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.,	)	Civil Action No. 4:17-CV-04113-LLP
Plaintiffs,	)	
-and-	)	
THE CHICAGO TRANSIT AUTHORITY RETIREE HEALTH CARE TRUST,	)	
Intervenor-Plaintiff,	)	
-against-	)	
U.S. BANK NATIONAL ASSOCIATION,	)	
Defendant.	)	

DEFENDANT U.S. BANK NATIONAL ASSOCIATION'S
MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This lawsuit stems from two series of taxable bonds issued to finance economic development projects on the Pine Ridge Reservation in South Dakota. The majority of the proceeds from these bond issuances were misappropriated as part of an elaborate scheme of investment advisor and securities fraud executed by individuals who have pleaded guilty to, or been convicted of, crimes relating thereto. As a result of this misappropriation, the bonds have lost much, if not all, of their value.

Plaintiffs[1] seek to recover approximately $29 million, in aggregate, that was invested in these bonds by Plaintiffs' third-party investment managers. Unable to collect this money from their investment managers or the other perpetrators of this fraud, Plaintiffs have focused their recoupment efforts on the only deep pocket connected to the bond transactions—Defendant U.S. Bank National Association ("U.S. Bank")—asserting negligence and breach of contract claims against U.S. Bank based on its role as indenture trustee for the bonds.

Plaintiffs are looking in the wrong place for redress. Their negligence and breach of contract claims lack merit and reveal a fundamental misunderstanding of the role, duties, obligations, and liabilities of an indenture trustee. U.S. Bank is entitled to summary judgment as a matter of law on all of Plaintiffs' claims for the following reasons:

[1] The term "Plaintiffs" refers collectively to Intervenor-Plaintiff The Chicago Transit Authority Retiree Health Care Trust ("RHCT") and Plaintiffs The Water Works Board of the City of Birmingham ("Birmingham Water"); Washington Suburban Sanitary Commission Employees' Retirement Plan ("Washington Suburban"); Atlantic Global Yield Opportunity Master Fund, L.P. ("Atlantic Master Fund"); and Atlantic Global Yield Opportunity Fund, L.P. ("Atlantic Feeder Fund").

- Plaintiffs cannot maintain any claim for negligence against U.S. Bank because such claims are barred by the independent legal duty doctrine.
- Plaintiffs cannot maintain a private right of action for negligence to enforce U.S. Bank's internal policies.
- Plaintiffs cannot maintain any claim for negligence based on reliance upon U.S. Bank's representations or statements.
- Plaintiffs' breach of contract claims fail because they are based on alleged contractual duties that do not exist and because the evidence does not show that U.S. Bank breached the indentures at issue.
- The indentures expressly limit U.S. Bank's liability for certain acts and omissions, and Plaintiffs cannot show that U.S. Bank committed any act or omission that falls outside the scope of these limits.
- U.S. Bank's alleged conduct did not proximately cause Plaintiffs' losses because those losses were caused by the superseding criminal acts of third parties.
- Plaintiffs Atlantic Feeder Fund and Atlantic Master Fund are barred from recovery by the doctrine of *in pari delicto.*

FACTUAL BACKGROUND

I. THE PARTIES

The bonds at the center of this lawsuit were issued by the Wakpamni Lake Community Corporation ("WLCC"). WLCC is wholly-owned by the Wakpamni Lake Community, a subdivision of the Wakpamni Lake District, which is itself a subordinate governmental unit of the Oglala Sioux Tribe. SUMF ¶¶1-4. To fund economic development projects on the Pine Ridge Reservation, WLCC issued bonds in August 2014 ("August 2014 Bonds"), September/October 2014 ("September 2014 Bonds"), and April 2015 ("April 2015 Bonds") (collectively, "WLCC Bonds"). SUMF ¶¶7-8. The

transactions in which these bonds were issued are referred to respectively as the August 2014 Offering, the September 2014 Offering, and the April 2015 Offering.

Plaintiffs Birmingham Water, Washington Suburban, and RHCT are public entities that provide retirement or health benefits for retired public employees. SUMF ¶¶10-11, 17. They each own August 2014 Bonds with a face value in excess of $4 million. *Id.* These bonds were purchased on their behalf by Hughes Capital Management, Inc. ("Hughes"), a Registered Investment Advisor that had served as an investment manager to each for many years. SUMF ¶40.

Plaintiffs Atlantic Feeder Fund and Atlantic Master Fund are limited partnerships that were organized, promoted, and controlled by Atlantic Asset Management, Inc. ("Atlantic"), a Registered Investment Advisor. SUMF ¶¶42-43. The general partner of the Atlantic Feeder Fund was Atlantic GYOF GP, LLC, and the sole limited partner was the Omaha School Employees Retirement System ("OSERS"), a long-time client of Atlantic. SUMF ¶¶12, 16, 42. Atlantic was acquired by and merged into Hughes in March 2015, and the surviving company did business under Atlantic's name. SUMF ¶44. The Atlantic Master Fund purchased the entire issuance of April 2015 Bonds, totaling $16.2 million. SUMF ¶13.

Defendant U.S. Bank is the indenture trustee for the WLCC Bonds. U.S. Bank engages in the corporate trust business through its Global Corporate Trust Services ("GCTS") division. SUMF ¶26. Because it is a national bank granted trust powers pursuant to the National Bank Act by the Office of Comptroller of Currency ("OCC"), U.S. Bank may engage in the trust business, and its provision of indenture trustee services is not

subject to state licensing requirements like those imposed in the accounting, medical, legal, and other professional fields. SUMF ¶¶18-25, 27. U.S. Bank serves as indenture trustee both for bond issues subject to the Trust Indenture Act of 1939 ("TIA") and for bond issues not subject to the TIA, such as taxable municipal bonds and private placements. SUMF ¶26.

II. THE AUGUST 2014 OFFERING

A. Origins

John ("Yanni") Galanis—acting on behalf of his son, Jason Galanis, who was purportedly an investment banker at Burnham Securities, Inc. ("Burnham"), a registered broker-dealer—proposed to WLCC and its lawyer, Timothy Anderson ("Anderson") of Dilworth Paxon LLP ("Dilworth"), the idea of financing economic development projects for the Wakpamni Lake Community through the issuance of bonds, which would be repaid primarily by payments from annuities purchased with the majority of the bond proceeds. SUMF ¶¶103-108.

Anderson saw no legal reason why an annuity could not be used as a repayment source. SUMF ¶110. After receiving written conflict waivers, Anderson agreed to represent Burnham, which would serve as the Placement Agent for the proposed bond transaction. SUMF ¶113. Before agreeing to act as Burnham's counsel, Anderson conducted basic research on Burnham, which led him to conclude that it was a respected investment bank without any regulatory issues. SUMF ¶¶111-112. Anderson's primary contact at Burnham was Jason Galanis. SUMF ¶115.

The stated goal of the proposed bond offering was to "[c]reate a permanent endowment to provide a current income stream supporting economic development which will provide significant long-term employment gains to the community thereby permanently enhancing the quality of life for tribal members." SUMF ¶123. Under the proposed structure of the transaction, WLCC would "borrow a sufficient amount to create an investment program that will pay the annual interest cost of the bond plus a return for the communities[']current programs with the principal being allocated to increase in asset allocation strategy used by most pension and endowment funds." SUMF ¶124; *see also* SUMF ¶¶116-122. The WLCC Bonds were not exempt from federal income taxation because they were private activity bonds, as well as because there was arbitrage between the interest rate being paid on the bonds and the return WLCC was to receive on the Annuity Investment. SUMF ¶9.

Burnham recommended that WLCC invest the bond proceeds "in an annuity product issued by Wealth Assurance AG," which Burnham disclosed to WLCC was "indirectly controlled by entities that also have an economic interest in Burnham and its affiliates"; Burnham also disclosed there were some overlapping directors. SUMF ¶120.

WLCC engaged Michael McGinnis ("McGinnis") and Heather Dawn Thompson ("Thompson") of Greenberg Traurig, LLP ("GT") to represent it in the proposed bond transaction. SUMF ¶¶53, 64. When they became involved in June 2014, the basic economic structure of the transaction had already been agreed upon between Burnham and WLCC. SUMF ¶128.

B. U.S. Bank Is Selected to Be Indenture Trustee

Anderson and McGinnis agreed to seek a proposal from U.S. Bank to serve as indenture trustee for the August 2014 Offering, both having had past experience working with U.S. Bank. SUMF ¶¶129-131. Scott Graham ("Graham") of U.S. Bank proposed that U.S. Bank be paid a $3,250 administrative fee to set up the account and $3,250 annually to serve as indenture trustee. SUMF ¶136. [redacted] SUMF ¶¶135-136. Neither Anderson nor McGinnis expected the fees quoted by U.S. Bank to include any diligence by U.S. Bank on anyone other than WLCC. SUMF ¶¶137-139. WLCC and Burnham accepted U.S. Bank's proposal. SUMF ¶140.

