UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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TRIAXX PRIME CDO 2006-1, LTD.,
TRIAXX PRIME CDO 2006-2, LTD., and
TRIAXX PRIME CDO 2007-1, LTD.,

Plaintiffs,

- against -

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

Defendants.
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**MEMORANDUM AND ORDER**

16 Civ. 1597 (NRB)

**NAOMI REICE BUCHWALD**
**UNITED STATES DISTRICT JUDGE**

Plaintiffs Triaxx Prime CDO 2006-1, Ltd., Triaxx Prime CDO 2006-2, Ltd., and Triaxx Prime CDO 2007-1, Ltd. (together, "Triaxx," the "CDO Issuers," or "plaintiffs"), bring this suit against defendants U.S. Bank, National Association ("U.S. Bank") and the Bank of New York Mellon ("BNY Mellon" and, together with U.S. Bank, "defendants"), for breach of contract, breach of fiduciary duty, and failure to avoid conflicts, seeking damages and equitable relief. In Triaxx Prime CDO 2006-1, Ltd. v. Bank of New York Mellon, No. 16 Civ. 1597 (NRB), 2017 WL 1103033 (S.D.N.Y. Mar. 21, 2017) ("Triaxx I"), we dismissed plaintiffs' contract claims and breach of fiduciary duty claims, and granted plaintiffs a final opportunity to file an amended complaint. Because plaintiffs' third amended complaint ("TAC") did not cure the deficiencies we identified in Triaxx I and has failed to

state any viable tort claim, defendants' motion to dismiss is granted.

## I. Background[1]

In the wake of the financial crisis, this District has been awash in suits seeking redress for and attempting to apportion liability for the losses incurred by RMBS trusts and CDOs. In this case, the Triaxx plaintiffs are three special-purpose investment vehicles incorporated in the Cayman Islands that issued three eponymous CDOs, and the defendants U.S. Bank and BNY Mellon are the trustees of 45 RMBS trusts purchased by the plaintiffs in 2006 and 2007 that comprised part of the corpus of the CDOs (the "RMBS Trusts" or the "Subject Trusts"). TAC ¶¶ 1, 4. At the time of their issuance, the 45 Subject Trusts had a notional value of approximately $4.26 billion. TAC ¶ 1.

Each of the Triaxx CDOs is governed by an indenture agreement (the "CDO Indentures") between the CDO Issuer and the trustee of the CDO indenture (the "CDO Indenture Trustee"), which, inter alia, transferred the CDO Issuers' property to the CDO Indenture Trustee and provided the CDO Indenture Trustee certain rights and duties. ECF Nos. 54-2, 54-7, and 54-8. The original CDO Indenture Trustee was LaSalle Bank; U.S. Bank

[1] The facts are drawn from plaintiffs' TAC (ECF No. 109) and Triaxx I. We assume the reader's familiarity with our earlier opinion and only provide the background relevant for deciding the motions before the Court. For general background on the structuring of residential mortgage-backed security ("RMBS") trusts, see Phoenix Light SF Ltd. v. Deutsche Bank Nat'l Tr. Co., 172 F. Supp. 3d 700, 705-06 (S.D.N.Y. 2016), and Fixed Income Shares: £Series M v. Citibank N.A., 130 F. Supp. 3d 842, 845-46 (S.D.N.Y. 2015).

succeeded LaSalle Bank and is the current CDO Indenture Trustee for each CDO. Triaxx I, 2017 WL 1103033, at *1.[2]

The CDO Issuers also entered into Collateral Management Agreements ("CMAs"), which appoint a Collateral Manager as their agent to "take on behalf of the Issuer or direct the [CDO Indenture] Trustee to take [various enumerated] actions . . . [including] exercis[ing] any other rights or remedies with respect to such Collateral Debt Security, Equity Security or Eligible Investment as provided in the related Underlying Instruments or tak[ing] any other action consistent with the terms of the Indenture which the Collateral Manager reasonably believes to be in the best interests of the Noteholders." TAC ¶ 21; see ECF Nos. 62-1 ¶ 2, 62-2 ¶ 2, 62-3 ¶ 2; Triaxx I, 2017 WL 1103033, at *4.

