Section 5.03 of the Security Agreement states that, with respect to funds for the purchase of new mortgages, "no withdrawals from the Collateral Account shall be made *on any day*" unless, giving effect to the issuance of and payment on specific notes on that day and the purchase of additional Mortgage Loans on that day, the sum of the aggregate principal amount of the outstanding notes and certain other amounts would not exceed the value of mortgage loans and other assets owned or held "by the Issuer [Ocala] *on such day*." Ex. A, § 5.03(a) at 20 & § 5.03(b) at 26 (emphases added). Based solely on this provision, Plaintiffs allege that BoA could not comply with instructions to withdraw funds without first examining whether the value of the collateral held or owned by Ocala was sufficient to cover Ocala's obligations under the notes. DB Compl. ¶ 78; BNP Compl. ¶¶ 84-85. But, as with their arguments concerning the *use* of funds withdrawn from the collateral accounts, Plaintiffs fail to identify any language indicating that it was *BoA's* responsibility—as opposed to the responsibility of TBW or Ocala—to ensure that the specified conditions existed before a fund withdrawal request could be made.

As noted above, the Security Agreement and the other Facility Documents make clear that it is *Ocala*, and not BoA, that is to "purchase" new mortgage loans. *See, e.g.*, Purchase Agmt., Ex. I, § 2.1 at 2-4. And Section 5.03 of the Security Agreement places squarely upon Ocala the responsibility to instruct BoA to withdraw funds for such purchases, stating that Ocala "shall on any given day ... instruct according to the Facility Documents the Collateral Agent to withdraw, or order the transfer of, Deposited Funds" for the purchase of additional mortgage loans. Ex. A, § 5.03(a) at 16 & § 5.03(a)(vii) at 20; *see also id.* § 5.03(b) at 21 & § 5.03(b)(ix) at 25. It is in this specific context of *Ocala-requested* withdrawals for the purchase of new mortgages that Section 5.03 states that "no withdrawals from the Collateral Account shall be made on any day" unless the specified conditions exist, and then goes on to state that the instructions from Ocala "shall be effective upon receipt" and that BoA "shall promptly comply with any such approved instruction made by the Issuer [Ocala]." Ex. A, § 5.03(a) at 20 & 5.03(b) at 26.

Against this backdrop, Plaintiffs' assertion that *BoA* was required to conduct an analysis of the assets and liabilities held by Ocala each time BoA received a funding request is not supported

by any plausible reading of the Security Agreement. Most prominently, Section 5.03 of the Agreement does not expressly place this responsibility on BoA, and any retrospective effort to *imply* duties that BoA did not expressly assume is precluded by the explicit internal rule of construction that nothing in the Agreement shall be deemed to "impose on the Collateral Agent [BoA] *any obligations other than those for which express provision is made herein.*" Ex. A, § 8.01 at 36 (emphasis added). Moreover, given that the withdrawal or transfer instructions come from Ocala, the Agreement can only be read to place the responsibility on Ocala or its manager, TBW, to ensure that the asset/liability test is met before Ocala makes such an instruction. "[W]hen interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized." *Joseph v. Creek & Pines, Ltd.*, 217 A.D.2d 534, 535, 629 N.Y.S.2d 75, 76 (1995).

The structure of the Security Agreement and the other Facility Documents confirm that it was Ocala, and not BoA, that was to ensure the formula in Section 5.03 was met before instructing withdrawals. Once again, the Agreement contained no process or procedure whatsoever—either in Section 5.03 or anywhere else in the Agreement—for BoA, upon receipt of a transfer instruction, to undertake the analysis and calculations that would be required to determine whether the formula in Section 5.03 was satisfied before BoA complied with the instruction. The Agreement does not include provisions by which Ocala would provide the necessary information to BoA to make that determination, or even a waiting period in which BoA would conduct the analysis. On the contrary, the specification that the instruction is "effective on receipt" and must be complied with "promptly" (Ex. A, § 5.03(a) at 20 & § 5.03(b) at 26) makes clear that the Section 5.03 condition must be evaluated *before* Ocala issues the instruction—and thus, necessarily, must be evaluated by Ocala or TBW, as its sole manager.

Moreover, as the Facility Documents are structured, it is only TBW and Ocala that would know, on any given day, precisely what assets were owned by Ocala as of that date and the precise status of the various outstanding mortgage loans. For example, although the Security Agreement

mandates that cash received through the sale of mortgages would be placed by Ocala in the Collateral Account (*see* Ex. A, § 4.02 at 10), it would not be possible on any given day for BoA to know exactly what proceeds Ocala had on hand at that time because cash would not be deposited instantaneously. Further, the Ocala program contemplated that mortgages would be transferred out of the program to be considered for possible purchase (*see* Custodial Agmt., Ex. D, § 6(c) at 4-5), so at any time, by design, some of Ocala's mortgages would not be in BoA's custody. BoA necessarily would have to rely on TBW and Ocala to tell it which of these loans out for sale had been sold and which remained in the program. Because TBW and Ocala were the only entities that had that information, the Agreement can only be read to require TBW and Ocala, and not BoA, to ensure that Ocala's funding requests were in compliance with Section 5.03.

Once again, this conclusion is confirmed by the express contractual provisions delineating the respective roles of TBW, Ocala, and BoA. Not only does BoA have no responsibilities *other* that those expressly imposed by the Agreement (*see* Ex. A, § 8.01 at 36), but it expressly has no duty to monitor or even "inquire" as to the performance or observance of TBW's or Ocala's duties under the Agreement or any other Facility Document, or to "inspect any books and records relating to the Assigned Collateral" (*id.* § 8.01 at 37). Rather, BoA "shall be entitled to rely, and shall be fully protected in such reliance" on any "communication" or "direction" that it reasonably believes to be genuine—including communications or directions from TBW. *Id.* By contrast, TBW, as Ocala's sole manager and agent, expressly undertook to comply with Ocala's contractual duties, as well as to perform its own. LLC Agmt., Ex. G, § 4.01(b) at 11. These provisions confirm that the Agreement did not require BoA, as a condition to its affirmative duty to comply with withdrawal requests, either to police TBW's or Ocala's compliance with their own contractual obligations or to examine Ocala's books and records to perform an assets/liabilities analysis. *See Banco Espanol*, 763 F. Supp. at 39.

6. <u>The Security Agreement Did Not Require BoA to Ensure Segregation of Loans and Cash Collateral.</u>

Equally flawed is Plaintiffs' assertion that the Security Agreement imposed on BoA the duty to ensure that "mortgages *it* purchased and funds *it* received from the sale of such mortgages"

were rigorously segregated as between the two collateral sub-accounts set up for the benefit of the Secured Parties. *See* DB Compl. ¶ 141 (emphases added); *see also* BNP Compl. ¶ 128(iii). Although Plaintiffs attempt to locate such a duty within Sections 5.01 and 5.03 of the Agreement (*see* DB Compl. ¶ 116; BNP Compl. ¶ 89), those sections contain no such duty.

Section 5.01 merely charges BoA with the responsibility of *opening* and *maintaining* the sub-accounts. But Plaintiffs do not allege that BoA failed to *open or maintain* the sub-accounts or even that it erroneously *closed* them. Rather, they contend that funds from the Deutsche sub-account were used to purchase loans for the benefit of BNP, and vice-versa. DB Compl. ¶ 121; BNP Compl. ¶ 91. Further, they allege that when loans were *sold,* proceeds from the sale of Deutsche loans might be deposited in the account of BNP, and vice versa. *Id.* They conclude that "BOA acted in disregard of its contractual duty to maintain the DB and BNP Sub-Accounts separately, and to withdraw from and deposit into the DB and BNP Sub-Accounts the appropriate funds." DB Compl. ¶ 121.