Keith Henselen ("Henselen") in U.S. Bank's Phoenix office was assigned as account manager for the August 2014 Offering. SUMF ¶165. Henselen had been employed in corporate trust operational capacities for fifteen years, the last eight of which as an account manager handling many engagements in which U.S. Bank served as indenture trustee. SUMF ¶¶75-76. Henselen was supervised by Robert Von Hess ("Von Hess"), a Certified Corporate Trust Specialist with thirty-five years of experience administering indentures and other corporate trusts. SUMF ¶¶77-80. U.S. Bank retained Michael Slania ("Slania") as its counsel for the August 2014 Offering. SUMF ¶65.

C. An Indenture Trustee's Role

In bond transactions subject to the TIA, which are tax exempt or public bond offerings, indenture trustees are only liable for the performance of such duties as are specifically set out in the indenture. SUMF ¶156. Although the August 2014 Bonds (and subsequent WLCC Bonds) were neither tax exempt nor publicly offered, the principles of Section 315(a)(1) are considered applicable to bonds such as the WLCC Bonds. James E. Spiotto, *Defaulted Securities: The Guide for Trustees and Bondholders*, 14 (Chapman and Cutler LLP 2018) (hereinafter "Spiotto"); *see* SUMF ¶¶156-157.

Indenture trustees do not determine the structure of transactions, evaluate the structure of transactions, do feasibility studies of transactions, evaluate the parties to transactions, or take responsibility for the economic outcome of transactions. SUMF ¶¶146-151. Indenture trustees do not get involved in determining whether there is an offering document; nor do they have any involvement in the sale of the bonds. SUMF ¶¶152-153. Until a default occurs, indenture trustees play only a ministerial role, and their duties are limited to those expressly stated in the governing indenture. SUMF ¶¶141-145 Indenture trustees have no duties or obligations related to transactional documents to which they are not parties. SUMF ¶158. Indeed, indenture trustees are not even expected to review documents to which they are not parties. SUMF ¶159-160.

D. U.S. Bank's KYC/AML Review for the August 2014 Bonds

[redacted]

[redacted]

[redacted]

E. Drafting the Documents for the August 2014 Offering

The three primary attorneys involved in the August 2014 Offering—Anderson, McGinnis, and Slania—each had decades of experience as municipal finance lawyers specializing in public and private bond financings and economic development matters, and each had substantial experience acting as bond counsel, issuer's counsel, underwriter's counsel, and placement agent's counsel in the course of their involvement in hundreds of bond offerings. SUMF ¶¶45-57, 65-70. All three are members of the National Association of Bond Lawyers. SUMF ¶¶52, 58, 70.

Slania did not draft any of the documents for the August 2014 Offering. Anderson drafted the Term Sheet, Indenture, Bonds, Closing Statement, and Closing Certificate. McGinnis drafted the Placement Agency Agreement between WLCC and Burnham. SUMF ¶204. None of the three drafted the Annuity Investment between WLCC and the Annuity Provider, Wealth Assurance Private Client Corporation ("WAPCC"), which the contract

stated "is incorporated and authorized to do business in the British Virgin Islands and is part of the Wealth Assurance Group of Companies." SUMF ¶204-210. WAPCC was incorporated on August 22, 2014, just days before the August 2014 Bonds were issued. SUMF ¶31. Nor did any of the three lawyers draft the Investment Management Agreement between WLCC and Private Equity Management Limited ("PEML"), which assigned PEML the task of managing the investments made to support the annuity. SUMF ¶33-34, 212.

F. Burnham's Investment Committee Approves Its Role as Placement Agent

Hugh Dunkerley ("Dunkerley") played a central role for Burnham in connection with the August 2014 Bonds. SUMF ¶94.[2] Dunkerley prepared a memorandum accurately describing the August 2014 Offering to Burnham's Investment Committee, and he attended the Investment Committee meeting at which the transaction was discussed. SUMF ¶¶214-216. The Investment Committee approved Burnham's role as Placement Agent for the August 2014 Bonds. SUMF ¶217. Dunkerley believed at the time that there was nothing

[2] To support its motion, U.S. Bank relies in part on testimony given by Dunkerley at the criminal trial relating to the WLCC Bond transactions. Dunkerley was the only criminal perpetrator deposed in this action, and at his deposition, he invoked his Fifth Amendment privilege against self-incrimination in response to almost all substantive questions. Because U.S. Bank has established that Dunkerley is unavailable as a witness due to his invocation of the Fifth Amendment, Dunkerley's criminal trial testimony is admissible under Fed. R. Evid. 804(b)(1), *see Azalea Fleet, Inc. v. Dreyfus Supply & Mach. Corp.* 782 F. 2d 1455, 1461 (8th Cir. 1986); *Rule v. Int'l Ass'n of Bridge, Structural, and Ornamental Ironworkers*, 568 F. 2d 558 (8th Cir. 1977), and under Fed. R. Evid. 807, *see United States v. Earles*, 113 F.3d 796, 799 (8th Cir. 1997).

improper about the August 2014 Offering, and there was no discussion of any inappropriate activity related to it. SUMF ¶¶218-220.

G. Burnham Places the August 2014 Bonds with Hughes

Jason Galanis told Dunkerley that Michelle Morton ("Morton") was going to acquire Hughes in order to provide a client base to purchase the August 2014 Bonds because Hughes had enough clients over which Morton would have discretionary control for whom she could purchase the WLCC Bonds. SUMF ¶¶221-224. The transaction by which Morton's company, GMT Duncan, acquired Hughes closed on August 11, 2014, but it was not a matter of public record until reported to the Securities and Exchange Commission ("SEC") on September 1, 2014. SUMF ¶¶228, 346-347. The buyers of the August 2014 Bonds were already selected by Hughes before the August 2014 Offering had closed. SUMF ¶226.

H. The Closing of the August 2014 Offering

The first tranche of the August 2014 Offering closed on August 25, 2014, at which time the August 25, 2014 Indenture ("August 2014 Indenture") was fully executed by WLCC and U.S. Bank; the Closing Statement was fully executed by WLCC, U.S. Bank, and Burnham; and the Annuity Investment was delivered, signed by Dunkerley as WAPCC's President. SUMF ¶¶ 231, 273, 281. Dilworth and GT also delivered opinion letters to WLCC and U.S. Bank at the closing. SUMF ¶273. The Dilworth opinion letter relied in part on an "investor letter" (sometimes referred to as a "big boy" letter) from Hughes, and WLCC relied upon the representations in this letter as well. SUMF ¶¶ 274, 277. The big boy letter represented and warranted "on behalf of," among others,

Birmingham Water, Washington Suburban, and RHCT, that "[w]e have had such opportunity as we have deemed adequate to obtain from representatives of [WLCC] such information as is necessary to permit me to evaluate the merits and risks of our investment in [WLCC]," and that "[w]e have sufficient experience in business, financial, and investment matters to be able to evaluate the risks involved in the purchase of the [August 2014 Bonds] and to make an informed investment decision with respect to such purchase." SUMF ¶ 279.

Section 2.11(f) of the August 2014 Indenture requires the Closing Statement to set forth "the amount of the proceeds to be received by [WLCC] from the sale of the 2014 Bonds for funding the purchase of the Annuity Investment." SUMF ¶254. Section 2.12 of the August 2014 Indenture requires U.S. Bank to deposit the proceeds of the bonds into a "Settlement Account," from which U.S. Bank is instructed to pay "$22,094,089 for the purchase of the Annuity Investment." SUMF ¶255. The Closing Statement instructs U.S. Bank to apply $22,094,089 from the Settlement Account for the "Annuity Purchase Payment." SUMF ¶¶283-284.

At the time the Closing Statement for the August 2014 Offering was prepared, neither Anderson (who prepared it) nor WLCC, GT, or others on the deal team had been provided with information about the bank account to which the purchase price for the Annuity Investment from WAPCC was to be wired, so Anderson did not include that information in the Closing Statement. SUMF ¶¶287-289. Anderson, McGinnis, and Slania all expected that either Burnham or Anderson would provide that information to U.S. Bank as soon as it was obtained, which in the experience of all involved was how such

information was usually transmitted. SUMF ¶¶291-294. Anderson—who drafted the August 2014 Indenture—did not believe that this type of ministerial communication needed to come directly from WLCC, especially where WLCC has already instructed U.S. Bank to purchase the annuity in the Indenture and the Closing Statement. SUMF ¶296. Anderson likewise did not believe that the provision of the wire transfer information was governed by Section 12.13 of the August 2014 Indenture, which provides U.S. Bank the permissive "right" (not a "duty") to "accept and act upon instructions or directions" sent electronically with certain authorized signatures. SUMF ¶¶297-298. McGinnis had the same understanding in this regard as Anderson. SUMF ¶299.

On August 26, 2014, Jason Galanis sent Anderson an email containing the wire transfer information for WAPCC's bank account at J.P. Morgan Chase in Beverly Hills, California. SUMF ¶¶300-301. Noting that Jason Galanis had copied "Wealth Assurance's" legal department on his email, and concluding that the information was "quite ordinary and regular," Anderson forwarded Jason Galanis' email to Henselen. SUMF ¶¶302-305. Henselen, who did not believe that receipt of the wire transfer information from Anderson instead of from WLCC was "a suspicious or unusual event," initiated the wire transfer to WAPCC's account at J.P. Morgan Chase. SUMF ¶¶295, 307. Von Hess, who was required to approve the wire transfer, followed his normal verification routine and approved the transfer. SUMF ¶308.