Each of the 45 RMBS Trusts at issue in this case is governed by its own Pooling and Servicing Agreement ("PSA"), which sets forth certain duties of the RMBS Trustees, including protecting the rights and interests of the Trust for the benefit of its certificateholders. TAC ¶ 14. U.S. Bank is the RMBS Trustee of 33 of the Subject Trusts; BNY Mellon is the RMBS Trustee for the other 12. TAC ¶ 3.

Plaintiffs assert that RMBS Trust documents generally include representations and warranties ("R&Ws") from the loan

[2] While U.S. Bank is both the CDO Indenture Trustee and an RMBS Trustee, the CDO Issuers sue U.S. Bank only in its capacity as RMBS Trustee.

sellers attesting to the quality and characteristics of the mortgages, including compliance with underwriting standards, owner occupancy statistics, appraisal procedures, and loan-to-value ratios. TAC ¶¶ 12, 14, 15.

Plaintiffs allege that defendants knew that the RMBS Trusts' loan pools contained a high percentage of loans that materially breached the R&Ws in the PSAs, TAC ¶¶ 54-94, knew that the RMBS Trusts suffered from ongoing breaches of covenants and agreements by servicers and master servicers, TAC ¶¶ 95-123, and knew of numerous Events of Default ("EODs") for the loans in the RMBS Trusts, TAC ¶¶ 124-26. Given defendants' knowledge of these breaches of R&Ws, breaches of covenants and agreements, and EODs, plaintiffs argue that defendants had contractual duties to take various actions to remedy these issues. TAC ¶¶ 128-36.

Plaintiffs further allege that after an EOD occurred, defendants' duties "expanded to include a fiduciary duty owed to the Subject Trusts and all Certificatefolders," and that defendants breached this duty by failing to "create a strategy for recovery across all of the Subject Trusts . . . to protect the Subject Trusts and Certificateholders." TAC ¶¶ 181-82, 187-88. Finally, plaintiffs assert that defendants violated their duties "to give the Subject Trusts and their Certificateholders

undivided loyalty, free from any conflicting self-interest." TAC ¶¶ 167, 175.

## II. Procedural History

Plaintiffs filed their initial complaint against U.S. Bank, BNY Mellon, and JPMorgan Chase & Co. ("JPMC") on March 2, 2016. ECF No. 1. On April 21, 2016, plaintiffs voluntarily dismissed their claims against JPMC. ECF No. 32. Plaintiffs filed an amended complaint on May 3, 2016, asserting claims for breach of contract and breach of fiduciary duty. ECF No. 33. Defendants U.S. Bank and BNY Mellon subsequently moved to dismiss. ECF Nos. 49, 53. Plaintiffs filed a proposed second amended complaint as an attachment to their opposition to the first motion to dismiss, replacing their breach of fiduciary duty claims with claims for breach of duty to avoid conflicts. ECF No. 61-1.

On March 21, 2017, we granted defendants' motions to dismiss, holding that plaintiffs lacked standing for their contract claims because they granted "all of [their] right, title and interest" in "any and all . . . property" to the CDO Indenture Trustee in the CDO Indentures, and that this grant included the transfer of the right to bring contract claims relating to the RMBS at issue in this case. Triaxx I, 2017 WL 1103033, at *3-*5. We also dismissed plaintiffs' breach of fiduciary duty claims as abandoned. Id. at *6.

The Court granted plaintiffs a final opportunity to amend their complaint. Plaintiffs filed a second amended complaint on May 4, 2017 and the TAC on July 17, 2017, which corrected a pleading error affecting one of the 45 Subject Trusts. ECF Nos. 96, 106, 109. The TAC asserted seven claims, entitled: (1) Breach of Contract against U.S. Bank; (2) Breach of Contract against BNY Mellon; (3) Negligence/Failure to Avoid Conflicts against U.S. Bank; (4) Negligence/Failure to Avoid Conflicts against BNY Mellon; (5) Breach of Fiduciary Duty against U.S. Bank; (6) Breach of Fiduciary Duty against BNY Mellon; and (7) Breach of Duty and Equitable Relief against U.S. Bank. TAC ¶¶ 148-99.

