GRAT ("GRAT II") to hold the 51,954 AIG shares. *Id.* at ¶ 258. AIG's stock price continued to fall, which defeated the purpose of the GRAT II. *Id.* at ¶ 259. Bob Loutit and JPMorgan then created a third GRAT ("GRAT III"), which it funded with the same 51,954 AIG shares. *Id.* at ¶ 259. The Loutits allege that, due to JPMorgan's failure to diversify or hedge the GRATs, Bob Loutit's Revocable Trust lost approximately $3.4 million. *Id.*

In 2006 and 2007, JPMorgan liquidated small amounts of AIG stock at the Loutits' request. *Id.* at ¶ 240. JPMorgan did not sell any additional AIG shares until after the shares had lost most of their value in September of 2008. *Id.* By 2009, when JPMorgan resigned as trustee at the Loutits' request, JPMorgan had sold the majority of the Trusts' AIG shares for $2 to $7 per share. *Id.* at ¶ 241. The Loutits allege that the Trusts lost approximately $15 million in value due to JPMorgan's failure to timely sell the Trusts' AIG holdings.

Following JPMorgan's resignation in 2009, the Loutits hired a successor trustee. *Id.* at ¶ 263. JPMorgan only transferred a portion of the Trusts' assets to the successor trustee.

Id. at ¶ 264. JPMorgan withheld more than $4.3 million in liquidated assets from the Trusts. *Id.* at ¶ 265.

On July 31, 2009, the Loutits brought an action in Massachusetts to recover the funds withheld by JPMorgan following their resignation as trustee. *Id.* at ¶ 268. In October of 2009, the parties settled the Massachusetts action. *Id.* at ¶ 269. JPMorgan agreed to transfer all but $50,000 of the Trusts' assets to the successor trustee. *Id.*

II. STANDARD OF LAW

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994). The court accepts the facts as alleged in the non-moving party's pleading as true and accords the non-moving party the benefit of every possible favorable inference. *Id.* "[A] court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Id.* (internal citations omitted).

III. ANALYSIS

A. Choice of Law

JPMorgan contends that Massachusetts law applies to all but one of the trusts and all three GRATs. JPMorgan argues that Chris Loutit's Revocable Trust (Compl., Ex. 13, Art. 20) is governed by North Carolina law.

The James Loutit's Irrevocable Trust, (Cavaleri Aff., Ex. A ("Compl."), Ex. 1, Art. 9), Doug Loutit's Irrevocable Trust, (Compl., Ex. 4, Art. 9), Bob Loutit's Recovable Trust (Compl., Ex. 10, Art. 24), Doug Loutit's Revocable Trust (Compl., Ex. 16, Art. 19) and Chris Loutit's Irrevocable Trust (Compl., Ex. 7, Art. 14) each contain a choice of law provision requiring the application of Massachusetts law. For example, Article 9 of Doug Loutit's Irrevocable Trust contains the following language: "The validity, construction and effect of this instrument and of the Trust created hereunder shall in all respects be governed by the laws of the Commonwealth of Massachusetts." (Compl., Ex. 4, Art. 9). The relevant provision of each of Trust Documents contains identical or substantially similar language.

"It is the well-settled policy of the courts of this State to enforce contractual provisions for choice of law." *Boss v. American Exp. Fin. Advisors, Inc.*, 15 A.D.3d 306, 307 (1st Dep't 2005), *aff'd* 6 N.Y.3d 242 (2006) (internal quotation marks omitted). The choice of law clauses contained in the Trust documents are "prima facie valid." *Id.* at 307. To invalidate the clauses, the Loutits "must show that [their] enforcement would be unreasonable, unjust, or would contravene public policy, or that the clause is invalid because of fraud or overreaching." *Id.* at 307-08 (internal quotation marks omitted).