But nothing in the Security Agreement charges BoA with a duty to monitor deposits and withdrawals by Ocala to ensure that they are being made to and from the appropriate sub-accounts. Once again, Plaintiffs' effort to plead such a duty would require the Court to rewrite the very contract language on which they purport to rely. BNP misleadingly alleges, quoting selectively from Section 5.01, that "Bank of America was required to deposit into the 2005-1 Collateral sub-account, among other funds, 'the net proceeds from the sale of the Series 2005-1 Short Term Notes' and 'all monies received by or on behalf of [Ocala] as proceeds from the sale or securitization of Series 2005-1 Mortgage Loans.'" BNP Compl. ¶ 90. *See also* DB Compl. ¶ 121. But what Section 5.01 *actually says* is not that BoA "was required to deposit" funds into the separate accounts but rather simply that "[i]t is understood and agreed by the Issuer [Ocala], the Collateral Agent [BoA], and the Indenture Trustee [BoA] that *there shall be deposited*' in the sub-accounts the proceeds from the sale of notes and monies received from the sale or securitization of Mortgage Loans. Ex. A, § 5.01 at 13 & 14 (emphasis added). This says *nothing* about what party

shall do the depositing—thus again triggering the express provision by which the parties disclaimed any intent to impose on BoA duties not expressly assumed by it. *Id.* § 8.01 at 36.

Nor can the "there shall be deposited" language in Section 5.01 reasonably be construed as creating an affirmative duty of segregation on the part of BoA. That is because the only affirmative obligation to segregate deposited funds was set out in the Purchase Agreement (to which BoA was not a party), which placed that duty squarely on TBW/Ocala: "The proceeds of sale of any ... loan will be *remitted directly to the applicable sub-account* of the Collateral Agent *at the direction of the Servicer [TBW]*...." Ex. I, § 4.2 at 37 (emphasis added). This allocation made eminent sense given that it was *Ocala, acting at TBW's direction*, and not BoA, that was directing the sale of Ocala's mortgage loans and thus TBW would be the only party in a position to know the source of the sale proceeds. And, again, BoA had no duty to monitor the conduct of either TBW or Ocala with their obligations under the Facility Documents. *See* Ex. A, § 8.01 at 37.

The same analysis applies to *withdrawals* from the sub-accounts. As shown above, Section 5.03 of the Security Agreement provided that *Ocala* had both the prerogative to instruct withdrawals and the duty to ensure that the conditions for withdrawals were met. Indeed, it was Ocala that was to "instruct ... the Collateral Agent to withdraw, or order the transfer of, Deposited Funds ... *from the applicable sub-account* of the Collateral Account." Ex. A, § 5.03(b) at 21 (emphasis added). And BoA had neither a duty to monitor the propriety of such requests, nor even the temporal opportunity. The instructions were "effective upon receipt"; BoA was required to comply with them "promptly"; and BoA was expressly absolved of any duty to monitor the compliance or Ocala or TBW with *their* obligations. *See* Ex. A, § 8.01 at 37; *id.* § 5.03(a) at 20 & 5.03(b) at 26.

Finally, to the extent that Plaintiffs are trying to suggest an *implied* duty to segregate funds, any such effort would run aground not only of the provision of the Security Agreement stating that BoA has no duties except those "for which express provision is made," but also the more specific language of Section 8.01 stating that that "[t]he Assigned Collateral held by the Collateral Agent in trust hereunder *need not be segregated from other collateral except to the extent required by law or*

the specific provisions hereof." Ex. A, § 8.01 at 37 (emphasis added). Accordingly, Plaintiffs' "no segregation" claim fails under the plain terms of the Agreement.

7. **The Security Agreement Does Not Require BoA To Perfect Security Interests In Mortgage Loans.**

Seeking to wring one more theory out of the Security Agreement, Plaintiffs assert that BoA had a duty under the Agreement to ensure that security interests were perfected in mortgages sold to Ocala. *See* BNP Compl. ¶ 128(iv); DB Compl. ¶ 138. They assert that BoA breached this putative obligation in two ways: (1) by "[f]ailing to ensure that the security interest it held on behalf of the Secured Parties was perfected by obtaining written confirmation from Colonial that it had released any security interest in mortgages for which BOA paid Colonial" and (2) by "[f]ailing to keep accurate and adequately detailed records sufficient to permit BOA to establish and prove with specificity the security interests it held on behalf of the Secured Parties." DB Compl. ¶ 138; *see also* BNP Compl. ¶ 128(iv). Notably, Plaintiffs offer no citation to any provision of the Security Agreement requiring BoA to undertake such obligations. Nor can they, because none exists.[10]

The Security Agreement—like the other Facility Documents—makes crystal clear that only TBW and Ocala are responsible for perfecting the security interests in loans assigned to the facility. TBW expressly represented in the Purchase Agreement that it was passing a "first priority perfected security interest" in the loans. Ex. I, § 2.1(b) at 4; *accord id.* § 3.2(c) at 14; *id.* at Schedule A § 12. Ocala, in turn, conclusively represented and warranted in the Security Agreement that *it* was responsible for all actions necessary to ensure the perfection of the relevant security interests in favor of the Secured Parties:

> [T]he *Issuer* will warrant and defend, *and take all actions necessary or*

[10] Indeed, it is altogether unclear which contract BNP alleges was breached by purported inaccuracies in the Shipped Report and Tracking reports, *see* BNP Compl. ¶¶ 100-105, because the Complaint states only that the "misrepresentations . . breached . . . contractual obligations" without identifying any contractual duties. These allegations should thus be dismissed for failure to identify a contractual obligation breached. *See Wolff*, 210 F. Supp. 2d at 496 ("For a breach of contract claim to exist, the Plaintiffs must identify what provisions of the contract [were] breached as a result of the acts at issue.") (internal quotation marks omitted).

> *appropriate to perfect*, the Collateral Agent's right, title and interest in and to the Assigned Collateral ... for the benefit of the Collateral Agent and the Secured Parties ... against the claims and demands of all Persons whomsoever.

Ex. A, § 3.02(e) (emphasis added). Virtually identical undertakings appear in the Indenture—again, undertakings made by Ocala to BoA and the Secured Parties. *See* Ex. F1, § 7.14(a) at 40 (representation from Ocala that "[a]ll action necessary . . . to protect and perfect the Collateral Agent's security interest in the Collateral now in existence and hereafter acquired or created has been duly and effectively taken."); *accord id.* § 7.14(e) at 40. The Security Agreement provides that Ocala "reaffirms and repeats" its representations and warranties from the Indenture and "agrees that the Collateral Agent, the Indenture Trustee and the other Secured Parties [including Plaintiffs] may rely on such representations and warranties as though set forth herein in full." Ex. A, § 3.01(a) at 5. It also states that the BoA shall not be liable to any Secured Party (including Plaintiffs) for "the validity, effectiveness, value, priority, sufficiency or enforceability" of "the Assigned Collateral (or any part thereof), the Eligible Investments (or any part thereof) or the Deposited Funds (or any part thereof)," *id.* § 8.01 at 37. And in stark contrast to *TBW*'s express undertaking, as sole manager and agent of Ocala, to ensure Ocala's compliance with its obligations under the Security Agreement and other Facility Documents (LLC Agmt., Ex. G, § 4.1(b) at 11), the Agreement expressly relieves BoA of any such obligation—stating that BoA has no duty to monitor TBW or Ocala's compliance with their duties under the Facility Documents, may rely upon representations and warranties from TBW and Ocala, and has no duties other than those expressly assigned to it. *See* Ex. A, § 8.01 at 36-37.

8. <u>Plaintiffs' Attempt to Create a Separate Contractual Claim for Negligence Is Contrary to Law.</u>

In an apparent effort to avoid the absence of any contractual terms that support their claims, Plaintiffs resort to a "negligence" or "should have known" theory. This appears to be the gist of Plaintiffs' allegations that some of the transfer instructions were made in amounts that BoA should have recognized were inconsistent with the purchase of mortgage loans, because they were either in round numbers (*see* DB Compl. ¶ 71; BNP Compl. ¶ 78) or amounts either significantly larger or smaller than the accumulated loans that Ocala purchased on that day (*see* DB Compl. ¶¶ 14, 74;

BNP Compl. ¶ 78), as well as their more general suggestion that BoA should have known that Ocala or TBW were not complying with contractual limitation on the use of funds. *See* BNP Complaint ¶ 128(i); DB Complaint ¶ 139. Plaintiffs appear to assert that, apart from any express contractual duties, BoA had a generalized duty under the contract not to be negligent. Plaintiffs' sole basis for this theory is the contractual liability limitations contained in Sections 4.10 and 8.01, but, as the text of these provisions confirms, their function is to *limit* liability with specified exceptions—not to create new contractual rights or duties not otherwise specified in the Agreement. The liability limiting provisions state:

> Section 4.10: No Liability. Neither the Collateral Agent, nor any director, officer, employee, agent or stockholder of the Collateral Agent, shall be liable for any action taken or omitted to be taken by it or them relative to any of the Assigned Collateral, *except for its or their own negligence, fraud, bad faith or willful misconduct*....
>
> * * *
>
> Section 8.01: Appointment and Powers of the Collateral Agent. .... Neither the Collateral Agent, nor any of its respective directors, officers, employees, affiliates or agents, shall be liable to any Secured Party or the Issuer for any action taken or omitted to be taken by it or them hereunder, or in connection herewith, *except for its own negligence, fraud, bad faith or willful misconduct*.....