Defendants filed a joint motion to dismiss, arguing that (1) plaintiffs lack standing for each of their claims; (2) the economic loss doctrine bars plaintiffs' tort claims; (3) plaintiffs abandoned their fiduciary duty claims; and (4) the Court already rejected the basis for Count VII. Defs.' Mem. of Law, ECF No. 103.

## III. Legal Standard

"[A]ny person invoking the power of a federal court must demonstrate standing to do so." Hollingsworth v. Perry, 570 U.S. 693, 704 (2013). Plaintiffs bear the burden "of alleging facts that affirmatively and plausibly suggest that it has standing to sue." Cortlandt St. Recovery Corp. v. Hellas

Telecomms., S.à.r.l, 790 F.3d 411, 417 (2d Cir. 2015). In assessing plaintiffs' standing, the Court must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the plaintiffs' favor. Tandon v. Captain's Cove Marina of Bridgeport, Inc., 752 F.3d 239, 243 (2d Cir. 2014). In deciding a Rule 12(b)(1) motion, the Court may review evidence outside the pleadings to determine whether jurisdiction exists. Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000).

On a motion to dismiss under Rule 12(b)(6), the Court must accept as true all factual allegations in the complaint and draw all reasonable inferences in plaintiffs' favor. City of Providence v. BATS Glob. Mkts., Inc., 878 F.3d 36, 48 (2d Cir. 2017). Nevertheless, plaintiffs' factual allegations must "be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

## IV. Discussion

### 1. Breach of Contract Claims

In Triaxx I, the Court dismissed plaintiffs' contract claims for lack of standing, stating: "[i]f plaintiffs wish to assert contract claims in the amended complaint, the plaintiffs must also explain how they have cured the standing issues identified herein." 2017 WL 1103033, at *6. Plaintiffs assert

that two "developments" exhume their contract claims: 1) "changes" in New York law; and 2) Section 7.5 of the CDO Indentures. Neither cures the defects that we previously identified.

First, plaintiffs assert that the New York Appellate Division's decision in Natixis Real Estate Capital Tr. 2007-HE2 v. Natixis Real Estate Holdings, LLC, 50 N.Y.S.3d 13, 149 A.D.3d 127 (1st Dep't 2017) ("Natixis"), clarified New York law as to standing. We initially note that Natixis was decided on March 9, 2017, 12 days before the Court dismissed plaintiffs' contract claims in Triaxx I. To the extent that plaintiffs believe Natixis is controlling law in their favor, they could have filed a letter with the Court or submitted a motion for reconsideration. See Local Civil Rule 6.3; Fed. R. Civ. P. 59(e); Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 104 (2d Cir. 2013) (motion for reconsideration should be granted when a party identifies "an intervening change of controlling law"). However, plaintiffs failed to bring this case to the Court's attention, even though they had previously done so. See Pls.' Letter to the Court (Feb. 24, 2017), ECF No. 82 ("We write to bring to the Court's attention two relevant court decisions that were issued after the parties completed briefing on Defendants' motions to dismiss . . . .").

Moreover, Natixis is readily distinguishable from the present case, as the plaintiff in that case was the Securities Administrator of an RMBS Trust who was explicitly granted by contract the right to bring claims to address a failure to repurchase a breaching loan on behalf of the Trust. 50 N.Y.S.3d 13, 17-19. By contrast, we held in Triaxx I that the Collateral Manager, who plaintiffs agree is analogous to the Securities Administrator in Natixis, is precluded by the granting clause of the CDO Indentures from bringing these contract claims. Triaxx I, 2017 WL 1103033, at *4.

The other cases cited by plaintiffs in support of this argument, Hildene Capital Management, LLC v. Bank of New York Mellon, 105 A.D.3d 436 (1st Dep't 2013), and CWCapital Asset Management, LCC v. Chicago Properties, LLC, 610 F.3d 497 (7th Cir. 2010), clearly do not merit departure from our holding in Triaxx I. Plaintiffs cited Hildene in their initial motion to dismiss, ECF No. 60, p. 18 n.8, and Triaxx I rejected plaintiffs' Hildene argument, 2017 WL 1103033, at *5. CWCapital likewise cannot "cure" plaintiffs' standing deficiencies: not only did it precede Triaxx I by almost seven years, but it is also not binding authority on this Court.