The J.P. Morgan Chase account to which the funds were wired by U.S. Bank was owned by WAPCC. SUMF ¶311. Dunkerley, the sole managing member of WAPCC, was a signer on the account. SUMF ¶¶95, 314. However, contrary to the understanding of the

parties and the language on the Annuity Investments which Dunkerley signed, WAPCC was not a part of the Wealth Assurance Group of Companies; in Dunkerley's words, the statement in the Annuity Investments was "a lie." SUMF ¶315.

I. The August 2014 Bond Proceeds Are Stolen

When WAPCC received the money in its account, Dunkerley did not use it to make investments to support an annuity. SUMF ¶320. Instead, Dunkerley wired the money out to individuals and corporations pursuant to directions given to him by Jason Galanis, because Dunkerley followed whatever instructions Jason Galanis gave him and would do anything Jason Galanis asked him to do "even if it was a fraudulent transaction." SUMF ¶¶320-339. Among other withdrawals from the WAPCC account, Dunkerley sent $15 million from the WAPCC account to an entity owned by Jason Galanis, $2.35 million to a corporation controlled by John Galanis, and $1 million to a law firm not involved in the August 2014 Offering. SUMF ¶¶332, 335, 337.

Indeed, within one week after the August 2014 Bonds were issued, over $7.35 million had been withdrawn from the WAPCC account, and within four weeks, all but slightly more than $1.2 million had been withdrawn, every penny of which was stolen by Dunkerley. SUMF ¶339. And even though Dunkerley committed crimes because Jason Galanis told him to do so, Dunkerley maintains that "he had no inkling that there was anything wrong with this deal" until the point in time at which, at Jason Galanis' direction, he wired money "to different corporations" and did "not put[] it into a variable annuity." SUMF ¶¶341-342.

J. Hughes' Clients Discover the Purchase of the August 2014 Bonds

Five days before the August 2014 Bonds were issued, Washington Suburban learned that GMT Duncan, a "Minority Woman Business Enterprise" founded by Morton, had acquired Hughes. SUMF ¶348. Upon learning this information, Washington Suburban did not look into the backgrounds of Morton or other new personnel at Hughes, like Richard Deary ("Deary") and Gary Hirst ("Hirst"), nor did it consider asking Hughes to halt any trading for its account until it had a chance to understand the new ownership better. SUMF ¶¶349-350.

On September 2, 2014, Washington Suburban learned that Hughes had purchased the August 2014 Bond for its account, and immediately became concerned that the purchase had taken place only a matter of days after Morton acquired Hughes. SUMF ¶¶353-354. It also advised Hughes that the August 2014 Bond was not a "suitable investment" for Washington Suburban. SUMF ¶355. Over the next week, Washington Suburban and Hughes exchanged correspondence and engaged in telephone conversations in which Hughes made statements to Washington Suburban about the August 2014 Bonds that Washington Suburban knew to be false. SUMF ¶¶355-360. As early as September 4, 2014, Washington Suburban was concerned that something fraudulent had occurred, and discussed reporting its concerns to the SEC, the DOJ, or FINRA, but it never did so, nor did it make any effort to contact U.S. Bank (which it knew was Trustee) or WLCC to express its concerns. SUMF ¶¶359-364. On September 8, 2014, Washington Suburban instructed Hughes to stop trading in its account, and on September 26, 2014, it terminated

its relationship with Hughes, yet it never demanded that Hughes repurchase the bond from it. SUMF ¶¶365-367.

In contrast, Birmingham Water did not raise any concerns about the purchase of the August 2014 Bond for its account until December 2015, when it learned that the SEC had opened an investigation relating to the WLCC Bonds. SUMF ¶375. In fact, Birmingham Water represents that, prior to December 2015, it had completely overlooked that it owned the August 2014 Bond as part of its portfolio—despite receiving monthly account statements from Hughes starting in September 2014 that listed the August 2014 Bond as one of Birmingham Water's assets. SUMF ¶¶374-375.

RHCT knew about GMT Duncan's acquisition of Hughes by August 22, 2014. SUMF ¶378. RHCT's executive director testified that he knew of both Morton and Deary prior to this point and that one of Morton's prior companies—Pacific American Securities LLC—may have provided brokerage services for some of RHCT's investments. SUMF ¶379. Upon learning about Hughes' acquisition, RHCT did not perform any diligence itself, but it did task its investment consultant (Marquette Associates) to look into things. SUMF ¶380. Following its investigation, Marquette Associates advised RHCT to terminate Hughes. SUMF ¶381. By letter, dated October 27, 2014, RHCT notified Hughes that their relationship would terminate on November 28, 2014 and that Hughes should liquidate RHCT's portfolio by that point. *Id.* Despite RHCT's instruction, Hughes did not sell the August 2014 Bond that was part of RHCT's portfolio. SUMF ¶382. Over the course of several months, RHCT received multiple communications from Morton and others about Hughes' supposed efforts to sell the bond. SUMF ¶383. Even though it believed that

Morton was being dishonest, RHCT did not alert any government regulators about its concerns. *Id.* Nor did it contact U.S. Bank to relay those concerns. *Id.* Despite all of this, RHCT claims that it did not suspect there was any fraud relating to the WLCC Bonds until it learned about the SEC's investigation in December 2015. *Id.*

III. THE SEPTEMBER 2014 OFFERING

WLCC issued additional bonds in September and early October pursuant to a September 2014 Indenture and a Supplemental Indenture. SUMF ¶7. None of the Plaintiffs own September 2014 Bonds. SUMF ¶384. Except for the dates, amounts, and project description, the deal structure was the same as that for the August 2014 Bonds, and the Indenture, Annuity Investment, Investment Management Agreement, and legal opinions of GT and Dilworth were each substantially identical in form and substance to the counterpart documents for the August 2014 Bonds, with one significant exception. SUMF ¶386. That exception was that, at Henselen's request, Anderson included wire transfer information for the payment to WAPCC in the Closing Statement, that information being identical to what Anderson had provided Henselen for the August 2014 Offering. SUMF ¶¶387-388. WLCC, represented by GT, was the Issuer; Burnham, represented by Dilworth, was Placement Agent; U.S. Bank, represented by Slania, was the Indenture Trustee; and WAPCC was the Annuity Provider. SUMF ¶385. Neither Hughes nor its clients were involved in the September 2014 Offering. *See* SUMF ¶384.

Dunkerley withdrew $15 million from WAPCC's account after the August 2014 Offering, and then deposited that money in the account of Jason Galanis' company. SUMF ¶390. That money was then used to purchase the September 2014 Bonds, a fact of which

Dunkerley himself was unaware until much later when he was indicted and arrested. SUMF ¶391.

Within one week after the September 2014 Bonds were issued, Dunkerley had withdrawn an additional $6.47 million from WAPCC's account, and within six weeks after the September 2014 Bonds were issued, all that remained in WAPCC's account was $5,151.68. SUMF ¶392. None of the money was used to purchase investments to support the annuity. *See* SUMF ¶320.

IV. THE APRIL 2015 OFFERING

A. Hughes Acquires Atlantic

In early 2015, Hughes agreed to acquire Atlantic, which had been the principal investment manager for the Omaha School Employees Retirement System ("OSERS") for over twenty years; the financing for the acquisition was arranged by Dunkerley. SUMF ¶¶393-397. On February 19, 2015, Atlantic advised OSERS that it had signed a merger agreement with Hughes, that the merged entity would go forward under Atlantic's name, that Morton would become Atlantic's CEO, and that Deary, who was Hughes' president, would become Atlantic's president. SUMF ¶¶398, 400. The letter also asked OSERS to sign a "consent" to having its investment management agreement taken over by the merged entity. SUMF ¶401.

Atlantic's longtime president, a trusted advisor to OSERS, made a presentation to OSERS on March 4, 2015, in which he represented that he would continue to be involved with Atlantic and that the staff OSERS had always dealt with would remain at the company. SUMF ¶¶402-404. At the same time, he also recommended that OSERS increase its $100

million investment in the Atlantic Feeder Fund to $125 million. SUMF ¶402. After hearing this presentation, and without meeting Morton or Deary, OSERS unanimously approved continuation of the existing investment management agreement with Atlantic, and the Omaha Board of Education later adopted the recommendation of OSERS without doing any due diligence. SUMF ¶¶404-408. On March 16, 2015, OSERS signed the "consent" which Atlantic had requested. SUMF ¶409. Had OSERS not given its consent, Atlantic would have allowed OSERS to redeem its investment in the Atlantic Feeder Fund prior to the merger. SUMF ¶410.

B. U.S. Bank's KYC/AML Review for the April 2015 Bonds

[redacted]

C. Documents Relating to April 2015 Offering

The principal parties involved in the April 2015 Offering were the same as those involved in the August 2014 and September 2014 Offerings: WLCC, represented by GT, was the Issuer; Burnham, represented by Dilworth, was the Placement Agent; U.S. Bank, represented by Slania, was the Trustee; and WAPCC was the Annuity Provider. SUMF ¶414. Except for the dates, amounts, and description of the Project, the Indenture, the

Annuity Investment, the Investment Management Agreement, and the opinions of GT and Dilworth for the April 2015 Bonds were each substantially identical in form and substance to the counterpart documents for the August 2014 and September 2014 Bonds. SUMF ¶¶427. The wire transfer information in the April 2015 Closing Statement was identical to that included in the September 2014 Closing Statement and the email Anderson sent Henselen for the August 2014 Offering. SUMF ¶428.