Security Agmt., Ex. A, § 4.10 at 13 & § 8.01 at 36-37 (emphases added). For several reasons, Plaintiffs' "should have known" musings (best directed at themselves) cannot create a valid claim for breach of the Security Agreement.

First, by their plain terms, the liability limiting provisions cited by Plaintiffs do not create a new contractual cause of action for negligence separate from any claim of actual breach. They state that BoA "shall not be liable" under the contract, *except* for acts of negligence, fraud, and the like. New York courts consistently construe liability limiting provisions such as Sections 4.10 and 8.01 to *preclude* liability *even for breach of the existing contract terms* unless there is a breach *and* it is caused by defendant's negligence or other wrongful conduct. In other words, the provision would not create a new cause of action for negligent performance of a contract apart from any breach of the express contract terms, but rather would impose an additional requirement that a plaintiff prove *both* a breach of an express contractual duty, *and* that the breach resulted from the defendant's negligence. *See, e.g., Digital Broad. Corp. v. Ladenburg, Thalmann & Co., Inc.*, 63

A.D.3d 647, 647, 883 N.Y.S.2d 186, 187 (2009) (dismissing breach of contract claim where plaintiffs failed to prove breach *and* that conduct was grossly negligent, pursuant to an exculpatory provision); *accord Trump Village Section 3, Inc. v. New York State Housing Fin. Agency*, 292 A.D.2d 156, 739 N.Y.S.2d 37 (2002). This reading is consistent with the purpose of such provisions to *preclude* or *limit* otherwise valid causes of action, not to create new rights or duties. *See, e.g., Banco Espirito Santo de Investimento, S.A. v. Citibank, N.A.*, No. 03 Civ. 1537, 2003 WL 23018888, at *9 (S.D.N.Y. Dec. 22, 2003) (Mukasey, J.) (liability-limiting provision did not creat a cause of action because "the plain intent of the parties to the contract" was "to limit duties rather than to generate an additional duty"). Plaintiffs' effort to use these provisions to create a new cause of action where none otherwise exists would turn the provisions on their head.

Second, Plaintiffs' theory is expressly precluded by the separate clause of Section 8.01 of the Security Agreement, which expressly states that "nothing herein shall be deemed ... to impose on the Collateral Agent any obligations other than those for which *express* provision is made herein." Ex. A, § 8.01 at 36 (emphasis added). This precludes reading the liability-limiting provision as *implicitly* creating new obligations not specified in the Agreement. Plaintiffs' claims also would require the Court to qualify other broad exculpatory provisions of the Agreement, which allow BoA to rely upon statements and representations made by TBW and Ocala, state that BoA has no duty to examine Ocala's books and records, and generally provide that BoA may perform its contractual functions based upon information and actions provided by others. *See* Ex. A § 8.01 at 36-37. Plaintiffs' suggestion that an amorphous, free-floating "negligence" standard somehow qualifies all of these provisions even when there is no breach of any express contract term would improperly require the Court to rewrite the Agreement—and also would impose impermissibly vague standards to which the parties never agreed. *See Slamow*, 174 A.D.2d at 727, 571 N.Y.S.2d at 336. *See also Marraccini v. Bertelsmann Music Group Inc.*, 221 A.D.2d 95, 97, 644 N.Y.S.2d 875, 877 (1996) (court will not recognize alleged contract terms that are too indefinite to be enforced). It is for this reason that New York courts, sensibly, do not recognize a contractual cause of action for "negligent" performance of a contract. *See RI Ins. Co. v. King Sha*

Group, 598 F. Supp. 2d 438, 444 (S.D.N.Y. 2009); *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 389, 521 N.Y.S.2d 653, 656 (1987) (breach of contract cannot be asserted as a tort unless a legal duty independent of the contract has been violated); *Hamilton v. Hertz Corp.*, 130 Misc. 2d 1034, 1037, 498 N.Y.S.2d 706, 709 (1986) (claim for "negligent performance" of a contract "simply does not exist at law"). For this reason alone, Plaintiffs' "negligence" theory should be rejected.[11]

B. The Claims for Breach of the Depositary and Custodial Agreements Must Be Dismissed for Lack of Standing.

Plaintiffs also assert claims for breach of the Depositary Agreement. Deutsche claims standing to bring this claim under the terms of the Depositary Agreement itself, while BNP relies exclusively for its standing on the March 2009 Letter between its parent entity, BNP Paribas, and BoA. Deutsche also claims a breach of the Custodial Agreement. But none of these claims is cognizable because Plaintiffs lack standing under either agreement to pursue a claim. Plaintiffs are not parties to, nor third-party beneficiaries of, the Depositary Agreement, which contains an express provision disclaiming any intent by the contracting parties to permit enforcement by non-parties. Likewise, Deutsche's claim under the Custodial Agreement fails because Deutsche is not a party to that Agreement and Noteholders such as Deutsche are not intended third-party beneficiaries. For these reasons, the claims should be dismissed.

1. Plaintiffs Lack Standing to Bring a Claim for Breach of the Depositary Agreement.

Plaintiffs allege that BoA breached the Depositary Agreement by certifying documents that it received from TBW on Ocala's behalf and that allegedly contained false statements of Ocala's

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[11] Plaintiffs have not tried to plead a tort claim for negligence, nor could they. Under New York law, where the contracting parties are sophisticated entities and the losses are only economic, a negligence claim is not cognizable. *See, e.g., County of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 62 (2d Cir. 1984) ("New York law holds that a negligence action seeking recovery for economic loss will not lie."); *Deutsche Bank Sec., Inc. v. Rhodes*, 578 F. Supp. 2d 652, 670 (S.D.N.Y. 2008) ("in actions involving the contractual duties of corporations and financial institutions, a negligence action may not be maintained and parties must proceed under a contract theory"); *Labajo v. Best Buy Stores, L.P.*, 478 F.Supp.2d 523, 529 (S.D.N.Y. 2007) (New York "follow[s] the economic loss doctrine, which bars the recovery of economic loss in negligence cases.").

collateral and by issuing new notes pursuant to such documents. DB Compl. ¶¶ 107, 147; BNP Compl. ¶ 119. Once again, Plaintiffs misconstrue the relevant provisions, but this Court need not reach the merits of Plaintiffs' claims, because they fail at the threshold for lack of standing.

To state a claim for breach of the Depositary Agreement, Plaintiffs must establish either that they are a party to the Agreement or that the contracting parties intended them to be third-party beneficiaries. *See, e.g., Pile Found. Constr. Co., Inc. v. Berger, Lehman Assocs., P.C.*, 253 A.D.2d 484, 486, 676 N.Y.S.2d 664, 665 (1998); *see also Long Island Lighting Co.*, 728 F.2d at 63 (it is "ancient law in New York that to succeed on a third-party beneficiary theory, a non-party must be the intended beneficiary of the contract"). Neither of the Plaintiffs can make such a showing.

a. Deutsche's Various Theories of Standing are Meritless.

Deutsche is not, nor does it claim to be, a party to the Depositary Agreement, which is between Ocala and BoA, as Depositary. Rather, its sole theory is that it is a third-party beneficiary of the Depositary Agreement. *See* DB Compl. ¶ 38(e). But the sole provision on which it relies, Section 15 of the Agreement, not only does not identify Deutsche (or Noteholders generally) as a third-party beneficiary, but expressly states that the Indenture Trustee is such a beneficiary and that no other person shall have that status. Section 15 states:

> Section 15. Successors and Assigns; Benefit of Agreement. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns; provided, however, that (a) except for the assignment by the Issuer [Ocala] of its right, title and interest hereunder to the Collateral Agent [BoA] pursuant to Section 4.01(ii) of the Security Agreement and (b) except as provided in Section 16 hereof, *no party hereto may assign any of its rights or obligations hereunder* unless such party shall have obtained (i) the prior written consent of all parties hereto and (ii) the written confirmation of each of the Rating Agencies that such assignment will not result in a reduction or withdrawal of its then current rating, if any, of the Short Term Notes. *This Agreement shall also inure to the benefit of the Indenture Trustee [BoA], which is hereby expressly declared to be a third-party beneficiary hereof. Subject to the foregoing, no Person not a party to this Agreement shall be deemed to be a third-party beneficiary hereof nor shall any Person be empowered to enforce the provisions of this Agreement, except as set forth in the preceding sentence and to the extent such Person becomes a permitted successor or assign hereunder.*

Ex. B, § 15 at 18; *see also* Ex. C § 15 at 17-18 (identical language except referring to "Rating Agency" rather than "Ratings Agencies," as in Ex. B) (emphases added). This provision, by naming one third-party beneficiary but expressly excluding all others, and by prohibiting

assignment without written consent of parties other than Plaintiffs, definitively precludes third-party beneficiary status for Noteholders such as Deutsche.

