UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

THE WATER WORKS BOARD OF THE CITY OF BIRMINGHAM; WASHINGTON SUBURBAN SANITARY COMMISSION EMPLOYEES' RETIREMENT PLAN; ATLANTIC GLOBAL YIELD OPPORTUNITY MASTER FUND, L.P.; AND ATLANTIC GLOBAL YIELD OPPORTUNITY FUND, L.P.,	
Plaintiffs,	Civil Action No. 4:17-CV-04113-LLP
-against-	Oral Argument Requested
U.S. BANK NATIONAL ASSOCIATION,	
Defendant.	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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Plaintiffs The Water Works Board of the City of Birmingham; the Washington Suburban Sanitary Commission Employees' Retirement Plan; Atlantic Global Yield Opportunity Master Fund, L.P.; and Atlantic Global Yield Opportunity Fund, L.P. (collectively, "Plaintiffs"), respectfully submit this memorandum of law in opposition to the motion to dismiss filed by defendant U.S. Bank National Association ("U.S. Bank," "Defendant," or "Indenture Trustee") on October 19, 2017.

PRELIMINARY STATEMENT

In the Complaint, Plaintiffs allege that U.S. Bank breached the Indentures[1] by sending offering proceeds to the wrong entity and by failing to act in good faith and with the requisite due care in carrying out other prescribed duties under the Indentures, specifically by not properly examining and responding to the defective payment instructions it received. The Indentures *explicitly* incorporate in a number of places both due care and good faith requirements for U.S. Bank's performance of its duties pursuant to the Indentures. Applicable common law requires the same.

The Complaint alleges in detail, with references to the supporting documentation, numerous irregularities and/or contradictions in the offering documents and payment instructions which show precisely how U.S. Bank breached the Indentures and failed to act with the required due care and good faith. Rule 12(b)(6)'s threshold pleading requirement of plausibility has therefore been met. Moreover, many of U.S. Bank's arguments should be rejected as inconsistent with the plain meaning of terms of the Indentures. In addition, whether U.S. Bank's conduct satisfied its contractual and common law obligations of due care and good faith involves disputed questions of fact, precluding U.S. Bank's motion to dismiss on the pleadings.

[1] Capitalized terms have the same meaning set forth in the Complaint, dated August 23, 2017, Docket No. 1.

Although U.S. Bank seeks to blame other participants in the August 2014 and April 2015 Offerings for Plaintiffs' losses, its role was crucial as the final gatekeeper in connection with the disbursement of the bond proceeds it received in trust from the offerings. The whole purpose of having an indenture trustee is to protect the security for which the bondholders bargained. *See LNC Invs., Inc. v. First Fid. Bank, N.A. N.J.*, 173 F.3d 454, 462 (2d Cir. 1999). U.S. Bank was the final entity that stood between that money and the Criminal Defendants – not Wakpamni Corp. (the issuer, which was an unsophisticated and impoverished tribal entity), Burnham (the placement agent, which was a broker-dealer controlled by the Criminal Defendants), or Dilworth Paxson LLP ("Dilworth"), Burnham's counsel (which did not have an attorney-client relationship with Plaintiffs and did not provide them with any legal opinion). U.S. Bank cannot escape its liability under contractual and common law by pointing the finger at other wrongdoers.

Finally, U.S. Bank's contention that it is not liable for "investment losses" pursuant to Section 5.8 of the Indentures is based on a flawed analysis of the relevant provisions. Section 5.8 does not address U.S. Bank's disbursement of the initial offering proceeds or any related "losses," and is simply not relevant to the Court's analysis of U.S. Bank's liability in this case.

STATEMENT OF FACTS

Plaintiffs are investment vehicles for various public employee retirement plans established for the benefit of water utility workers in Alabama and Maryland, and school teachers and other school employees in Nebraska. Compl. ¶¶ 1, 3-5. Plaintiffs, through their investment advisors, purchased $25 million worth of the Tribal Bonds at issue in this case in Offerings in August 2014 (Birmingham Water and Washington Suburban) and April 2015 (GYOF). *Id.* ¶¶ 3-5, 14-16, 43-44. U.S. Bank concedes that substantially all the proceeds of

both Offerings were stolen by the Criminal Defendants in connection with the fraud described in the Complaint. Br. at 3.[2] As a result, the bonds owned by Plaintiffs are now worthless. *Id.* ¶ 1.

Plaintiffs' claim that U.S. Bank, as indenture trustee for the Offerings, improperly released the net proceeds of both Offerings to the wrong entity – a sham entity controlled by the Criminal Defendants – in violation of the express terms of the Indentures and other key documents governing the offerings, and of its common law obligations of due care. Specifically, in the August 2014 Offering, U.S. Bank followed the disbursement instructions of one of the Criminal Defendants in violation of the Indenture, which required that such disbursements be for the purchase of the Annuity Investment from the Annuity Provider, and that all disbursements were to be upon written instructions from Wakpamni Corp. *Id.* ¶¶ 19-25. Such disbursements also conflicted with other key offering documents that U.S. Bank was required to know, such as the Annuity Contract, which required payment to the Annuity Provider in the British Virgin Islands, not to the sham entity in the United States, where U.S. Bank sent the proceeds. *Id.* ¶¶ 27-35.

In the April 2015 Offering, U.S. Bank again disbursed the initial offering proceeds to the wrong entity in the wrong country in violation of the Indenture, which required that the proceeds be used to purchase the Annuity Contract, and in violation the Annuity Contract, which required payment to the Annuity Provider in the British Virgin Islands. *Id.* ¶¶ 42-50.

Plaintiffs also allege that U.S. Bank ignored numerous other red flags in the key closing documents for the Offerings, which would have led a reasonable indenture trustee to be suspicious of and question the transactions before releasing the initial offering proceeds. *Id.* ¶¶ 26, 36, 38, 47.

[2] References herein to "Brief" or "Br." are to Defendant U.S. Bank's Memorandum of Law in Support of Motion to Dismiss, dated Oct. 19, 2017, Docket No. 26.

ARGUMENT

I. The Complaint Meets the Plausibility Standard of Rule 12(b)(6)

U.S. Bank argues that the Complaint is not "plausible on its face" within the meaning of U.S. Supreme Court pronouncements in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556); *see also Haney v. Am. Mut. Ins. Co.*, 223 F.Supp.3d 921, 924 (D.S.D. 2017) (Piersol, J.). Thus, a complaint cannot be comprised of merely "labels and conclusions," "formulaic recitation of the elements of a cause of action," "naked assertions," or "[t]hreadbare recitals." *Iqbal*, 556 U.S. at 678; *see also Haney*, 223 F.Supp.3d at 924. Here, the legal conclusions in the Complaint are tied to specific documentary evidence, including the Indentures that explicitly support the claims, as well as other specific factual content.

