UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

GRUSS GLOBAL INVESTORS MASTER FUND, LTD., GRUSS GLOBAL INVESTORS MASTER FUND (ENHANCED), LTD., PERRY PARTNERS INTERNATIONAL, INC., PERRY PARTNERS L.P., THE VÄRDE FUND, L.P., THE VÄRDE FUND V-B, L.P., THE VÄRDE FUND VI-A, L.P., THE VÄRDE FUND VII-B, L.P., THE VÄRDE FUND VIII, L.P., THE VÄRDE FUND IX, L.P., THE VÄRDE FUND IX-A, L.P., VÄRDE INVESTMENT PARTNERS, LTD., VÄRDE INVESTMENT PARTNERS, L.P., VR LIQUIDITY CRISIS RECOVERY FUND, L.P., VR GLOBAL PARTNERS, YORK CAPITAL MANAGEMENT, L.P., YORK INVESTMENT MASTER FUND, L.P., YORK SELECT, L.P., YORK CREDIT OPPORTUNITIES FUND, L.P., HFR ED SELECT FUND IV MASTER TRUST, LYXOR/YORK FUND LIMITED, YORK SELECT MASTER FUND, L.P., YORK GLOBAL VALUE MASTER FUND, L.P., PERMAL YORK LIMITED, YORK CREDIT OPPORTUNITIES MASTER FUND, L.P., AURELIUS CAPITAL MASTER, LTD., ACP MASTER, LTD., THIRD POINT, LLC, BRF HIGH VALUE, L.P., BENNETT RESTRUCTURING FUND, L.P., BENNETT OFFSHORE RESTRUCTURING FUND, INC., CONTRARIAN ADVANTAGE MASTER FUND I LTD., CONTRARIAN CAPITAL FUND I L.P., CONTRARIAN CAPITAL TRADE CLAIMS L.P., CCM PENSION-A LLC, CCM PENSION-B LLC, CCM PENSION-C LLC, CONTRARIAN CAPITAL SENIOR SECURED L.P., AND PERMAL CONTRARIAN FUND I, LTD. Plaintiffs, -v- DEUTSCHE BANK TRUST COMPANY AMERICAS, Defendant.	Case No: 09-CV-9723-AKH **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**
DEUTSCHE BANK TRUST COMPANY AMERICAS, Third-Party Plaintiff, -against- CAPMARK FINANCIAL GROUP, INC., CAPMARK CAPITAL INC., CAPMARK FINANCE INC., CAPMARK INVESTMENTS LP, COMMERCIAL EQUITY INVESTMENTS, INC., MORTGAGE INVESTMENTS, LLC, NET LEASE ACQUISITION LLC, SJM CAP, LLC and CRYSTAL BALL HOLDING OF BERMUDA LIMITED, Third-Party Defendants.	

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PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

The motion to dismiss filed by Defendant Deutsche Bank Trust Company Americas ("DBTCA" or "Defendant") should be denied.

For purposes of this motion, there is no dispute that DBTCA, acting as indenture trustee under Indentures[1] for unsecured notes issued by Capmark Financial Group, Inc. ("Capmark" or "Issuer"), had a fiduciary duty under New York law to avoid conflicts of interest and to discharge its obligations as trustee with absolute singleness of purpose; that DBTCA executed amendments to the Indentures in May 2009; that the amendments materially and adversely affected the rights of noteholders; and that the amendments permitted Capmark to incur substantial new secured debt – within a week of the amendments – in order to pay an unsecured debt to (among others) DBTCA's parent, Deutsche Bank AG. The complaint properly pleads four claims arising from these facts (and others alleged in the complaint) and the terms of the Indentures.

Each of the arguments advanced by DBTCA in its motion to dismiss requires this Court to embrace, at the pleading stage, one or both of two fact-bound contentions set forth in DBTCA's affirmative defenses to the Second Amended Complaint. See Answer to Second Amended Compl. ¶¶ 66-68, ECF No. 34. First, DBTCA asserts that the Indentures authorized the amendments because they were used to cure an "ambiguity, omission, defect, or inconsistency" in the Indentures arising from a scrivener's error. Second, pointing to an opinion of counsel and a certification by Capmark officers that the amendments were authorized by the Indentures, Defendant asserts that it cannot be liable – even if the amendments in fact were *not*

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[1] If not otherwise defined, capitalized terms are given the same definition as in the Second Amended Complaint, ECF No. 9.

authorized under the terms of the Indentures, even if they operated to the material detriment of the noteholders, and even if they provided a substantial financial benefit to DBTCA's parent. *Id.* ¶ 69.

Both contentions must be rejected, and for two independent reasons. First, both contentions rest on documents and on DBTCA's version of disputed "facts" that may not properly be considered in ruling on a motion to dismiss. Second, even DBTCA's incomplete and self-serving evidence fails to show that DBTCA is entitled to a favorable judgment. Both of its "defenses" require consideration of evidence *in addition to* the documents on which DBTCA relies – evidence that is likely to be within the sole possession of DBTCA and/or Capmark and which Plaintiff has not yet had an opportunity to discover. Whether the amendment in fact corrected a scrivener's error in order to cure an ambiguity, omission, defect, or inconsistency in the Indentures cannot be determined (in DBTCA's favor) merely by examining the Indentures themselves, or even the handful of extraneous documents that Defendant proffers in support of its motion. And DBTCA's claim of reliance on Capmark's certification, even if true (and at this time, we have only Defendant's say-so on that point), is irrelevant under the express terms of the Indentures if DBTCA did not act in good faith – a question that cannot be answered merely by examining those documents that DBTCA has chosen to proffer (and no others). Indeed, DBTCA seems to recognize as much, going so far as to ask this Court to select *its* defense as "more plausible" (Mem. Of Law in Supp. of Mot. To Dismiss at 19 ("Mot."), ECF No. 58) than the self-dealing motive pleaded in the Complaint – a choice this Court is plainly precluded from making at the pleading stage.

Plaintiffs have adequately pleaded all four of the claims in the Second Amended Complaint. DBTCA breached the terms of the Indentures by signing amendments that were not

authorized (Count One). It violated the Trust Indenture Act, which creates a federal right of action to enforce the terms of indentures registered with the SEC (Count Two). It breached the duties it owed to Plaintiffs by enriching its parent company at Plaintiffs' expense (Count Three). And it was negligent in executing amendments that, on their face, were in violation of the terms of the Indentures (Count Four). Nothing in the documents integral to the Second Amended Complaint – or in the documents improperly introduced by Defendant's motion – forecloses any of Plaintiffs' claims. And if the Court does determine that any of Plaintiffs' claims are nominally lacking specificity, DBTCA has presented no reason for the Court to depart from the general rule that re-pleading should be liberally allowed to add specificity.

