SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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U.S. EDUCATION LOAN TRUST IV, LLC, and HENRY B. HOWARD,

Plaintiffs,

-against-

THE BANK OF NEW YORK MELLON,

Defendant.

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DECISION AND ORDER
Index No.: 654415/2017

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

Defendant moves to dismiss the complaint in its entirety pursuant to CPLR 3211 (a) (1), (a) (5) and (a) (7). As this is a motion to dismiss, the facts are taken from the complaint and are deemed true (*see Monroe v Monroe*, 50 NY2d 481, 484 [1980]). For the reasons that follow, the motion shall be granted in part.

I. BACKGROUND

A. The Parties

Between 2005 and 2007, plaintiff U.S. Education Loan Trust IV, LLC ("USELT" or "Trust") issued $2.5 billion worth of asset-backed notes (the "Notes"), the proceeds of which were used to purchase portfolios of education loans guaranteed by the United States government (the "Loans") (NYSCEF Doc. No. 2 ["complaint"] ¶¶ 20, 23). Principal and interest payments on the Loans were the exclusive source of income for paying principal, interest and administrative expenses (*id.* ¶ 24). When all outstanding Notes were retired, any remaining assets in plaintiff (*i.e.*, the equity) reverted to an owner trust for distribution to plaintiff Henry Howard, who is USELT's chairman, chief executive officer, and ultimate owner (*id.* ¶¶ 16, 25).

Defendant The Bank of New York Mellon ("BNYM") served as Auction Agent for the Trust, pursuant to two Auction Agent Agreements (*id.* ¶ 33; NYSCEF Doc. Nos. 7 and 8 [Auction Agent Agreements], and as Indenture Trustee, Paying Agent, and Calculation Agent, pursuant to an indenture (*id.* ¶ 29; NYSCEF Doc. No. 3 [the "Indenture"]; *see also*, NYSCEF Doc. Nos. 4, 5 and 6 [supplemental Indentures, together with the Indenture, "Indentures"]).

As Indenture Trustee, defendant's duties included:

- calculating the amounts of interest earned and payable on the Notes;
- distributing available funds according to a Waterfall Provision in the Indenture;
- calculating Carry-Over Amounts accruing on auction-rate Notes ("ARNs") and interest thereon;
- paying Eligible Carry-Over Makeup Amounts to Noteholders if funds were available to do so pursuant to the Waterfall Provision;
- calculating and verifying amounts of principal to be paid on the Notes;
- paying and verifying third-party expenses, including broker-dealer fees; and
- ensuring that the Trust's funds and accounts were administered pursuant to the terms of the Indentures

(NYSCEF Doc. No. 46 ["opp mem"] at 3; *see* complaint ¶ 32). As Auction Agent, defendant was responsible for administering periodic auctions of the ARNs and entering into contracts with broker-dealers on USELT's behalf for the auctions (*id.* ¶¶ 33-34).

B. Breaches Alleged

Plaintiffs' claims arise primarily out of three claims of breach: that defendant miscalculated the "Maximum Rate" of interest payable on ARNs, that defendant improperly paid out "Carry-Over Amounts," and that defendant improperly made payments to broker-dealers for failed auctions.

1. *Miscalculation of the Maximum Rate*

According to plaintiffs, if there were not enough buyers on an auction to match the sellers, that auction "failed," and the interest rate payable on ARNs for the auction period (the "Auction Rate") was to be set at the "Maximum Rate." The Maximum Rate was to be calculated using a formula set forth in the Indenture (*id.* ¶¶ 43, 69). Although initially there were no failed auctions, after broker-dealer RBC Dain Rauscher Inc. d/b/a RBC Capital Markets ("RBC") ended its practice of submitting clearing bids to purchase any ARN that otherwise would have remained unsold, auctions began to consistently fail (*id.* ¶¶ 67-69). Thereupon, defendant, upon the direction of a Noteholder with a conflict of interest, failed to correctly calculate the applicable formula by applying the "Auction Period Rate," rather than the required "Auction Rate," which inflated the Maximum Rate (*id.* ¶¶ 67-72). Defendant's miscalculation resulted in $19.2 million in improper and excessive Carry-Over Amounts and interest on Carry-Over Amounts.

2. *Improper Payment of Carry-Over Amounts*

Plaintiffs assert that under the Indentures, accrued Carry-Over Amounts could be paid to Noteholders only if (i) the "Eligible Carry Over Makeup Amount" was greater than zero, and (ii) there were funds at the requisite level of the Waterfall Provision (*id.* ¶ 46). However, defendant improperly paid out Carry-Over Amounts because it failed to calculate the Eligible Carry-Over Makeup Amount and misclassified Carry-Over Amounts and interest on Carry-Over Amounts as interest (*id.* ¶¶ 76, 79). Consequentially, Carry-Over Amounts were paid out at the wrong step of the Waterfall Provision, using funds which should have instead been used to make principal reduction payments or repurchases of other series of Notes (*id.* ¶¶ 78–79, 82–92).

Plaintiffs allege they were ultimately harmed by these errors in the form of (i) $12.1 million in overpaid Carry-Over Amounts; and (ii) additional interest payments USELT paid for Notes that should have been repurchased or partially paid off earlier (*id.* ¶¶ 80–83).

3. *Improper Payments to Broker-Dealers*

Plaintiffs maintain that as Auction Agent, defendant entered into contracts with broker-dealers, who would in turn facilitate the auctions by accepting bids from Noteholders and prospective purchasers (*id.* ¶¶ 2, 33, 60, 62). In this same capacity, defendant was also obligated to calculate and pay the broker-dealers' fees (*id.* ¶ 33, 63). Although, under the broker-dealer agreements, fees are not to be paid for a failed auction, defendant incorrectly paid $1.4 million in fees to broker-dealers in connection with failed auctions (*id.* ¶¶ 63–64, 96–100).

C. The Noteholder Lawsuits

Defendant was also responsible for converting certain Notes to ARNs and ensuring that auctions could be held to set the interest rate for the ARNs (*id.* ¶ 124). However according to plaintiffs, defendant failed to do either of these tasks, which caused defendant to pay interest on certain Notes at incorrect reduced rates (*id.*). Two investors discovered these errors, and after purchasing subordinate Notes at a substantial discount, demanded that the interest payments be corrected, that auctions commence, and that their Notes be redeemed at par (*id.* ¶ 126).

One of these investors, One William Street Capital Management L.P. ("OWS"), filed a lawsuit against USELT, Howard, and defendant BNYM for allegedly unpaid principal and

interest amounts (the "OWS Lawsuit"). Both defendant and USELT incurred millions of dollars in attorneys' fees and costs in defending this lawsuit, and defendant demanded that it be indemnified (*Id.* ¶¶ 130, 137). After plaintiffs disputed BNYM's refusal to authorize payment of defendant's attorneys' fees, defendant took roughly $1.8 million out of USELT accounts without prior notice to USELT (*id.* ¶¶ 138, 140).

The other investor, RBC Dain Rauscher Inc. ("RBC"), filed two lawsuits in Delaware state court (the "RBC Lawsuits"), alleging that USELT improperly stopped making interest payments on the ARNs (*id.* ¶¶ 131–133). In actuality, defendant had been overpaying RBC and other ARN Noteholders because it had mischaracterized unauthorized payments of Carry-Over Amounts as interest (*id.* ¶ 134). Plaintiffs thus posit that defendant's subsequent discontinuance of the erroneous payments prompted RBC to file the RBC Lawsuits.

Defendant again incurred significant legal fees from the RBC Lawsuits and sought indemnification (*id.* ¶ 141). Unaware of the fact that defendant's misconduct caused the RBC Lawsuits, USELT paid BNYM's legal counsel $1.3 million (*id.* ¶ 144).

D. Defendant's Actions After Plaintiffs' Discovery of Errors

Plaintiffs contend that, after they discovered defendant's errors, defendant engaged in actions that were deliberately aimed at forestalling any potential lawsuit. For example, defendant represented to plaintiffs that it was working to resolve the errors by undertaking extensive reviews and, if necessary, taking corrective measures (*id.* ¶ 113). Defendant also claimed, falsely and without support, that the overpayments would largely be "netted out" over time as the obligations to pay other Carry-Over Amounts to ARN Noteholders accrued, thereby eliminating the overpayments (*id.* ¶ 118). Defendant provided plaintiffs with recalculations, but even these were incorrect because they continued to provide for the payment of Carry-Over Amounts on ARNs without regard to the Eligible Carry-Over Makeup Amount (*id.* ¶ 117). Defendant also claimed (and plaintiffs agreed) that its errors had not yet harmed plaintiffs because it could not yet be determined whether there would be a positive remainder in USELT to be paid out (*id.* ¶ 118).