On behalf of Atlantic, Morton executed a big boy letter in connection with the purchase of the entire April 2015 Bond issue. SUMF ¶430. The big boy letter "represented, warranted and covenanted," among other things, that "[w]e have had such opportunity as we have deemed adequate to obtain from representatives of [WLCC] such information as is necessary to permit us to evaluate the merits and risks of our investment in [WLCC]," and that "[w]e have sufficient experience in business, financial and investment matters to be able to evaluate the risks involved in the purchase of the [April 2015 Bonds] and to make an informed investment decision with respect to such purchase." *Id.* The big boy letter did not disclose that the actual purchaser of the April 2015 Bonds was the Atlantic Master Fund. SUMF ¶431.

D. OSERS Learns that the Atlantic Master Fund Purchased the April 2015 Bonds

To purchase the April 2015 Bonds for the Atlantic Master Fund, Atlantic used funds coming from the additional $25 million investment that OSERS had made into the Atlantic Feeder Fund in March. SUMF ¶434. OSERS claims that the purchase of the April 2015 Bonds was not a permissible investment because it violated the investment guidelines in

OSERS' agreement with Atlantic. SUMF ¶432. When OSERS learned of the purchase on April 23, 2015, it demanded that the transaction be reversed. SUMF ¶435. However, OSERS did not notify U.S. Bank about Atlantic's improper actions, nor did it report Atlantic to the SEC or other regulators. SUMF ¶¶436-438.

E. The April 2015 Bond Proceeds Are Stolen

As it was directed to do in the April 2015 Indenture and Closing Statement, U.S. Bank wired approximately $16 million to WAPCC's bank account at J.P. Morgan Chase for the purchase of the Annuity Investment. *See* SUMF ¶¶441-442. Immediately prior to U.S. Bank's wire, the balance in WAPCC's bank account at J.P. Morgan Chase was $54.66. SUMF ¶440. The funds sent by U.S. Bank's wire were withdrawn almost immediately from WAPCC's bank account to provide working capital for Atlantic and to purchase a corporation of which Dunkerley became president. SUMF ¶441.

Within one week after the issuance of the April 2015 Bonds, $6.47 million had been withdrawn from WAPCC's bank account at J.P. Morgan Chase. SUMF ¶442 Within four weeks, all of the money was gone except for $20,993.30. *Id.*

V. THE AFTERMATH

The Annuity Investments provided that WAPCC would make loans to WLCC, and in late September or early October 2015, WLCC requested a $1.25 million loan. SUMF ¶443. On behalf of WAPCC, Dunkerley assured WLCC that the loan would be made and that distribution requests would also be processed. SUMF ¶¶444-445. He also sent WLCC accounts statements for the each of the Annuity Investments. SUMF ¶¶446, 449. The account statements falsely represented that the bond proceeds had been invested into the

annuities, that the balance in the annuities was protected, and that interest was being paid. SUMF ¶450. Jason Galanis provided Dunkerley with the false account statements that Dunkerley provided to WLCC, and the pair also created and falsified other documents to cover up their fraud. SUMF ¶¶451-452. Subsequently, Dunkerley pleaded guilty to obstruction of justice and falsification of documents, in addition to conspiracy to commit securities fraud, securities fraud, and bankruptcy fraud. SUMF ¶¶453, 469. As part of his guilty plea, Dunkerley confessed to misappropriating the bond proceeds by making or directing transfer of proceeds to persons and entities not entitled to the funds. SUMF ¶470.

Atlantic (including Hughes) was placed into receivership on the petition of the SEC. SUMF ¶459. Morton pleaded guilty to charges of investment advisor fraud and conspiracy to commit securities fraud, but only in connection with the actions she took as Atlantic's CEO with respect to the April 2015 Offering. SUMF ¶¶472-473.[3] Hirst, who was either a consultant for Hughes for several days or its chief investment officer, pleaded guilty to charges of conspiracy to commit securities fraud, conspiracy to commit investment advisor fraud, securities fraud, and investment advisor fraud in connection with the August 2014 Offering. SUMF ¶¶475-476.[4]

Burnham is out of business, not having been registered as a broker-dealer with the SEC since 2016. SUMF ¶460. Jason Galanis is serving a 173-month sentence after pleading guilty to charges of conspiracy to commit securities fraud, conspiracy to commit

[3] Morton has a motion pending to withdraw her guilty plea. SUMF ¶474.

[4] Hirst has a motion pending to vacate, set aside, or correct his sentence. SUMF ¶477.

investment advisor fraud, and securities fraud in connection with the WLCC Bond transactions. SUMF ¶¶461-463.[5]

John Galanis was convicted of conspiracy to commit securities fraud and securities fraud by a jury, and is serving a 120-month prison term. SUMF ¶¶466-468.

The holders of the WLCC Bonds instructed U.S. Bank to declare Events of Default, but have not exercised their right under the Indentures to instruct U.S. Bank to take actions against third parties to recover their losses. SUMF ¶458.

QUESTIONS PRESENTED

Plaintiffs' claims for breach of the implied covenant of good faith and fair dealing were previously dismissed by this Court. U.S. Bank seeks summary judgment on Plaintiffs' two remaining claims—negligence[6] and breach of contract. U.S. Bank's motion presents the following issues for the Court's resolution:

1. Can Plaintiffs prove that U.S. Bank owed them an independent legal duty that is sufficient to support Plaintiffs' negligence claims against U.S. Bank?

2. Can Plaintiffs assert a private cause of action against U.S. Bank for violation of its internal policies?

3. Can Plaintiffs prove that they relied on U.S. Bank's representations or statements?

[5] The Second Circuit has remanded Jason Galanis' case back to the district court for a hearing upon his claim that he had ineffective assistance of counsel in connection with his guilty plea. SUMF ¶464.

[6] Plaintiffs style their negligence claims as claims for "Negligence and Gross Negligence." To the extent Plaintiffs are still pursuing any claim for "Gross Negligence," such claims fail for the same reasons Plaintiffs' negligence claims fail, as discussed herein.

4. Can Plaintiffs maintain a claim for negligence against U.S. Bank for actions taken or not taken by U.S. Bank prior to execution of the Indentures?

5. Can Plaintiffs offer sufficient evidence to support their allegations that U.S. Bank breached its contractual duties and that such breaches caused injury to Plaintiffs?

6. Do Plaintiffs' negligence and breach of contract claims satisfy Section 10.3 of the Indentures, which requires, among other things, proof that U.S. Bank's alleged conduct was taken without good faith?

7. Can U.S. Bank's alleged conduct be a proximate cause of Plaintiffs' injuries where the undisputed evidence shows that those injuries were caused by the breaches of contract and fraudulent and criminal acts of third parties unrelated to U.S. Bank?

8. Can Plaintiffs Atlantic Feeder Fund and Atlantic Master Fund state any claim whatsoever that is sufficient to overcome the doctrine of *in pari delicto*?

As demonstrated below, each of these questions should be resolved in U.S. Bank's favor.

LEGAL STANDARD

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To avoid summary judgment, "[t]he nonmoving party may not rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." *Mosley v. City of Northwoods, Mo.*, 415 F.3d 908, 910 (8th Cir. 2005) (internal quotation marks omitted). Although the facts and reasonable inferences therefrom are viewed in a light favorable to the nonmoving party, the nonmoving party "must substantiate [its] allegations with sufficient probative evidence [that] would permit a finding in [its] favor based on more than mere speculation,

conjecture, or fantasy." *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782, 801 (8th Cir. 2011).

ARGUMENT

Plaintiffs' claims for negligence and breach of contract are legally and factually deficient. Because Plaintiffs cannot offer any authority or evidence to overcome these deficiencies, the Court should grant U.S. Bank summary judgment on all of Plaintiffs' remaining claims and dismiss this action.

I. U.S. BANK IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' NEGLIGENCE CLAIMS

Plaintiffs' negligence claims are governed by the laws of either South Dakota, Minnesota, or Arizona. For the purposes of the present motion, it is unnecessary for the Court to resolve this question because the law from each of these jurisdictions is substantially the same with respect to the issues raised in this memorandum.

To establish a claim for negligence, a plaintiff must prove the following elements: "(1) a duty on the part of the defendant; (2) a failure to perform that duty; and (3) an injury to the plaintiff resulting from such a failure." *Kuehl v. Horner (J.W.) Lumber Co.*, 678 N.W.2d 809, 812 (S.D. 2004).

Plaintiffs cannot satisfy their burden here for multiple reasons. First, as the Court previously held, to establish the duty element, Plaintiffs must prove that U.S. Bank owed them an "independent legal duty"—*i.e.*, a duty arising from something other than U.S. Bank's contractual relationships with Plaintiffs under the August 2014 and April 2015

Indentures. (ECF 32 at 10-11.) U.S. Bank owed Plaintiffs no such duty, and Plaintiffs cannot offer any evidence or authority to demonstrate otherwise.