STANDARDS FOR DECISION

DBTCA styles its motion as a motion to dismiss under Rule 12(b)(6). However, because Defendant has already answered the Second Amended Complaint, its motion is in fact a motion for judgment on the pleadings pursuant to Rule 12(c). See *McKenzie v. O'Gara*, 289 F. Supp. 2d 389, 390–91 (S.D.N.Y. 2003). The standard under Rule 12(c) is the same as under Rule 12(b)(6). *Johnson v. Rowley*, 569 F.3d 40, 43 (2d Cir. 2009). Under either rule, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). A court should not attempt to evaluate the weight and credibility of evidence on a motion to dismiss, when the evidentiary record is necessarily incomplete because plaintiff has not yet obtained discovery. Rather than attempting to assess the likelihood that specific facts will ultimately be proved, a court must assume the truth of all specific facts alleged in the complaint. *Spagnola v. Chubb Corp.*, 574 F.3d 64, 67 (2d Cir. 2009); *Twombly*, 550 U.S. at 556 ("[A] well-pleaded complaint may proceed even if it strikes a

savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'").

In the face of this well-settled pleading principle, Defendant incorrectly urges the Court to decide whether it is "more plausible that DBTCA was acting in good faith reliance upon the documents furnished to it by Capmark . . . than somehow deliberately taking advantage of the Noteholders for its own benefit." Mot. at 19. But a court may not grant a motion to dismiss based on its assessment which of two plausible inferences is more likely than the other. All reasonable inferences from pleaded facts are drawn in the non-moving party's favor, meaning that if an inference is reasonable, it need not be the *most* plausible of all possible inferences from the facts. *Spagnola*, 574 F.3d at 67; *Twombly*, 550 U.S. at 545 ("Asking for plausible grounds does not impose a probability requirement at the pleading stage."); *Tronox Inc. v. Anadarko Petroleum Corp.* (*In re Tronox, Inc.*), 429 B.R. 73, 91 (Bankr. S.D.N.Y. 2010) ("The relative strength of the parties' explanations is not a question to be decided at the pleading stage unless the plaintiff's version is so remote as to be implausible.").[2]

In further contravention of traditional pleading rules, DBTCA attaches a number of documents to its motion, upon which it relies in arguing that Plaintiffs' claims should be dismissed. In deciding a Rule 12(c) motion for judgment on the pleadings, however, a court may consider only two types of documents: First, the court can consider documents attached to, incorporated in, or "integral" to the complaint. *Chambers v. Time Warner, Inc.*, 282 F.3d 147,

[2] Although courts may consider alternative inferences that are apparent *from the facts pleaded in the complaint*, they cannot assume facts not alleged in the complaint. See *ADL, LLC v. Tirakian*, 2010 WL 3925131 (E.D.N.Y. Aug. 26, 2010), *report and recommendation adopted,* No. 06-CV-5076, 2010 WL 3926135 (E.D.N.Y. Sept. 29, 2010) (denying motion to dismiss when "the moving defendants' argument . . . turns on assumptions of facts not included in plaintiff's pleadings").

153 (2d Cir. 2002).[3] Mere reference to or limited quotation from a document in a complaint does not ordinarily constitute incorporation by reference. *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 156 (2d Cir. 2006). Second, the court can consider documents of which it could take judicial notice under Fed. R. Evid. 201(b),[4] such as SEC filings, documents filed in other lawsuits, and media reports. *Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 425 (2d Cir. 2008). Documents examined pursuant to judicial notice, however, may not be considered for the truth of their contents, but merely to establish the fact of the filings, litigation, or reports. *Ibid.*

Defendant's motion relies on documents that fall well outside of both categories. The Opinions of Counsel (Mot. Ex. 5), Officers' Certificates (Mot. Ex. 4), and Offering Circular (Mot. Ex. 2) were not attached to, incorporated in, or integral to Plaintiffs' Second Amended Complaint. Those documents were not filed publicly, and therefore are not subject to judicial notice. Accordingly, the Court may not rely on those documents in deciding Defendant's motion under Rule 12(c).

Reliance on those documents is permitted only if the Court chooses to treat Defendant's motion as a motion for summary judgment. Courts typically decline to convert a motion for judgment on the pleadings to a motion for summary judgment where discovery is in its early stages or (as here) has not even begun. See, *e.g.*, *Fleurimond v. New York Univ.*, No. 09-CV-3739, 2010 WL 2773089, at *3 (E.D.N.Y. July 14, 2010) (holding that court was "not prepared

[3] Defendant cannot rely upon the documents attached to its Answer unless those documents were "integral" to the Second Amended Complaint, such that they could have been relied on in a 12(b)(6) motion. See, *e.g.*, *Wachovia Corp. v. Citigroup, Inc.*, 634 F. Supp. 2d 445, 450–51 (S.D.N.Y. 2009).

[4] Under Fed. R. Evid. 201(b), the court may take judicial notice of a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

to conclusively determine these issues without giving [plaintiff] an opportunity to conduct discovery"); *Umoh v. Marks*, No. 1:09-CV-838, 2010 WL 2651939, at *3-4 (N.D.N.Y. June 25, 2010) (court declined to convert motion to dismiss into one for summary judgment where litigation was "in the preliminary throes of litigation, such that the parties have not yet engaged in any discovery"); *Aaronson v. Am. Med. Sys., Inc.*, No. 09-CV-2487, 2010 WL 3603618, at *2 n.3 (E.D.N.Y. Sept. 7, 2010).

It would be entirely inappropriate for the Court to grant summary judgment here. Defendant possesses the vast majority of the relevant evidence, especially pertaining to the key questions of its internal decision-making process, its motivations in executing the amendments to the Indentures, whether it in fact relied on Officers' Certificates and Opinions of Counsel in executing the amendments and, if it did, whether that reliance was in good faith. To grant summary judgment based only on the evidence Defendant has chosen to make available would unfairly deny Plaintiffs an opportunity to engage in discovery and prove their claims. "Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery." *Hellstrom v. U.S. Dep't of Veterans' Affairs*, 201 F.3d 94, 97 (2d Cir. 2000); see also *Berger v. United States*, 87 F.3d 60, 65 (2d Cir. 1996) (where discovery was stayed pending disposition of purely legal issues, nonmoving party had not had an adequate opportunity for discovery, and summary judgment was therefore inappropriate).

As explained below and demonstrated by the attached affidavit of counsel, Defendant cannot establish as a matter of law that its amendments to the Indentures were permissible without noteholder consent, nor can it conclusively establish that it acted in good faith in failing to secure such consent. Pursuant to Rule 56(f), Plaintiffs attach a declaration describing in detail

the discovery that would be necessary to oppose Defendant's motion if it were converted to a motion for summary judgment. See Rule 56(f) Declaration of Alan D. Strasser, Esq.

FACTUAL BACKGROUND

Plaintiffs are investors presently holding several hundred million dollars worth of unsecured notes in Capmark Financial Group, Inc. ("Capmark" or "Issuer"). The notes were issued on May 10, 2007, under a series of indentures ("Indentures") designating Defendant Deutsche Bank Trust Company Americas ("DBTCA") as indenture trustee. Second Am.Compl. ¶ 39; Mot. Ex. 1 (Indentures). The terms of the Indentures are identical in all respects that are material here.