In June 2014, USELT requested, under the terms of the Indentures, that defendant be replaced as Indenture Trustee (*id.* ¶ 93). Defendant refused on the basis that, under section 7.07

of the Indenture, it could not be removed while it endeavored to correct its errors and while the aforementioned lawsuits were still pending (*id.* ¶ 94). Plaintiffs contend that defendant's refusal to be removed allowed it to continue to prevent plaintiffs from taking actions to correct or mitigate defendant's errors (*id.* ¶ 95).

In March 2016, USELT sold substantially all of the Loans with the consent of the Noteholders and used the proceeds to repurchase and retire all of the remaining Notes (*id.* ¶¶ 121, 145). Plaintiffs contend that at this point in time, any damages to plaintiffs were realized because plaintiffs became entitled to receive a distribution of the remaining equity and because, due to the accrued and accruing Carry-Over Amounts, plaintiffs did not know whether defendant's errors had resulted in a reduction or elimination of the equity that might ultimately be distributed to plaintiffs (*id.* ¶ 121). Defendant was removed from all its roles in June 2016.

E. This Litigation

Upon the forgoing facts, plaintiffs assert the following claims: breach of the Indenture (count one), breach of the Auction Agent Agreements (count two), breach of the duty to not operate under a conflict of interest (count three), breach of the duty of care (count four), conversion (count five), common law indemnification for the Noteholder Lawsuits (count six), and a claim for attorneys' fees (count seven). Plaintiffs also seek a declaratory judgment that defendants "fees and expenses (and any ultimate liability) related to both the Noteholder Lawsuits and this action are a result of [defendant's] negligence, bad faith, or willful misconduct and are not required to be reimbursed by the accounts and funds managed by [defendant] pursuant to the Indentures" (count eight).

II. DISCUSSION

A. Howard's Standing to Sue

Plaintiffs concede that Howard is not a party to any of the relevant agreements, but contend that he has standing as an "intended beneficiary of any accounts and funds available to be transferred to USELT IV upon retirement of the Notes" (complaint ¶ 16). Defendant responds that each of the relevant agreements contain provisions explicitly limiting defendant's duties to those defined in the agreements (NYSCEF Doc. No. 38 ["sup mem"] at 8-9). Specifically, the Indenture provides that "[w]ith the exception of rights herein conferred, nothing expressed or

mentioned in or to be implied from this Indenture or the Notes is intended or shall be construed to give any Person other than the parties hereto . . . and the Beneficiaries" (Indenture § 10.02), who were in turn defined as various holders of outstanding Notes (*id.* § 1.01 at 6, 14, 20, 21). The Auction Agent Agreements state that "[t]he Auction Agent is acting solely as agent of the Issuer hereunder and owes no duty to any other Person by reason of this Agreement" (NYSCEF Doc. No. 7 § 4.1 [a]; *see also* NYSCEF Doc. No. 8 § 4.1 [a] ["The Auction Agent is acting solely as non-fiduciary agent of the Issuer hereunder and owes no duty to any other Person and owes no fiduciary duty to any Person by reason of this Agreement and no implied duties, fiduciary or otherwise, shall be read into this Agreement against the Auction Agent"]). Thus, defendant argues that because a contractual provision which "expressly negates enforcement by third parties . . . is controlling," and because plaintiffs fail to allege any non-contractual duties defendant might have owed him, Howard should be dismissed for lack of standing (sup mem at 8-10, quoting *IMS Engineers-Architects, P.C. v State*, 51 AD3d 1355, 1358 [3d Dept 2008] and citing *e.g. State ex rel. Grupp v DHL Exp. (USA), Inc.*, 19 NY3d 278, 286 [2012] [finding that plaintiffs "cannot recover under a breach of contract action because they lack privity to enforce the benefit of the parties' bargain"] and *Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389 [1987] [noting the "well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated"]).

In opposition, plaintiffs argue that Howard is an intended third-party beneficiary of the Indenture by virtue of the fact that section 4.09 provides that, upon dissolution of the Trust, the remainder shall be paid out "to the Issuer, or to the order of the Issuer" (Indenture § 4.09; opp mem at 29-30). Plaintiffs' only argument regarding any of the limiting clauses referenced above is that section 10.02 of the Indenture sets forth its limitations "[w]ith the exception of rights herein conferred" (opp mem at 30, quoting Indenture § 10.02). Thus, plaintiffs argue, because section 4.09 requires defendant to pay out any remainder "to the Issuer, or to the order of the Issuer," one of the "rights herein conferred" is Howard's right to receive a remainder. However, nothing in the provisions plaintiffs rely on reveals any right going to Howard. To the extent that amounts could have been paid to Howard as "to the order of the Issuer," those amounts could have also gone to anyone else. Plaintiffs also contend that defendant owes Howard extra-contractual duties by virtue of his status as an intended third-party beneficiary (*id.* at 30).

However, "[w]here a provision exists in an agreement expressly negating an intent to permit enforcement by third parties . . . that provision is decisive" (*Nepco Forged Products, Inc. v Consol. Edison Co. of New York, Inc.*, 99 AD2d 508 [2d Dept 1984]). As plaintiffs' arguments fail under the plain language of the agreements' negating provisions, Howard's breach of contract claims must fail. Similarly, because Howard's theory of standing regarding his other claims turns on his status as a third-party beneficiary of the agreements, those claims must be dismissed as well.

B. Statute of Limitations

1. *Defendant's Memorandum in Support*

In the first instance, defendant contends that documentary evidence in the form of pre-litigation correspondences establishes that certain portions of counts one, two, and four accrued no later than 2011 (sup mem at 11-14). With respect to claims arising out of defendant's purported miscalculation of the Maximum Rate and improper payment of Carry-Over amounts, defendant relies on two documents, 1) an email, dated November 2, 2010, in which Howard asserts that defendant miscalculated the Maximum Rate (*see* NYSCEF Doc. No. 19), and 2) a letter from Howard, dated February 21, 2012, where he "outline[s] errors regarding the payment of Carry-Over Amounts made by the Trustee" (NYSCEF Doc. No. 20). Defendant contends these writings constitute "admissions" which demonstrate that the alleged miscalculations occurred by no later than 2009, and that plaintiffs were aware of them as early as November 2010 (sup mem at 12-13).

With respect to payments to broker-dealers, defendant relies on an October 20, 2011 letter in which defendant, copying USELT, requested that broker-dealer SunTrust Capital Markets Inc. ("SunTrust") return a $381,044.52 overpayment (NYSCEF Doc. No. 35). On October 24, 2011, defendant sent a similar letter to RBC, again copying USELT (NYSCEF Doc. No. 36). Schedule 2 to the letters identifies the failed auctions, all occurring in 2008 or 2009. Defendants argue that these communications show that plaintiffs were on notice of calculation errors by no later than October 2011, and that these errors occurred no later than 2009 (sup mem at 13).

Defendant further argues that as dictated by CPLR 202's borrowing statute, the law governing limitations period for each of plaintiffs' claims is Delaware (sup mem at 10-14). Although the complaint states that Miami, Florida is USELT's principal place of business, defendant contends that this assertion is conclusively refuted the fact that USELT represented that Wilmington, Delaware was its principal place of business in both the Indenture and the records of the Secretaries of State of Delaware and Florida (*id.* at 3, citing Indenture § 5.13 and NYSCEF Doc. Nos. 21 and 22). Thus, because plaintiffs allege purely economic harms, the claims accrued in Delaware (*id.* at 10-11, citing *e.g. Glob. Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 529 [1999]).