As the Supreme Court recognized, the plausibility standard is not akin to a "probability requirement." *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." *Id.*; *see also Haney*, 223 F.Supp.3d at 924. The detailed Complaint, which is focused on breaches of the express terms of the Indentures and supported by numerous additional documents related to the August 2014 and April 2015 Offerings and applicable case law, clearly passes muster under the Supreme Court standard.[3]

[3] In a similar case, the court in *Taylor v. U.S. Bank, National Ass'n* considered the claims brought by a receiver alleging that U.S. Bank as indenture trustee in two secured note offerings wrongly disbursed "Ponzi" payments of new investors to earlier investors. No. H-12-3550, 2013 WL 4434610, at *1 (S.D. Tex. Aug. 16, 2013). The court found plausible claims against U.S. Bank including, *inter alia*, breach of contract and negligence. *See id.* at 2 (indicating that "further factual development is necessary to assess U.S. Bank's arguments regarding the parties' respective duties and obligations, arising in contract and tort, under the Trust Agreement and governing law").

II. The Complaint States a Claim for Breach of Contract

U.S. Bank argues that Plaintiffs unfairly attempt to hold U.S. Bank liable on the ground that it "had a duty to investigate, detect, and prevent the fraud." Br. at 1. This is purely a straw man argument because Plaintiffs do not claim that U.S. Bank had such a duty. Rather, Plaintiffs allege that U.S. Bank breached specific provisions of the 2014 and 2015 Indentures, and as a result, caused Plaintiffs millions of dollars in losses.

A. U.S. Bank Breached the 2014 Indenture by Disbursing the Offering Proceeds Pursuant to Instructions from One of the Criminal Defendants, Not Wakpamni Corp.

U.S. Bank argues that Plaintiffs have failed to point to an express provision or "promise" in the Indenture that it breached, and that without such an express provision Plaintiffs' claims fail because the Indenture states that "no implied covenants or obligations shall be read into this Indenture." Br. at 12-13. U.S. Bank is wrong on both counts.

First, the 2014 Indenture expressly required that U.S. Bank "shall make the payments" in "the amount of $22,094,089 for the purchase of the Annuity Investment." Ex. A § 2.12.[4] Such a payment never took place because U.S. Bank sent the proceeds to the wrong entity, from which they were stolen. Compl. ¶ 59. Second, Plaintiffs allege that the 2014 Indenture required U.S. Bank to receive "appropriate instructions" "signed by Wakpamni Corp." before releasing the offering proceeds to fund the annuity investment. *Id.* ¶¶ 57, 60. No such appropriate instruction was issued by Wakpamni Corp. Instead, U.S. Bank disbursed the offering proceeds upon the instruction of a stranger, Galanis, which was forwarded to U.S. Bank by Dilworth, not Wakpamni Corp.[5] Such conduct breached the 2014 Indenture.

[4] References to "Ex. _" are to the exhibits to the Complaint.

[5] U.S. Bank's argument that "Galanis . . . was identified in the email and draft distribution list as being with Burnham," Br. at 22 n.6, misses the point. U.S. Bank was required to follow the instructions of Wakpamni Corp.,

The relevant provisions of the 2014 Indenture required the following:

> *A Closing Statement signed by the President or Vice-President of [Wakpamni Corp.] setting forth (i) the amount of the proceeds to be received by [Wakpamni Corp.] from the sale of the 2014 Bonds for funding the purchase of the Annuity Investment* . . .; (ii) the amounts to be paid or reserved for the costs and expenses of the financing; and (iii) the amounts to be deposited in the funds established under this Indenture.

Ex. A § 2.11(e) (emphasis added).

> *The proceeds of the 2014 Bonds shall be paid over to the Trustee and deposited by the Trustee in the "Settlement Account", which is hereby established. From the Settlement Account the Trustee shall make the payments, disbursements and deposits as set forth in the Closing Statement required by Section 2.11, including, inter alia, the amount of $22,094,089 for the purchase of the Annuity Investment. Any reserves which shall be established in the Settlement Account shall be disbursed from time to time by the Trustee pursuant to further written directions of the President or Vice-President of [Wakpamni Corp.]* and any balance ultimately remaining in any such reserve shall, automatically, without any further action by [Wakpamni Corp.], be deposited in the Debt Service and Sinking Fund thirty (30) days after the date of closing on the Bonds. The Trustee is hereby authorized and directed to make such deposit at such time.

Id. § 2.12 (emphasis added).

These two sections make clear that U.S. Bank may disburse offering proceeds only at the written direction of Wakpamni Corp.[6] Section 2.11 of the 2014 Indenture required that the Closing Statement, signed by Wakpamni Corp., provide for the disbursement to purchase the annuity investment. Section 2.12 required U.S. Bank to make the payments, disbursements or deposits "*as set forth* in the Closing Statement," and that amounts remaining in the Settlement

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not Burnham or Dilworth. Any instruction from Galanis, Burnham or Dilworth is hardly equivalent to an instruction signed by an officer of Wakpamni Corp. Moreover, according to the government, Galanis had no official position with Burnham. Compl. ¶ 29. Galanis was, in fact, the main architect of the scheme who pled guilty to federal charges in February 2017. *Id.* ¶ 11.

[6] Section 315 of the Trust Indenture Act of 1939 provides that an indenture trustee "shall examine the evidence furnished to it . . . to determine whether or not such evidence conforms to the requirements of the indenture." 15 U.S.C. § 77ooo. Such "evidence" includes instructions for the release of offering proceeds. 15 U.S.C. § 77nnn(c). Although the Act does not apply to private placements such as the August 2015 and April 2015 Offerings, 15 U.S.C. § 77ddd(a)(1), it is instructive as to the duties of an indenture trustee.