Plaintiffs' reliance on Section 7.5 of the CDO Indentures fares no better. While plaintiffs cite this provision for the first time in the TAC, the full text of the CDO Indentures was

before the Court in deciding Triaxx I. This contractual provision is not "new" merely because plaintiffs did not choose to highlight it until now.

In any event, Section 7.5 does nothing to change our calculus: it concerns the preservation of a security interest in the collateral and does not circumscribe the CDO Indentures' grant of "all . . . right, title and interest" to the CDO Indenture Trustee. We agree with the Southern District of Florida's analysis of the same contractual provision in reaching the decision that these very same Triaxx plaintiffs lacked standing for their contract claims: Section 7.5 "fail[s] to establish Plaintiffs' right to 'sue to defend the value of the collateral.'" Triaxx Prime CDO 2006-1, Ltd. v. Ocwen Loan Servicing, LLC, No. 17 Civ. 80203 (RLR), 2017 WL 3701251, at *3 (S.D. Fla. Aug. 21, 2017).

Having rejected plaintiffs' attempts to resuscitate their contract claims, we reiterate our holding in Triaxx I: "Each CDO Issuer's 'Grant' of 'all of its right, title and interest' in 'any and all . . . property' is broad enough to include the transfer of the right to bring contract claims relating to any 'instruments [and] securities . . . including . . . the Collateral Debt Securities . . . .'" Triaxx I, 2017 WL 1103033, at *3. These plaintiffs therefore lack standing to bring these contract claims.

**2. Tort Claims**

Plaintiffs' initial complaint and first amended complaint asserted tort claims against defendants for breaches of their fiduciary duties. ECF No. 1 ¶¶ 78-93; ECF No. 33 ¶¶ 55-70. In their opposition to defendants' first round of motions to dismiss, plaintiffs attached a proposed second amended complaint that substituted breach of the duty to avoid conflict claims for the breach of fiduciary claims. ECF No. 61-1 ¶¶ 156-71. Plaintiffs then conceded at oral argument that they were abandoning their breach of fiduciary duty claims, and the Court dismissed these claims as abandoned. Triaxx I, 2017 WL 1103033, at *6. We then observed that plaintiffs appeared to "have retained their standing to bring extracontractual tort claims," but reserved judgment on whether "extracontractual tort claims would or would not survive a motion to dismiss on other grounds." Id. at *5.

**a. Failure to Plead Existence of a Duty**

In the TAC, plaintiffs alleged failure to avoid conflicts and breach of fiduciary duty claims against U.S. Bank and BNY Mellon. For any of these four claims to survive a motion to dismiss, plaintiffs must allege that defendants owed them a duty.

Plaintiffs' failure to avoid conflicts claims are pled as claims for negligence. TAC ¶¶ 166-179; see Phoenix Light SF

Ltd. v. Bank of New York Mellon, No. 14 Civ. 10104 (VC), 2015 WL 5710645, at *7 (S.D.N.Y. Sept. 29, 2015) ("[C]onflict of interest allegations are properly pled under a negligence cause of action, not a breach of fiduciary or breach of loyalty cause of action."). Under New York law,[3] to sustain a claim for negligence, plaintiffs must show that (1) defendants owed plaintiffs a cognizable duty of care; (2) defendants breached that duty; and (3) plaintiffs suffered damage as a proximate result of the breach. Di Benedetto v. Pan Am World Serv., Inc., 359 F.3d 627, 630 (2d Cir. 2004) (citing Solomon by Solomon v. City of New York, 66 N.Y.2d 1026, 1027, 489 N.E.2d 1294 (1985)). "Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party." Espinal v. Melville Snow Contractors, 98 N.Y.2d 136, 138, 773 N.E.2d 485 (2002).

Breach of fiduciary duty claims also require plaintiffs to plead that defendants owed them a duty. See Johnson v. Nextel Comm'ns Inc., 660 F.3d 131, 138 (2d Cir. 2011) (citing Barrett v. Freifeld, 64 A.D.3d 736, 883 N.Y.S.2d 305, 308 (2d Dep't 2009)) ("The elements of a claim for breach of a fiduciary obligation are: (i) the existence of a fiduciary duty; (ii) a knowing breach of that duty; and (iii) damages resulting

[3] All parties assume that New York law applies to plaintiffs' tort claims, and the Court sees no reason to deviate from that understanding.

therefrom."). For all of plaintiffs' tort claims, "[t]he existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the courts." Sanchez v. State of New York, 99 N.Y.2d 247, 252, 784 N.E.2d 675 (N.Y. 2002).