Section 4.04 of the Indentures imposes certain restrictions on the Issuer's ability to take on additional debt. Prior to May 20, 2009, under the plain language of Section 4.04, the Issuer was required to grant the Noteholders security, equally and ratably, if the Issuer incurred new secured debt that left the company with more than $1.5 billion in total indebtedness. Second Am. Compl. ¶ 40. The purpose of this restriction was simple: It protected the value of the Noteholders' investment by ensuring that subsequently incurred secured debt would not force the Noteholders to the back of the credit line.

On May 20, 2009, however, that key protection was removed when Capmark and Defendant purported to amend the Indentures (the "First Supplemental Indentures"). The sole effect of that amendment was to allow Capmark to incur up to $1.5 billion in *secured* debt *without* ratably securing the Noteholders. Second Am. Compl. ¶ 44; Mot. Ex. 6 (First Supplemental Indentures). Defendant did not seek or obtain the consent of any of the Noteholders prior to signing the First Supplemental Indentures. Second Am. Compl. ¶ 45. A week later, Capmark entered into a new $1.5 billion secured Term Facility Credit and Guaranty

Agreement. Capmark used the proceeds of this new secured debt, in part, to pay off an unsecured debt it owed to Deutsche Bank AG, Defendant's parent company. Second Am. Compl. ¶ 46. Under the original terms of the Indentures, Capmark would have been required to equally and ratably secure the Noteholders when it took on this new secured debt. The amendment purported to allow Capmark to take on the new secured debt without providing that protection to the Noteholders. *Ibid.*

The Plaintiffs first filed their complaint in New York state court on October 1, 2009. Defendant filed a notice of removal on November 23, 2010. Plaintiffs have filed two amended complaints, on November 9 and December 28, 2009. These amended complaints merely added or eliminated certain Noteholders as Plaintiffs; they made no substantive changes to the allegations in the original complaint.

Capmark, along with most of the guarantors on the Indentures, filed for bankruptcy in the Delaware Bankruptcy Court (the "Bankruptcy Court") on October 25, 2009. In the bankruptcy proceedings, Capmark and its secured lenders have strenuously (and for the most part, successfully) attempted to prevent any scrutiny of the circumstances leading to the amendment of the Indentures. Defendant has adopted the same strategy in this case. Thus, while Defendant and Capmark are in exclusive possession of most of the relevant evidence relating to the amendment of the Indentures, Defendant's motion to dismiss proffers the evidence it believes to be most helpful to its defense, in an effort to secure a dismissal that would preclude discovery of any additional evidence concerning its conduct. This rush to judgment is completely unwarranted.

ARGUMENT

I. DEFENDANT'S MOTION REQUIRES THE COURT TO EMBRACE TWO FACT-BOUND CONTENTIONS THAT ARE INCONSISTENT WITH THE ALLEGATIONS OF THE COMPLAINT AND THAT SHOULD NOT BE CREDITED ON A MOTION TO DISMISS

DBTCA's argument as to each of Plaintiffs' claims requires the Court to accept one or both of two fact-intensive propositions: (1) that DBTCA was permitted to amend the Indentures without the Noteholders' consent; and (2) that DBTCA could conclusively rely on the Opinions of Counsel and Officers' Certificates to avoid any and all liability. Neither of those contentions may be credited on a motion to dismiss. Both rest on factual assumptions that are contradicted by the allegations of the complaint. These factual disputes cannot be resolved without discovery.

A. DBTCA Has Not Established As A Matter Of Law That The Amendments Were Authorized By The Indentures

Taken together, Sections 9.01 and 9.02 of the Indentures specify the procedures that must be followed to amend the Indentures. Mot. Ex. 1 §§ 9.01, 9.02. Section 9.01 describes a limited set of circumstances in which the Indentures may be amended *without* obtaining the consent of the Noteholders – for example, to secure the notes, to appoint a successor trustee, or to add to the Issuer's covenants for the benefit of the Noteholders. Each of the circumstances itemized in Section 9.01 shares a key characteristic: any amendment authorized by Section 9.01 is either neutral toward the Noteholders, or benefits the Noteholders.

Section 9.02 specifies the required procedure for any amendment that is *not* contained in the exceptions of Section 9.01.[5] Under Section 9.02, some such amendments require "the written consent of the Holders of at least a majority in principal amount of the Notes then outstanding."

[5] Contrary to DBTCA's assertion (Mot. at 12 n.9), Section 9.02 *does* address amendments to the Indentures. See Mot. Ex. 1 § 9.02(a) ("The Issuer and the Trustee may amend this Indenture . . . with the written consent of the Holders of at least a majority in principal amount of the Notes then outstanding voting as a single class.").

Other amendments are so important to Noteholders that *unanimous* consent is required for their enactment, including any amendment that would "reduce the principal amount of or interest with respect to any Note."[6] Thus, under Section 9.02, amendments that materially and adversely affect Noteholder interests require the approval of a majority or all of the Noteholders.

DBTCA does not dispute Plaintiffs' allegation that no notice was provided to, and no approval was obtained from, *any* Noteholders prior to the execution of the First Supplemental Indentures. Therefore, in order for the First Supplemental Indentures to have been authorized, DBTCA must show that the amendment was authorized under Section 9.01 of the Indentures.

DBTCA argues that the authorization was provided by Section 9.01(i), which allows an amendment "without notice to or consent of any Holder" to "cure any ambiguity, omission, defect, or inconsistency." Mot. Ex. 1 § 9.01(i).[7] But DBTCA fails to identify any ambiguity or inconsistency within the four corners of the Indentures, because there was none. Under New York law, whether a contract provision is ambiguous depends only on whether the language *in the contract* is ambiguous – the threshold determination of ambiguity cannot go beyond the four corners of the agreement. *SEC v. Credit Bancorp, Ltd.*, 232 F. Supp. 2d 260, 264-65 (S.D.N.Y. 2002), *aff'd sub nom. Loewenson v. London Mkt. Cos.*, 351 F.3d 58 (2d Cir. 2003). Here, DBTCA advances no argument that Section 4.04 of the Indentures as originally written was

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[6] Although the amendment to the Indentures did not by its terms explicitly reduce the principal owed under the notes, the amendment at the very least significantly reduced the probability that the Noteholders would ever be able to collect on the full amount owed to them. The practical and intended effect of the amendment was to permit a struggling company (which would declare bankruptcy within six months) to place $1.5 billion dollars of secured debt ahead of the Noteholders.

[7] DBTCA argues that Plaintiffs have failed to allege that "the First Supplemental Indentures were not curative amendments under Section 9.01(i)." Mot. at 12. This is simply not true – the Second Amended Complaint alleges that "[n]one of those circumstances" listed in Section 9.01 were present at the time of the amendment. Second Am. Compl. ¶ 42. This necessarily means that it was not a "curative amendment," authorized by Section 9.01(i).