Second, Plaintiffs' negligence claims are based substantially on allegations regarding U.S. Bank's conduct *before* the execution of the Indentures governing Plaintiffs' respective WLCC Bonds. Plaintiffs cannot show that U.S. Bank owed them a duty with respect to this alleged pre-execution conduct because they cannot establish that there was any relationship whatsoever between them and U.S. Bank during this period.

There is no genuine dispute as to any material fact on the issue of whether U.S. Bank owed Plaintiffs a duty sounding in tort. As explained below, Plaintiffs cannot prove the existence of any extracontractual duty, and without such a duty, there can be no claim for negligence.

A. U.S. Bank Did Not Owe an Independent Legal Duty to Plaintiffs

South Dakota, Minnesota, and Arizona recognize that negligence claims are subject to the independent legal duty doctrine. *Sundt Corp v. S.D. Dep't of Transp.*, 566 N.W.2d 476, 478 (S.D. 1997); *U.S. Bank Nat'l Ass'n v. San Antonio Cash Network*, 252 F. Supp. 3d 714, 718 (D. Minn. 2017); *Zinn v. ADT LLC*, No. CV-17-03037, 2018 WL 526899, at *2 (D. Ariz. Jan. 24, 2018).

Under this doctrine, no cause of action for negligence can exist unless the defendant owed a duty of care to the plaintiff that was independent from the defendant's duties under the contract that created the parties' relationship. *Sundt*, 566 N.W.2d at 478; *U.S. Bank*, 252 F. Supp. 3d at 718 ("[T]he 'duty' supporting a negligence claim must arise from something other than a contract—a claim will lie only if a relationship would exist which would give

rise to the legal duty without enforcement of the contract promise itself." (quotation marks omitted)); *D & A Dev. Co. v. Butler*, 357 N.W.2d 156, 158 (Minn. Ct. App. 1984) ("To prevail in negligence, a plaintiff must prove . . . some duty imposed by law, not merely one imposed by contract." (internal quotations and citation omitted)); *Aspell v. Am. Contract Bridge League*, 595 P.2d 191, 194 (Ariz. Ct. App. 1979) ("A breach of contract is not a tort unless the law imposes a duty on the relationship created by the contract which exists apart from the contract.").

Plaintiffs bear the burden of establishing that the independent legal duty doctrine is satisfied here. *Fisher Sand & Gravel Co. v. S.D. Dep't of Transp.*, 558 N.W.2d 864, 868-69 (S.D. 1997). In other words, for their negligence claims to survive summary judgment, Plaintiffs must show that U.S. Bank owed them a duty of care that arose separate and apart from the contractual duties accepted by U.S. Bank under the August 2014 and April 2015 Indentures. *Id.*

Based on their pleadings and discovery responses to date, it appears that Plaintiffs will attempt to prove the existence of an independent legal duty by relying on one or more of the following theories. First, Plaintiffs might contend that the indenture trustee services U.S. Bank provided in connection with the WLCC Bonds are the type of "professional services" that give rise to an independent legal duty. Second, Plaintiffs might suggest that U.S. Bank owed Plaintiffs an independent legal duty to comply with its internal policies, procedures, and guidelines relating to account acceptance and AML. Third, Plaintiffs might argue that U.S. Bank made representations regarding its expertise in the indenture

trustee business and that Plaintiffs' reliance on those representations created an independent legal duty.

As explained below, none of these theories passes muster.

1. The Indenture Trustee Services Provided by U.S. Bank Are Not the Type of "Professional Services" that Give Rise to an Independent Legal Duty

Certain categories of "professional services" may under certain circumstances give rise to an independent legal duty. This "professional services" exception to the independent legal duty doctrine is limited, and courts have narrowly circumscribed the exception's scope to include only certain types of professionals, such as architects, doctors, veterinarians, engineers, and attorneys. *See, e.g., GSAA Home Equity Trust 2006-2 v. Wells Fargo Bank, N.A.*, 133 F. Supp. 3d 1203, 1222 (D.S.D. 2015); *U.S. Bank*, 252 F. Supp. 3d at 720. Attempts to expand the exception's scope beyond this narrow group of commonly-accepted professionals have consistently been rejected. *Boyd & Co., LLC v. Tom's Backhoe Serv., Inc.*, No. 17-CV-178, 2017 WL 8787047, at *6-7 (D. Minn. Nov. 30, 2017), *report and recommendation adopted*, 2018 WL 740389 (D. Minn. Feb. 7, 2018); *see also GSAA*, 133 F. Supp. 3d at 1222-23 (exception not applicable to servicer of mortgage-backed securities trust); *Zinn*, 2018 WL 526899, at *2 (finding no independent duty in relationship between security company and homeowner).

Here, there is no legal or evidentiary basis upon which to apply the "professional services" exception to U.S. Bank. There does not appear to be a single case in South Dakota, Minnesota, or Arizona in which a court has held that indenture trustees fall within the exception's scope.

Likewise, there are no facts in the record showing that indenture trustees are analogous to the types of professionals that courts have found to be subject to the exception, such as architects, doctors, veterinarians, engineers, and attorneys. Indeed, indenture trustees vary from these types of professionals in at least two crucial ways. First, all of these professionals provide specialized services and receive specialized training in order to do so. This specialization is the fundamental rationale for subjecting these types of professionals to the "professional services" exception, as the Minnesota Supreme Court has explained:

> Architects, doctors, engineers, attorneys, and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. Thus, doctors cannot promise that every operation will be successful; a lawyer can never be certain that a contract he drafts is without latent ambiguity; and an architect cannot be certain that a structural design will interact with natural forces as anticipated. Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.

City of Mounds View v. Walijarvi, 263 N.W.2d 420, 424 (Minn. 1978). In contrast, there is nothing "specialized" about the services provided by an indenture trustee. Performing the administrative and ministerial tasks specified in a trust indenture are nondiscretionary duties imposed upon U.S. Bank by the Indentures, and are not an "inexact science" involving "indeterminate" matters that call for the application of "skilled judgment." *See id.*; *U.S. Bank*, 252 F. Supp. 3d at 720. Likewise, indenture trustees do not receive any type

of training that remotely resembles the specialized training received by architects, doctors, veterinarians, engineers, and attorneys. SUMF ¶27.

Second, the types of professionals that fall within the "professional services" exception are generally—if not always—subject to rigorous state licensing standards. *See Ferris & Salter, P.C. v. Thomson Reuters Corp.*, 889 F. Supp. 2d 1149, 1152-53 (D. Minn. 2012) (discussing link between licensure and imposing a duty based on the provision of professional services). Indenture trustees, though, are not subject to these sorts of licensing requirements. U.S. Bank's ability to provide indenture trustee services flows solely from its status as a national bank chartered in Ohio. SUMF ¶¶19-23. Because of this status, U.S. Bank is not required to obtain a license (or pass an exam) in order to act as an indenture trustee in any state. SUMF ¶27. This stands in stark contrast to architects, doctors, veterinarians, engineers, and attorneys—all of whom are subject to licensure requirements in South Dakota, Minnesota, and Arizona.

U.S. Bank has not located a single case in South Dakota, Minnesota, or Arizona in which the "professional services" exception was found to apply to a profession lacking the aforementioned characteristics. In fact, there is case law suggesting that something more may be required beyond possessing these characteristics. For example, professions have been found to be outside the scope of exception even when they are subject to licensure requirements. *See, e.g.*, *Boyd & Co.*, 2017 WL 8787047, at *7 (dismissing negligence claim against contractor for lack of an independent legal duty and explaining that "the Minnesota Supreme Court has specifically distinguished the professionals who fall under [the 'professional services'] exception from others to whom the exception would not apply,

including specifically and particularly distinguishing them from contractors[,]" who are required to be licensed under Minnesota law).

No caselaw suggests that a business becomes a provider of "professional services" with an attendant independent legal duty simply by virtue of its incorporation, or because it is granted certain powers as a result of being a corporation. Thus, the conclusion is inescapable that U.S. Bank does not have an independent legal duty to Plaintiffs simply by virtue of being chartered as a national bank and exercising the indenture trustee powers statutorily granted to it. *See GSAA*, 133 F. Supp. 3d at 1222-23 (finding that a national bank registered to do business as master servicer of mortgage-back securities trust was not subject to the "professional services" exception).

Because Plaintiffs cannot cite to any case holding that an indenture trustee provides "professional services," and because Plaintiffs cannot offer any facts demonstrating that indenture trustees are analogous to the professionals that are subject to the "professional services" exception, Plaintiffs cannot satisfy their burden of showing that U.S. Bank owed them an independent legal duty.