Under CPLR 202, a claim accruing outside of New York must satisfy both New York's and that state's limitation periods – thus the shorter period governs. Delaware employs a three-year statute of limitation for breach of contract claims (compared to New York's six-year statute) (CPLR 213 [2]; Del Code 10 § 8106). Defendant argues that because a breach of contract claim accrues at the time of breach, regardless of whether damages accrue later, and because as argued above, those breaches occurred no later than 2009, all breach of contract claims are time-barred (sup mem at 11, citing *e.g. Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399, 402 [1993] ["In New York, a breach of contract cause of action accrues at the time of the breach . . . though no damage occurs until later."] and *Gunn v First Am. Fin. Corp.*, CV 13-174-RGA, 2014 WL 2445750, at *4 [D Del May 30, 2014] [noting that a breach of contract claim "accrues at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action."]). Defendant also argues that, even if Florida's period governed the breach of contract claims, they would still be barred, the since Florida has a five-year limitation period for such claims (*id.*, at 10 n 5, citing Fla Stat Ann § 95.11 [2] [b]).

New York and Delaware each have a three-year limitations period for negligence claims (*see* CPLR 214 [6]; Del Code 10 § 8106), whereas Florida's is four-years (*see* Fla Stat Ann § 95.11 [3] [a]). Defendant argues that the communications discussed above establish plaintiff's tort claims are time-barred, because under both New York and Delaware law, negligence claims accrue at the time of the "injurious act." Defendant's citations to Delaware law describes the standard as looking to the "injurious act." However, New York law looks to the time the purported injury occurred. (*Id.* at 13-14, citing *Bank of Delmarva v S. Shore Ventures, LLC*, CV

S13C-05-008 THG, 2014 WL 5390389, at *4 [Del Super Ct Oct. 21, 2014] [tolling on a negligence claim "begins to run on the date the alleged injurious act occurred"] and *Ackerman v Price Waterhouse*, 84 NY2d 535, 541 [1994] ["A malpractice cause of action sounds in tort and, therefore, absent fraud, accrues when an injury occurs, even if the aggrieved party is then ignorant of the wrong or injury"]; *see also Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993] [noting that "a tort cause of action cannot accrue until an injury is sustained"].)

2. *Memorandum in Opposition*

Plaintiffs contend that the above discussed communications fail under the documentary evidence standard because they are not "essentially undeniable" and "undisputed proof" on the accrual date on their claims (opp mem at 10, quoting *Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]). Plaintiffs contend that, at most, these documents suggest some of defendant's errors began prior to 2010, but not that all errors occurred before then. Even if defendant could establish that plaintiffs' claims accrued prior to the relevant limitation periods, the statute is tolled under the doctrines of equitable estoppel (*id.* at 10-12) and continuous representation (*id.* at 12-13), and by virtue of defendant's role as a fiduciary (*id.* at 13-14). Additionally, with respect to the breach of contract claims only, the continuous wrong doctrine also applies (*id.* at 14-15).

Regarding equitable estoppel, the doctrine applies under New York law where "a party was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Simcuski v Saeli*, 44 NY2d 442, 449 [1978]). Where there are questions of fact regarding whether the doctrine applies, dismissal is not appropriate (opp mem at 11, citing *e.g. Will of Spewack*, 203 AD2d 133, 134 [1st Dept 1994]). Plaintiffs contend that their allegations regarding defendant's actions after the errors were discovered, show a "deliberate attempt . . . to obfuscate the facts and . . . to run out the clock on plaintiffs' claims" (*id.*). Thus plaintiffs argue they have alleged facts sufficient to raise an issue of fact regarding equitable estoppel.

With respect to the continuous representation doctrine, which tolls claims "concerning the manner in which professional services were performed," where there is "ongoing provision of professional services with respect to the contested matter or transaction" (*In re Lawrence*, 24 NY3d 320, 341 [2014]), plaintiffs reference *Educ. Loan Co. Tr. v Lords Sec. Corp.* (2016 WL 1610951, at *2 [Sup Ct, New York County 2016]). Plaintiffs contend the facts in that case are

substantially similar to the facts in this case (opp mem at 12-13). That breach of contract case involved a student-loan backed trust's claims against its trust administrator for alleged miscalculations. Justice Ramos denied a motion to dismiss the claim as time-barred, finding that "'the two prerequisites for continuous representation tolling,' namely, a claim of misconduct concerning the manner in which the professional services were performed, and the ongoing provision of professional services with respect to the contested matter or transaction" (*Educ. Loan Co. Tr. v Lords Sec. Corp.*, 2016 WL 1610951, at *2, quoting *In re Lawrence*, 24 NY3d at 341). Plaintiffs contend the same reasoning applies here, since plaintiffs "have alleged a claim of misconduct . . . concerning the manner in which its professional services under the Indenture and Auction Agent Agreements were performed" and because "plaintiffs have alleged that BNYM performed continuous services in these roles through June 2016" (opp mem at 12-13).

Plaintiffs next note that, under New York law, where the parties share a continuing fiduciary relationship, the relevant statute of limitations periods may be tolled until that relationship terminates (*id.* at 13-14, citing *e.g. Otto v Otto*, 110 AD3d 620, 621 [1st Dept 2013]). Plaintiffs contend that such a relationship is established by the fact that defendant served as USELT's agent, with many of its roles being described as "Fiduciaries" in the Indenture, (opp mem at 13, citing Indenture §§ 7.02, 7.05, 7.06, 7.21, 7.22). Plaintiffs argue that the fact that defendant acted as USELT's agent establishes as a matter of law that it was a fiduciary (*id.* at 14, citing *Caleb & Co. v E.I. DuPont de Nemours & Co.*, 599 F Supp 1468, 1475 [SD NY 1984] [noting that "[a]n agent and attorney-in-fact stands in a fiduciary relationship to the person for whom he acts" and finding that a bank, which had been appointed "lawful agent and attorney-in-fact" of tendering shareholders was a fiduciary]; Restatement [Third] Of Agency § 1.01, [defining agency as a "fiduciary relationship"] § 8.01 ["An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship"]).

On the breach of contract claims, plaintiffs note that "where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew such that accrual occurs continuously" (*id.* at 14-15, quoting *Beller v William Penn Life Ins. Co. of New York*, 8 AD3d 310, 314 [2d Dept 2004]). Plaintiffs contend that, under the Indenture, defendant had a continuing duty "to accurately administer the trust funds and accounts and to report the status of those funds and accounts to USELT" as well as "an implied obligation

to correct its mistakes and to recover monies that were overpaid to Noteholders and broker-dealers" (*id.*). Accordingly, plaintiffs' breach of contract claims are tolled until 2016, when defendant was removed from its professional roles.

Plaintiffs also dispute defendant's claim that, under CPLR 202, the breach of contract claims should be dismissed as barred under Delaware's statute of limitations. In the first instance, plaintiffs contend that their claims accrued in New York. Although plaintiffs concede that their claims are purely economic and that, as a general matter, such claims accrue where the plaintiff is located (and thus where the economic loss is suffered), because defendant maintained USELT's funds and accounts in New York, the economic harm plaintiffs suffered occurred in New York as well (*id.* at 16). For this proposition, plaintiffs rely on *Lang v Paine, Webber, Jackson & Curtis, Inc.* (582 F Supp 1421, 1426 [SD NY 1984]), where the court found that the economic impact to the Canadian plaintiff occurred in Massachusetts because that was where his "financial base" was.

Failing this, plaintiffs argue that there is, at minimum, an issue of fact regarding whether Florida or Delaware is USELT's principal place of business and therefore the issue cannot be resolved on a motion to dismiss (opp mem at 16-17, citing *Oxbow Calcining USA Inc. v Am. Indus. Partners*, 96 AD3d 646, 651 [1st Dept 2012]). Finally, even if Florida or Delaware law applies, there are still issues of fact regarding whether plaintiffs' claims are tolled, since Florida recognizes the doctrines of continuous representation and fiduciary tolling, and both Florida and Delaware recognize equitable tolling (*id.* at 17-18).

On their negligence claim, plaintiffs argue that under New York, Delaware, and Florida law, a claim for negligence accrues, not at the time of the wrongful act, but at the time of injury (*id.* at 18, citing *Kaufman v C.L. McCabe & Sons, Inc.*, 603 A2d 831, 834 [Del 1992] ["A cause of action in tort accrues at the time of injury"]; *Peat, Marwick, Mitchell & Co. v Lane*, 565 So 2d 1323, 1325 [Fla 1990] ["Generally, a cause of action for negligence does not accrue until the existence of a redressable harm or injury has been established and the injured party knows or should know of either the injury or the negligent act"]). Plaintiffs maintain that the negligence claim did not accrue until March 2016, when the Notes were retired.