The Loutits do not allege that the choice of law provisions are the product of fraud or overreaching. Nor do the Loutits argue that enforcement of the choice of law clauses would be unreasonable or unjust. Rather, the Loutits contend that EPTL §11-1.7, which prohibits

exculpatory clauses exonerating fiduciaries "from liability for failure to exercise reasonable care," *Id.*, "expresses [New York's] public policy with respect to the conduct of fiduciaries . . . who do business here." The Loutits' Memorandum of Law in Opposition to Plaintiffs' Motion to Dismiss the Loutits' Counterclaims, p. 13, n. 8. To the extent that the Loutits thereby suggest that the enforcement of Massachusetts and North Carolina law contravenes public policy, their argument fails as a matter of law.

It is well-established that "foreign-based rights should be enforced unless the judicial enforcement of such a contract would be the approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense." *Intercontinental Hotels Corp. v. Golden*, 15 N.Y.2d 9, 13 (1964). "[A] mere difference between the foreign rule and our own does not warrant a refusal to apply the foreign law." *Boss*, 15 A.D.3d at 308 (internal quotation marks omitted). The Loutits do not allege that the application of Massachusetts or North Carolina law in this case would somehow be vicious or immoral. *Intercontinental Hotels Corp.*, 15 N.Y.2d at 13. The choice of law clauses set forth in the Trust Documents are therefore enforceable because they are not contrary to public policy.

The Loutits additionally contend that the court should apply New York law because (1) JPMorgan is a New York bank; (2) JPMorgan managed the Trusts from its New York offices; and (3) JPMorgan brought the underlying action in New York. Plaintiffs cite no case law supporting the proposition that any of these factors could override the well-established presumption that the choice of law clauses are enforceable.

Finally, the Loutits argue that New York law should apply because JPMorgan entered into an agreement with the Loutits stating that New York Law would apply to "all of [Plaintiffs'] account relationships with JPMorgan." Plaintiffs' Memorandum of Law in Support of their Motion to Dismiss the Loutits' Counterclaims,
p. 14. The purported "agreement" that allegedly calls for the application of New York law is, in fact, an unsigned, generic document which concerns deposit accounts, not trusts, and which does not refer to the Loutits at all. The Loutits did not proffer an affidavit from anyone with personal knowledge indicating the applicability of the agreement to the instant dispute or to the Trusts generally, or stating that the Loutits had ever seen or received the agreement. As such, the agreement carries no weight.

The Loutits have not shown that enforcement of the choice of law provisions contained in the Trust Documents "would be unreasonable, unjust, or would contravene public policy, or that the clause[s] [are] invalid because of fraud or overreaching." *Boss*, 15 A.D.3d at 307. Consequently, Massachusetts law applies to Counterclaim-Plaintiffs' claims regarding all of the Trusts except for Chris Loutit's Revocable Trust, to which North Carolina law applies.

B. Enforceability of the Trust Documents' Exculpatory Provisions

The Loutits assert that JPMorgan violated the terms of the Guidelines and breached their fiduciary duty as trustee of the Trusts by failing to sell off the Trusts' AIG holdings prior to September of 2008.

JPMorgan claims that it is protected from Counterclaim-Plaintiffs' first cause of action for breach of contract and second and third causes of action for breach of fiduciary duty under the exculpatory clauses contained in the Trust Documents.

The Loutits argue that the exculpatory clauses are invalid under the Prudent Investor Act, which has been enacted by New York, Massachusetts and North Carolina.

1. The Exculpatory Clauses

All of the Trust Documents contain some type of exculpatory clause. Some specifically grant their respective trustees the ability to retain AIG stock. For example, Chris Loutit's Irrevocable Trust and Bob and Doug Loutit's Revocable trusts empower their trustees to retain, purchase and invest in property "regardless of . . . the principle of diversification or any other principle applicable to investments of fiduciaries" and in any securities or obligations of [AIG]." Compl., Ex. 7, Art. 9; Compl. Ex. 10, Art. 12(A)(1)(c); Compl., Ex. 16, Art. 7(A)(1)(a).