2. No Duty to Plaintiffs Arises from U.S. Bank's Internal Policies

Plaintiffs allege that U.S. Bank "violated or failed to adequately follow the guidance" contained in twelve of its internal policies, procedures, and guidelines (collectively, "Internal Policies"). To sustain a negligence claim based on this allegation, Plaintiffs must first establish that U.S. Bank owed Plaintiffs a duty to comply with these Internal Policies. U.S. Bank, however, had no such duty under federal or state law.

a. No Private Right of Action Exists to Enforce U.S. Bank's Internal Policies

Most of the Internal Policies at issue were adopted by U.S. Bank to comply with requirements imposed by the Bank Secrecy Act ("BSA") and the various statutes and regulations that have been passed in relation to the BSA. Pursuant to the BSA, banks have certain reporting and recordkeeping obligations that are deemed to "have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities." 31 U.S.C. § 5311. Although the BSA was initially focused on tracking large currency transactions, Congress expanded its scope by passing the Annunzio-Wylie Anti-Money Laundering Act of 1992 ("Annunzio-Wylie Act"). *See* 31 U.S.C. § 5318(g). As a result of the Annunzio-Wylie Act, banks now have obligations to report "suspicious transaction[s] relevant to a possible violation of law or regulation." 31 U.S.C. § 5318(g)(1). Banks also must establish AML programs. 31 U.S.C. § 5318(h). KYC requirements were added to these AML programs by the 2001 USA PATRIOT Act. *See* 31 U.S.C. § 5318(l). The FDIC, which insures U.S. Bank, has promulgated a set of principles to which insured banks must adhere in order to comply with these KYC requirements. SUMF ¶¶161-163.

Courts have repeatedly held that no private right of action was created by the BSA or the various BSA-related statutes and regulations. *Pub. Serv. Co. of Okla. v. A Plus, Inc.*, No. CIV-10-651-D, 2011 WL 3329181, at *8 (W.D. Okla. Aug. 2, 2011) ("[T]he [BSA] and its implementing regulations do not create a private right of action."); *see also Ray v. First Nat'l Bank of Omaha*, 413 F. App'x 427, 430 (3d Cir. 2011); *In re Agape Litig.*, 681

F. Supp. 2d 352, 360-61 (E.D.N.Y. 2010); *Stern v. Charles Schwab & Co.*, No. CV-09-1229, 2010 WL 1250732, at *5 (D. Ariz. Mar. 24, 2010); *Grad v. Associated Bank, N.A.*, 801 N.W.2d 349, at *5-7 (Wis. Ct. App. 2011); *Towne Auto Sales, LLC v. Tobsal Corp.*, No. 1:16-CV-02739, 2017 WL 5467012, at *2 (N.D. Ohio Nov. 14, 2017).

Because the BSA and its related statutes and regulations created no private right of action, it is axiomatic that the requirements they impose on banks do not give rise to a duty of care to private parties, such as Plaintiffs here. *Spitzer Mgmt., Inc. v. Interactive Brokers, LLC*, No. 1:13 CV 2184, 2013 WL 6827945, at *2 (N.D. Ohio Dec. 20, 2013); *Sterling Sav. Bank v. Poulsen*, No. C-12-01454, 2013 WL 3945989, at *19 (N.D. Cal. July 29, 2013); *Armstrong v. Am. Pallet Leasing Inc.*, 678 F. Supp. 2d 827, 874-75 (N.D. Iowa 2009); *Gilbert Tuscany Lender, LLC v. Wells Fargo Bank*, 307 P.3d 1025, 1029 (Ariz. Ct. App. 2013). One court explained this point as follows:

> The obligation under [the BSA] is to the government rather than some remote victim. The obligation is not to roam through its customers looking for crooks and terrorists. *By that act, banks do not become guarantors of the integrity of the deals of their customers*. It does not create a private right of action and, therefore, does not establish a standard of care.

Marlin v. Moody Nat. Bank, N.A., CIV.A. No. H-04-4443, 2006 WL 2382325, at *7 (S.D. Tex. Aug. 16, 2006), *aff'd*, 248 F. App'x 534 (5th Cir. 2007) (emphasis added).

Thus, it is well-settled law that banks owe no duty to private parties to comply with their BSA-related internal policies and, as a result, cannot be held liable in tort for any violation of such policies. *See, e.g., In re Agape Litig.*, 681 F. Supp. 2d at 360-61 (dismissing negligence claim by Ponzi scheme investors because bank owed them no duty

to detect and thwart customer's fraud); *Grad*, 801 N.W.2d 349, at *5-7; *Stern*, 2010 WL 1250732, at *5-7.

Accordingly, Plaintiffs have no legal basis on which to argue that U.S. Bank owed Plaintiffs an independent legal duty to comply with the Internal Policies it adopted pursuant to the BSA and the various BSA-related statutes and regulations.

b. U.S. Bank's Internal Policies Were Not Intended to Protect Plaintiffs

To establish that U.S. Bank owed Plaintiffs a duty to comply with its Internal Policies, whether federally mandated or self-imposed, Plaintiffs must show both (1) that they fall within the class of people for whose protection the Internal Policies were adopted; and (2) that they suffered the type of harm sought to be prevented by the Internal Policies. *See Gilbert Tuscany Lender*, 307 P.3d at 1030. Plaintiffs cannot make this showing here.

The Internal Policies invoked by Plaintiffs are focused on issues relating to how U.S. Bank opens accounts and what U.S. Bank must do to comply with its BSA-related obligations. There is no evidence in the record that remotely suggests that these Internal Policies were promulgated to protect Plaintiffs or any parties similarly-situated to Plaintiffs.

In fact, the case law makes clear that banks adopt these types of internal policies either for their own protection or to assist the government in its criminal, tax, and regulatory enforcement efforts. *See id.*; *Stern*, 2010 WL 1250732, at *5-6. For instance, in *Gilbert Tuscany Lender*, the defendant-bank permitted an account to be opened without receiving the information and documentation required by its internal account opening and screening

procedures. 307 P.3d at 1027. After funds were misappropriated from that account, the plaintiffs, who claimed an interest in those funds, brought a negligence claim against the defendant-bank for violating its internal procedures. *Id.* The trial court dismissed the claim on summary judgment, and the appellate court affirmed, holding that the defendant-bank owed no duty to the plaintiffs to comply with its internal procedures because such procedures exist to protect the bank itself, not the plaintiffs. *Id.* at 1030.

Likewise, in *Stern*, the plaintiffs, alleged victims of a Ponzi scheme, brought a negligence claim against the bank that maintained the account used to orchestrate that scheme. 2010 WL 1250732, at *1. To support their claim, the plaintiffs argued that, as a result of various fraud and AML laws, banks "whose customers defraud third persons have a duty to those third persons to detect and prevent the customers' fraud." *Id.* at *5. Rejecting the plaintiffs' argument, the court held that no such duty existed because the bank's obligations under these statutes were not intended to protect individual parties like the plaintiffs; instead, these obligations were imposed to serve the needs of the government and, therefore, give rise to a duty to the government alone. *Id.* at *5-6.

The case law also makes clear that a bank's internal policies do not give rise to an independent legal duty even where such policies are intended to protect the general public from harm. *Silverman Partners, L.P. v. First Bank*, 687 F. Supp. 2d 269, 282 (E.D.N.Y. 2010). In *Silverman Partners*, the plaintiffs and a co-borrower established a line of credit with the defendant-bank. 687 F. Supp. 2d at 278-79. After being defrauded by the co-borrower, the plaintiffs brought a negligence claim against the defendant-bank, arguing that, prior to extending the line of credit, it had a duty—arising from its internal procedures

and federal law—to investigate the co-borrower and certain entities providing security in the transaction, and that it had breached such duty. *Id.* at 282. The court rejected the plaintiffs' argument, holding that the internal procedures and federal law at issue were intended to protect only the defendant-bank and the general public from harm and, thus, did not give rise to any duty to the plaintiffs, even though they were customers of the defendant-bank. *Id.*

In general, courts in South Dakota, Minnesota, and Arizona have been hostile to the idea that a company's internal policies, whether federally-mandated or self-imposed, create any sort of independent legal duty to private parties. *See, e.g.*, *McGuire v. Curry*, 766 N.W. 2d 501, 506-07 (S.D. 2009); *Gilbert Tuscany Lender*, 307 P.3d at 1030; *Hendrickson v. Fifth Third Bank*, No. 18-CV-86, 2018 WL 6191948, at *8 (D. Minn. Nov. 28, 2018), *aff'd*, 2019 WL 969812 (D. Minn. Feb. 28, 2019) ("[A] company's internal policies and procedures do not create specific enforceable rights and thus cannot be relied on to create a standard of care."); *Bevier v. Prod. Credit Ass'n*, 429 N.W.2d 287, 289 (Minn. Ct. App. 1988). For instance, in *McGuire*, the South Dakota Supreme Court held that a company's adoption of a no-drinking policy for its underaged employees did not give rise to a general duty to the public, such that the company could be subject to tort liability based on its employee's violation of that policy. 766 N.W.2d at 506-07.

As all of the foregoing case law makes clear, there is no basis to find that U.S. Bank's Internal Policies gave rise to an independent legal duty to Plaintiffs.

c. An Independent Legal Duty Arising from the Internal Policies Would Conflict with the Indentures

The fundamental problem with recognizing an independent legal duty based on the Internal Policies is that doing so would ignore that the relationship between U.S. Bank and Plaintiffs arises solely from the Indentures. *See Fisher Sand & Gravel Co.*, 558 N.W.2d 864, 867-70. The Indentures—and the Indentures alone—create whatever rights and obligations that they have in that relationship.