3. *Reply*

In reply, defendant first maintains that the correspondences relied upon are indeed documentary evidence, conclusively establishing that "all of the relevant conduct occurred prior to 2009" (NYSCEF Doc. No. 49 ["reply"] at 3). In support, defendant cites *WFB Telecom., Inc. v NYNEX Corp.* (188 AD2d 257, 259 [1st Dept 1992]), which found that correspondences between counsel to the parties constituted "undisputed proof that defendants' actions were motivated, at least in part, by legitimate business goals" which negated plaintiffs' claim for prima facie tort.

Regarding plaintiffs' argument that Delaware's tolling statutes do not apply, defendant notes first that plaintiffs failed to address defendant's showing regarding USELT's principal place of business (reply at 5 n 7) and also provide certifications of nonexistence from the Florida Department of State to further demonstrate that USELT is not registered in Florida (*id.* citing NYSCEF Doc. Nos. 51, 52). As to plaintiffs' reliance on *Lang* (582 F Supp at 1421), defendant notes that the Court of Appeals in *Glob. Fin. Corp.* 93 NY2d at 529–30, specifically stated that the case involved a Canadian plaintiff who "intentionally maintained a separate financial base in Massachusetts," thus distinguishing it from the facts here (reply at 6).

Accordingly, applying Delaware law, defendant contends that each of plaintiffs' tolling arguments fail as a matter of law. Regarding equitable estoppel, plaintiffs must show that they (1) lacked knowledge or the means of obtaining knowledge of the truth of the facts in question, (2) relied on the conduct of the party against whom estoppel is claimed, (3) suffered a prejudicial change of position as a result of that reliance, and (4) that reliance was reasonable and justified under the circumstances (*see* reply at 8, quoting *Bantum v New Castle County Vo-Tech Educ. Ass'n*, 21 A3d 44, 51 [Del 2011]).[1]

Defendant contends plaintiffs cannot meet this standard because they have not established that any reliance was reasonable and justified and because, as shown by documentary evidence, plaintiffs had inquiry notice regarding the purported broker-dealer overpayments by no later than October 2011, and of the purported calculation errors by no later than November 2010 (*id.* citing *e.g. In re Dean Witter Partnership Litig.*, CIV. A. 14816, 1998 WL 442456, at *6 [Del

[1] Defendant also argues that this doctrine fails under Florida and New York law as well (reply at 8 n 10).

Ch July 17, 1998], *affd,* 725 A2d 441 [Del 1999] [noting that the "limitations period begins to run when the plaintiff [was] objectively aware of the facts giving rise to the wrong, *i.e.*, on inquiry notice"]).

On plaintiffs' fiduciary tolling argument, defendant observes that it is "well-settled law that indenture trustees do not owe any fiduciary duties prior to an event of default" (*id.* at 9-10, citing *Hazzard v Chase Nat. Bank of City of New York*, 159 Misc 57, 84 [Sup Ct 1936], *affd,* 257 AD 950 [1st Dept 1939], *affd,* 282 NY 652 [1940] [noting that, in contrast to most cases involving a trustee, a "trustee under a corporate indenture, . . . has his rights and duties defined, not by the fiduciary relationship, but exclusively by the terms of the agreement"]). Although defendant also engaged in capacities other than as Indenture Trustee and Auction Agent, these roles cannot serve as a basis for a fiduciary relationship either, since under New York law, "persons entering into contracts in different capacities evidence an intent to keep those functions separate and are considered distinct persons" (*id.* citing *Bank of New York v Riv. Terrace Assoc., LLC*, 23 AD3d 308, 311 [1st Dept 2005] ["Even though BNY is called 'Agent' in the credit agreement, the agreement and the case law make it clear that BNY is not a fiduciary"]).

Defendant also argues that even if it were a fiduciary, the exception would still fail because plaintiffs had inquiry notice (*id.* at 10, citing *In re Dean Witter Partnership Litig.*, 1998 WL 442456, at *8 [discussing fiduciary tolling and noting that "even where defendant is a fiduciary, a plaintiff is on inquiry notice when the information underlying plaintiff's claim is readily available"]).

With respect to equitable tolling, defendant argues that under Delaware law, the "doctrine of equitable tolling applies when a plaintiff 'reasonably relies on the competence and good faith of a fiduciary,' and tolls the relevant statute of limitations until the plaintiff is 'objectively aware of the facts giving rise to the wrong, *i.e.,* on inquiry notice'" (*id.* at 10-11, quoting *Sunrise Ventures, LLC v Rehoboth Canal Ventures, LLC*, CIV.A. 4119-VCS, 2010 WL 363845, at *6 [Del Ch Jan. 27, 2010]). Thus, for the reasons argued above, defendant contends this doctrine fails as well.

Regarding the continuous representation doctrine, defendant contends that the argument fails because Delaware law does not recognize the doctrine and because plaintiffs have failed to provide any authority stating otherwise (*id.* at 11, citing *Young Conaway Stargatt & Taylor, LLP*

v Oki Data Corp., CV N13C-02-085 WCC, 2014 WL 4102139, at *3 [Del Super Ct Aug. 1, 2014] [stating that "the Court is not willing to stretch the statute of limitations to the degree argued by Defendants" based on the continuous representation rule]).[2] Although Delaware courts recognize a similar doctrine with respect to medical malpractice claims (*see Ewing v Beck*, 520 A2d 653, 665 [Del 1987]), the court's research did not unearth any cases applying doctrine in the commercial law context (*cf. Shuttleworth v Lynch*, CIV. A. 94C-08-124, 1995 WL 339071, at *3 [Del Super Ct Apr. 25, 1995] [noting the existence of the doctrine, while citing to cases outside Delaware, but deciding the issue of tolling on other grounds]).

Defendant acknowledges that the doctrine is recognized under New York law, but argues that the doctrine is a limited exception that applies only where the parties have a "recognized special relationship, *i.e.*, in medicine, architectural design, accounting, and law, as evidenced by the existence of a malpractice claim covering the purported negligence" (*id.* citing *e.g. Regency Club at Wallkill, LLC v Appel Design Group, P.A.*, 112 AD3d 603, 606 [2d Dept 2013] [finding that "[n]ot only must the recurrent performance of professional services be specifically related to the matter upon which the alleged malpractice is based . . . but the services must be deemed continuous within the meaning of the tolling doctrine"]). Defendant contends that it has never been applied to an indenture trustee (*id.*).

With respect to tolling for continuing violations, defendant notes that, under Delaware law "the concept of a 'continuing wrong has no application . . . where the alleged wrongful acts are not so inexorably intertwined that there is but one continuing wrong,'" and that "if a continuing wrong can be segmented, the applicable statute of limitations will apply to each alleged wrong and not to the course of wrongful conducts as a whole" (*id.* at 12-13, quoting *Price v Wilmington Tr. Co.*, CIV.A. 12476, 1995 WL 317017, at *2–3 [Del Ch May 19, 1995]). Defendant also notes that the doctrine does not apply even where there are "numerous repeated wrongs of similar, if not [the] same, character over an extended period" or "where the alleged wrongful acts are not so inexorably intertwined that there is but one continuing wrong" (*id.* quoting *AM Gen. Holdings LLC v The Renco Group, Inc.*, CV 7639-VCS, 2016 WL 4440476, at

[2] Defendant also argues that Florida does not recognize the doctrine either (*id.* at 11 n 15 citing *Larson & Larson, P.A. v TSE Indus., Inc.*, 22 So 3d 36, 46 [Fla 2009] [finding that "in the absence of a specific statutory authorization for doing so, we are precluded from tolling the statute of limitations based on the continuous representation doctrine"]).

*13 [Del Ch Aug. 22, 2016] [rejecting argument that claims should have been tolled as continuing violations where "the alleged breaches were repetitive," but "not 'continuing' in the legal sense"]).

Finally, defendant reasserts that plaintiffs' negligence claim is time-barred because, under Delaware law, "an action sounding in tort accrues at the time when the tort is committed" (*id.* at 14, quoting *Isaacson, Stolper & Co. v Artisans' Sav. Bank*, 330 A2d 130, 132 [Del 1974]) and Delaware law does not require that "all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date" (*id.*, quoting *Kaufman v C.L. McCabe & Sons, Inc.*, 603 A2d 831, 834 [Del 1992]).