New York law is clear that a contractual provision expressly negating an intent to permit enforcement by third parties is "decisive." *See, e.g., India.Com, Inc. v. Dalal*, 412 F.3d 315, 321 (2d Cir. 2005) (citing authorities); *Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 859 F.2d 242, 249 (2d Cir. 1988). The preclusive effect of such a clause is strengthened by a clause, such as is contained in Section 15, prohibiting any assignment of rights and obligations without consent. *See Sazerac Co., Inc. v. Falk*, 861 F. Supp. 253, 258 (S.D.N.Y. 1994) (Sweet, J.) (contract clause prohibiting assignment without written consent bars third-party beneficiary claim).[12] It also is confirmed by the express provision in Section 15 specifying the parties to whom the benefits of the Agreement inure—a listing that, again, does not include Deutsche specifically or Noteholders in general. *See Banco Espirito*, 2003 WL 23018888, at *9-*10 (following *Sazerac* and holding that contract language "specifying to whose benefit the agreement inured and prohibiting assignment" precludes claim by purported third-party beneficiary); *Piccoli A/S v. Calvin Klein Jeanswear Co.*, 19 F. Supp. 2d 157, 163 (S.D.N.Y. 1998) ("The prohibition on assignments and the specification that the contract inures to the benefit of and binds the parties . . . makes plain the parties' intention to preclude third-party enforcement.").

Deutsche tries to avoid this problem by asserting that the indemnification clause in Section 8(g) of the Depositary Agreement—which provides for indemnification of "Secured Parties," defined to include Noteholders—gives it third-party beneficiary rights, despite the express preclusion of such rights in Section 15. Ex. B, § 8(g) at 11; DB Compl. ¶¶ 38e, 144. New York courts have rejected similar attempts by non-party indemnitees and other incidental beneficiaries to enforce contracts that contain express provisions negating third-party beneficiary rights.

[12] That Section 15 contemplates the possibility of assignment by written consent does not weaken its preclusive effect on third-party beneficiary claims. *See United Int'l Holdings, Inc. v. The Wharf (Holdings) Ltd.*, 988 F. Supp. 367, 373 (S.D.N.Y. 1997) (Sweet, J.).

In *Control Data Systems, Inc. v. Computer Power Group, Ltd.*, No. 94 Civ. 5396, 1998 WL 178775 (S.D.N.Y. April 15, 1998), for example, Judge Martin rejected precisely this argument. In that case, the Second Circuit had remanded to allow the district court to "resolve the tension" between a provision denying third-party beneficiary rights and a clause indemnifying the plaintiff. *See id.* at *1. Judge Martin found no tension between the two provisions because, under New York law, the obligation to indemnify could be enforced by one of the contracting parties and thus was consistent with the clause negating any intent to create third-party rights. *Id.* at *2-*3. Similarly here, the fact that Plaintiffs are potential indemnitees or even that they might receive a direct or indirect benefit under other contract provisions, does not overcome the "decisive" effect of the no-third-party-beneficiary clause. *India.Com*, 412 F.2d at 321.

This analysis comports with well-established New York law holding that a third party seeking to enforce a contractual promise must show not only that the parties intended to confer a benefit or right upon that third party, but also that the parties intended to permit that third party to *enforce* the promise—a showing that cannot be made where the parties expressly precluded third-party beneficiary status. *See Binghamton Masonic Temple Inc. v. City of Binghamton*, 213 A.D.2d 742, 745-46, 623 N.Y.S.2d 357, 360-361 (1995) (contract must "evince an intent to permit enforcement by a third party"); *Nepco Forged Products, Inc. v. Consolidated Edison Co. of New York, Inc.*, 99 A.D.2d 508, 470 N.Y.S.2d 680, 681 (1984) (provision "expressly negating an intent to permit enforcement by third parties" controls). Under New York law, just as the contracting parties may elect to confer a benefit or right upon a third party, they may elect to limit that right, including by limiting the third party's enforcement powers. *See, e.g., Consolidated Edison, Inc. v. Northeast Utils.*, 426 F.3d 524, 528 (2d Cir. 2005) (although contract "clearly created a third-party right" inuring to the benefit of shareholders, that right was limited by other express terms—including a provision restricting third-party enforcement). It is for this reason that an express provision barring third-party enforcement of a contract is "decisive"—even where the contract also contains a promise clearly conferring a benefit on a third party. *India.Com*, 412 F.3d at 321.

Deutsche's final theory is that it can simply step into the shoes of the Indenture Trustee, which is an express third-party beneficiary of the Depositary Agreement. DB Compl. § 145. This novel claim is as meritless as the preceding ones. The parties knew how to confer standing on both the Indenture Trustee and the Noteholders when they wished to: Section 10.08 of the Security Agreement, for example, does just that, providing that "the Indenture Trustee *and the holders of the Notes*" are "expressly declared to be third-party beneficiaries hereof." *See* Ex. A, § 10.08 at 43 (emphasis added). *See also* Ex. F1, § 9.7 at 51-52 (creating limited remedies for "Noteholder[s]"). And elsewhere in the Facility Documents—including the corresponding provision of the Depositary Agreement at issue here—the parties took pains to distinguish between the Indenture Trustee and the Noteholders and to treat them separately. *See* Ex. B, § 15 at 18; Ex. C, § 15 at 17-18. Such deliberate choices on the part of "sophisticated, counseled parties dealing at arm's length" in a "multimillion dollar transaction" must be given effect, *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 574-75, 498 N.Y.S.2d 344, 347 (1986), particularly in an agreement that contains an integration clause specifying that the written document is the "entire agreement" between the parties on the subject. Exs. B & C, § 23 at 19.

In any event, even if Deutsche were able to cast itself as a third-party beneficiary of the Depositary Agreement, its theories of standing would fail for a separate reason. Status as a third-party beneficiary does not imply standing to enforce any or every promise within that contract, including those not made for that party's benefit. *See Coalition of 9/11 Families, Inc. v. Rampe*, No. 04 Civ. 6941, 2005 WL 323747, at *2 (S.D.N.Y. Feb. 8, 2005) ("third parties may sue to enforce rights or obtain benefits under a contract only to the extent that the contracting parties specifically intended to provide the third parties with such rights or benefits"); *Nationwide Auction Co. v. Lynn*, No. 90 Civ. 7643, 1996 WL 148489, at *11 (S.D.N.Y. April 1, 1996) (although it was plausible that plaintiff was a third-party beneficiary as to a provision relating to auction commissions, there was "no basis to infer" that plaintiff was a third-party beneficiary of an attorney's fees provision; "[t]o allow a third party to enforce a promise of which it was not an intended beneficiary would run contrary to well-settled law"). A critical factor is whether, with

respect to a particular contractual promise, "performance is to be made directly to a third-party." *Nepco*, 99 A.D.2d at 508; *see also Coalition*, 2005 WL 323747, at *2 (plaintiffs clearly were not intended beneficiaries of a provision that "does not mention [them] at all"). Here, performance was not directly rendered to Plaintiffs, as BoA contracted only with Ocala under the Depositary Agreement. *See* Exs. B & C, at 1.