Here, plaintiffs alleged that defendants owed duties to the Certificateholders and Subject Trusts, but made no allegations that defendants owed any duty to the CDO Issuer plaintiffs. See TAC ¶¶ 127 ("Defendants failed to perform their contractual and extra-contractual duties to protect the Trusts and Certificateholders." (emphasis added)); 137 ("The Defendants failed to discharge their pre- and post-default duties owed to the Subject Trusts and Certificateholders because acting to protect the interests of the Trusts would have conflicted with their own interests." (emphasis added)); 167 ("Under New York law, U.S. Bank, as an indenture Trustee, has specific extra-contractual duties to the Subject Trusts and all Certificateholders. These duties include the duty to give the Subject Trusts and their Certificateholders undivided loyalty, free from any conflicting self-interest." (emphasis added)); 175 ("Under New York law, BNY Mellon, as an indenture Trustee, has specific extra-contractual duties to the Trusts and all Certificateholders. These duties include the duty to give the Subject Trusts and their Certificateholders undivided loyalty,

free from any conflicting self-interest." (emphasis added)); 181-82 ("After the occurrence of an Event of Default, U.S. Bank's duties expanded to include a fiduciary duty owed to the Subject Trusts and all Certificateholders. . . . U.S. Bank breached its fiduciary duty to the Subject Trusts and all Certificateholders in several respects . . . ." (emphasis added)); 187-88 ("After the occurrence of an Event of Default, BNY Mellon's duties expanded to include a fiduciary duty owed to the Subject Trusts and all Certificateholders. . . . BNY Mellon breached its fiduciary duty to the Subject Trusts and all Certificateholders in several respects . . . ." (emphasis added)).

However, plaintiffs here are neither Subject Trusts nor Certificateholders. See TAC ¶ 1 & Ex. A (listing the 45 "Subject Trusts"); Pls.' Mem. of Law in Opp'n, ECF No. 111, at 20-21 (describing plaintiffs as "the original holder[s] of the RMBS certificates" who "assigned those certificates to the Trustee" and are "not in physical possession of the RMBS certificates"). As described in Triaxx I and above, plaintiffs ceased to be Certificateholders when they entered into the CDO Indentures. See Triaxx I, 2017 WL 1103033, at *3. No current Certificateholder or Subject Trust is a plaintiff in this action, and none has sought to intervene or otherwise expressed support for the claims in this litigation to the Court. This

failure to plead the existence of a duty owed by defendants to plaintiffs must result in the dismissal of these claims.[4]

Even if plaintiffs asserted that their claims were based on having incurred damages as a result of defendants' breach of fiduciary duties owed to third parties, see TAC ¶¶ 184, 190,[5] that would not be sufficient to state a tort claim here. A fiduciary duty that arises out of contract, as defendants' duties here are allegedly triggered by EODs as defined in the PSAs, does not create a duty other than that established by the contract. See, e.g., Schwartzco Enters. LLC v. TMH Mgmt., LLC, 60 F. Supp. 3d 331, 353 (E.D.N.Y. 2014) (rejecting fiduciary duty claims arising from a contract where "Plaintiffs point to no specific [contractual language] triggering such a duty"). With limited exceptions that do not apply here,[6] a duty to the Certificateholders and RMBS Trusts does not give rise under New York law to tort liability in favor of a third party. See Espinal, 98 N.Y.2d at 138, 773 N.E. 2d 485; BNP Paribas Mortg.

[4] Plaintiffs offer no response to defendants' argument that they failed to allege the element of duty, focusing instead on Article III standing and damages. Defendants do not meaningfully contest these elements in their reply brief, and we need not address them here.

[5] It is not clear from plaintiffs' motion papers that they actually propound this argument. Nonetheless, we address (and refute) it here.

[6] The three exceptions are: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely." Espinal, 98 N.Y.2d at 140. Exceptions (1) and (3) facially have no application here. The detrimental reliance exception also does not apply because it "requires a showing of physical harm and is not satisfied by pure economic loss." BNP Paribas, 949 F. Supp. 2d at 518.