4. *Analysis*

i. Documentary Evidence

To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence that forms the basis of the defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR 3211 (a) (1) does not define "documentary evidence." Rather it has been described as "a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y.,

Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, "the contents of which are 'essentially undeniable'" (*id.* at 84-85).

The documentary evidence in this case is the aforementioned communications, the Indenture, and defendant's exhibits from the Departments of State for Florida and Delaware. Beginning with the issue of USELT's residency, defendant has provided sufficient documentary evidence to establish that USELT is a resident of Delaware, not Florida. Plaintiffs' sole citation on this point is inapposite. In *Oxbow,* 96 AD3d at 651, the First Department held that defendants had failed to submit documentary evidence that would "conclusively disprove" allegations in the complaint that a plaintiff had "its principal place of business at 551 Fifth Avenue" which "if proven, would establish that plaintiffs' principal office was in New York when the cause of action accrued" (*id.*). Here, defendant provided an image from the Florida Department of State, Division of Corporations webpage, showing that USELT is not a business entity registered to do business in Florida (Gonzalez aff ¶ 4, exhibit C). The image directly refutes the allegation that USELT has a principal place of business in Miami, FL (complaint ¶ 15; *see also* Indenture § 5.13 [f] [representing that the "principal offices of the Issuer are in Wilmington, Delaware."]; NYSCEF Doc. Nos. 50, 51).

The referenced communications establish, not only plaintiffs' notice of defendant's purported miscalculations and errors, but also the dates on which these errors were made.[3] Beginning with the alleged miscalculation of the Maximum Rate, exhibit J to the Gonzalez affirmation shows a November 2, 2010 email from Howard making reference to a miscalculation of the Maximum Rate (*see* Gonzalez aff, exhibit J at 2). The complaint alleges only a single instance of error with respect to the Maximum Rate (*see* complaint ¶¶ 70-73). Thus plaintiffs' argument that there may have been subsequent breaches fails. The document establishes that the alleged error occurred, at latest, by November 2, 2010.

Regarding the Carry-Over Amounts, exhibit K to the Gonzalez affirmation shows a correspondence from plaintiff dated February 21, 2012 referencing "$13.9 million of Carry-Over

[3] As defendant notes, correspondences between counsel may constitute documentary evidence where they establish "undisputed proof" that negates a claim (*see WFB Telecom., Inc.*, 188 AD2d at 259).

Amounts [that] were not properly allocated as part of the Section 4.06 Waterfall in the Trust Indenture" and positing that "the proper allocation of these funds would have had the cumulative effect of increasing Trust subordinate parity by 0.38% as of October 31, 2010." Significantly, these amounts correspond directly to the total Carry-Over Amounts alleged in the complaint (*see* complaint ¶ 81). Accordingly, the alleged improper Carry-Over Amounts were made, prior to October 31, 2010.

Regarding payments to broker-dealers, the letters corroborate the complaint itself, which alleges that SunTrust and RBC were the only broker-dealers who were improperly paid, and notes that defendant sent letters to these parties demanding return of the improper payments (*see id.* ¶¶ 100-102). The complaint alleges no further improper payments after the letters were sent. Schedule 2 in the letters demonstrates that no improper payments were made after 2009 (*see* Gonzalez aff, exhibits L, M). Thus, when viewed against the specific allegations made in the complaint, these documents show that the improper payments to broker-dealers occurred, at latest in 2009.

Accordingly, the documentary evidence establishes that the errors discussed above are alleged to have occurred in 2010 or before, and that USELT is not a Florida resident.

ii. Applicable Law

No party disputes that plaintiffs' alleged harms are "purely economic," such that "the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss" (*Glob. Fin. Corp.*, 93 NY2d at 529) which in this case is Delaware (Indenture § 5.13 [f]). Thus, under CPLR 202, Delaware's statute of limitations periods and law regarding tolling govern (*see e.g. Smith Barney, Harris Upham & Co., Inc. v Luckie*, 85 NY2d 193, 207 [1995]).[4]

Neither party disputes that, under Delaware law, the relevant limitations period is three years (Del Code 10 § 8106), and that a breach of contract claim accrues at the time of breach (*see*

[4] Plaintiffs' argument that its claims accrued in New York because defendant maintained plaintiffs' funds and accounts in New York fails. In *Lang* (582 F Supp at 1425), the sole case cited by plaintiffs in support of this argument, the court found that the plaintiff's "financial base" for the purposes of his claims was in Massachusetts where, plaintiff himself had opened bank accounts. In effect, plaintiffs' argument is indistinguishable from the "residency by agency" theory, also based on *Lang* (582 F Supp at 1425) that this court recently rejected in *Interventure 77 Hudson LLC, et al. v Howard E. Hallengren, et al.* (index no. 653913/2013) at p. 13, decided May 10, 2018.

Gunn v First Am. Fin. Corp., 2014 WL 2445750, at *4). The only dispute regarding accrual is whether a negligence claim accrues at the time of injury, as plaintiffs argue, or at the time of an "injurious act," as defendant asserts.

Kaufman (603 A2d at 834) supports plaintiffs' position to the extent the court stated that "[i]n general, a cause of action accrues with the occurrence of the wrongful act" but a "cause of action in tort accrues at the time of injury" (*id.*). However, the court also noted that accrual will happen when "an injury, although slight, is sustained in consequence of the wrongful act of another" and that it "is not required that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date" (*id.*). The court then rejected the argument that injury from a negligent procurement of insurance coverage did not occur until the insured suffered a loss for which it was not covered, finding instead that "injury first occurred at the moment [plaintiffs] entered into a contract which obligated them to pay a premium for stated coverage which was not the coverage they desired." Although later cases, including another from the Supreme Court of Delaware, simply state that "a cause of action arising in tort 'accrues' at the time the tort is committed," "at the time of the wrongful act" (*Coleman v Pricewaterhousecoopers, LLC*, 854 A2d 838, 842 [Del 2004]) or at the time the "alleged injurious act occurred" (*Bank of Delmarva v S. Shore Ventures, LLC*, CV S13C-05-008 THG, 2014 WL 5390389, at *4 [Del Super Ct Oct. 21, 2014]), those cases employed that language in the context of inquiry notice and do not to hold that a tort claim may accrue prior to injury. Other recent cases have stated expressly that a "cause of action in negligence accrues at the time of the injury to the plaintiff" (*Abdi v NVR, Inc.*, CIV.A 04C-08-028-PLA, 2007 WL 2363675, at *3 [Del Super Ct Aug. 17, 2007], *affd,* 945 A2d 1167 [Del 2008]). Defendant having failed to establish the existence of any injury earlier than three years before plaintiffs brought this action, the motion with respect to the negligence claim must be denied (*see Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016] [noting that on a motion to dismiss a claim as time-barred "a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" and that "the defendant must establish, *inter alia*, when the plaintiff's cause of action accrued"]).

iii. Tolling

As discussed above, defendants have alleged that the breach of contract claims based on the Maximum Rate, Carry-Over Amounts, and payments to Broker Dealers issues all accrued prior to the relevant statute of limitations period and are time-barred.

Inquiry notice serves to preclude plaintiffs' reliance on the doctrines of equitable estoppel and fiduciary tolling. In Delaware, the "doctrine of fraudulent concealment tolls the statute of limitations until a plaintiff is put on inquiry notice where an affirmative act of concealment or a misrepresentation was used to put the plaintiff off the trail of inquiry" (*Hegedus v Ross*, 2012 WL 2884792, *4, 2012 US Dist LEXIS 96699, *11 [D Del 2012] [citation omitted]). Inquiry notice does not require that the plaintiff have "actual knowledge of a wrong" before the statute of limitations period begins to run. Rather, a plaintiff need only have "an objective awareness of the facts giving rise to the wrong – that is, a plaintiff is put on inquiry notice when he gains possession of facts sufficient to make him suspicious, or that ought to make him suspicious" (*id.* [citation and internal quotation marks omitted]). Inquiry notice will also nullify any tolling based on a defendant's role as a fiduciary (*see In re Dean Witter Partnership Litig.*, 1998 WL 442456, at *8). Plaintiffs do not dispute that they had actual notice of the purported errors as early as 2010, but argue that defendant engaged in a pattern of delay which prevented plaintiffs from bringing suit earlier. Significantly, however, plaintiffs have not alleged that they were unaware of any relevant facts, or were unable to bring suit on any of these claims. That plaintiffs may have encountered a practical problem unrelated to the issues in this case that caused them to delay filing this lawsuit (*see* complaint ¶ 129), has no legal significance on the tolling issue. Accordingly, plaintiffs' claims are not tolled by the doctrines of equitable estoppel and fiduciary tolling.