Thus, even if Deutsche did have a limited right to enforce the *indemnification* provision in Section 8(g) of the Depositary Agreement, that certainly would not give it standing to enforce the other provisions of the Depositary Agreement that it claims were breached, including the provision of Section 4(d) relating to certification of certain financial information for Ocala. *See* Exs. B & C, § 4(d) at 6. Similarly, even if Deutsche could stand in the shoes of the Indenture Trustee, the Court still would have to determine that Section 4(d) is a provision that the parties intended to be enforced *by the Indenture Trustee*—a conclusion that simply is not borne out by the Depositary Agreement itself.[13] Thus, even if Deutsche could step into the shoes of the Indenture Trustee—which, under the plain language of the Depositary Agreement, it cannot—Deutsche still would lack standing to enforce Section 4(d) because the Indenture Trustee is not a third-party beneficiary of that provision.

b. <u>BNP Cannot Establish Standing Through the March 2009 Letter.</u>

Presumably recognizing the absence of enforceable rights running to and enforceable by it as Noteholder under the Depositary Agreement, BNP does not even bother asserting any of the three untenable bases for standing relied upon by Deutsche, and instead argues that it has such

[13] Although a handful of provisions in the Agreement specifically reference the Indenture Trustee and promise performance directly to the Indenture Trustee, the Trustee is not a beneficiary of, or even mentioned in, the overwhelming majority of the provisions of that Agreement, including those that Deutsche seeks to enforce—most notably, Section 4(d). *Compare, e.g.*, Ex. B, § 2(a) at 2; Ex. C, § 2(a) at 2-3 ("The Depositary agrees to give the Issuer, the Collateral Agent, the Short Term Note Dealers and the Indenture Trustee, as soon as practicable, written notice that the Short Term Note Account or any funds on deposit in the Short Term Note Account have become subject to any writ, judgment, warrant of attachment, execution or similar process to the actual knowledge of an officer of the Depositary assigned to the Depositary's corporate trust department.") *with* Exs. B & C, § 4(d) at 6.

rights under the March 2009 Letter. *See* Ex. E. For two reasons, this letter does not give BNP standing to enforce the Depositary Agreement.

First, the March 2009 Letter—to the extent that BNP is trying to use it to avoid the express limitations on standing under the Depositary Agreement or to claim new rights for itself under that Agreement—is legally ineffective for that purpose because it does not comply with either of the two requirements contained in that Agreement for a valid amendment or modification to the contract. Section 13 of the Agreement states that "[n]o amendment, modification, termination or waiver of any provision of this Agreement shall be effective unless the same shall be (i) in writing and signed by all of the parties hereto and (ii) accompanied by the written confirmation of each Rating Agency that same will not result in a reduction or withdrawal of its then current rating, if any, of the Short Term Notes." Ex. C, § 13 at 16. BNP has not alleged that either of these conditions to the effectiveness of the March 2009 Letter was satisfied; not only is there no showing of any signoff by the Rating Agencies, but it is clear on the face of the Letter that it was not signed by Ocala, which is a party to the Agreement.

Where a contract provides a procedure for amending contract provisions, that procedure must be followed in order to execute a valid amendment. For example, in *Deutsche Bank AG v. JPMorgan Chase Bank*, No. 04 Civ. 7192, 2007 WL 2823129, *23-*24 (S.D.N.Y. Sept. 27, 2007) (Stein, J.)—a case coincidentally involving both of the Plaintiffs here—the contract term relating to amendments provided that no amendment purporting to change certain contract provisions would be valid "unless in writing and signed" by certain required parties. *Id.* at *23. Both Deutsche and BNP Paribas were deemed by the court to be required parties, but neither had signed the letter. Deutsche argued that the absence of those signatures invalidated the purported amendment, and the court agreed, holding that the purported amendment was ineffective. *Id.* at *24. *See also John Street Leasehold LLC v. F.D.I.C.*, 196 F.3d 379, 382 (2d Cir. 1999) (New York law enforces contractual requirements that amendments be in writing and signed by the parties). Because BNP has not alleged, and cannot allege, that the March 2009 Letter was a valid contract amendment, its

claim fails as a matter of law. *See Dupler v. Costco Wholesale Corp.*, 249 F.R.D. 29, 46 (E.D.N.Y. 2008) (existence of a valid contract is an essential element of a contract claim).

Second, even if it were a proper amendment, the March 2009 Letter does not purport to alter the express provisions in the Depositary Agreement disclaiming any intent to create third-party beneficiary rights and prohibiting assignment, nor does it purport to elevate BNP to the status of a third-party beneficiary of that Agreement. On its face, it merely expands *indemnification* coverage for BNP in that, as discussed below, BoA purportedly agreed to indemnify for losses sustained by *BNP*, as opposed to losses suffered only by *Ocala*. *Compare* Ex. E *with* Exs. B & C, § 8(g) at 11. Because the letter does not expand the limited list of entities that may enforce the Depositary Agreement as third party beneficiaries to include BNP, any claim for indemnification arising under the Agreement and the March 2009 Letter would have to be brought by a party that did have enforcement rights. *See Control Data*, 1998 WL 178775, at *2-*3.

2. Deutsche Lacks Standing To Bring a Claim for Breach of the Custodial Agreement.

Only Deutsche asserts a claim for breach of the Custodial Agreement. It alleges that BoA as Custodian failed to maintain adequate controls over loans removed from Ocala's Custodial Account. DB Compl. ¶ 154. Once again, Deutsche ignores the critical role of TBW and Ocala, including the fact that, under the Agreement, TBW had the right to remove mortgage files from the Custodial Account in order to facilitate their sale to third parties such as Freddie Mac. *See* Ex. D, § 6(c) at 4-5 (loans released to TBW as Servicer). But, again, the Court need not reach the merits of Deutsche's claim because, as with the Depositary Agreement claims, the claim fails at the threshold for lack of standing.

Deutsche does not, and cannot, allege that it is a party to the Custodial Agreement, so again its sole theory of standing is that it is a third-party beneficiary under Sections 17 and 25. *See* DB Compl. ¶ 38(c); Ex. D, §§ 17 & 25 at 9, 17. But Section 25 is limited to Swap Counterparties—not Noteholders, which is the only capacity in which Deutsche (or BNP) claims to have suffered loss and is suing. It states that: "*[t]he Swap Counterparties* are third-party beneficiaries to this Agreement and are entitled to the rights and benefits hereunder and may enforce the provisions

hereof as if they were a party hereto." Section 17, the indemnification provision, likewise states that the Custodian will indemnify "each Swap Counterparty." Ex. D, § 17 at 9. Deutsche has not asserted claims in its capacity as Swap Counterparty; it does not seek to recover for any damages suffered in that capacity; and the Facility Documents clearly contemplate different roles for noteholders and Swap Counterparties, as shown by the fact that the parties knew how to specify *Noteholder* standing when they wished to do so. *See, e.g.*, Ex. A, § 10.08 at 43-44, Ex. F1, § 9.7 at 51-52. And the happenstance that Deutsche became a Noteholder in addition to a Swap Counterparty when the market for the notes dried up does not entitle it to invoke its rights in one capacity to pursue losses sustained in another capacity.

This conclusion is confirmed by the role of the Swap Counterparties in the Ocala facility. As discussed above, the interest rate swaps allowed Ocala to hedge its risk by shifting to Deutsche and BNP's parent company, as Swap Counterparties, the risk that TBW might be unable to perform its obligations—so it was the Swap Counterparties that, in many ways, had the role of protecting the economic security of Ocala and, in turn, the Noteholders. The Facility Documents recognized the very different economic interests and roles of the Swap Counterparties and Noteholders by consistently treating them as separate and distinct groups of entities—including assigning them different roles in the transaction and different sets of contractual rights and obligations. *See, e.g.*, note 3 *supra* & Ex. A, § 2.01 at 2-4. Indeed, the Facility Documents clearly anticipate not only different *roles* for Swap Counterparties and Noteholders, but different *actors* playing those roles; it appears to have been the fortuity of Deutsche's inability to sell the notes that led to its holding both the status of Swap Counterparty and the status as Noteholder. That fortuity certainly does not reflect any intention on the part of the contracting parties that a party's status as a Noteholder would give it rights as a Swap Counterparty—a construction that would introduce numerous absurdities into the core provisions of the documents that distinguish carefully between these two groups, including the post-Default payout provisions, which provide that the Swap Counterparties have certain payout and liquidation rights and Noteholders have distinct and different rights in the

same hierarchy.[14] For these reasons, it is not surprising that the Custodial Agreement and the other Facility Documents likewise treat the Swap Counterparties as separate and distinct from the Noteholders, including by specifying that "Swap Counterparties" are third-party beneficiaries of the Custodial Agreement, but not Noteholders.