"ambiguous" or that there was any "inconsistency" between Section 4.04 and any other section of the Indentures. The amendment that inserted the words "secured by Liens" did not clarify the meaning of an ambiguous or internally inconsistent agreement; it *changed* the meaning, in a manner that materially reduced the protections afforded to Noteholders.

DBTCA is likewise unable to show that the amendment cured an "omission" or "defect" in the Indentures. The amendment added words that were not contained in the Indentures and, by doing so, eliminated protections for Noteholders and a constraint on Capmark's ability to take on new secured debt. But any argument that Section 4.04 contained an "omission" because it did not contain the phrase "secured by Liens," or that the Indentures contained a "defect" because they afforded too much protection to Noteholders or too tightly constrained the Issuer, proves too much. By that logic, the Issuer and Trustee could insert *any* new language they wished into the Indenture, on the theory that the added language was "omitted" from the original Indenture and that, from the perspective of the Issuer, certain protections provided to Noteholders constituted a "defect." This would make the exception of Section 9.01 – which allows a limited set of amendments to be made without Noteholder consent – swallow the rule of Section 9.02, which requires at least majority Noteholder consent for every other proposed amendment.

Not surprisingly, any such gloss on Section 9.01 would also run headlong into well-settled law regarding indentures, and the rationale behind allowing certain types of amendments without noteholder consent. The language of the provisions in Section 9.01 is broadly understood to permit only "supplemental indentures which *clearly do not adversely affect the interests of the debentureholders* [which therefore] may be executed without their consent." American Bar Foundation, *Commentaries on Model Debenture Indenture Provisions*, § 9-1

(1971) ("*Commentaries*") (emphasis added).[8] Indenture references to "ambiguity," "inconsistency," and "defect" are construed in accordance with that fundamental principle:

> The major purpose of clause (3) [allowing the correction of an "ambiguity"] is to correct ambiguities discovered subsequent to the execution of the indenture which are inconsistent with the intention of the parties as *clearly expressed elsewhere in the indenture*. Some indentures permit the correction of provisions which might be "defective", but this word in itself is so ambiguous that it could provide an opportunity to make substantive changes without debentureholder consent. *No change made under clause (3) may adversely affect the interests of the debentureholders*, so that if there is an ambiguity in, for example, the terms of payment, a resolution of this ambiguity that adversely affects the interests of the debentureholders could not be made without debentureholder consent.

Commentaries § 9.01 (emphases added).

Attempting to reconcile its defense with those fundamental principles, DBTCA contends that the parties to the Indentures actually intended the meaning reflected in the First Supplemental Indentures, but that the critical words "secured by Liens" were left out of the Indentures as the result of a "scrivener's error." Mem. Of Law in Supp. of DBTCA Mot. to Transfer at 5, ECF No. 13.

To support this contention, DBTCA is required to turn to evidence other than the Indentures themselves. In particular, DBTCA asserts that the ambiguity, omission, defect, or inconsistency is demonstrated by the Offering Circular, which contains the words "secured by Liens." That claim, however, is foreclosed by the express language of the Offering Circular itself, which explicitly addresses the question of any differences between its terms and the terms of the Indentures. The Offering Circular – as well as the publicly-filed Prospectus – state that its

[8] "We have previously relied on the *Commentaries* to interpret indenture provisions. *See, e.g., Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.,* 838 F.2d 66, 71-72 (2d Cir. 1988); *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.,* 691 F.2d 1039, 1048-50 (2d Cir.1982); *see also* [*In re*] *Envirodyne* [*Indus., Inc.*], 29 F.3d [301,] 305 [(7th Cir. 1994)] (approving of the use of texts, such as the *Commentaries,* which 'like trade usage, are in the nature of specialized dictionaries')." *Deutsche Bank AG v. Metromedia Fiber Network, Inc.* (*In re Metromedia Fiber Network, Inc.*), 416 F.3d 136, 140 n.2 (2d Cir. 2005).

"summaries of certain provisions of the notes and the Indentures do not purport to be complete and are subject to, and are qualified in their entirety by reference to, all the terms and conditions of the notes and the Indentures. . . . *We urge you to read the Indentures because those documents, and not this 'Description of the Notes,' define your rights as a holder of notes*." Mot. Ex. 2 at 182, Mot. Ex. 3 at 216 (emphasis added).

More importantly for present purposes, DBTCA cannot establish that the amendments were undertaken to correct a scrivener's error merely by pointing to *differences* between the Indentures and the Offering Circular. It must also establish (at a minimum) that the Offering Circular, rather than the Indentures, reflected the actual terms of their agreement – notwithstanding that the Offering Circular itself said exactly the opposite. To do so necessarily requires consideration of the parties' intent and the history of the contract negotiations, among other things, and the proponent of such a change must satisfy demanding legal standards. While a party may seek to reform a contract through use of extrinsic evidence if that contract does not reflect the actual agreement between the parties, courts recognize that this "evasion of the parol evidence rule" requires the party seeking to reform the contract to meet a high evidentiary standard. *Int'l Multifoods Corp. v. Commercial Union Ins. Co.*, 98 F. Supp. 2d 498, 506 (S.D.N.Y. 2000). "There is a strong presumption that a deliberately prepared and executed instrument reflects the intention of the parties." *In re Schick*, 232 B.R. 589, 598 (Bankr. S.D.N.Y. 1999) (citing *George Backer Mgmt. Corp. v. Acme Quilting Co.*, 385 N.E.2d 1062, 1066 (N.Y. 1978)).[9] To overcome that "strong presumption," the party seeking to change the terms of the contract must show, by "clear and convincing evidence," that the contract as written

[9] This well-established doctrine further shows why Defendant's reliance on documents outside the four corners of the Indentures to establish an "ambiguity, omission, inconsistency, or defect" is misplaced. New York courts frown on all attempts to evade the parol evidence rule, as DBTCA attempts to do here.

does not reflect the actual agreement between the parties. *Collins v. Harrison-Bode*, 303 F.3d 429, 435 (2d Cir. 2002) (internal quotation marks omitted).

Here, DBTCA offers no evidence at all that the language in the Offering Circular and Prospectus, rather than the language in the original Indentures, reflected the parties' intent; it merely asserts, without support of any kind, "[t]he fact that it was the intention of the drafters to include the words 'secured by liens.'" Mot. at 5. As the proponent of a non-consensual change in the Indentures, DBTCA is obligated to overcome that presumption, and the Noteholders (who are intended beneficiaries of the Indentures but who did not participate in the negotiation and drafting of the Indentures) are entitled, at a minimum, to discovery on the factual issues relating to the parties' intent. We are not aware of any case holding, *on a motion to dismiss*, that a scrivener's error permits a contract to be changed over a beneficiary's objection.