As to whether Delaware law allows for tolling arising from continuing violations, the wrongful acts must be "so inexorably intertwined that there is but one continuing wrong" (*Price*, 1995 WL 317017, at *2–3). The allegations in the complaint belie any claim that the discussed errors constitute a "continuing wrong" as opposed to discrete wrongs. Accordingly, plaintiffs' claims are not tolled under the continuing violation principle of law either.

Finally, to the extent plaintiffs seek to rely on the continuous representation doctrine, as noted above, although Delaware courts have discussed the doctrine, they have not adopted it –

either with respect to indenture trustees, or with respect to any form of representation (*see Young Conaway Stargatt & Taylor, LLP*, 2014 WL 4102139, at *3). Accordingly, because this form of tolling is unavailable under Delaware law, plaintiffs may not rely on it here.

Accordingly, for the forgoing reasons, defendant's motion shall be granted to the extent it seeks dismissal of breach of contract claims relating to the purported miscalculation of the Maximum Rate, improper payment of Carry-Over Amounts, and improper payments to Broker-Dealers. This warrants full dismissal of the second cause of action but only partial dismissal of the first.

C. The Exculpatory Clauses' Impact on Breach of Contract Claims

Defendant contends that plaintiffs' breach of contract claims are also barred under certain exculpatory provisions in the Indenture and the Auction Agent Agreements (sup mem at 14-17). The applicable provision in the Indenture states, in relevant part, that:

> "No provision of this Indenture shall be construed to relieve the Trustee from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct, except that . . . the Trustee shall not be liable for any error of judgment made in good faith, unless it shall be proved that the Trustee was negligent in ascertaining the pertinent facts"

(Indenture § 7.01 [c]). The Auction Agent Agreements each provide that "[i]n the absence of bad faith, misconduct or negligence on its part, as determined by a court of competent jurisdiction the Auction Agent shall not be liable for any action taken, suffered or omitted, or for any error of judgment made, by it in the performance of its duties under this Agreement" (NYSCEF Doc. No. 7 at 4.1 [c] [omitting underlined portion]; NYSCEF Doc. No. 8 at 4.1 [c] [emphasis added to show additional language not included in other agreement]).

Defendant contends that these provisions "exculpate [it] from any liability unless plaintiffs can show that" defendant (i) "acted in bad faith," (ii) acted "with willful misconduct," or, (iii) "as here, where the alleged negligence is that [defendant] made certain errors of judgment, that it was negligent in ascertaining the pertinent facts" (sup mem at 15). Defendant then argues that the complaint offers only "conclusory allegations of bad faith" that "do not come close to pleading this type of conduct" (*id.* at 16; *see also id.* at 16-17).

Plaintiffs do not argue that they have alleged bad faith (*see generally* opp mem at 18-21). Rather, plaintiffs note that each provision expressly provides that defendant will be liable for negligence, with a limited exception provided in the Indenture "for any error of judgment made in good faith, unless it shall be proved that the Trustee was negligent in ascertaining the pertinent facts."[5] Plaintiffs thus argue that the provisions do not apply because their breach of contract claims are "*not* based upon errors of judgment by [defendant], but upon [defendant's] negligent failure to perform its ministerial duties" (*id.* at 19).[6] In the alternative, plaintiffs argue that even if the acts in questions involved an "error of judgment" the provisions would still not defeat plaintiffs' claims because "plaintiffs have pleaded facts which amply demonstrate that [defendant] was at least negligent in ascertaining the pertinent facts" – namely, by failing to properly consult the relevant provisions of the agreements (*id.* at 20).

In reply, defendant disputes plaintiffs' argument that none of the acts in question were an "error of judgment," contending that those acts "are not the sort of routine, simple tasks courts have found to be ministerial" (reply at 15, citing *Racepoint Partners, LLC v JPMorgan Chase Bank, N.A.*, 14 NY3d 419, 425 [2010]). However, the only case defendant cites for this proposition is inapposite. In that case, the court found only that a section of an indenture agreement that imposed a delivery requirement in accordance with provisions of the Securities Exchange Act did not, by refence to the Security Exchange Act, also impose on the trustee an implied duty to file accurate reports (*Racepoint Partners,* 14 NY3d at 425). Although the court also stated that its holding that the trustee did not have a duty to file accurate reports "is consistent with the limited, 'ministerial' functions of indenture trustees," that statement is dicta, and does not speak to what is or is not a trustee's act of "judgment" (*id.*).

Defendant also argues that plaintiffs' argument runs contrary to the canon of construction that a "court should not 'adopt an interpretation' which will operate to leave a 'provision of a contract . . . without force and effect'" (*id.* quoting *Acme Supply Co., Ltd. v City of New York*, 39

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[5] The Auction Agent Agreements, as drafted, do not include this carve-out, as they provide that defendant will not be liable for errors of judgment "[i]n the absence of bad faith, misconduct *or* negligence on its part" (NYSCEF Doc. Nos. 7 § 4.1 [c] [emphasis added], 8 § 4.1 [c] [emphasis added]).

[6] Plaintiffs also note that, in the OWS lawsuit, defendant represented that "[a]s Indenture Trustee, [it] undertakes only ministerial functions" (opp mem at 20, quoting NYSCEF Doc. No. 45, exhibit 1 at 1). In reply, defendant objects that the "gravamen of the claims against [defendant] there was that it failed to commence auctions upon receiving an order from the issuer, which is undoubtedly a ministerial task" (reply at 15 n 22).

AD3d 331, 332 [1st Dept 2007]). However, for this canon to apply, defendant must have no other duties under the Indenture than those plaintiffs argues are not "error[s] of judgment." Plainly, that is not so (*see e.g.* Indenture § 3.07 ["The Issuer may specify the maximum and minimum period of time which shall transpire between the date upon which such notice is to be given and the date upon which such tenders are to be accepted or may authorize the Trustee to determine the same in its discretion" . . ."if there shall be tenders at an equal price above the amounts of moneys available for purchase, then the Trustee shall, determine in its discretion, the Notes tendered which shall be purchased"], § 5.05 ["The duties of the Trustee under this Section may be performed by the Trustee or by any qualified agent, employee or other entity selected by the Trustee in the exercise of its reasonable judgment and discretion"]). Defendant fails to offer any argument in reply on the issue of, if the acts were in fact "error[s] of judgment," how they were not due to defendant's "negligen[ce] in ascertaining the pertinent facts."

As plaintiffs correctly note, none of the acts complained involve any issues of discretion and cannot be considered an "error of judgment" under the plain import of that phrase. Moreover, even if one were to accept defendant's argument that these duties involved discretion, defendant has failed to establish that plaintiff cannot "prove[] that Trustee was negligent in ascertaining the pertinent facts" in making such an error in judgment. Accordingly, neither of the breach of contract claims may be dismissed on this ground.