Nothing in the Indentures even remotely suggests that U.S. Bank agreed to accept extracontractual duties to Plaintiffs. Nor is there any language indicating that U.S. Bank agreed to be held liable to Plaintiffs (in tort or in contact) for violations of its Internal Policies. Rather, as Section 10.1 of the Indentures makes clear, U.S. Bank's duties are limited to those contained in the "express terms and conditions" of the Indentures, and "no implied covenants or obligations" can be read into the Indentures against U.S. Bank. SUMF ¶262. The concept of an independent legal duty based on U.S. Bank's Internal Policies directly conflicts with these contractual provisions and should be rejected as a result.

3. No Record Evidence Shows that Plaintiffs Relied on U.S. Bank's Representations

Plaintiffs assert that U.S. Bank made representations to Plaintiffs regarding its expertise in the area of indenture trust administration and that Plaintiffs relied on those representations. (*See* ECF No. 32 at 32.) By holding itself out as an expert, Plaintiffs argue, U.S. Bank assumed an independent legal duty to Plaintiffs that was extraneous to the governing Indentures. This argument fails for lack of evidence.

Birmingham Water, Washington Suburban, RHCT, and OSERS have admitted that they had no involvement in the purchase of the WLCC Bonds. ECF 1 ¶16. Instead, they claim these bonds were purchased by Hughes and Atlantic without their knowledge or consent. *Id.* They likewise all claim that these purchases were made in violation of the applicable investment management agreements and as part of a fraudulent scheme orchestrated by the investment managers and others in order to steal Plaintiffs' money. It is not surprising, therefore, that there is no evidence that Plaintiffs received or relied upon any representations from U.S. Bank in connection with the purchase of their WLCC Bonds.

Plaintiffs and their investment managers played no role whatsoever in selecting U.S. Bank as indenture trustee for the WLCC Bonds. U.S. Bank ended up in that role because it was approached by Burnham's counsel with the approval of WLCC's counsel. SUMF ¶¶129-132. U.S. Bank was approached because of the lawyers' prior experience with U.S. Bank in the role of indenture trustee—not based on any advertising representations U.S. Bank may or may not have made. *Id.* U.S. Bank was ultimately hired based on its agreement to charge only a $3250 initiation fee, followed by a $3250 annual fee; in other words, U.S. Bank was hired because it was a known quantity and inexpensive. And it was inexpensive because it was protected from risk by the language of the Indentures.

There is simply no evidence showing (1) that U.S. Bank made any representations to any of the Plaintiffs or their investment managers about its indenture trustee capabilities or its Internal Policies; (2) that Plaintiffs or their investment managers received or relied on any statements by U.S. Bank in connection with the decision to hire U.S. Bank as indenture trustee for the WLCC Bonds; or (3) that Plaintiffs or their investment managers

actually relied on representations by U.S. Bank about its indenture trustee capabilities or its Internal Policies, or even that they relied upon any of the Internal Policies themselves.

All Plaintiffs have offered are statements made by U.S. Bank on its website and in various promotional and marketing materials, which describe U.S. Bank as a leader in the indenture trustee industry and indicate that U.S. Bank employs highly trained personnel. However, there is not a scintilla of evidence that Plaintiffs were even aware of such statements prior to this lawsuit or that they relied upon them in any fashion in connection with their WLCC Bonds.

Without such evidence, Plaintiffs cannot establish the existence of an independent legal duty arising from any alleged representations by U.S. Bank. *See X-Cel Sales, LLC v. A.O. Smith Corp.*, No. CV-11-01082-PHX-GMS, 2012 WL 5269302, at *4 (D. Ariz. Oct. 24, 2012).

In sum, there is no genuine dispute as to any material fact on the issue of whether U.S. Bank owed Plaintiffs an independent legal duty. Plaintiffs cannot prove the existence of any duty sounding in tort, and without such a duty, there can be no claim for negligence.

B. U.S. Bank Had No Relationship with Plaintiffs Prior to the Execution of the Indentures

Plaintiffs' negligence claims cannot survive summary judgment to the extent they are based on allegations regarding what U.S. Bank did or did not do *prior* to the execution of the Indentures governing Plaintiffs' respective WLCC Bonds. Such pre-execution allegations cannot support a negligence claim against U.S. Bank because there is no relationship whatsoever between an indenture trustee and a bondholder until after the

indenture is executed and the bond transaction has closed. SUMF ¶154. Without this relationship, there is no basis upon which to impose a duty on an indenture trustee for the benefit of bondholders. *See Fisher Sand & Gravel Co.*, 558 N.W.2d at 867-70. As a noted expert wrote in his treatise:

> [A]t times, lawyers seeking to find a deep pocket in a default situation will seize upon some strained notion of fiduciary duty that will thrust upon the indenture trustee the duty to make sure that everything was right. The indenture trustee should not be held accountable or liable for the structure of the financing or the wording of the documents.[7]

Even Plaintiffs' own purported expert—who has offered an unreliable and unsupported opinion[8] that U.S. Bank owed broad extracontractual duties to Plaintiffs—conceded this point in his deposition, testifying that "pre-signing the indenture, the bank has no duties to bondholders" because "[t]here aren't any bondholders." SUMF ¶154.

Therefore, Plaintiffs' negligence claims fail as a matter of law to the extent they are based on anything other than what U.S. Bank did or did not do *after* the execution of the Indentures governing Plaintiffs' respective WLCC Bonds. This means that Plaintiffs cannot state a negligence claim based on allegations that, prior to closing, U.S. Bank failed to (1) conduct diligence on WLCC or any other party; or (2) investigate and resolve alleged material omissions or inconsistencies in the Indentures or other documents or any other alleged "red flags."

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[7] Spiotto at 19.

[8] Plaintiffs' purported expert is the subject of a *Daubert* motion filed by U.S. Bank contemporaneously herewith.

II. U.S. BANK IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' BREACH OF CONTRACT CLAIMS

The August 2014 and April 2015 Indentures specify that they are governed by South Dakota law. SUMF ¶¶269, 427. To state a breach of contract claim under South Dakota law, a plaintiff must prove "(1) an enforceable promise; (2) a breach of the promise; and, (3) resulting damages." *Bowes Constr., Inc. v. S.D. Dept. of Transp.*, 793 N.W.2d 36, 43 (S.D. 2010). Additionally, the plaintiff must show that the damages were proximately caused by the breach. S.D.C.L. § 21-2-1; *Morris, Inc. v. State Dept. of Transp.*, 806 N.W.2d 894, 903 (S.D. 2011).

The interpretation of a contract is a question of law. *Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, 709 N.W.2d 350, 354 (S.D. 2006). The South Dakota Supreme Court has promulgated the following general principles of contract interpretation:

> In interpreting a contract, we seek to ascertain and give effect to the intention of the parties; at the same time, to find the intention of the parties, we rely on the contract language they actually used. . . . It is a fundamental rule of contract interpretation that the entire contract and all its provisions must be given meaning if that can be accomplished consistently and reasonably. However, when provisions conflict and full weight cannot be given to each, the more specific clauses are deemed to reflect the parties' intentions—a specific provision controls a general one. Ordinarily, the plain meaning of the contract language will be followed unless there is some ambiguity or different intent manifested.

Prunty Constr., Inc. v. City of Canistora, 682 N.W.2d 749, 756 (S.D. 2004) (citations and quotation marks omitted).

Plaintiffs allege that U.S. Bank breached the Indentures in several ways. Plaintiffs, however, cannot show that U.S. Bank had a contractual duty to do (or refrain from doing)

most of the things that Plaintiffs complain about. For other alleged breaches, Plaintiffs cannot show that they suffered any damages whatsoever. As explained in the following sections, U.S. Bank is entitled to summary judgment on all of Plaintiffs' breach of contract claims.

A. The August 2014 Indenture Did Not Prohibit U.S. Bank from Relying on the Wire Transfer Information in Anderson's Email

The August 2014 Indentures, signed by WLCC and U.S. Bank, directed U.S. Bank to purchase the Annuity Investments, and set the forth the purchase price to be paid, but did not identify the Annuity Provider nor the address to which to send the purchase price of the Annuity Investments. Likewise, the Closing Statements for the August 2014 Bonds, signed by WLCC, U.S. Bank, and Burnham, directed U.S. Bank to purchase the Annuity Investments, and set forth the purchase price to be paid, but again did not identify the Annuity Provider nor the address to which to send the purchase price. The undisputed evidence shows that at the time of the Closing for the August 2014 Offering, neither WLCC, Burnham, nor U.S. Bank knew the address to which to send the purchase price. The undisputed evidence further shows that the parties expected that Burnham, or its attorney Anderson, would provide that information after the Closing. SUMF ¶¶286-292.

And, indeed, that is exactly what happened. On the day after the Closing, Anderson, emailed U.S. Bank a copy of the executed Annuity Investment showing WAPCC as the Annuity Provider, along with information as to where U.S. Bank should wire funds for the purchase of the Annuity Investment. SUMF ¶¶300-303. Anderson's email specified that the funds should be sent to an account owned by WAPCC at a J.P. Morgan Chase branch

in Beverly Hills, California. *Id.* Based on the information provided by Anderson and the prior instruction in the August 2014 Indenture and Closing Statement, U.S. Bank wired funds to this account. SUMF ¶307.