B. DBTCA Has Not Established As A Matter Of Law That It Acted In Good Faith

There is also no basis, on a motion to dismiss, to credit DBTCA's affirmative defense that it is immune from any and all liability because it claims to have executed the amendments in reliance on Opinions of Counsel and Officers' Certificates.

Section 7.01(b)(ii) of the Indentures provides that "*in the absence of bad faith on its part*, the Trustee may conclusively rely . . . upon certificates or opinions furnished to the Trustee." Mot. Ex. 1 (emphasis added). As an initial matter, it is not Plaintiff's burden to allege or prove that DBTCA acted in bad faith. Defendant treats the "in the absence of bad faith" reliance clause in the Indentures as an exculpatory clause which would permit it to escape liability even if it breached the contract. New York law places the burden on the party seeking shelter in an exculpatory clause to prove that it satisfies the clause's requirements. See, *e.g.*, *Travelers Cas. & Sur. Co. v. Dormitory Auth.*, No. 07-CV-6915 2010 WL 3419196, at *7, (S.D.N.Y. Aug. 26,

2010) (citing *Maric Mech., Inc. v. Dormitory Auth.*, 62 A.D.3d 965 (N.Y. App. Div. 2009)). However, regardless of which party bears the burden of proof, the question of Defendant's bad faith is a factual question that cannot be resolved merely on the basis of DBTCA's say-so.

Reliance in good faith – or "in the absence of bad faith" – requires something more than unquestioning acceptance. *Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992) (after close of discovery, trustee showed good faith reliance by introducing evidence that there was a "studied approach to the opinions," and that correspondence between the trustee and counsel "reflect[ed] discussion and work between them"); see also, *e.g.*, *United States v. Lung Fong Chen*, 393 F.3d 139, 151-153 (2d Cir. 2004) (approving of jury instruction, in criminal case, that "[a] good faith belief is not a blind faith belief"); *Conway v. United States*, 326 F.3d 1268, 1274, 1279 (Fed. Cir. 2003) (affirming Court of Federal Claims's determination that taxpayer had relied on advice of counsel on investment "tip"; absent a "reasonable basis" for accepting the tip as informed advice, the reliance was an act of "blind faith, not good faith") (internal quotations omitted); *Shaiman v. Carpet One of the Hamptons, Inc.*, No. BRC 208-08, 2010 WL 2305549, at *6 (N.Y. Dist. Ct. June 9, 2010) (under standard of practice for accountants that they may rely in good faith upon information provided by clients, accountant still "may not turn a blind eye to an obvious discrepancy"). To determine good faith or bad faith thus requires factual inquiry into DBTCA's knowledge and motives when it executed the amendments.

The Opinions of Counsel and the Officers' Certificates that DBTCA attaches to its motions provide no support for DBTCA's claim of good faith, much less the conclusive proof that would be required to support a motion to dismiss (even assuming such extraneous documents were cognizable on a motion to dismiss). The Opinions of Counsel provide *no* legal analysis of the relevant provisions of the Indentures (or, for that matter, of anything else). They

merely set forth the unadorned (but heavily qualified) opinion that "the Supplemental Indenture is authorized or permitted by the Indenture and complies with the provisions of the Indenture (including Sections 9.01(i) and 9.03 thereof)." Mot. Ex. 5. But in expressing that conclusion, the Opinion made crystal clear that it was not independently vouching for any of the facts on which the conclusion depended. "As to questions of fact material to this opinion, we have relied upon certificates or comparable documents of public officials and of officers and representatives of the Company." *Ibid.* The validity of the Opinion thus depended entirely on the self-interested certifications of Capmark itself as to the material facts. But those "facts" are nowhere to be found in the Officers' Certificates. The Officers' Certificates recite that the signing officers conducted such examinations and investigations "as we have deemed necessary" but reveal *none* of the facts learned through such examinations and investigations. Mot. Ex. 4. Instead, the officers merely stated their own "opinion" – clearly designated as such – that "the Supplemental Indenture complies with the requirements of the Indenture, including Section 9.01(i) thereof." *Ibid.* Assuming that there are *any* circumstances in which the Supplemental Indenture could have been authorized by Section 9.01(i), such authorization depends critically on the *facts* concerning the purported ambiguity, omission, defect, or inconsistency, for the reasons we have explained. But no facts relevant to that question – *none* – can be found in either the Opinions of Counsel or the Officers' Certificates.

Plaintiffs have alleged that Defendant allowed the Indentures to be amended because its parent company, Deutsche Bank AG, stood to have a substantial loan paid off from the proceeds of the new secured debt that Capmark would take on if the Indentures were amended. Second Am. Compl. ¶¶ 1, 2, 46. DBTCA does not dispute that its parent was paid from those proceeds; indeed, it is a matter of public record that Deutsche Bank AG was a lender under Capmark's

unsecured credit facilities. See Ex. A (Capmark Apr. 22, 2009 8-K, Ex. 10.1, 10.2). Those allegations, if proven, would at the very least justify a strong inference – and certainly a plausible inference – that Defendant's purported reliance on the Officers' Certificates and Opinions of Counsel was not in good faith. That inference is strengthened by the studious avoidance of any representation in the Opinions of Counsel and Officers' Certificates that purports to make a *factual* claim that would support DBTCA's "scrivener's error" defense.[10]

DBTCA's motion to dismiss, even when improperly supplemented by its attached documents, merely highlights the factual questions that have not been answered, and cannot be answered without discovery. Defendant's arguments for dismissal rest on the propositions that the Supplemental Indentures were authorized by Section 9.01(i) to correct a scrivener's error, and that DBTCA acted in good faith – without regard to its parent's financial interests – when it amended the Indentures to the detriment of Noteholders. The Court should not credit those disputed factual contentions on a motion to dismiss. And when those fact-intensive contentions are stripped away from Defendant's motion to dismiss, little else remains.

[10] DBTCA itself offers another reason to question its good faith reliance on those documents in its own Motion, when it suggests that it might have been named as a defendant in a different proceeding had it not agreed to amend the Indentures. Mot. at 25 n.14. It is certainly plausible that DBTCA decided to shift its litigation risk from one group of potential plaintiffs to another.

II. THE COMPLAINT SUFFICIENTLY PLEADS CLAIMS AGAINST DBTCA

The motion to dismiss should be denied under well-established pleading principles. The factual allegations in the complaint sufficiently plead claims against DBTCA, and it is those allegations that are controlling, not DBTCA's version of disputed facts as reflected in the incomplete and self-serving evidence upon which its motion improperly relies.