All three of the GRATS permitted their trustees to "[r]etain, purchase and invest in any property . . . regardless of . . . the principles of diversification." Compl., Ex. 19, Art. 15; Compl., Ex. 21, Art. 8; Compl., Ex. 23, Art. 8(1).

Similarly, James and Doug Loutits' Irrevocable Trusts empowered their trustees to acquire and hold "any securities . . . for as long a period as they shall think proper . . . of a kind or in an amount which ordinarily would not be considered suitable for a trust

investment, even to the extent of keeping all of the trust fund hereunder in one investment or in one type of investment." Compl., Ex. 1, Art. 5(A)(1); Compl., Ex. 4, Art. 5(A)(1).

Chris, Bob and Doug Loutit's Revocable Trusts and Chris Loutit's Irrevocable Trust further absolved their trustees of liability "for any error of judgment or law on [their] own part" and provided that the trustees "shall only be liable for [their] own willful default." Compl., Ex. 7, Art. 10; Compl., Ex. 10, Art. 19; Compl., Ex. 13, Art. 15; Compl., Ex. 16, Art. 14.

2. Exculpatory Clauses Under the New York, Massachusetts and North Carolina Prudent Investor Acts

The Loutits assert that New York's Prudent Investor Act, EPTL § 11-1.7, specifically prohibits the enforcement of clauses exculpating trustees. While the Loutits are correct that exculpatory clauses such as those contained in the Trust Documents are unenforceable under New York law, as explained above, New York law does not apply in this case. *See supra,* Section II(A).

Unlike New York's Prudent Investor Act, the Massachusetts and North Carolina Prudent Investor Acts do not expressly prohibit the enforcement of exculpatory clauses. Rather, the Massachusetts and North Carolina Acts provide that "[t]he prudent investor rule may be expanded, restricted, eliminated or otherwise altered by the provisions of a trust." Mass. Ann. Laws Ch. 203C § 2(b); N.C. Gen. Stat. Ann. § 36C-9-901(b). The Massachusetts Prudent Investor Act further states that, in the event that the prudent investor rule is altered

by the provisions of a trust, "[a] trustee shall not be liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the provisions of the trust." Mass. Ann. Laws Ch. 203C § 2(b). This standard does not appear in North Carolina's Prudent Investor Act.

In general, "contractual exculpatory provisions are not per se invalid as a matter of public policy in [Massachusetts]." *Greenleaf Arms Realty Trust I, LLC v. New Boston Fund, Inc.*, 81 Mass App. Ct. 282, 288 n.11 (2012). "Exculpatory provisions inserted in [a] trust instrument without any overreaching or abuse by the trustee. . . are generally held effective except as to breaches of trust 'committed in bad faith or intentionally or with reckless indifference to the interest of the beneficiary.'" *Palm v. Stonehedge Farm Condo. Trust*, 13 Mass. LCR 171, 175 (2005) (quoting *New England Trust Co. v. Paine*, 317 Mass. 542, 550 (1942); *see also McDonald v. First Nat'l Bank*, 968 F. Supp. 9, 10 (1997) ("Massachusetts law is clear that trustees who have the benefit of valid exculpatory clauses . . . are not liable for actions taken as trustees unless they acted fraudulently or with reckless indifference.")

Similarly, North Carolina courts have held that, while exculpatory clauses "are not favored by the law, and are strictly construed against those relying thereon, nevertheless, . . . a person may effectively bargain against liability for harm caused by his ordinary negligence in the performance of a legal duty arising out of a contractual relation." *Sylva Shops, Ltd. P'ship v. Hibbard*, 175 N.C. App. 423, 428 (2009) (quoting *Hall v. Sinclair Refining Co., Inc.*, 242 N.C.707, 709 (1955).[2]

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[2] The Loutits contend that Massachusetts and North Carolina law concerning the enforceability of exculpatory clauses in trust agreements changed subsequent to the 1998 enactment of the Prudent Investor Act. The Loutits cite no statutory authority or case law in support of this position.