Account as reserves would be disbursed pursuant to "further written directions" of Wakpamni Corp.[7] Thus, the 2014 Indenture contained no provision for disbursement of proceeds without the written instructions of Wakpamni Corp.[8]

The Closing Statement for the August 2014 Offering was flawed in that it did not "set forth" the identity of the annuity provider or the bank account and address information necessary for the "funding of the purchase of the Annuity Investment" and the "purchase of the Annuity Investment" as explicitly contemplated by Sections 2.11 and 2.12 of the 2014 Indenture. The Closing Statement was thus incomplete on its face. Simply put, U.S. Bank could not have followed the directions "set forth" in the Closing Statement – without more – even if it wanted to. When U.S. Bank later followed the more specific instructions provided by Galanis, rather than obtain complete instructions directly from Wakpamni Corp., U.S. Bank breached the 2014 Indenture requirement that offering proceeds could only be disbursed upon signed instructions of Wakpamni Corp.[9]

B. U.S. Bank Also Breached the 2014 Indenture by Failing to Act in Good Faith and With Due Care

The 2014 Indenture contained two exculpatory clauses that absolve U.S. Bank of liability for taking or failing to take certain actions as Indenture Trustee. In its Brief, U.S. Bank selectively quotes from Sections 10.3 and 10.9 of the 2014 Indenture, and in doing so,

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[7] In connection with the April 2015 Offering, the 2015 Indenture contained identically worded provisions, but the Closing Statement provided the *complete* instructions regarding the disbursement of the offering proceeds and was signed by Wakpamni Corp., thus supporting Plaintiffs' interpretation of the Indentures on this point.

[8] U.S. Bank's assertion that the 2014 Agenda provided that Dilworth would draft the 2014 Indenture and Closing Statement, Br. at 6, is immaterial. Wakpamni Corp. executed the 2014 Indenture and the Closing Statement. There is no evidence – and U.S. Bank points to none – that Wakpamni Corp. signed, reviewed, or was even aware of the misleading Galanis instructions.

[9] The Indenture provided a mechanism for rectifying Wakpamni Corp.'s failure to provide instructions. Pursuant to Section 9.1, an event of default occurred if Wakpamni Corp. "default[ed] in due and punctual performance of any other of the . . . provisions contained . . . in this Indenture." The Indenture required U.S. Bank to notify Wakpamni Corp. of the default and provide 30 days to cure. Ex. A § 9.1(d).

conspicuously omits the fact that these exculpatory clauses relieve U.S. Bank from liability *only if* it acts reasonably and in good faith, and *without* willful misconduct and negligence.[10] The relevant provisions are as follows:

> The Trustee shall not be answerable for the exercise of any discretion or power under this Indenture or under any Supplemental Indenture, nor for anything whatever in connection with the trust, *except only its own willful misconduct or negligence*. The Trustee shall not be liable for *any action taken by it in good faith and reasonably believed* by it to be within the discretion or power conferred upon it, *or omitted to be taken by it in good faith and reasonably believed* by it not to be within the power or discretion conferred upon it, or taken by it pursuant to any direction or instruction by which it is governed under this Indenture or omitted to be taken by it by reason of the lack of direction or instruction required for such action, including but not limited to investment of funds hereunder.

Ex. A § 10.3 (emphasis added).

> The Trustee shall be fully protected and shall incur no liability in acting or proceeding in *good faith* upon any resolution, opinion, notice, telegram, request, requisition, consent, waiver, certificate, statement, affidavit, voucher, bond, or other paper or document which it shall in *good faith* believe to be genuine and to have been passed or signed by the proper board or person or to have been prepared and furnished pursuant to any of the provisions of this Indenture, and the Trustee shall be under no duty to make *any investigation or inquiry* as to any statements contained or matters referred to in any such instrument but may accept and rely upon the same as conclusive evidence of the truth and accuracy of such statements. The Trustee may consult with counsel, who may or may not be counsel to the Corporation, and the opinion of such counsel shall be full and complete authorization and protection with respect to any action taken or suffered by it hereunder in *good faith*. In the exercise of the powers of the Trustee and its officers, employees and agents hereunder including (without limiting the foregoing) the application of moneys and the investment of funds, and otherwise generally in the exercise of any of the Trustee's duties hereunder, the Corporation shall, to the extent permitted by law, indemnify, protect, defend and save the Trustee and its agents and employees harmless for, from and against any and all losses, damages, injuries, costs or expenses (including reasonable attorneys fees) and for, from and against any and all claims, demands, suits, actions or other proceedings whatsoever, brought by any person whatsoever arising in connection with the exercise of such duties hereunder and which are not due to its *negligence or bad faith*.

[10] Plaintiffs contend that Section 10.9 relates – as the title of that section states – specifically to U.S. Bank's reliance on requisitions such as those discussed in Sections 5.3 and 5.7, and not to documents such as the Galanis instruction. The resolution of this issue, however, is not necessary for purposes of this motion of dismiss.

Id. § 10.9 (emphasis added). Thus, Plaintiff's claims, insofar as they are premised on due care and good faith, are not based on "implied" covenants. The Indenture explicitly incorporates the good faith and due care obligations alleged in the Complaint. The Complaint provides ample evidence that U.S. Bank failed to act in good faith and with due care:

1. U.S. Bank Exercised Discretion without Requisite Due Care. In choosing to follow the disbursement instructions provided by Galanis – as opposed to any precise language in the Indenture itself, U.S. Bank exercised its own discretion in the performance of its duties as Indenture Trustee. As discussed above, U.S. Bank is relieved of liability for exercising such discretion, except in situations involving "willful misconduct or negligence." Id. § 10.3. In this case, U.S. Bank's exercise of its discretion was at least negligent because it violated the 2014 Indenture's requirement of acting solely on instructions of Wakpamni Corp. and ignored all of the other red flags related to the identity of the Annuity Provider alleged in the Complaint. Compl. ¶¶ 22-29.[11]

2. U.S. Bank Failed to Obtain Specific Disbursement Instructions from Wakpamni Corp. Similarly, U.S. Bank chose to "omit" the action of seeking specific written instructions from Wakpamni Corp. with respect to the disbursement of the offering proceeds. U.S. Bank is relieved of liability for omitting to take such an action *only* if it "in good faith and reasonably believed" it had the right to do so. Ex. A § 10.3. Here, Plaintiffs have alleged ample facts that U.S. Bank could not have been acting in good faith when it disbursed offering proceeds based on

[11] U.S. Bank tries to minimize the last minute switch of annuity provider from a legitimate entity, Wealth Assurance AG, to Wealth Assurance US. Br. at 7-8. However, as discussed in the Complaint, the discrepancies in connection with the identification of the annuity provider, combined with all the red flags related to the location of that provider, should have caused U.S. Bank to require some clarity before disbursing the proceeds.

the instruction of Galanis, without the instructions of Wakpamni Corp., as required by the Indenture.[12]

3. U.S. Bank Improperly Relied on the Instructions Provided by One of the Criminal Defendants without Investigation or Inquiry. U.S. Bank's claimed right to rely on the Galanis instructions without investigation or inquiry, Br. at 14-15, is inconsistent with a plain reading of the 2014 Indenture. Any such right, along with the others referenced in Section 10.9, is premised on and qualified by the "good faith" requirement that precedes it. In other words, if U.S. Bank did not in good faith reasonably believe that the instructions it received were "passed or signed by the proper board or person," it would not be excused from investigation or inquiry. Ex. A § 10.9. As discussed above, the 2014 Indenture explicitly contemplated issuance of disbursement instructions only by Wakpamni Corp. The Galanis instruction does not qualify. U.S. Bank's lack of good faith and reasonable belief in following it obviated any "conclusive" reliance pursuant to Section 10.9.