It is clear from these provisions of the Custodial Agreement and the other Facility Documents that the contracting parties carefully distinguished Noteholders and Swap Counterparties when drafting the Custodial Agreement, because they knew well how to designate an intent to benefit a party in both capacities. *See, e.g.*, Ex. A, §§ 10.08 at 43-44 & 10.18 at 46 (separately designating "holders of the Notes" and each "Swap Counterparty" as third-party beneficiaries). As Judge Kennedy noted in *Compania De Vapores Arauco Panamena S.A. v. Moore-McCormack Lines*, 91 F. Supp. 545, 549 (E.D.N.Y. 1950): "The very fact that two contracts were made, and that [respondent] assumed two capacities, is evidence of an intention to keep its functions separate—to indemnify under one set of circumstances but not under another."

This conclusion is consistent with fundamental principles of New York contract law, which recognize that parties can be beneficiaries of or stand in privity to a contract in one, but not all, capacities. *See, e.g., Kirby v. Coastal Sales Ass'n, Inc.*, 82 F. Supp. 2d 193, 197 (S.D.N.Y. 2000) (under New York law, a party that signs a contract in his capacity as corporate officer may not maintain an action on the contract in his individual capacity); *Bank of New York v. River Terrace Assocs., LLC*, 23 A.D.3d 308, 310, 804 N.Y.S.2d 728, 730 (2005) (bank could not bring a claim for losses under an indemnity agreement where its losses were incurred in its individual capacity and the agreement indemnified only for acts undertaken in its capacity as agent); *see also Banco Espirito*, 2003 WL 23018888 at *9. Similarly, it is a basic axiom of contract law that parties are liable only for foreseeable damages. *See, e.g., Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 28, 523 N.Y.S.2d 475, 479 (1987);

[14] *Compare, e.g.*, Ex. A, § 2.01 (Second) (payout rights for Swap Counterparties) *with* § 2.01 (Third) (payout rights for Noteholders) *with* § 2.01 (Fourth) (additional payout rights for Swap Counterparties) *with* § 2.01 (Seventh) (additional rights for Swap Counterparties after satisfaction of other payment categories).

RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981). In specifying the limited capacity in which they intended to benefit Deutsche in its capacity as Swap Counterparty, the contracting parties did not reasonably expect to assume losses and liabilities experienced by Noteholders that also happened to be Swap Counterparties. For all of these reasons, Deutsche's status as Swap Counterparty cannot give it standing here.

C. Plaintiffs' Indemnification Claims Fail to State a Claim.

Plaintiffs purport to bring "indemnification" claims for the same first-party investment losses that are the subject of their breach of contract claims—*i.e.*, losses they suffered as Noteholders by virtue of alleged breaches of duty by BoA. *See* DB Compl. ¶¶ 160-61 (alleging BoA caused the loss of note collateral and "is required to indemnify DB for this loss"); *see also* BNP Compl. ¶ 133 (same).

Significantly, Plaintiffs do not allege that they were sued, or that any claims or losses have been asserted against them, by another party, much less that they have been subject to any judgment of liability in favor of such third parties. Rather, they sue for "indemnification" for the same investment losses that they seek through their breach of contract claims. These "indemnification" claims—which are asserted under clauses in the Security, Collateral, and Depositary Agreements, and in a side letter specific to BNP—must be dismissed because those clauses do not support indemnification for the claims asserted here. As shown below, the clause in the Custodial Agreement does not extend to Noteholders such as Plaintiffs, and the Depositary Agreement clause covers only losses suffered *by Ocala*, not losses suffered by Plaintiffs or other Noteholders. More generally, *none* of the clauses contains language demonstrating, as they must for Plaintiffs' theory to prevail, an "unmistakably clear" intent to cover *first-party* losses of the sort that Plaintiffs allege here—as opposed to covering liabilities or losses from claims that others might bring *against* Plaintiffs. Under New York law, the absence of such "unmistakably clear" language means that the clauses cover only losses and liabilities from third-party claims, and the indemnification claims fail for this reason alone. *Bridgestone/Firestone, Inc., v. Recovery Credit Servs., Inc.*, 98 F.3d 13 at 20-21 (2d Cir. 1996); *see also Hooper Assoc., Ltd. v. AGS Computer,*

Inc.,, 74 N.Y.2d 487, 492, 549 N.Y.S.2d 365 (1989). Finally, the March 2009 Letter does not properly amend the Depositary Agreement and in any event does not support the claim here.

1. **Under New York Law, Indemnification Clauses Are "Strictly Construed" to Cover Only Parties Expressly Identified, and to Extend Only to Third-Party Claims.**

Under New York law, a contractual indemnification clause must be "construed so as not to read into it any obligations the parties never intended to assume." *Haynes v. Kleinewefers and Lembo Corp.*, 921 F.2d 453, 456 (2d Cir. 1990); *see also Hooper*, 74 N.Y.2d at 491. This rule includes two more specific principles of construction that compel dismissal of Plaintiffs' indemnification claims here.

First, a party seeking indemnification under a contractual indemnification clause must show a specific intent to allow *that party* to recover under the clause. *See Bank of New York, LLC*, 23 A.D.3d at 310. Similarly, where the indemnity clause extends only to a plaintiff's actions in a specific capacity, or to specific *types* of losses, that limitation will be given effect. *Id.*; *see also TIC Holdings, LLC v. HR Software Acquisitions Group, Inc.*, 301 A.D.2d 414, 415, 755 N.Y.S.2d 19, 20 (2003).

Second, under New York law, indemnification clauses are not construed to cover first-party claims—that is, claims between the indemnitor and the indemnitee, as opposed to those arising from third-party claims *against* the indemnitee—unless the contract makes it "unmistakably clear" that the parties intended so to provide. *See Bridgestone/Firestone*, 98 F.3d at 21 (absent "unmistakably clear" language extending indemnification to claims between the indemnitor and indemnitee, indemnification provision must be construed as limited to actions brought by third parties against the indemnitee, following *Hooper*, 74 N.Y.2d 491). Unless the indemnification clause refers "exclusively or unequivocally" to claims between the indemnitor and indemnitee, the court "must find the agreement to be lacking evidence of the required intent" to cover such claims. *Sequa Corp. v. Gelmin*, 851 F. Supp. 106, 110-11 (S.D.N.Y. 1994) (Haight, J.) (barring first-party indemnity claims); *Bourne Co. v. MPL Communications, Inc.*, 751 F. Supp. 55, 57-58 (S.D.N.Y. 1990) (Sprizzo, J.) (same). *See also GEM Advisors, Inc. v. Corporación Sidenor, S.A.*, No. 06 Civ.

5693, 2009 WL 3459187, at *15-16 (S.D.N.Y. Oct. 27, 2009) (Sullivan, J.) (indemnification clause will not be construed to cover suits between the indemnitor and indemnitee unless the parties "explicitly provide" such coverage).

This latter rule is consistent with the general New York view of indemnity as a mechanism to allow a party held liable on a third-party claim brought against the indemnitee to *shift* that loss to another. *See Mas v. Two Bridges Assocs.*, 75 N.Y.2d 680, 690, 555 N.Y.S.2d 669, 674 (1990) (indemnity means that "a party held legally liable to plaintiff shifts the entire loss to another"); *Weissman v. Sinorm Deli, Inc.*, 88 N.Y.2d 437, 446, 646 N.Y.S.2d 308, 312 (1996) ("[i]n an indemnification the entire loss is shifted from the person who has been compelled to pay (the indemnitee) to another upon the imposition of a contingent liability"). Under that framework, New York courts generally treat indemnification as involving liabilities, losses, or claims associated with third-party suits—not contractual damages or losses *between* the contracting parties themselves. *See, e.g., Madeira v. Affordable Hous. Found., Inc.*, 323 Fed. Appx. 89, 91 (2d Cir. 2009) (contractual right to indemnification accrues only when the "indemnified party has satisfied the judgment, *i.e.*, suffered a loss").

Here, as shown below, the specific provisions of the indemnification clauses invoked by Plaintiffs do not support their indemnification claims. Certain of the clauses do not even extend indemnity coverage to Noteholders or purport to cover *any* of their losses or liabilities. Moreover, nothing in *any* of the clauses suggests—much less makes it "unmistakably clear"—that the parties intended for BoA to indemnify Plaintiffs for first-party losses of the sort Plaintiffs allege here. *Hooper*, 74 N.Y.2d at 492. Accordingly, the indemnification claims should be dismissed.