A. The Complaint Sufficiently Pleads DBTCA's Breach Of The Indentures

DBTCA's attack on Plaintiffs' breach of contract claim fails. The complaint alleges that DBTCA breached the Indentures by amending them to the detriment of the Noteholders and without the Noteholders' consent, and to the financial benefit of DBTCA's parent. Second Am. Compl., ¶ 44-46. Defendant's assertion that the amendment was authorized to correct an ambiguity, omission, defect, or inconsistency resulting from a scrivener's error is a defense that cannot properly be accepted on a motion to dismiss. Its claim of reliance on Opinions of Counsel and Officers' Certificates must also be rejected at this stage of the litigation, because that defense turns on the question of DBTCA's good faith. Whether the amendments were authorized by Section 9.01(i) and whether DBTCA acted in good faith are disputed factual issues that should not be resolved on the pleadings, before Plaintiff has obtained discovery of the relevant facts, most of which are in the exclusive possession of Defendant. If the amendments were not authorized by the Indentures, as the complaint alleges, DBTCA's execution of the amendment was, by definition, a violation of the terms of the Indentures.

For this reason, both of the cases cited by Defendant as relevant to the breach of contract claim are readily distinguishable. In *Williams v. Continental Stock Transfer & Trust Co.*, the plaintiff sought to hold the trustee liable for defects in documents that the *issuer* was required to provide. 1 F. Supp. 2d 836, 841 (N.D. Ill. 1998). In *Hazzard v. Chase Nat'l. Bank of City of*

N.Y., the trustee was held not liable (after a full trial) because it had "complied with every detail of its contractual duty." 159 Misc. 57, 82 (Sup. Ct. N.Y. Cnty. 1936). In this case, by contrast, Plaintiffs have alleged a clear breach by DBTCA of its contractual duty to provide notice and obtain consent from Noteholders before amending the indenture.

Defendant's primary argument appears to be that, since it purportedly created a paper trail when it signed the First Supplemental Indentures, it is fully insulated from liability as a matter of law. This is plainly wrong. The Indentures state that, even when the "procedures" of amending the Indentures are followed, the Trustee: (1) may rely on Officers' Certificates or Opinions of Counsel only "in the absence of bad faith," Mot. Ex. 1 § 7.01(b)(ii); and (2) "may not be relieved from liability for its own negligent action, its own negligent failure to act or its own willful misconduct." *Id.* § 7.01(c). These qualifications would be rendered meaningless if, as Defendant claims, the rote following of the process for amending the Indentures was sufficient, without more, to absolve it of all liability.

B. The Complaint Sufficiently Pleads A Violation Of The Trust Indenture Act

The Second Amended Complaint sufficiently pleads a violation of the Trust Indenture Act ("TIA"). DBTCA does not contest the proposition that the TIA creates a private federal right of action against indenture trustees, both for "negligence or willful misconduct," and to "enforce [the] provisions" of an indenture which has been qualified with the SEC. *LNC Inv., Inc. v. First Fid. Bank, Nat'l Ass'n*, 935 F. Supp. 1333, 1338-40 (S.D.N.Y. 1996) (internal quotations omitted). At a minimum, the TIA creates a right of action where the trustee does not ensure *its own* full compliance with the terms of the Indentures and, in failing to do so, breaches them. *Ibid.* As the TIA clearly states, and as Defendant acknowledges (Mot. at 15), an indenture trustee may be liable for failing in "the performance of such duties as are specifically set out in

such indenture." 15 U.S.C. § 77ooo(a)(1); see also Mot. Ex. 1 § 7.01(b)(i) ("Trustee undertakes to perform such duties . . . as are specifically set forth in this Indenture"). For the reasons described in Parts I and II.A, *supra*, therefore, Plaintiffs have adequately pleaded a breach of the Indentures by Defendant, and therefore a breach of the Trust Indenture Act, and are entitled to discovery on the underlying factual questions surrounding that claim.

C. The Complaint Sufficiently Pleads A Breach Of Fiduciary Duties

Defendant's attacks on the sufficiency of the pleadings on Plaintiffs' breach of fiduciary duty claim fail, as well. DBTCA concedes (Mot. at 17), as it must, that indenture trustees owe a duty of loyalty to noteholders – that is, a duty to carry out their obligations under the indenture with "absolute singleness of purpose." *Dabney v. Chase Nat'l Bank of City of N.Y.*, 196 F.2d 668, 670 (2d Cir. 1952) (holding that an indenture trustee owes a duty "to give his beneficiary his undivided loyalty, free from any conflicting personal interest"); *AMBAC Indem. Corp. v. Bankers Trust Co.*, 151 Misc. 2d 334, 340 (N.Y. Sup. Ct. 1991) ("[P]rior to default, [the trustee] has a fiduciary duty not to advance its own interests at the expense of the bondholders.").[11] In seeking dismissal, however, DBTCA urges several limitations on the duty of loyalty that the law simply does not support.

First, DBTCA suggests that the duty can be breached only if the defendant, itself, receives a direct economic benefit. That is wrong. As the cases make clear, the relevant inquiry is whether the defendant has acted with "undivided loyalty to trust beneficiaries," and with "absolute singleness of purpose." See, *e.g.*, *Beck v. Mfrs. Hanover Trust Co.*, 218 A.D.2d 1, 11 (N.Y.A.D. 1995) ("[F]idelity to the terms of an indenture does not immunize an indenture trustee

[11] See also *U.S. Trust Co. of N.Y. v. First Nat'l City Bank*, 57 A.D.2d 285, 296–97 (N.Y. App. Div. 1977) (holding that the *Dabney* rule that indenture trustees owe a fiduciary duty of loyalty had survived the passage of the TIA), *aff'd* 45 N.Y.2d 869 (1978).

against claims that the trustee has acted in a manner inconsistent with his or her fiduciary duty of undivided loyalty to trust beneficiaries."); *LNC Inv., Inc.*, 935 F. Supp. at 1347 ("[A]n indenture trustee must avoid conflicts of interest and discharge its obligations 'with absolute singleness of purpose,' because of the inability of dispersed investors to enforce their rights.") (quoting *Dabney*, 196 F.2d at 669–71).

The duty of undivided loyalty is breached if a trustee subordinates the interests of noteholders to the interests of a third party, just as it is breached if a trustee subordinates noteholders' interests to its own interests. A parent corporation, moreover, is not just any third party. "With or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder. . . . [I]n reality a parent and a wholly owned subsidiary *always* have a 'unity of purpose or a common design.'" *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771–72 (1984) (emphasis added). In light of the nature of the parent-subsidiary relationship, "allegations of substantial concrete financial benefits to the parent are sufficient to plead the subsidiary's motive" – even under the heightened pleading requirements for claims of fraud (much less the lower pleading standards that govern this claim). *In re Indep. Energy Holdings PLC Sec. Litig.*, 154 F. Supp. 2d 741, 766 (S.D.N.Y. 2001), *abrogated on other grounds by In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003); see also *Abbell Credit Corp. v. Bank of Am. Corp.*, No. 01-CV-2227, 2002 WL 335320, at *5 (N.D. Ill. Mar. 1, 2002) ("A subsidiary's desire to benefit its parent could constitute a valid motivation [to commit fraud].").