D. Tort Claims: Conflict of Interest, Duty of Care, and Conversion (counts three, four and five)

1. Parties' Arguments

Defendants also offer various arguments why the tort claims should be dismissed. The first, which applies to counts three (the duty to avoid a conflict of interest) and four (the duty of care), asserts that, as discussed above with respect to Howard's standing, any extra-contractual duties are precluded by the agreements' negating provisions (sup mem at 19-20).[7] The second asserts that counts four and five (conversion) are duplicative of a breach of contract claim (*id.* at

[7] Defendant also argues that the "Court of Appeals has expressly rejected attempts to 'expand[] indenture trustees' recognized administrative duties far beyond anything found in the contract' (reply at 19, quoting *Racepoint Partners,* 14 NY3d at 425). However, as discussed above, that case involved a claim that a contractual reference to provisions of the Securities Exchange Act also implied other duties relating to that Act. The case does not stand for the proposition that indenture trustees can have *no* duties beyond what is found in the contract

20-23, citing *Ellington Credit Fund, Ltd. v Select Portfolio Servicing, Inc.*, 837 F Supp 2d 162, 203-204 [SD NY 2011]).[8]

Additionally, with respect to the conversion claim only, defendant argues that the claim fails since the Indenture specifically provided that "the Trustee shall be reimbursed or indemnified by . . . the Issuer . . . for all reasonable fees, costs and expenses, liabilities, outlays and counsel fees . . . ." and that, where USELT is required to indemnify defendant and "fail[s] to make such reimbursement or indemnification, then the Trustee may reimburse itself from any money in its possession under the provisions of this Indenture" (Indenture § 7.23). Defendant thus argues this claim should be dismissed because defendant's actions were authorized by contract (sup mem at 23, citing *B & C Realty, Co. v 159 Emmut Properties LLC*, 106 AD3d 653, 656 [1st Dept 2013] [finding that even "accepting the truth of the allegations in the complaint, plaintiff does not allege that defendants wrongfully exercised dominion over those funds in derogation of plaintiff's ownership" since "by alleging that it agreed to, and did, transfer the funds in return for the 7% interest in the property, plaintiff tacitly concedes that possession of the money was authorized"]).

Finally, defendant argues that count three fails because plaintiffs have offered only conclusory allegations that defendant prioritized its own interests to be indemnified and "not be

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[8] Defendant also contends that all tort claims should be dismissed for violation of the "economic loss doctrine" (*see* sup mem at 23-24, citing *e.g. 17 Vista Fee Assoc. v Teachers Ins. and Annuity Ass'n of Am.*, 259 AD2d 75, 83 [1st Dept 1999] and *BNP Paribas Mortg. Corp. v Bank of Am., N.A.*, 949 F Supp 2d 486, 505 [SD NY 2013]). However, as plaintiffs note in opposition (*see* opp mem at 26-27), this doctrine applies principally to claims relating to defective products, with courts in New York looking chiefly to whether there exists an independent duty on which to base the tort claim. Although federal courts in New York have described a two-fold standard whereby a plaintiff must allege an independent duty and that damages were not mere "economic loss," (*see e.g. Robehr Films, Inc. v Am. Airlines, Inc.*, 85 CIV. 1072 (RPP), 1989 WL 111079, at *2 [SD NY Sept. 19, 1989], *affd sub nom. Robehr Films, Inc. v Am. Airlines*, 902 F2d 1556 [2d Cir 1990]) and have extended the economic loss rule beyond product liability cases, those decisions rely almost exclusively on federal precedent (*see e.g. Manhattan Motorcars, Inc. v Automobili Lamborghini, S.p.A.*, 244 FRD 204, 220 [SD NY 2007]). Conversely, the First Department has expressed its reservation as to whether the rule extends beyond defective products. In *Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.* (80 AD3d 293, 306 [1st Dept 2010], *affd,* 18 NY3d 341 [2011]), for example, the court found that plaintiffs tort claims were not "barred by the economic loss rule," and stated that "[e]ven were we to apply the economic loss rule beyond defective products, the better course is to recognize that the rule allows ... recovery [for economic loss] in the limited class of cases involving liability for the violation of a professional duty" (*id.*). Citing that case, the First Department in *Redf Organic Recovery, LLC v Rainbow Disposal Co., Inc.* (116 AD3d 621, 622 [1st Dept 2014]) rejected an argument that a claim for unfair competition was barred by this rule, stating simply that "Defendant's reliance on the economic loss rule is unavailing, as it does not apply in this case." Lastly, in *The Ltd., Inc. v McCrory Corp.* (169 AD2d 605, 607–08 [1st Dept 1991]) the court held that the "'economic loss rule' does not extend to prohibiting a suit by a party in privity for pecuniary losses suffered as a result of breach of a duty independent of the contract."

held responsible for expenses and fees associated with seeking remedial measures" (complaint ¶¶ 181-182; *see* sup mem at 21, citing *Commerce Bank v Bank of New York Mellon*, 141 AD3d 413, 416 [1st Dept 2016] [dismissing conflict of interest claim where the "amended complaint merely contains conclusory allegations as to such conflict" and where plaintiff did "not allege a quid pro quo situation"] and *U.S. Bank Nat. Ass'n v Fed. Home Loan Bank of Boston*, 2016 WL 9110399, at *9 [Sup Ct, New York County 2016] [finding, in CPLR Article 77 proceeding for judicial approval of a proposed settlement that, as party withdrew its objection to the proposed settlement "it has failed to develop its conflict of interest claims" but also stating that "[t]he court does not, however, credit the contention that mere exposure to litigation in the event of a failure to accept the Proposed Settlement, in and of itself, suffices to establish a Trustee conflict of interest"]).

In opposition, plaintiffs observe that the Court of Appeals in *AG Capital Funding Partners, L.P. v State St. Bank and Tr. Co.* (11 NY3d 146, 157 [2008]) specifically held that "an indenture trustee owes a duty to perform its ministerial functions with due care, and if this duty is breached the trustee will be subjected to tort liability." For this reason, says plaintiffs, defendant's first argument fails with respect to count four (opp mem at 23-24). Plaintiffs add that the court also recognized that an indenture trustee owes a duty to "avoid conflicts of interest," although that portion of the opinion was merely dicta from a quoted case, which in turn made a passing parenthetical explanation of a federal decision in support of the proposition (*id.*, citing *AG Capital*, 11 NY3d at 157). The First Department has also acknowledged that an indenture trustee shares both duties (*id.* citing *Cece & Co. Ltd. v U.S. Bank Nat. Ass'n*, 153 AD3d 275, 280 [1st Dept 2017] [finding that an "indenture trustee clearly owes the security holders a duty to perform its ministerial functions with due care" as well as "a fundamental duty to avoid conflicts of interest"]; *see also Ellington Credit Fund, Ltd. v Select Portfolio Servicing, Inc.*, 837 F Supp 2d 162, 191–92 [SD NY 2011] ["Prior to an event of default, an indenture trustee's duty is governed solely by the terms of the indenture, with two exceptions: a trustee must (1) avoid conflicts of interest, and (2) perform all basic, non-discretionary, ministerial tasks with due care"]).

Regarding the duty to avoid conflicts of interest, plaintiffs argue that they have sufficiently pleaded breach by way of, not only allegations regarding defendant's refusal to take remedial measures and self-indemnification, but by refusing to be replaced as trustee and by

"conspir[ing] with a broker-dealer and substantial Noteholder to bring or continue a lawsuit against USELT in order to cover up its own errors" (*id.* at 25, citing complaint ¶ 132).

Plaintiffs also note that the court in *AG Capital* (11 NY3d at 157) also rejected an argument that a negligence claim was duplicative of a breach of contract claim, finding that there were issues of fact as to whether defendant "separate and apart from its contractual duty under the [contract], undertook and breached a duty of care, connected with and dependent upon the [contract]" (*id.* at 158-159; *see also* opp mem at 24-25, citing *Commerce Bank v Bank of New York Mellon*, 141 AD3d 413, 415 [1st Dept 2016] [holding that an "argument that the negligence claims should be dismissed in their entirety as duplicative of the contract claims is unavailing" in light of *AG Capital* but dismissing that portion of the claim that did "not involve the performance of basic non-discretionary ministerial tasks"] and *Royal Park Investments SA/NV v Deutsche Bank Natl. Tr. Co.*, 14-CV-4394 (AJN), 2016 WL 439020, at *9 [SD NY Feb. 3, 2016] [finding that breach of duty of trust claim against indenture trustee was not duplicative of contract claim in light of trustee's independent "extra-contractual" duty]).

Plaintiffs contend their conversion claim is not duplicative since, as was the case in *Zurich Am. Ins. Co. v Whitmore Group, Ltd.* (11 Misc 3d 1070(A) [Sup Ct, NY County 2006]), a "conversion claim may be asserted separately from a contract claim where it arises out of a duty distinct from that imposed by the contract." (Opp mem at 17-18.) However, as defendant notes in reply, that case is inapposite because the court found that the "conversion claim ar[ose] out of a broker's statutorily mandated fiduciary duty to hold and remit insurance funds under Insurance Law 2120." Plaintiffs additionally dispute that the act of purported conversion was authorized by contract, since plaintiffs read the self-reimbursement provision as applying only if defendant incurred fees "without negligence or bad faith on [defendant's] part" (opp mem at 18, quoting Indenture § 7.23).