2. Plaintiffs' Indemnification Claim Under the Custodial Agreement Fails as a Matter of Law.

Plaintiffs rely upon Section 17 of the Custodial Agreement to support their claim for "indemnification" for their investment losses. As discussed above, Deutsche lacks standing to enforce the Custodial Agreement in its capacity as Noteholder, and cannot bring a claim for breach of contract or indemnification under this Agreement. The same standing arguments apply to BNP

suing in its capacity as Noteholder and bar BNP's indemnification claim. Moreover, Plaintiffs' indemnification claims are not covered by Section 17, which provides as follows:

> Section 17. Indemnification of the Issuer, the Seller, the Servicer, the Swap Counterparty by the Custodian. The Custodian hereby agrees to indemnify the Issuer, the Seller, the Servicer, each Swap Counterparty, their respective Affiliates, their respective directors, officers, trustees, employees and agents and their respective successors and assigns (each, an "Indemnified Party") against, and agrees to hold them harmless from, any and all claims, losses, liabilities, obligations, damages, payments, costs and expenses (including, without limitation, reasonable legal fees and expenses arising in connection therewith) which may be imposed on, incurred by or asserted against any Indemnified Party and resulting from the Custodian's negligence, lack of good faith or willful misconduct or the performance of or other breach of its obligations hereunder; *provided* that the Custodian shall not be liable for any portion of any such amounts resulting from the negligence or misconduct of the Issuer. The indemnifications contained herein survive any termination of this Agreement. Any payment under Section 17 shall be remitted by the Custodian to the Collateral Agent for deposit in the Collateral Account.

Ex. D, § 17 at 9.

For two reasons, this clause does not support Plaintiffs' claim for indemnification. First, the clause by its terms extends indemnity rights only to "the Issuer, the Seller, the Servicer, and each Swap Counterparty," as well as their respective affiliates, directors, officers, and other employees and agents. Although Plaintiffs apparently seek to invoke their status (or, in the case of BNP, its parent's status) as "Swap Counterparty," that plainly is insufficient to give them indemnification rights here because, as shown above, they are not suing in their capacity as Swap Counterparties and they are not seeking losses sustained in that capacity. Under clear New York law, and under the plain language of the Agreement, Plaintiffs may not invoke their status in one capacity (as Swap Counterparties, or, in BNP's case, as a subsidiary of a Swap Counterparty) to seek indemnification for losses they have incurred in another capacity (as Noteholders). *See Bank of New York*, 23 A.D.3d at 310 (clause allowing indemnity for claims against bank in one capacity could not support indemnity for claims against it in another capacity); *TIC Holdings*, 301 A.D.2d at 415 (clause indemnifying for liability for acts of plaintiff's manager held not to cover liability for manager's acts in another capacity).[15] Again, the separate treatment in the Facility Documents of

[15] *See also Cohen v. Employers Reins. Corp.*, 117 A.D.2d 435, 436-37, 503 N.Y.S.2d 33, 34 (1986) (indemnification provision covering plaintiff in his capacity as a lawyer did not cover claims

Plaintiffs (or their affiliates) in different capacities "is evidence of [the] intention to keep its functions separate—to indemnify under one set of circumstances but not under another." *Compania De Vapores*, 91 F. Supp. at 549.

Second, the clause does not demonstrate an "unmistakably clear" intent to cover first-party losses of the sort that Plaintiffs allege here—as distinguished from losses they might sustain if sued *by a third party* based on BoA's acts. To the contrary, Section 17 provides that the Indemnified Parties shall be indemnified for "claims, losses, liabilities, obligations, damages, payments, costs and expenses . . . which may be *imposed on, incurred by or asserted against* any Indemnified Party and resulting from the Custodian's negligence . . . or other breach of its obligations . . . ." Ex. D, § 17 at 9 (emphasis added). The description of claims and losses "imposed on, incurred by or asserted against" an Indemnified Party most naturally refers to third-party claims asserted against the Indemnified Party—and certainly cannot be read to refer "exclusively or unequivocally" to losses suffered directly *by* Indemnified Parties, as would be required to overcome the strong presumption *against* such coverage established by *Hooper*. Courts have held similar language to be consistent with coverage for third-party claims and have applied the *Hooper* rule to preclude coverage for claims arising between the parties themselves. *See Bridgestone/Firestone*, 98 F.3d at 21 (holding similar language "may easily be read as limited to third party actions" and thus would not be construed as extending to first party claims); *Bourne*, 751 F. Supp. at 58 (indemnity provision did not evince parties' unmistakably clear intent to indemnify first-party claims, so indemnification claim failed); *Sequa Corp.*, 851 F. Supp. at 110-11 (indemnity provision did not expressly provide for indemnification between the parties).[16] Plaintiffs' claims for indemnity under the Custodial Agreement fail as a matter of law.

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against him in his capacity as trustee); *Syvertsen v. Great American Ins. Co.*, 267 A.D.2d 854, 857, 700 N.Y.S.2d 289, 292-293 (1999) (insurer's indemnity obligation for acts of corporate officers did not extend to claims brought against them in their individual capacities).

[16] *See also Hooper*, 74 N.Y.2d at 490; *GEM Advisors*, 2009 WL 3459187, at *16; *Dolphin Direct Equity Partners, LP v. Interactive Motorsports & Entm't Corp.*, No. 08 Civ. 1558, 2009 WL 577916, at *10 (S.D.N.Y. March 2, 2009); *Nathan v. Cooper*, No. 06 Civ. 5973, 2007 WL 4352705, at *4 (S.D.N.Y. Dec. 12, 2007); *Tecnoclima, S.p.A., v. The PJC Group of New York, Inc.*, No. 89 Civ. 4337, 1995 WL 390255, at *1-*2 (S.D.N.Y. June 30, 1995). Some courts have found

3. Deutsche's Depositary Agreement Indemnification Claim and BNP's Claim Under the March 2009 Letter Must Be Dismissed.

As noted, only Deutsche brings an indemnification claim under the Depositary Agreement, whereas BNP asserts a right to indemnification under March 2009 Letter that it contends expands the indemnity rights conferred by the Depositary Agreement. Both claims fail as a matter of law.

a. Deutsche's Depositary Agreement Claims Fail As a Matter of Law.

Deutsche's claim for indemnification under the Depositary Agreement rests on Section 8(g), but that clause—in addition to other limitations—provides only for losses sustained by Ocala, which was the "Issuer" under the Facility Documents:

> The Depositary agrees to indemnify and hold harmless the Secured Parties and the Issuer against any and all claims, losses, penalties, fines, forfeitures, reasonable legal fees and related costs, judgments, and any other costs, fees and expenses *that the Issuer may sustain* to the extent attributable to the Depositary's negligence, fraud, bad faith or willful misconduct in the performance of its duties hereunder.

Exs. B & C, § 8(g) at 11 (emphasis added).

Deutsche's indemnification claim fails at the threshold because it does not purport to assert—nor could it assert—indemnification for claims, liabilities, or other losses *sustained by Ocala*. On the contrary, the clear import of Deutsche's claim is that it suffered its *own* investment losses *by virtue of TBW's and Ocala's wrongdoing*, which it alleges BoA should have prevented. Because the clause by its express terms does not extend to losses suffered by Noteholders such as

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evidence of a "clear or unequivocal intent" to cover claims brought by the indemnitee against the indemnitor in a handful of cases based on specific language in the relevant indemnification provisions clearly indicating such an intent. *See, e.g., Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 178 (2d Cir. 2005) (where contract contained two nearly identical indemnity provisions, and only the first contained language limiting indemnity to losses from the indemnitor's negligence, the clear intent of the second was to make no such exceptions); *E*Trade Fin'l Corp. v. Deutsche Bank*, 631 F. Supp. 2d 313, 391-92 (S.D.N.Y. 2009) (finding indemnification provision covers claims between parties because another provision "unambiguously contemplates direct actions between the parties" and directed that all such claims "be resolved within the framework" of indemnification provision). Other courts have found that the presence of certain notice provisions may suggests an intent to provide for attorneys' fees in claims between the indemnitor and the indemnitee. *See, e.g., Promuto v. Waste Mgmt., Inc.*, 44 F. Supp. 2d 628, 651-52 (S.D.N.Y. 1999); *Pfizer, Inc., v. Stryker Corp.*, 348 F. Supp. 2d 131, 145-46 (S.D.N.Y. 2004). The better-reasoned authority has found this latter line of cases "unpersuasive," particular where there is no other unmistakable express intent to cover suits between the indemnitor and the indemnitee. *Sequa Corp.*, 851 F. Supp. at 111 n.7. But, in any event, here, there is no indication of any clear intent that claims such as the present ones be covered.