For similar reasons, Plaintiffs are not required to specifically plead or prove that DBTCA's actions in executing the amendment were "controlled" by its parent. Of course, as a matter of law, a parent corporation exercises ultimate control over its subsidiaries, and "the

parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests." *Copperweld*, 467 U.S. at 771-72. But a breach of the fiduciary obligation of undivided loyalty does not require that the beneficiary of the fiduciary's improper conduct "controlled" the actions of the fiduciary that conferred the improper benefit.

None of the cases on which DBTCA relies are in conflict with these principles. Most of those cases have nothing to do with a subsidiary's fiduciary obligations; they merely hold that a parent and its subsidiary are separate entities – a proposition that is utterly irrelevant here. *See Rubin v. Mfrs. Hanover Trust Co.*, 661 F.2d 979, 991, 993-94 (2d Cir. 1981) (addressing the consideration offered for security on a loan); *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1091 (1st Cir. 1992) (addressing personal jurisdiction); *Mellon Bank, N.A. v. Metro Commc'ns, Inc.*, 945 F.2d 635, 643 (3d Cir. 1991) (addressing the location of an entity's primary office); *Oxford Furniture Cos. v. Drexel Heritage Furnishings, Inc.*, 984 F.2d 1118, 1126 (11th Cir. 1993) (addressing tortious interference with contracts); *Am. Cyanamid Co. v. Wilson & Toomer Fertilizer Co.*, 51 F.2d 665, 671 (5th Cir. 1931) (addressing breach of contract).

Second, DBTCA incorrectly asserts that an indenture trustee can breach its fiduciary duty only through "'knowing, intentional action in flagrant disregard of the interests of the bondholders.'" Mot. at 17, 19, 20. That is *not* the holding of the case DBTCA cites in support of that assertion, *Morris v. Cantor*, 390 F. Supp. 817, 824 (S.D.N.Y. 1975). Rather, *Morris* holds that such conduct would be *encompassed by* the TIA's prohibition of "willful misconduct." *Ibid.*[12] See also *In re Equity Funding Corp. of Am. Sec. Litig.*, 416 F. Supp. 161, 203 (C.D. Cal.

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[12] In any event, *Morris* dealt with a type of conflict clearly *allowed* by the TIA, given certain protections to noteholders – the situation where a trustee is also a creditor on the notes at issue.

1976) (citing *Morris* in holding that a TIA claim is stated by allegations that the trustee knowingly allowed the impermissible conduct and that the conduct harmed the debenture holders); *E.F. Hutton Sw. Props. II, Ltd. v. Union Planters Nat'l Bank* (*In re E.F. Hutton Sw. Properties II, Ltd.*), 953 F.2d 963, 972 (5th Cir. 1992) (summarizing New York law and concluding that heightened fiduciary duties for an indenture trustee arise "where it is evident that the indenture trustee may be sacrificing the interests of the beneficiaries in favor of its own financial position").

"Under New York Law, 'a fiduciary relationship exists from the assumption of control and responsibility,' and it is 'founded upon trust reposed by one party in the integrity and fidelity of another.'" *New York State Med. Care Facilities Fin. Agency v. Bank of Tokyo Trust Co.*, 163 Misc. 2d 551, 560-61 (N.Y. Sup. Ct. 1994), *aff'd,* 216 A.D.2d 126 (N.Y. App. Div. 1995) (citation omitted). DBTCA, by agreeing to become a trustee under the Indentures, undertook – among other duties – the duty of reviewing proposed amendments in good faith. Mot. Ex. 1 §§ 9.01, 9.02. Once the existence of the fiduciary relationship is shown, the remaining elements of a claim for breach of fiduciary duty are: "misconduct by the defendant, and [] damages directly caused by the defendant's misconduct." *Rut v. Young Adult Inst., Inc.*, 74 A.D.3d 776, 777 (N.Y. App. Div. 2010).

The complaint alleges that DBTCA agreed to an improper amendment that conferred a substantial benefit to Deutsche Bank AG, despite the obvious adverse consequences for the Noteholders. Under *Morris*, *Equity Funding*, and other cases, those allegations are sufficient.[13]

Morris, 390 F. Supp. at 823-24; 15 U.S.C. § 77kkk. The sort of self-dealing alleged here, of course, is outside the scope of Trustee activites permitted by the TIA.

[13] Defendants twice cite to language referring to the heightened pleading standard of Federal Rule of Civil Procedure 9(b). Mot. at 23, 24. That standard is inapplicable here because Plaintiffs have not alleged fraudulent conduct.

The cases make clear that a fiduciary duty claim is stated whenever a plaintiff alleges that that the trustee has acted to benefit another party at the expense of the noteholders. For instance, the court found in *Dabney* that the trustee had violated its fiduciary duty by putting itself before the bondholders in collecting a personal claim from the debtor, when it knew the debtor was nearly insolvent. 196 F.2d at 673. Similarly, in *U.S. Trust Co. of New York v. First Nat'l City Bank*, 57 A.D.2d 285, 296–97 (N.Y. App. Div. 1977), the plaintiff properly stated a claim for breach of fiduciary duty by alleging that the trustee engaged in transactions that favored its own interest as a creditor of the issuer over the noteholders' interests.

DBTCA cites cases that are very different from this case; its cases involve situations in which the trustee either acted within the discretion given to it by the indenture, or performed an action *required* by the indenture. Neither of those situations exists here. For example, in *Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.*, 838 F.2d 66, 73 (2d Cir. 1988), the Second Circuit held that *when there is no conflict of interest and the trustee's actions are expressly authorized by the indenture*, indenture trustees are not required to go beyond the indenture's terms to advance the noteholders' financial interests. In that case, the trustee exercised its discretion, as it was specifically authorized to do by the indenture, to waive the requirement that the issuer give notice to the trustee 50 days prior to redemption of the debentures. The court emphasized that the notice requirement was "intended for the *trustee's* benefit," not the noteholders' benefit, which was why the indenture explicitly permitted the trustee to waive the notice requirement. *Elliot*, 838 F.2d at 71 (emphasis added). Further, the *Elliot* court found – *after* trial – that the plaintiffs had presented no evidence that the trustee benefitted, "directly or indirectly," from its decision to waive the notice requirement. *Id.* at 73. Meanwhile, the court repeated the well-established rule that "a trustee must refrain from engaging in conflicts of

interest." *Ibid.* Here, Plaintiffs allege both a breach of the indentures (an amendment adverse to the Noteholders' interests made without their consent), and an improper benefit (the repayment of a loan to DBTCA's parent).

Meckel v. Cont'l Res. Co., 758 F.2d 811, 815 (2d Cir. 1985), is similarly off-target; it merely held that a trustee did not breach its fiduciary duty when it took actions *required* by the indenture. There, the indenture required the trustee to give redemption notice to the bondholders via first-class mail, and the trustee did so. When some of the bondholders did not receive the mailed notice, the registered holder of the debentures filed suit, arguing that the trustee should have provided more thorough notice. *Id.* The court concluded that the trustee owed no duty of reasonable care and skill that required it to go *beyond* the obligations imposed in the indenture. *Id.* See also *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 959 (5th Cir. 1981) (en banc) (where trustee had complied with terms of the indenture, there was no action under New York law for a breach of fiduciary duty because an indentured trustee is not required "to seek for the holders of debentures any benefits that are greater than those contractually due them."); *Hazzard*, 159 Misc. at 66 (concluding, after a six-week trial, that no duty was breached where the trustee had complied with the terms of the indenture and there was no evidence of bad faith or self-dealing).