The Loutits do not allege that the exculpatory clauses were the result of "overreaching or abuse." *New England Trust Co.*, 317 Mass. at 550. Nor do the Loutits allege that JPMorgan acted fraudulently or with reckless indifference. *McDonald*, 968 F. Supp. at 10. The exculpatory clauses are valid and enforceable under both Massachusetts and North Carolina law. *Id.; Sylva Shops, Ltd. P'ship*, 175 N.C. App. at 428. The Loutits' claims are therefore precluded by the exculpatory provisions found in the Trust Documents.

3. Reasonable Relinace Standard Under Massachusetts Law

The Loutits next argue that the exculpatory provisions in the Trust Documents governed by Massachusetts law may only be enforced "to the extent that the trustee acted in reasonable reliance on the provisions of the trust." Mass. Ann. Laws Ch. 203C § 2(b). The Loutits posit that JPMorgan could not have reasonably relied on the exculpatory provision found in the Trust Documents because the Guidelines plainly require them to phase out the Trusts' AIG holdings over time.

It is unclear how the Guidelines could render JPMorgan's reliance on the Trust Documents unreasonable, as the Trust Documents' exculpatory provisions are not inconsistent with the Guidelines. Nothing in the Guidelines purports to alter or override the Trust Agreements' exculpatory provisions. The Guidelines provide a framework for JPMorgan's investment strategy, but they are silent as to the issue of liability. Furthermore, the Trust Documents exculpate the trustee in the event that it chooses not to sell AIG shares,

but the Trust Documents do not mandate that the trustee maintain all of the AIG shares in the Trusts. On their face, the Guidelines do not, therefore, amend, override or otherwise conflict with the Trust Documents. Plaintiffs provide no other reason why JPMorgan's reliance on the Trust Documents may have been unreasonable.

4. The Guidelines of Doug and Chris Loutit's Revocable Trusts

Finally, the court notes that the clear and unambiguous language of the Guidelines for Chris and Doug Loutit's Revocable Trusts and for the GRATs exonerate JPMorgan from any claim that JPMorgan violated those Guidelines' terms by failing to sell off AIG sufficiently quickly. The Guidelines of Chris and Doug Loutit's Revocable Trusts specifically prohibit JPMorgan from "buy[ing] or sell[ing] any shares" of AIG stock. Affirmation of David M. Lederkramer in Support of Motion to Dismiss ("Lederkramer Affirm."), Exs. G-H. The Guidelines for the GRATs do not require that JPMorgan sell off AIG shares. The GRATs' Guidelines state merely that "[t]he Trustees do not wish to specify investment restrictions or other special instructions." Lederkramer Affirm, Exs. I-K. Thus JPMorgan's alleged failure to sell off the AIG holdings from those trusts cannot be a breach of the Guidelines for Chris and Doug Loutit's Revocable Trusts and for the GRATs.

JPMorgan's motion to dismiss the Loutits' causes of action for breach of contract and breach of fiduciary based on JPMorgan's alleged failure to adequately diversify the Trusts' assets is therefore granted in its entirety.

C. JPMorgan's Retention of the Trust Assets

The Loutits allege that JPMorgan breached its fiduciary duty by failing to timely transfer all of the assets contained in the Trusts to the successor trustee, whom the Loutits appointed following JPMorgan's resignation as trustee. As damages, the Loutits seek the amount of profits that would have been generated by the assets JPMorgan withheld had they been transferred to and invested by the successor trustee.

JPMorgan argues that it had a right to retain a portion of the Trusts' assets. Alternatively, JPMorgan argues that lost profits damages in this case are, as a matter of law, too speculative to be compensable. The court considers each argument in turn.