Plaintiffs, the claims fails on this basis alone. *See Bank of New York*, 23 A.D.3d at 310 (clause that limited indemnity to certain types of losses could not be construed to cover other types of losses).

Deutsche's claim also fails under *Hooper*, because the coverage language of Section 8(g), like Section 17 of the Custodial Agreement, Ex. D, § 17 at 9, is consistent with coverage of claims brought by third parties against the indemnitees, and thus, under *Hooper*, cannot be extended to cover claims between the parties absent "unmistakably clear" language not present in Section 8(g). *Hooper*, 74 N.Y.2d at 491. Nothing in Section 8(g) specifically refers to claims *between* the parties, and, in fact, the reference to "claims, losses, penalties, fines, forfeitures, reasonable legal fees and related costs, judgments, and any other costs, fees and expenses that the Issuer may sustain" confirms that this language refers to claims that might be brought *against* the indemnitee. Exs. B & C, § 8(g) at 11. Accordingly, under *Hooper*, the language—which sophisticated parties can be presumed to have intended to be given effect—should not be construed as extending beyond such claims. *See Bridgestone/Firestone*, 98 F.3d at 21; *GEM Advisors*, 2009 WL 3459187, at *16; *Bourne*, 751 F. Supp. at 58; *Sequa*, 851 F. Supp. at 110; *Hooper*, 74 N.Y.2d at 491.

Finally, because Deutsche does not have standing to enforce the Depositary Agreement, it also cannot enforce Section 8(g). Courts have reached this result even where (unlike here) the indemnification clause expressly covered losses sustained by the plaintiff: the clause precluding third-party enforcement still must be given effect. *See Control Data Sys.*, 1998 WL 178775, at *2-*3. Even in that circumstance, it is only the contracting parties who may bring suit (if they so choose) to seek damages on the indemnitee's behalf. *Id.*

b. BNP's Indemnification Claims Under the March 2009 Letter Also Must be Dismissed.

As noted, BNP does not assert a claim for indemnification directly under the Depositary Agreement but rather invokes the March 2009 Letter it claims to have obtained from BoA, and which it contends expanded the indemnity rights contained in the Depositary Agreement. BNP Compl. ¶¶ 48-50, 132-33; Ex. E. The letter states:

> As an inducement to BNP Paribas ("BNPP") to enter into, and/or to continue its participation in, the Related Transactions (as defined below), the Depositary hereby agrees to indemnify and hold harmless BNPP, its officers, directors,

> controlling persons and affiliates (collectively, the "Indemnified Persons") against any and all claims, losses, penalties, fines, forfeitures, reasonable legal fees and related costs and judgments, and any other costs, fees and expenses that any Indemnified person may sustain to the extent attributable to the Depositary's negligence, fraud, bad faith or willful misconduct in the performance of its duties under the Depositary Agreement (including, without limitation, its duties under Section 4(d) thereof).

Ex. E at 1. The letter goes on to state that "[f]or the avoidance of doubt, the Depositary's undertakings *herein*"—*i.e.*, in the letter itself—"extend to BNPP [BNP's parent company, BNP Paribas] in its individual capacity, as Series 2005-01 Swap Counterparty and (as applicable) as a holder of Series 2005-1 Short Term Notes." *Id.* at 2 (emphasis added).[17] For two reasons, the March 2009 Letter does not support BNP's indemnification claim here.

First, as shown above, the Letter is not a valid amendment to the Depositary Agreement, so it cannot be used to expand rights already provided for in that Agreement in connection with an alleged breach of that Agreement. *See John Street*, 196 F.3d at 382. Nor can it be cast as a separate agreement on the same subject matter, because any such construction would violate the "Entire Agreement" provision, which states that "[t]his Agreement and the Facility Documents constitute the entire agreement among the parties hereto with respect to the Short Term Notes and any Extended Notes and Non-Called Notes.") *See* Exs. B & C, § 23 at 19. The March 2009 Letter does not purport to be a Facility Document, nor, as already shown, was it signed by Ocala or accompanied by the requisite writing from the rating agencies. *Id.* § 13 at 16. It therefore cannot be used to expand BNP's indemnification rights.

Second, even if the March 2009 Letter were valid, it does not support indemnification here. The Letter appears to be a self-conscious attempt to cure the most glaring problem with the Depositary Agreement—namely the fact, discussed above, that its indemnity provision covers only losses suffered by "the Issuer." Indeed, one cannot but marvel at the timing and content of the Letter, which certainly suggests consciousness of a problem rather than innocent prescience. But it

[17] As the letter indicates, the BNP party to which it was addressed is actually BNP Paribas, BNP's parent company—which, as discussed above in the text, was one of the Swap Counterparties and was not a Noteholder.

still does not confer a right to indemnification for the alleged violations of the Depositary Agreement here because it does not purport to cure the underlying defects in BNP's *standing* to enforce the terms of the Depositary Agreement. *See Control Data Sys.*, 1998 WL 178775, at *2-*3. Certainly, the statement that the letter applies to BNP in its different capacities does not make BNP a third-party beneficiary with standing to enforce the terms of the Depositary Agreement itself, and the March 2009 Letter does not create any substantive rights beyond those contained in the Depositary Agreement. Accordingly, BNP's lack of standing precludes it from seeking indemnity for breaches of the Depositary Agreement just as does Deutsche's lack of standing. *Id.*

Finally, once again, the reference in the March 2009 side letter to "any and all claims, losses, penalties, fines, forfeitures, reasonable legal fees and related costs and judgments, and any other costs, fees and expenses that any Indemnified person may sustain" clearly may be read to cover only third-party claims, and thus is not an "unmistakably clear" reference to first-party losses allegedly suffered by BNP as a result of BoA's alleged breaches of the Depositary Agreement. *See* Ex. E at 1; *Sequa*, 851 F. Supp. at 110; *Bridgestone/Firestone*, 98 F.3d at 21; *GEM Advisors*, 2009 WL 3459187, at *16.

4. **The Indemnification Clause in the Security Agreement Does Not Cover Claims Between the Indemnitor and the Indemnitee.**

Finally, both Plaintiffs assert indemnification claims under Section 8.05 of the Security Agreement, which provides:

> Section 8.05 *Indemnification of Third-Party Claims.*[18] The Collateral Agent agrees to indemnify and hold harmless the Secured Parties and the Issuer against *any and all claims, losses, penalties, fines, forfeitures, reasonable legal fees and related costs, judgments, and any other costs, fees and expenses that the Issuer or the Secured Parties may sustain* to the extent attributable to the Collateral Agent's negligence, fraud, bad faith or willful misconduct in the performance of its duties hereunder.

Ex. A, § 8.05 at 40 (emphasis added).

[18] Although headings do not themselves constitute contract terms that can bear upon construction, *see* Ex. A, § 10.11 at 44, the heading for Section 8.05 confirms the parties' manifest intent.

Once again, the coverage language referring to "any and all claims, losses, penalties, fines, forfeitures, reasonable legal fees and related costs, judgments, and any other costs, fees, and expenses that the Issuer or the Secured Parties may sustain" can be read to cover third-party claims and thus, under the logic of *Hooper*, cannot be read to express an exclusive and unequivocal intent to cover first party claims. *See* Ex. A, § 8.05 at 40; *Bridgestone/Firestone*, 98 F.3d at 21; *GEM Advisors*, 2009 WL 3459187, at *16; *Sequa Corp.*, 851 F. Supp. at 110-11; *Hooper*, 74 N.Y.2d at 491.

V. CONCLUSION

For all these reasons, BoA respectfully requests that these actions be dismissed in their entirety with prejudice.

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Respectfully submitted,

MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, Thirty-Fifth Floor
Los Angeles, CA 90071-1560
(213) 683-9100

By: s/
Marc T. G. Dworsky
Kristin Linsley Myles
Gregory Weingart
Richard St. John
Attorneys for Defendant Bank of America, N.A.

KING & SPALDING
1185 Avenue of the Americas
New York, NY 10036
(212) 556-2242

By: s/
Richard T. Marooney, Jr.
Attorneys for Defendant Bank of America, N.A.