Here, unlike any of the cases cited by the Defendant, the Plaintiffs allege that DBTCA breached the terms of the indenture *and* that its actions were motivated by a conflict of interest – DBTCA's parent stood to "profit at the possible expense of [its] beneficiary." See *Dabney*, 196 F.2d at 670. These allegations place the case squarely within the rule of *Dabney* and its progeny, and state a cause of action for a breach of the indenture trustee's duty of loyalty. See *E.F. Hutton*, 953 F.2d at 972 (describing New York law as imposing *Dabney*'s heightened duty of loyalty when "a conflict arises where it is evident that the indenture trustee may be sacrificing

the interests of the beneficiaries in favor of its own financial position."). These allegations differ both in degree and kind from the alleged "conflicts of interest" that courts have held insufficient: a "bald assertion[]" of conflict, *Elliot*, 838 F.3d at 70; a generally lucrative relationship between issuer and trustee, *Page Mill Asset Mgmt. v. Credit Suisse First Boston Corp.*, Nos. 84152, 98-CV-6907, 2000 WL 877004, at *2 (S.D.N.Y. June 30, 2000); and a "mere hypothetical possibility that the indenture trustee might favor the interests of the issuer merely because the former *is* an indenture trustee," *E.F. Hutton*, 953 F.2d at 972.

D. The Complaint Sufficiently Pleads Negligence

DBTCA's challenge to Plaintiffs' negligence claim is based both on a crabbed reading of the law, and on Defendant's factual assertion – contrary to the allegations of the complaint – that the First Supplemental Indentures could be enacted without noteholder consent. DBTCA correctly identifies a pre-default general duty "not to negligently carry out a ministerial task," Mot. at 31, but this duty does not occupy the entire field of pre-default negligence claims. At the very least, Defendant had an obligation "to comply with the indenture" during the time that it served as Trustee. *Semi-Tech Litig., LLC v. Bankers Trust Co.*, 353 F. Supp. 2d 460, 482 (S.D.N.Y. 2005). This obligation is not, as DBTCA claims, a creation of Plaintiffs here; the purpose of requiring indentures to qualify under the TIA is to "vindicate a federal policy of protecting investors." *Phelps v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago* (*In re Nucorp Energy Sec. Litig.*), 772 F.2d 1486, 1489 (9th Cir. 1985) (internal quotation omitted) (quoted by *Bluebird Partners, L.P. v. First Fidelity Bank, N.A. New Jersey*, 85 F.3d 970, 974 (2d Cir. 1996)). 15 U.S.C. § 77ooo(d) forbids trustees from absolving themselves of liability for their own negligence as part of that federal policy. DBTCA, therefore, owed Plaintiffs at least the

duty of care of compliance, as properly alleged in the Second Amended Complaint. Second Am. Compl. ¶ 63.

Compliance with the Indentures required, among other things, compliance with the provisions that govern the trustee's obligations and authority to amend the Indentures. See Mot. Ex. 1 §§ 9.01, 9.02. Defendant does not deny that it had a duty to perform the tasks delineated in these provisions; in fact, it asserts that it was "required" to sign a conforming amendment. Mot. at 10. DBTCA cannot assert, on the one hand, that it was required to sign a conforming amendment, without acknowledging that it was required *not* to sign a non-conforming amendment. See Part I, *supra*. If Defendant was negligent in executing an impermissible amendment, Section 7.01(c) specifically states that it is *not* exempted from liability for that negligence.

Defendant cites no cases to the contrary. Instead, DBTCA cites only cases in which the indenture in question imposed *no* duty upon the trustee, or in which the court found that the trustee had fully *complied* with its duties under the indenture. See *Williams*, 1 F. Supp. 2d at 840-841 (N.D. Ill. 1998) (where indenture required only that documents be submitted *to* trustee, trustee held not liable for alleged defects in those documents); *Elliot*, 838 F.2d at 72-73 (50-day notice period before redemption for trustee's benefit; because it acted within discretion granted to it by indenture, trustee was not required to consider effect on noteholders when agreeing to shorten notice period). Defendant concedes that it undertook duties regarding the amendment of the indentures, and has not established as a matter of law that it complied with those duties. The complaint alleges that Defendant failed to obtain the consent of the Noteholders before executing the First Supplemental Indentures, and in so doing acted without due care in a duty it specifically undertook. Second Am. Compl. ¶¶ 45, 63, 64. Since the Indentures and the TIA specifically

provide that Defendant may be held liable for negligence in performing the tasks it undertook as Trustee, and Defendant cannot establish as a matter of law that it was *not* negligent, Plaintiffs' negligence claim must stand.

III. IF THE COURT FINDS THAT ANY OF PLAINTIFFS' CLAIMS ARE INSUFFICIENTLY PLEADED, IT SHOULD ALLOW PLAINTIFFS LEAVE TO AMEND THE COMPLAINT

If the Court concludes that any of Plaintiffs' pleadings are insufficient, Plaintiffs should be permitted to amend the complaint to remedy any deficiencies. Plaintiffs have twice amended their complaint in this action, but both amendments merely added or subtracted parties as plaintiffs, and neither amendment made any substantive change to the allegations. Defendant has identified no applicable exception to the general rule that leave to amend the complaint should be freely given. "The court should freely give leave [to amend the complaint] when justice so requires." Fed. R. Civ. P. 15(a)(2).

CONCLUSION

The Second Amended Complaint fully and adequately pleads the four causes of action contained in it; therefore, Defendant's motion should be denied. If the Court chooses to convert the motion to a motion for summary judgment, it should either deny the motion or hold it in abeyance until discovery is complete. If any of the counts of the Second Amended Complaint are dismissed, the dismissal should be without prejudice, and Plaintiffs should be given leave to amend the complaint.

Dated: October 22, 2010 Respectfully submitted,

By: /s/

Lawrence S. Robbins, New York Bar No. 8917
Alan D. Strasser (admitted *pro hac vice*)
Jennifer S. Windom (admitted *pro hac vice*)
Thomas L. Devlin (admitted *pro hac vice*)
Robbins, Russell, Englert,
Orseck, Untereiner & Sauber LLP
1801 K Street N.W., Suite 411L
Washington, DC 20006
Tel: (202) 775-4500
Fax: (202) 775-4510
lrobbins@robbinsrussell.com

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Rule 56(f) Declaration of Alan D. Strasser, Esq.

Declaration of Thomas L. Devlin

April 22, 2009 8-K and attached exhibits .... Exhibit A