In reply to plaintiffs' argument that its negligence claim is not duplicative, defendant distinguishes *AG Capital* where the court found there were "'issues of fact as to whether, [defendant], separate and apart from its contractual duty' failed 'to protect plaintiffs' security rights,'" whereas here there are no allegations of breached additional duties (reply at 16, quoting *AG Capital*, 11 NY3d at 159). Defendant maintains that *Commerce Bank* actually supports dismissal of plaintiffs' claim since, there, the court dismissed the portion of plaintiff's negligence

claims that did not involve the performance of "basic non-discretionary ministerial tasks" (*Commerce Bank* 141 AD3d at 415; *see also* reply at 16).

Finally, regarding plaintiffs' argument that self-indemnification was not permitted under the Indenture, defendant argues that the full text of the provision on which plaintiffs rely shows that, before such a "limitation" applies, there must be an adjudication of defendant's fault (reply at 18). The relevant portion of the Indenture reads that defendant will be reimbursed for fees "unless [those fees] are adjudicated to have resulted from the negligence, bad faith or willful misconduct of the Trustee" (Indenture § 7.23).

2. Analysis

Count five, for conversion, must be dismissed as duplicative because a "claim to recover damages for conversion cannot be predicated on a mere breach of contract" (*Priolo Communications, Inc. v MCI Telecom. Corp.*, 248 AD2d 453, 454 [2d Dept 1998]).

With respect to plaintiffs' duty of care claim, as both *AG Capital* (11 NY3d at 159) and *Commerce Bank* (141 AD3d at 415) demonstrate, such claims against indenture trustees should not be dismissed as duplicative to the extent they are based on "basic non-discretionary ministerial tasks" (*id.*). Although defendant argues that the breaches alleged here do not meet this standard, they fail to provide any authority to support the claim. To the extent *Commerce Bank* (141 AD3d at 415) dismissed a portion of the negligence claim as not relating to "ministerial tasks," it did so on the basis that the if the act in question (that defendant failed to "notify [plaintiffs] that other parties to the PSA had failed to perform their obligations"), were a breach, "defendant would have to monitor other parties" (*id.*). Those facts are far removed from the breaches alleged here. Additionally, although defendant contends the agreements' negating provisions defeat these claims, the court in *AG Capital* specifically found that the duties described above exist, notwithstanding the Trust Indenture Act's mandate that an "indenture trustee shall not be liable except for the performance of such duties as are specifically set out in such indenture" (*id.* at 157-158). Accordingly, that branch of defendant's motion which seeks to dismiss count four is denied.[9]

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[9] Defendant also argues that counts 1, 2 and 4 fail in that, because plaintiffs' damages are based on its claims that the purported errors decreased the value of USELT assets and plaintiffs' recovery on the Notes was dependent on was "*always* uncertain at best," the damages alleged are wholly speculative and remote, and not the natural and probable

Finally, although plaintiffs are correct that an indenture trustee also has a duty to avoid conflicts of interest, all of the purported conflicts alleged in the complaint fail to set forth how defendant favored its own interests to the detriment of plaintiffs. Accordingly, that branch of the motion seeking to dismiss the Third Cause of Action is granted.

E. Indemnification and Declaratory Judgment Claims

Defendant contends that plaintiffs' claim for common law indemnification fails because there has been no determination that defendant was at fault with respect to those actions (sup mem at 24-25). However, defendant provides no authority that suggests there must be such a determination *prior* to plaintiffs commencing a common law claim for indemnification. The first case defendant cites *In re Poseidon Pool & Spa Recreational, Inc.* (391 BR 234, 247 [Bankr ED NY 2008]) declined to dismiss such a claim, finding that there was "a genuine issue of fact concerning whether the Debtor is primarily liable for Joseph Gartner's alleged wrongful conduct." The second case dismissed the claim only after it was already determined that the defendant was not at fault (*see Bigelow v Gen. Elec. Co.*, 120 AD3d 938, 941 [4th Dept 2014]).

Plaintiffs also note in opposition that the court in *Children's Corner Learning Ctr. v A. Miranda Contr. Corp.* (64 AD3d 318, 326 [1st Dept 2009]) specifically allowed a claim for common law indemnification to continue prior to a determination of fault, stating that "the possibility exists that an ultimate finding of liability against Loheac could have been solely due to Berger's negligence" (opp mem at 28). Defendant fails to address any of these points in reply. The motion to dismiss the Sixth Cause of Action is denied.

Defendant also argues that plaintiffs' claim for attorney's fees should be denied on the basis that section 6.11 of the Indenture "merely describes the Court's authority under New York law to award attorneys' fees" for frivolous conduct, as detailed provided in 22 N.Y.C.R.R. §

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consequence of the breach (sup mem at 17-19). The only cases defendant cites to in support of this argument, however, are factually inapposite (*see id.*, citing *Vista Food Exch., Inc. v BenefitMall*, 138 AD3d 535, 536 [1st Dept 2016], *lv to appeal denied*, 28 NY3d 902 [2016] [claimed damages from "potential incurment of tax penalties and other liabilities due to the third party's failure to pay plaintiff's taxes"] and *Kenford Co., Inc. v Erie County*, 67 NY2d 257, 262 [1986] [finding that evidence presented at trial regarding lost profits from stadium that was never completed did not establish damages with sufficient certainty due to "the multitude of assumptions required to establish projections of profitability over the life of this contract"]). Plaintiffs note this fact in opposition (opp mem at 21-23), and defendant abandons the argument in reply (*see generally* reply). Defendant also argues that the claimed damages are expressly barred by the Auction Agent Agreements. Those claims were dismissed on other grounds. The issue is moot.

130- 1(a) (sup mem at 25). Defendant thus argues that count seven should be dismissed because the complaint does not assert that defendant engaged in frivolous conduct. However, as plaintiffs note in reply, defendant's argument is belied by the plain language of section 6.11, which states that "in any suit for the enforcement of any right or remedy under this Indenture, or in any suit against the Trustee for any action taken or omitted by it as Trustee," the Court "may in its discretion assess reasonable costs, including reasonable attorneys['] fees, against any party in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant." Defendants fail to address this point in reply. The Seventh Cause of Action survives.

Defendant also contends plaintiffs' declaratory judgment claim should be dismissed "[b]ecause Plaintiffs fail to adequately allege any actionable breach" (sup mem at 25 n 14). Because, as described above, plaintiffs have sufficiently pleaded multiple claims of breach, the motion is denied on that ground but shall be granted in the court's discretion as plaintiffs have alleged sufficient claims at law (*see Apple Records, Inc. v Capital Records, Inc.*, 137 AD3d 50, 54 [1st Dept 1988] [dismissal of causes of action for declaratory judgments within the motion court's discretionary powers since the "plaintiff has an adequate, alternative remedy in another form of action," namely "breach of contract"]).

III. CONCLUSIONS

For the forgoing reasons, the motion is GRANTED to the (x) extent of dismissing counts two (breach of Auction Agent Agreements), three (breach of the duty to avoid conflicts of interest), five (conversion) and eight (declaratory judgment) in their entirety, and (y) dismissing count one (breach of the Indenture) to the extent it relates to the purported miscalculation of the Maximum Rate and improper payment of Carry-Over Amounts. All claims by plaintiff Henry Howard are dismissed as he is neither a party to nor a beneficiary of any of the relevant agreements. The court has considered the other claims of the parties and found them of no merit. The motion is denied in all other respects.

Accordingly, it is hereby

ORDERED that the motion of defendant, The Bank of New York Mellon, to dismiss the complaint (Motion Sequence Number 001) is GRANTED to the extent of (1) dismissing the Second, Third, Fifth and Eighth Causes of Action, (2) dismissing the First Cause of Action only

to the extent it relates to the alleged miscalculation of the Maximum Rate and improper payment of Carry-Over Amounts and (3) dismissing the complaint of Henry Howard in its entirety, and is otherwise DENIED; and it is further

ORDERED that defendant shall answer the complaint within twenty (20) days of the date of service of this Decision and Order with notice of entry; and it is further

ORDERED that counsel for the parties shall appear at a compliance conference on Tuesday, January 22, 2019 at 10:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: August 7, 2018

ENTER,

O. PETER SHERWOOD J.S.C.