1. JPMorgan's Right to Withhold Trust Assets

"When a trustee resigns he is under a duty to transfer the trust property to a successor trustee." Restatement 2d of Trusts, § 106, Comment (b). Nonetheless, "[a] trustee is entitled to indemnification of 'proper expenses' paid either out-of-pocket or directly by the trust." *In re Trusts Under the Will of Crabtree*, 49 Mass. 128, 151 (2007), *citing* Restatement 3d of Trusts, § 38(2); *see also* N.C. Gen. Stat. § 32-58 ("the trustee shall be entitled to reimbursement out of the assets of the trust for expenses properly incurred or advanced in the administration of the trust."). Under Massachusetts law, "a trustee should not receive payment of his attorneys fees and expenses in connection with litigation relating to trust business if the trustee's attorneys fees and expenses would not have been incurred or would

not have been necessary but for the trustee's actions." *Sigel v. Krock*, 65-1935, 2006 Mass. Super. LEXIS 369, at *39-40 (July 19, 2006).

As explained above, the court has determined as a matter of law that JPMorgan's actions were protected from suit under the exculpatory provisions of the Trust Documents. However, even if JPMorgan may be entitled to attorneys fees, JPMorgan has not established that it had a right to withhold attorneys fees from the Trusts rather than seek indemnification from the Trusts after it incurred such expenses. Nor has JPMorgan established that, if it was entitled to withhold funds from the Trusts, the amount it withheld was reasonable and proportionate to its potential attorneys' fees. Both of these issues require further briefing and factual discovery, and are not amenable to disposition on the instant motion to dismiss.

2. Lost Profits Damages

Lost profits damages, like those the Loutits seek here, must be proved with a reasonable degree of certainty. *Steele v. Kelley*, 46 Mass. App. Ct. 712, 741 n. 28 (1999) ("lost profits damages, [] must be proved with reasonable certainty and may not be recovered where they are uncertain, contingent, or speculative.") (internal quotation marks omitted); *see also Plasma Centers of America, LLC v. Talecris Plasma Resources, Inc.*, No. COA11-1266, 2012 N.C. App. LEXIS 930, at *17, 731 S.E.2d 837, 843 (2012) ("damages for lost profits will not be awarded based on hypothetical or speculative forecasts.").

The Loutits assert that they can prove with a reasonable degree of certainty the amount the Trusts would have accrued had JPMorgan timely transferred the Trust assets to the

successor trustee. The Loutits allege that the successor trustee had a detailed investment plan in place at the time JPMorgan withheld the Trust assets. Affidavit of Christopher C. Loutit in Opposition to Motion to Dismiss, ¶ 18. The Loutits argue that they can, therefore, prove lost profits damages by examining changes in the value of the investments the successor trustee had planned to make during the time JPMorgan withheld funds from the Trusts.

JPMorgan does not provide, nor can the court locate, any case law stating that such a method of ascertaining damages is impermissibly uncertain as a matter of law. Whether the Loutits can prove damages is a question not appropriately resolved at this early stage of litigation. At the very least, the parties must conduct discovery regarding the nature and level of detail of the successor trustee's investment plan before the court can determine whether lost profits damages are too speculative as a matter of law given the particular circumstances in this case.

JPMorgan's motion to dismiss The Loutits' claim for breach of fiduciary duty based on JPMorgan's withholding of funds is thus denied.

The court's order follows on the next page.

IV. CONCLUSION

For the reasons set forth above, it is hereby

ORDERED that the motion to dismiss by JPMorgan Chase Bank, N.A., is granted as to Counterclaim Plaintiffs' first cause of action for breach of contract and second and third causes of action for breach of fiduciary duty, and the motion is otherwise denied; and it is further

ORDERED that JPMorgan Chase Bank, N.A. is directed to serve a reply to Counterclaim Plaintiffs' fourth counterclaim for breach of fiduciary duty within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on February 26, 2013, at 10:00 AM.

Dated: New York, New York
January 12, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.