Corp. v. Bank of America, N.A., 949 F. Supp. 2d 486, 518 (S.D.N.Y. 2013) ("Under New York law, breach of a contractual duty to render services does not give rise to tort liability in favor of a third party except in three circumstances . . . .").

In sum, plaintiffs' tort claims seek damages on behalf of third parties for breaches of duties owed to those third parties without the third parties' participation in or any manifestation of their consent to bring this litigation. See Feb. 21, 2018 Oral Arg. Tr. 8:8-8:24. Plaintiffs cite no authority, and the Court is aware of none, that supports the existence of a duty owed by defendants to plaintiffs under these circumstances.

**b. Breach of Fiduciary Duty Claims**

Plaintiffs' renewed breach of fiduciary duty claims also fail because they largely mirror the claims we already dismissed as abandoned in Triaxx I. Compare ECF No. 33 ¶¶ 55-70, with ECF No. 109 ¶¶ 180-191. There are two principal changes in the renewed claims: 1) plaintiffs excised all explicit references to the relevant contractual provisions of the PSAs; and 2) plaintiffs added a footnote that states: "To be clear, the fiduciary duty claims asserted herein . . . are based on ***extra-contractual*** fiduciary duties – not the contractually-based obligations alleged in the fiduciary duty claims asserted in the First Amended Complaint." TAC ¶ 182 n.12 (emphasis in original). That is, plaintiffs seem to contend that merely

labeling these claims "extra-contractual" will somehow transmogrify them into extracontractual claims. It does not.

Plaintiffs' renewed breach of fiduciary duty claims rely on the fact that "[a]fter the occurrence of an Event of Default, [defendants'] duties expanded to include a fiduciary duty owed to the Subject Trusts and all Certificateholders." TAC ¶¶ 181, 187. That is, defendants' fiduciary duties derive from their contractual obligations arising in the "Event of Default," which as plaintiffs acknowledge elsewhere in the TAC, is a defined term in the PSAs. TAC ¶ 42 ("The PSAs also set forth the obligations of U.S. Bank and BNY Mellon upon occurrence of a servicer/master servicer 'Event of Default,' which is defined as a specified failure of the servicer to perform its servicing duties and cure this failure within a specified time period."). Simply put, defendants' fiduciary duties that arise in an Event of Default, and plaintiffs' claims for breaches of those duties, are based in contract.

As a result, these claims for breach of fiduciary duty fail for two reasons. First, they represent an improper attempt to re-plead the claims we already dismissed as abandoned. See Radin v. Tun, No. 12 Civ. 1393 (ARR) (VMS), 2015 WL 4645255, at *22-23 (E.D.N.Y. Aug. 4, 2015); Benjamin v. T.U.C.S., No. 14 Civ. 2982 (KBF), 2015 WL 3947902, at *4 (S.D.N.Y. June 29, 2015); Allen v. N.Y.C. Hous. Auth., No. 10 Civ. 00168 (CM) (DF),

2012 WL 4794590, at *4 (S.D.N.Y. Sept. 11, 2012) ("A party may voluntarily drop claims by choosing not to include them in a proposed amended pleading. In such a circumstance, it is appropriate for the Court to dismiss the abandoned claims with prejudice.").

Second, even if these claims had not already been dismissed as abandoned, they would be barred by the economic loss doctrine, which provides that "a contracting party seeking only a benefit of the bargain recovery may not sue in tort notwithstanding the use of familiar tort language in its pleadings." BlackRock Allocation Target Shares: Series S. Portfolio v. Wells Fargo Bank, Nat'l Ass'n ("BlackRock"), 247 F. Supp. 3d 377, 399 (S.D.N.Y. 2017) (quoting Phoenix Light SF Ltd. v. U.S. Bank Nat'l Ass'n, No. 14 Civ. 10116 (KBF), 2016 WL 1169515, at *9 (S.D.N.Y. Mar. 22, 2016)). In BlackRock, the plaintiffs pleaded "extracontractual" fiduciary duty claims against an RMBS trustee. However, the court dismissed some of these claims as barred by the economic loss doctrine, holding that "insofar as Plaintiffs have pleaded that Defendant breached, for example, its post-EOD fiduciary duty in failing to act as it was contractually required to, the economic-loss doctrine *does* bar Plaintiffs' claims." 247 F. Supp. 3d at 400 (emphasis in original). This decision is consistent with a host of courts in this District that have dismissed claims for