In its Brief, U.S. Bank ignores the allegations that its internal procedures required payment authorization from the customer, which was Wakpamni Corp., and

> Established practice in connection with the private placement of securities such as bonds required that before acting on instructions for the disbursal of the proceeds, U.S. Bank had to be sure that the instructions were genuine, signed by the appropriate party, reasonable, and appropriate under the circumstances.

Compl. ¶¶ 29, 56. These allegations must be taken as true on a motion to dismiss. U.S. Bank's failure to follow its own internal procedures and established industry practice in connection with the August 2014 Offering is further evidence of its lack of due care, good faith and reasonableness.

[12] Moreover, the Galanis instruction was not a "direction or instruction" that "governed" U.S. Bank because it was not given "under" or in accordance with the Indenture, making the last sentence of Section 10.3 inapplicable and unable to shield U.S. Bank from liability.

4. U.S. Bank Failed to Recognize Red Flags. As discussed above, U.S. Bank ignored a whole host of red flags and proceeded to follow the Galanis instructions in violation of the 2014 Indenture. In its Brief, U.S. Bank also minimizes or ignores other red flags:

The Management Agreement. In its Brief, U.S. Bank completely ignores the Investment Management Agreement, which provided that U.S. Bank was to act as custodian for the annuity investments, which never happened. Compl. ¶ 36. Moreover, the Investment Management Agreement contradicted the Annuity Contract as to who had authority to make investments, a plainly relevant fact to the investment custodian. *Id.* ¶ 37. Finally, U.S. Bank effectively admits it reviewed the Investment Management Agreement by pointing out in its Brief that the President of Wakpamni Corp. signed a notice identifying Wealth Assurance US as the annuity provider, which was dated August 21, 2014, but attached to the management agreement dated August 26th, a day after the closing. Br. at 5 (discussing Ex. H, at 17). In addition to being late, the notice from Wakpamni Corp. failed to specify the destination of the offering proceeds, such as a bank or account number. This notice should have drawn further attention to the lack of complete issuer instructions, as well as the contradictions between the Annuity Contract and the Galanis instruction to make payment in the United States.

Annuity Contract. In its Brief, U.S. Bank states, without citation to any authority, that it was not a "party" to the Annuity Contract, and suggests that the contract was outside its purview. Br. at 8. However, U.S. Bank was formally designated "Payee" under that contract, and would obviously be able to enforce the payment provision under contract theories. *See D&H Distrib. Co. v. United States*, 102 F.3d 542, 547 (Fed. Cir. 1997). It was also designated

custodian of the annuity investments, as described above, and had valuation responsibilities.[13] U.S. Bank was therefore no stranger to the Annuity Contract.

U.S. Bank states that it received a copy of the Annuity Contract either on the day of the closing (August 25) or the next day, when the offering proceeds were disbursed, suggesting that the offering proceeds were possibly disbursed before the Annuity Contract was even examined by U.S. Bank. Br. at 8. But this hurts rather than helps U.S. Bank. Key deal documents involving U.S. Bank's role in the transaction changed at the last minute or were received by U.S. Bank after the closing. This exacerbated the existing irregularities, contradictions and suspicious nature of the deal, and underscored the importance of clarity before U.S. Bank disbursed the initial offering proceeds. In addition, U.S. Bank cannot deny it received the Annuity Contract before the offering proceeds were disbursed since that contract was attached to the very same Galanis instructions on which U.S. Bank relied to disburse them.

U.S. Bank's Ministerial Duties. U.S. Bank argues that it was paid little and that its duties were therefore minimal.[14] Br. at 24. However, it was not onerous for U.S. Bank to review the 2014 Indenture and other basic deal documents, at least insofar as they *related to U.S. Bank's role* in the offering, and for it to properly examine, and, if appropriate, question the disbursal instructions it received in relation to them. U.S. Bank cites to no legal authority that it had no such "minimal" duty. In fact, correctly disbursing the offering proceeds was undoubtedly

[13] U.S. Bank correctly notes that the draft 2014 indenture did not identify Wealth Assurance AG as the "Annuity Provider" as listed in the chart on page 13 of the Complaint, but as the "investment manager with respect to the annuity investment," as stated on page 8. Br. at 8 n.3. As noted in the Complaint, Wealth Assurance AG also was identified as the "Annuity Provider" in two other pre-closing documents, the Distribution List and the Closing Agenda. Exs. C, D. There is no reason such entity could not fill both roles. Then, on August 26th, after the closing, U.S. Bank was notified that it was going to be the custodian of annuity investments, and that Private Equity would be the Investment Manager. Yet another last minute wrinkle in the players in the August 2014 Offering.

[14] The law firms involved in the August 2014 and April 2015 Offerings, including Dilworth and counsel to Wakpamni Corp., Greenberg Traurig, LLP, were more highly compensated than U.S. Bank for their work in connection with the Offerings. Ex. E at B-1. However, they were responsible for legal review and issuance of legal opinions to their clients (which did not include Plaintiffs).

the single most important duty U.S. Bank had under the Indenture. If U.S. Bank's "ministerial" duty had any meaning, it surely meant vigilance in the disbursal of offering proceeds.

C. U.S. Bank Breached the 2015 Indenture

U.S. Bank also released the 2015 Offering proceeds in breach of the 2015 Indenture. This was the third offering of Tribal Bonds engineered by the Criminal Defendants. Compl. ¶ 42. U.S. Bank's compliance with the 2015 Indenture, including its due care and good faith obligations,[15] has to be evaluated in relation to its accumulated knowledge, including the breaches and/or red flags from the previous offerings. This time, Wakpamni Corp. signed the disbursement instructions, but U.S. Bank again sent the proceeds to the wrong entity: a bank account in California held by Wealth Assurance US, instead of to the Annuity Provider, Wealth Assurance BV. *Id.* ¶¶ 45-46. This violated Section 2.12 of the 2015 Indenture which stated that U.S. Bank "shall make the payments, disbursements and deposits as set forth in the Closing Statement . . . including, inter alia, the amount of $15,850,000 for the purchase of the Annuity Investment." Ex. K § 2.12. The payment U.S. Bank made to Wealth Assurance US was not for the purchase of the Annuity. In addition, the instructions in the Closing Statement directing payment to Wealth Assurance US contradicted the terms of the Annuity Contract. This was apparent on the face of the Annuity Contract itself: (i) the annuity provider was a British Virgin Islands entity; (ii) that entity was not authorized to do business outside of the British Virgin Islands; and (iii) the purchase payment had to be made to Wealth Assurance BV's home office in the British Virgin Islands. Ex. J. Sending the proceeds to the wrong entity and the wrong country (the United States) violated both the 2015 Indenture and Annuity Contract, as to which U.S. Bank was designated as "Payee." *Id.* In light of these contradictions, and its previous

[15] The 2015 Indenture contains exculpatory clauses that are almost identical to Sections 10.3 and 10.9 of the 2014 Indenture. Ex. K §§ 10.3, 10.9. Both sections subject U.S. Bank to liability if it has failed to act in good faith or without due care.

experience with the August and October 2014 Offerings, U.S. Bank could not have simply complied with such faulty instructions in good faith and/or with due care within the meaning of the virtually identical Sections 10.3 and 10.9 of the 2015 Indenture.

D. U.S. Bank Breached the 2014 and 2015 Indentures by Failing to Value the Annuity Investments

U.S. Bank argues that it cannot be held liable for failing to value, as per the 2014 and 2015 Indentures, the investments that were to be made by the investment manager pursuant to the Annuity Contract. Br. at 16-17. First, it claims that such valuation relates to "investments," and it cannot be held liable for investment selection and losses thereon pursuant to Section 5.8 of the Indenture. *Id.* at 17. However, Plaintiffs are not seeking to hold U.S. Bank liable for the "selection" of these investments (or investment losses "thereon," as to which there were none), but rather for its failure to *value* them as required under the Indentures. Plaintiffs allege that had a reasonable and good faith attempt been made to value the annuity investments, it is plausible to conclude that U.S. Bank would likely have discovered evidence suggesting that there were no such investments.

U.S. Bank further argues that it could have agreed with Wakpamni Corp. to use valuations provided by Wealth Assurance U.S., *id.*, but U.S. Bank does not suggest that such an agreement was ever made. Similarly, there is no evidence that Wealth Assurance U.S. ever made its own valuations. Had Wealth Assurance U.S. made and distributed what would have been false valuations, such facts likely would have been included in government court filings detailing the Criminal Defendants' wrongdoing. They are not. It is much more plausible that a good faith effort to value the investments would have led to the discovery that no investments in fact ever existed.

III. USB Had a Duty to Notify the Bondholders of its Breaches of the Indenture and any Other Information It Possessed Concerning the Substantial Possibility of Fraud

U.S. Bank argues that it had no duty to disclose to the Plaintiffs its breaches of the Indentures and the existence of possible fraud in connection with the Offerings because the Indentures did not explicitly require such notice. Br. at 18. The cases upon which U.S. Bank relies do not support its position. First, *Lorenz v. CSX Corp.*, 1 F.3d 1406 (3d Cir. 1993) was decided before a series of New York law cases that recognized and clarified a notification duty. Since then, several courts have found that trustees like U.S. Bank have an independent common law duty to act with due care in relation to carrying out their ministerial duties under indentures, which in this case were also expressly incorporated and preserved in the Indentures at issue. *See, e.g., Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F.Supp.2d 162, 191-92 (S.D.N.Y. 2011); *LNC Invs., Inc. v. First Fid. Bank, Nat'l Ass'n*, 935 F. Supp. 1333, 1346-47 (S.D.N.Y. 1996); *N.Y. State Med. Care Facilities Fin. Agency v. Bank of Tokyo Trust Co.*, 621 N.Y.S.2d 466, 470 (N.Y. Sup. Ct. 1994), *aff'd*, 629 N.Y.S.2d 3 (1st Dep't 1995) [hereinafter, *Bank of Tokyo*].

The other case upon which U.S. Bank relies – *Raymond James & Assocs. v. Bank of New York Trust Co.*, No. 8:07-CV-239-T-27TBM, 2008 WL 186590 (M.D. Fla. Jan. 18, 2008) – cites *Bank of Tokyo*, 621 N.Y.S.2d at 471-72, in which the court found that notice to the indenture trustee of an event that could seriously prejudice the bondholders was sufficient to trigger a duty to notify bondholders. The *Bank of Tokyo* case involved an indenture trustee that purchased bonds on behalf of a beneficial owner failing to notify the bondholder that an early redemption had taken place. *Id.* at 468. Like U.S. Bank, the trustee argued that there was no express requirement in the indenture that it monitor the bonds and provide such notice. *See id.* at 469. The court held that despite the absence of such an express notice requirement, the trustee could

be liable for negligence in failing to "perform its basic administrative" and "ministerial" functions. *Id.* at 471-72. The court also noted that there was no indenture provision that expressly authorized the bank to withhold notice or to leave such notice in the discretion of the bank, "It cannot be reasonably argued that it is within the trustee's discretion not to promptly respond to an early bond redemption call or to notify [the bondholder] of the early redemption call."[16] *Id.* at 471. In addition, the *Bank of Tokyo* court observed that certain provisions in the indenture did not relieve the bank of liability for its own negligence, but rather preserved it. *See id.* The Indentures in this case have similar provisions, discussed *supra* Sections II.B, requiring due care and good faith in the performance of basic ministerial duties. Such duties are not "implied," as U.S. Bank contends, they are explicitly incorporated in the Indentures.

Finally, U.S. Bank argues that it did not have any more information than Wakpamni Corp. and/or its counsel, so that its failure to provide notice to Wakpamni Corp. could not have been the cause of the loss. Br. at 18-19. As a threshold issue, neither Wakpamni nor its counsel was copied on the Galanis instructions in 2014. In any event, while notice should have been given to Plaintiffs *and* Wakpamni Corp., U.S. Bank's liability in this case is premised on its failure to give notice to *Plaintiffs*, as bondholders.