breaches of fiduciary duties based in contract on the basis of the economic loss doctrine in the RMBS context. See Blackrock Core Bond Portfolio v. U.S. Bank Nat'l Ass'n, 165 F. Supp. 3d 80, 105-06 (S.D.N.Y. 2016); Phoenix Light SF Ltd. v. U.S. Bank Nat'l Ass'n, No. 14 Civ. 10116 (KBF), 2016 WL 1169515, at *9 (S.D.N.Y. Mar. 22, 2016); Nat'l Credit Union Admin. Bd. V. U.S. Bank Nat'l Ass'n, No. 14 Civ. 9928, 2016 WL 796850, at *11 (S.D.N.Y. Feb. 25, 2016). The same logic applies here. Plaintiffs' fiduciary duty claims are based on defendants' alleged violations of their post-EOD contractual obligations, and their damages therefore lie in the enforcement of those contractual obligations.

**3. Equitable Relief**

Plaintiffs' seventh claim for relief requests that the Court "exercise its equitable power over U.S. Bank as a trustee to direct U.S. Bank . . . to assign its authority to the Triaxx CDOs or to the Collateral Manager . . . to pursue the Triaxx Action on its behalf." TAC ¶ 199. Plaintiffs base this argument on the assertion that, without such an assignment, they will "ha[ve] no adequate remedy at law" because U.S. Bank as CDO Indenture Trustee "is operating under an irreconcilable conflict of interest." TAC ¶¶ 194, 198.

Plaintiffs cite authority that purportedly stands for the proposition that courts have the equitable power to award the

requested relief, see, e.g., Amara v. Cigna Corp., 925 F. Supp. 2d 242, 260 (D. Conn. 2012), aff'd, 775 F.3d 510 (2d Cir. 2014); In re Joint E. & S. Dist. Asbestos Litig., No. 90 Civ. 3973 (BRL), 1991 WL 86304 (E.D.N.Y. May 16, 1991), amended, 129 B.R. 710 (E.D.N.Y. June 26, 1991), vacated, 982 F.2d 721 (2d Cir. 1992); Benedict v. Amaducci, No. 92 Civ. 5239 (KMW), 1993 WL 87937 (S.D.N.Y. Mar. 22, 1993). However, examination of the citations reveals that the courts did not actually order the assignment of the authority to pursue litigation from a trustee to a third party in any of these cases. Even assuming that the Court possesses this power, plaintiffs have not demonstrated that such a remedy would be appropriate in this case. The ultimate beneficiaries of any award here would be the noteholders of the CDOs, not the plaintiffs.[7] The noteholders are sophisticated investors who have neither chosen to litigate this case nor attempted to direct the CDO Indenture Trustee to assign the claims back to the plaintiffs or to a third party.[8] Therefore, we reject plaintiffs' assertion that any allegedly injured party has been deprived of an adequate remedy of law,

[7] See Feb. 21, 2018 Oral Arg. Tr. 8:8-8:15 ("THE COURT: . . . There are three plaintiffs here. My question is: Do any or all of these three plaintiffs stand to lose any money because of the alleged breaches by the defendants? MR. JACOB: . . . They don't lose the money perhaps in a sense you are asking the question because at end of the day, they don't keep the money, they distribute the money.").

and see no valid reason to grant plaintiffs this extraordinary relief.

## V. Conclusion

For the foregoing reasons, we grant defendants' motion to dismiss. Plaintiffs have already been given their "final opportunity to amend the complaint. No subsequent amendments will be permitted." Triaxx I at *6.

The Clerk of Court is respectfully directed to terminate the motion pending at docket entry 102, enter judgment for defendants, and close this case.

**SO ORDERED.**

Dated: New York, New York
March 8, 2018

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

[8] See Feb. 21, 2018 Oral Arg. Tr. 7:7-8 ("THE COURT: So no noteholder has reared its head? MR. JACOB: Not that I am aware of with respect to these instruments, your Honor.").