IV. U.S. Bank's Wrongful Conduct Was the Proximate Cause of Plaintiffs' Losses

U.S. Bank argues that it "did not cause the Criminal Defendants to steal the bond proceeds," and that Plaintiffs' bonds became worthless because of such theft, not because of U.S. Bank. Br. at 15. However, U.S. Bank's conduct in releasing the offering proceeds in breach of the 2014 and 2015 Indentures and without the requisite good faith and due care, enabled the Criminal Defendants to steal the funds. But for U.S. Bank's release of the offering proceeds in

[16] In *Raymond James*, on which U.S. Bank relies, the court found that the indenture specifically stated that only registered holders were to receive notice, and since plaintiffs in that case were not such holders, their case was dismissed. 2008 WL 186590, at *4. There is no such specific notice provision in this case.

breach of the 2014 and 2015 Indentures the funds could not have been stolen. The theft of the funds made the bonds "worthless" because without the annuity investment there were no funds to pay the bondholders. Wakpamni Corp.'s development project was never completed (it was not even developed or constructed in August 2014), and the first, and only, interest payment was made by the Criminal Defendants. Compl. ¶¶ 51-52; Ex. A at 1. Plaintiffs' losses were thus "proximately caused" by U.S. Bank's actions. *See* S.D. CODIFIED LAWS § 21-2-1.[17]

Further, it was plainly foreseeable that "in the ordinary course of things," "such a breach "would be likely to result" in the proceeds being misappropriated, lost or stolen. This could have occurred under any of a number of circumstances, including, but not limited to fraud; for example, funds misdirected to a party that subsequently went bankrupt. Further, the foreseeability of loss greatly increases if there have been red flags or suspicious activity surrounding the transaction, as in this case. *See, e.g.*, *Allied Irish Banks, P.L.C. v. Citibank, N.A.*, No. 03-CV-3748, 2015 WL 4104703, at *13 (S.D.N.Y. June 30, 2015). Indeed, it was obviously to guard against these risks that the Indentures required written instructions prior to release of the funds. In any event, U.S. Bank's causation defense presents clear fact issues not properly resolved on a motion to dismiss. *See In re Cell Therapeutics, Inc. Class Action Litig.*, No. 2:10-cv-00414, 2011 WL 444676, at *5 (W.D. Wash. Feb. 4, 2011); *In re Compuware Secs. Litig.*, 301 F. Supp. 2d 672, 690-91 (E.D. Mich. 2004). "Any doubt persisting on the certainty of damages should be resolved against the contract breaker." *McKie v. Huntley*, 620 N.W.2d 599, 604 (S.D. 2000).

[17] The statute provides, in relevant part:

> For the breach of an obligation arising from contract, the measure of damages . . . is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

Finally, U.S. Bank speculates that it would have made no difference which entity under the Criminal Defendants' control received the offering proceeds because the money would have been stolen in either case. However, had the payment instructions been appropriately rejected or questioned, light would have been shed on the various red flags in the offerings, which likely would have resulted in the scheme unraveling.[18]

V. The Complaint States a Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing

U.S. Bank argues that Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing fails because such a claim seeks to modify the Indentures' express provisions. Br. at 19. As an initial matter, Plaintiffs allege that U.S. Bank expressly agreed to discharge its duties in good faith. Compl. ¶ 19; Exs. A, K §§ 10.3, 10.9. U.S. Bank, however, denies such an obligation and denies that it was obligated to disburse the offering proceeds to the proper Annuity Provider. Br. at 13-15.

In the event that it is determined that the Indentures are silent with respect to the proper disbursement of the offering proceeds, the implied covenant operates to fill the "gap," which is the very purpose of the implied covenant of good faith and fair dealing.[19] *Farm Credit Servs. v. Dougan*, 704 N.W.2d 24, 29 (S.D. 2005) (citing RESTATEMENT (SECOND) OF CONTRACTS § 205

[18] U.S. Bank also speculates that no one besides the Criminal Defendants knew there were two identically named entities. Br. at 7. At this stage, Plaintiffs are not privy to everything U.S. Bank knew *internally* about the offerings, including about the various Wealth Assurance entities and other red flags. However, the Complaint alleges that U.S. Bank had Anti-Money Laundering obligations to detect suspicious activity, which were found deficient during this period by regulators. Compl. at 7 n.1. Such regulations focus on wire activity, including overseas wire activity, and off shore transactions. *See* Office of the Comptroller of the Currency, *Money Laundering: A Banker's Guide to Avoiding Problems* (Dec. 2002), https://www.occ.treas.gov/topics/bank-operations/financial-crime/money-laundering/money-laundering-2002.pdf.

[19] U.S. Bank seeks to rely on Section 10.1 for the proposition that it has no "implied" obligations under the Indentures. Br. at 21. This would be a nonsensical result. The implied covenant was developed by courts for precisely those situations where a contract is silent and the principle of "good faith" is required to fill in a gap. Section 10.1 cannot be applied if the implied covenant is necessary to fill in a gap such as the proper disbursement of offering proceeds.

cmt. A (1981)).[20] U.S. Bank relies on cases that limit or qualify the applicability of the doctrine where the defendant had an "absolute right" to act under the contract or where the contract "expressly permitted" the defendant's conduct. Br. at 19-20 (discussing *Taylor Equip., Inc. v. John Deere Co.*, 98 F.3d 1028, 1033 (8th Cir. 1996); *Farm Credit Servs.*, 704 N.W.2d at 29). Such cases are inapplicable here since the Court need only address the implied covenant if it finds "gaps" in the Indentures, and U.S. Bank's relevant rights are expressly circumscribed by good faith requirements set forth in sections 10.3 and 10.9.[21]

U.S. Bank also argues that the claim must fail because the facts do not support a finding of "dishonesty." Br. at 21-22. U.S. Bank is mistaken. Its misconduct is squarely within the types of wrongdoing found to have been "bad faith." By its very design, the implied covenant "prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract." *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990). As discussed *supra*, the agreed benefits of the bargain here must include, at a minimum, proper disbursement of offering proceeds since the very purpose of an indenture is to safeguard the security of the bondholders. Comp. ¶ 17; *LNC Invs.*, 173 F.3d at 462.

Moreover, breaches of the implied covenant are not strictly limited to situations involving "dishonesty":

> Good faith is derived from the transaction and conduct of the parties. Its meaning varies with the context and emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.

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[20] U.S. Bank relies on *Midwest AG Enterprises, Inc. v. Poet Investments, Inc.* for the notion that implied covenant claims should be dismissed if they are duplicative of breach of contract claims. Br. at 20 (discussing Civ. No. 08-4091, 2010 WL 2332717, at *17-18 (D.S.D. June 9, 2010) (Piersol, J.)). That ruling, however, was issued on a motion for summary judgment when the facts were more fully developed. Plaintiffs are entitled to pursue this alternative theory at this stage. *See Fantozzi v. Axsys Techs., Inc.*, No. 07 Civ. 02667, 2008 WL 4866054, at *7-8 (S.D.N.Y. Nov. 6, 2008).

[21] Further, the fact that the contract incorporates good faith as a limitation on U.S Bank's actions shows that an implied covenant "arise[s]" from the language of the Indentures. *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 731 N.W.2d 184, 194 (S.D. 2007).

Farm Credit Servs., 704 N.W.2d at 28.

> [T]he nature and extent of an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties. When one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the parties. A violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract.

Spanish Oaks, Inc. v. Hy-Vee, Inc., 655 N.W.2d 390, 400 (Neb. 2003) (citations omitted). In addition, good faith *excludes* conduct that violates "community standards of decency, fairness or reasonableness." RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).[22] Such "bad faith" conduct also includes "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rending of imperfect performance." *Id.* § 205 cmt. d. In any event, whether conduct amounts to lack of good faith is a question of fact. *See Spanish Oaks*, 655 N.W.2d at 396-97. This Court should decline to dismiss Plaintiffs' claim for breach of the implied covenant.

VI. The Complaint States a Claim for Negligence

U.S. Bank argues that Plaintiffs' negligence claim for damages must be dismissed because there is no duty independent of the contract to support a tort claim. Br. at 23. Plaintiffs have averred that U.S. Bank was obligated to act with due care, undivided loyalty, and to avoid conflicts of interest. Compl. ¶¶ 19, 74-75. These duties arise by operation of law and from the nature of the relationship of the Indenture Trustee and the Plaintiffs as bondholders. That they may also arise and form the basis of a breach of contract action does not prevent Plaintiffs from pursuing both claims.

The courts of New York are frequently called upon to address the duties of indenture trustees. In numerous cases, courts have found that indenture trustees have a common law duty – independent of their contract obligations – to perform their obligations with due care. *See, e.g.*,

[22] The Restatement was relied on by the South Dakota Supreme Court in adopting the implied covenant doctrine. *See Garrett*, 459 N.W.2d at 841.

AG Cap. Funding Partners, L.P v State St. Bank and Trust Co., 896 N.E.2d 61, 67 (N.Y. 2008).

The breach of this duty supports a negligence action:

> We further note that a number of courts have held that prior to default, indenture trustees owe note holders an *extracontractual* duty to perform basic, nondiscretionary, ministerial functions *redressable in tort* if such duty is breached. . . . Based on the foregoing, we hold that an indenture trustee owes a duty to perform its ministerial functions with due care, and if this duty is breached the trustee will be subjected to tort liability.

Id. (emphasis added) (citations omitted). Such an independent duty has been recognized where the relevant trust documents carve out claims for negligence. *See Burns v. Del. Charter Guar. & Trust Co.*, 805 F.Supp.2d 12, 25-27 (S.D.N.Y. 2011); *Grund v. Del. Charter Guar. & Trust Co.*, 788 F. Supp.2d 226, 246-48 (S.D.N.Y. 2011). The *Burns* court explained:

> Significantly, the [trust agreement] explicitly carves out claims of negligence and intentional conduct from its coverage. [The trust agreement] provides that '[t]he Trustee shall not be liable for any act or omission made in connection with the Trust except for its intentional misconduct or negligence.' Plaintiffs' tort claims based in negligence and intentional misconduct thus seek to enforce duties outside of the contract and cannot be precluded by Plaintiffs' contract claims.

805 F.Supp.2d at 26. *Cf. In re Nat'l Century Fin. Enters., Inc., Inv. Litig.*, No. 2:03-md-1565, 2006 WL 2849784, at *7 (S.D. Ohio Oct. 3, 2006) (addressing similar provision in an indenture and finding that "on its face, the Indenture imposes a . . . duty of care on the Trustees" giving rise to negligence claim distinct from plaintiffs' contract claims). Here, U.S. Bank similarly agreed in the Indentures to be answerable for its willful misconduct or negligence with respect to "anything whatever in connection with the trust." Exs. A, K § 10.3. Pursuant to the well-developed case law specifically related to the duties of indenture trustees, U.S. Bank, as indenture trustee, had an independent duty to perform its "basic, nondiscretionary, ministerial" functions with due care.[23]

[23] South Dakota law supports such an independent duty owed by those providing professional services like indenture trustees. In *Kreisers Inc. v. First Dakota Title Ltd. Partnership*, the court held the defendant had an independent

The cases cited by U.S. Bank are distinguishable. Br. at 23. In most of the cases, the relationship between the parties did not involve the special circumstances of an indenture trustee, but rather arose from a common business transaction. *See Sundt Corp. v. S.D. Dep't of Transp.*, 566 N.W.2d 476, 477-478 (S.D. 1997) (construction contract); *Fisher Sand & Gravel Co. v. S.D. Dep't of Transp.*, 558 N.W.2d 864, 866-67 (S.D. 1997) (same); *Schipporeit v. Khan*, 775 N.W.2d 503, 504 (S.D. 2009) (motel purchase contract). Similarly, *GSAA Home Equity Trust 2006-2 v. Wells Fargo Bank, N.A.*, 133 F.Supp.3d 1203, 1207-08 (D.S.D. 2015), which addressed claims against servicers in connection with residential mortgage backed securities, did not implicate the well-developed body of law governing the duties and obligations of indenture trustees.[24]

In the Complaint, Plaintiffs set forth a series of failures and omissions on the part of U.S. Bank that caused it to hand over tens of millions of dollars to thieves. It may be plausibly alleged that an indenture trustee exercising due care at virtually any stage of the transaction would have become suspicious.[25]

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duty redressable in tort because it was rendering professional services. 852 N.W.2d 413, 420 (S.D. 2014) ("[O]ne who undertakes to provide professional services has a duty to the person for whom the services are performed to use such skill and care ordinarily exercised by others in the same profession."). Thus, U.S. Bank, holding itself out as having professional expertise and experience to act as indenture trustee, and assuming the responsibility to hold and deliver millions of dollars invested in corporate bonds and to carry out the terms of a complex trust indenture, has a heightened duty and professional responsibility that supports a cause of action in tort.

[24] One case cited by U.S. Bank, *Abbate v. Wells Fargo Bank, N.A.*, involved claims against an indenture trustee. No. CV 10-6564, 2011 WL 13128742, at *2 (C.D. Cal. Apr. 25, 2011). However, the court did not address – and it appears that the plaintiffs did not raise – the common law duty of due care found by New York courts in cases such as *AG Capital Funding Partners*.

[25] U.S. Bank argues that Plaintiffs' tort claims should be dismissed because they allege the exact same conduct and "seek the *exact* same damages" as the contract claim. Br. at 24. This is not relevant to U.S. Bank's motion. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805 (1999) (recognizing that the federal rules "permit parties to 'set forth two or more statements of a claim or defense alternately or hypothetically,' and to 'state as many separate claims or defenses as the party has regardless of consistency'") (citing FED. RULE CIV. PROC. 8(e)(2); *see also Broin and Assocs., Inc. v. Genencor Int'l, Inc.*, 232 F.R.D. 335, 340 (D.S.D. 2005) (Piersol, J.).

VII. Section 5.8 of the Indentures Does Not Insulate U.S. Bank from Liability for Improperly Releasing Tribal Bond Offering Proceeds

U.S. Bank argues that Plaintiffs are barred from recovery by Section 5.8 of the Indentures, which relieves U.S. Bank from liability for "selection of investments or for investment losses incurred thereon." Br. at 11-12. U.S. Bank is mistaken. Plaintiffs' allegations focus on U.S. Bank's initial disbursement of offering proceeds to the purported "Annuity Provider," not on the selection of investments. Compl. ¶¶ 22-25, 27-35, 45-50. Section 5.8, by its express terms, does not apply to the initial disbursement, and thus, is irrelevant.

U.S. Bank's proffered reading of Section 5.8 is contradicted by the plain language of Article V, and Section 5.8 in particular. Article V of the Indentures exclusively relates to the investment of certain specifically described "funds," which do not include the initial offering proceeds. Ex. A §§ 2.11, 2.12, 5.8. These monies, which were contemplated to become part of certain explicitly defined "Funds" created under Article V of the Indentures, were to be kept in one or more Corporation Account(s) at U.S. Bank, or at another bank or trust company account secured by and under U.S. Bank's control and were to be invested by U.S. Bank. *Id.* §§ 5.1, 5.8. Wakpamni Corp. was authorized to direct the investment of these "funds" by issuing a written direction to U.S. Bank. *Id.* § 5.8(b). If Wakpamni Corp. failed to direct U.S. Bank with respect to the investments, the "funds" would be invested by U.S. Bank in First American Funds Government Obligation Class D Fund.[26] *Id.* Section 5.8 provides that U.S. Bank has no liability for "selection" of such investments or "losses thereon":

> SECTION 5.8 Investment of Funds and Securing of Funds.
>
> (a) The money and investments in the Revenue Fund, Debt Service and Sinking Fund, Corporation Account . . . the Bond Redemption and Improvement Fund and the Project Fund created herein, shall be held by the Trustee until disbursed as

[26] The types of "investments" referred to in Section 5.8 that were contemplated to be made by U.S. Bank, such as the First American Fund, did not include the Tribal Bonds that Plaintiffs purchased, and the losses on such bonds.

> authorized by this Article V in trust for the benefit of the Registered Owners from time to time of the Bonds issued and Outstanding under this Indenture . . . .
>
> (b) The Trustee agrees to secure (to the extent not insured) all monies held by it hereunder and to require the securing of any monies held in the funds established hereunder which are deposited in another bank or trust company. *The Trustee shall, upon the written instructions of the Corporation, deposit or invest in Investment Securities as defined herein, funds from time to time held in the Revenue Fund, Debt Service and Sinking Fund, Corporation Account, the Project Fund and Bond Redemption and Improvement Fund* which are not currently required to be applied to the current obligations of the Corporation or to the payment or redemption of principal of or the payment of interest on the Bonds . . . . In the absence of any written directions from the Corporation, any funds held by the Trustee shall be initially invested in the First American Funds Government Obligation Class D Fund. . . .
>
> . . . .
>
> (e) *In no event shall the Trustee be liable for the selection of investments or for investment losses incurred thereon. . . .*

(emphasis added).

U.S. Bank cites no authority for its interpretation of the Indentures other than *Richland State Bank v. Household Credit Servs., Inc.*, 340 F.Supp.2d 1051 (D.S.D. 2004). That case supports Plaintiffs, however, in that it rejected a contract argument like the one made by U.S. Bank here, that "ignores the plain language of the contract." *Id.* at 1058. Unlike the "funds" discussed in Section 5.8, the initial offering proceeds were paid into a "Settlement Account" established under Section 2.12 and disbursed directly from that account to the "Annuity Provider" – the fraudulent Wealth Assurance US entity. Ex. A § 2.12; *see also* Compl. ¶¶ 27-35. It is a recognized rule of contract interpretation, *ejusdem generis*, that general language such as that in Section 5.8(e) relied on by U.S. Bank, when contained in a clause or section of a contract that is specific to a particular subject, is construed as being applicable solely to the subject matter of that clause or section of the contract. *See Richland State Bank*, 340 F.Supp.2d at 1058; *Goetz v. South Dakota*, 636 N.W.2d 675, 682 (S.D. 2001). Thus, the release from liability related to

"investment losses" applies *only* to those investments made pursuant to Section 5.8.[27] Finally, since the offering proceeds were never sent to the actual Annuity Provider, no "investment" of those proceeds ever took place, and no "investment losses" were incurred "thereon," within the plain meaning of Section 5.8. A plain reading of the Indentures will not support U.S. Bank's position that it is not liable for Plaintiffs' losses on their investments in the Tribal Bonds.

CONCLUSION

Plaintiffs respectfully request oral argument on U.S. Bank's motion to dismiss.

For the reasons set forth above, Plaintiffs respectfully request that the Court deny U.S. Bank's motion to dismiss the Complaint.

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[27] U.S. Bank's reading of Section 5.8 also runs counter to the obvious purpose of these provisions – which was to safeguard actual investments held or controlled by U.S. Bank and to protect U.S. Bank from liability for losses on investments it did not choose – not to protect U.S. Bank from wrongfully releasing initial offering proceeds.

In the Facts Section of its Brief, U.S. Bank partially quotes the inartfully drafted third sentence of Section 10.1, providing that U.S. Bank "shall have no responsibility" for "the use of proceeds of the Bonds." Br. at 5. U.S. Bank does not further discuss this quotation in the Argument Section. Nevertheless, the reference to "*use* of proceeds" obviously means how the proceeds are used *after* they are *properly* disbursed in accordance with the Indenture. Otherwise, U.S. Bank would have no responsibility for disbursing the proceeds in accordance with the Indenture, an absurd result completely at odds with the due care and good faith requirements explicitly set out in the Indenture.