Plaintiffs fault U.S. Bank for relying upon the wire transfer information provided by Anderson and claim that it breached its contractual duties under the Indenture by doing so. According to Plaintiffs, U.S. Bank should have instead insisted that this information be furnished directly by WLCC. However, the Indenture contains no prohibition against U.S. Bank accepting the information from Anderson, nor did it contain any requirement that the information could only be furnished by WLCC. Plaintiffs cannot point to anything in the August 2014 Indenture that prohibited U.S. Bank from relying upon the wire transfer information furnished by Anderson.

Indeed, the August 2014 Indenture is completely silent about who will or who must provide the wire transfer information for the purchase of the Annuity Investment. There is nothing in that agreement which even remotely suggests that this information must come from WLCC (or, for that matter, any other specific source). Instead, Section 2.11 simply states that WLCC must deliver to U.S. Bank a "Closing Statement" signed by WLCC's president or vice president that sets forth "the amount" of the bond proceeds "for funding the purchase of the Annuity Investment." SUMF ¶254. WLCC did just that, and as a result, U.S. Bank was obligated under Section 2.12 to follow WLCC's direction and "make the payments, disbursements and deposits as set forth in the Closing Statement . . . , including, . . . the amount of $22,094,089 for the purchase of the Annuity Investment." SUMF ¶255.

U.S. Bank fulfilled this obligation, using the wire transfer information provided in Anderson's email to do so.

Plaintiffs nonetheless argue that it was a breach of the Indenture for U.S. Bank to rely on Anderson's email because Anderson's email did not satisfy the requirements of Section 12.13 of the August 2014 Indenture. However, Plaintiffs seriously misconstrue the meaning and import of that provision.

Section 12.13, which is titled "Electronic Communications," provides in relevant part:

> The Trustee shall have the *right* to accept and act upon instructions or directions pursuant to this Indenture sent by unsecured e-mail, facsimile transmission or other similar unsecured methods, provided, however, that the instructions or directions shall be signed by a person as may be designated and authorized to sign for the Corporation by an authorized representative of the Corporation, who shall provide to the Trustee an incumbency certificate listing such designated persons . . . If the Corporation *elects to give* the Trustee e-mail or facsimile instructions . . . and the Trustee *in its discretion* elects to act upon such instructions, the Trustee's understanding of such instructions shall be deemed controlling. The Trustee shall not be liable for any losses, costs or expenses arising directly or indirectly from the Trustee's reliance upon and compliance with such instructions notwithstanding such instructions conflict or are inconsistent with a subsequent written instruction. The Corporation agrees to assume all risks arising out of the use of such electronic methods . . . .

SUMF ¶271 (emphasis added). The words italicized in the foregoing excerpt are critical to a proper understanding of Section 12.13.

Section 12.13 does not impose any duty or obligation on U.S. Bank. Rather, it is a "safe harbor" clause that grants U.S. Bank a permissive right, which, if exercised by U.S.

Bank, serves as an affirmative defense to certain claims. For the safe harbor of Section 12.13 to be activated, WLCC must first "elect" to send instructions or directions to U.S. Bank electronically; thus, WLCC itself has no duty to proceed electronically, but must first exercise its discretion to give electronic instructions or directions. Should WLCC exercise its discretion in this manner, then U.S. Bank has a "right" in its "discretion" to act upon those instructions, and if it does so, it is protected from any liability if any losses occur as a proximate cause of U.S. Bank acting on WLCC's instructions or directions.

But a discretionary right is not a duty that must be discharged. This is made crystal clear in Section 10.1 of the August 2014 Indenture, which provides that "[t]he permissive rights of [U.S. Bank] shall not be construed as duties." SUMF ¶262. U.S. Bank could not have breached, and did not breach, Section 12.13 because (a) WLCC did not "elect" to electronically provide U.S. Bank instructions or directions relating to the purchase of the Annuity Investment, and (b) even had WLCC elected to do so, U.S. Bank had no duty to follow any such electronic instructions, but instead had the permissive right to exercise its discretion not to follow those instructions, and (c) in any event, U.S. Bank is not asserting the "safe harbor" of Section 12.13 as a defense.

The only provision of the August 2014 Indenture that might actually apply to U.S. Bank's use of the wire transfer information in Anderson's email is Section 10.9, a different safe harbor provision, which provides, in pertinent part:

> The Trustee shall be fully protected and shall incur no liability in acting or proceeding in good faith upon any . . . 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 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 the statements."

SUMF ¶266.

While Section 12.13 is not dependent upon whether U.S. Bank acted in good faith, Section 10.9 does require U.S. Bank to act in good faith in order to benefit from the shelter of its safe harbor. Thus, whether U.S. Bank is entitled to summary judgment depends upon whether there is evidence in the record that U.S. Bank did not act in good faith when wiring the purchase price of the Annuity Investment to WAPCC at the address furnished by Anderson's email.

The Indentures do not define the phrase "good faith." The South Dakota Supreme Court recently stated that the phrase should be understood based on the following explanation:

> [G]ood faith is an "excluder." It is a phrase without general meaning (or meanings) of its own and serves to exclude a wide range of heterogeneous forms of bad faith. In a particular context the phrase takes on specific meaning, but usually this is only by way of contrast with the specific form of bad faith actually or hypothetically ruled out.

Domson, Inc. v. Kadrmas Lee & Jackson, Inc., 918 N.W.2d 396, 404 (S.D. 2018) (quoting *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 841 (S.D. 1990)). The South Dakota Supreme Court went on to state:

> This is not to say that good faith simply means the absence of bad faith. . . . Indeed, good faith has been defined to mean: "honesty in fact concerning conduct or a transaction," and

> "[g]ood faith is distinguished from mere negligence or an honest mistake."

Id. (internal citations omitted).

In order to establish a breach based on Section 10.9, Plaintiffs have to prove at least one of three crucial elements: (1) *That U.S. Bank did not act in good faith (i.e., "honesty in fact") in believing that Anderson's email was genuine*; but there is no dispute that Anderson's email was genuine, so Plaintiffs cannot prove a breach of Section 10.9 based on this element. (2) *That U.S. Bank did not act in good faith (i.e., "honesty in fact") because it did not believe that the email was "passed or signed" by the proper person*; Plaintiffs cannot prove a breach of Section 10.9 based on this element because undisputed testimony demonstrates otherwise. McGinnis, WLCC's lawyer, "did not understand or expect that the wire transfer address for the purchase of the Annuity Investment could be provided to the Trustee only by WLCC" or its counsel. SUMF ¶292. Similarly, Anderson, Burnham's lawyer, did not understand Section 12.13 to apply to "ministerial communications to the Trustee such as providing the address for wiring funds," and believed that the email he forwarded to Henselen with the wire transfer information "was quite ordinary and regular in practice." SUMF ¶¶297, 304. Further, Anderson "was unaware of any reason to conclude the wire information was not valid and proper and consistent with the executed closing documents." SUMF ¶304. (3) *That U.S. Bank did not believe in good faith (i.e., "honesty in fact") that Anderson's email was prepared and furnished pursuant to the provisions of the Indenture*; but Plaintiffs cannot prove a breach of Section 10.9 based on this element given that Anderson's email clearly relates to the

implementation of WLCC's direction to purchase the Annuity Investment, and was furnished to U.S. Bank pursuant to both Section 2.12 and the Closing Statement delivered pursuant to Section 2.11.

The record in this case is devoid of even a scintilla of evidence that U.S. Bank did not act with "honesty in fact" in accepting and acting upon the wire transfer information in Anderson's email. Because there is no evidence of a lack of honesty in fact, Plaintiffs cannot prove that U.S. Bank acted without good faith. Thus, U.S. Bank was permitted by Section 10.9 to rely on the wire transfer information contained in Anderson's email and had "no duty to make any investigation or inquiry" regarding such information.

Lastly, two points are worth noting. First, the bank account to which the funds were wired was in WAPCC's name and was controlled by Dunkerley, who signed the Annuity Investment as WAPCC's President; there is no doubt the money reached that account because Dunkerley was the thief who withdrew the money from the account and then stole it. SUMF ¶¶330-331. Second, the wire transfer information contained in Anderson's email is the same as the wire transfer information included in the Closing Statements for the subsequent WLCC Bond issuances, all of which were signed by WLCC, Burnham, and U.S. Bank, SUMF ¶¶428, 429; this undisputed fact illustrates that none of these parties felt it was improper for U.S. Bank to use this wire transfer information when purchasing the first Annuity Investment, or that it was the wrong address.

B. The Indentures Did Not Require U.S. Bank to Value the Annuity Investments or Enter into a Valuation Agreement with WLCC

Plaintiffs allege that U.S. Bank had a contractual duty "to value or cause to be valued the Annuity Investments on a monthly basis." ECF 1 ¶62. Plaintiffs argue that this valuation duty arises from the definition of "Investment Securities" set forth in Section 1.2 of the August 2014 and April 2015 Indentures. Plaintiffs are wrong for several reasons.

Plaintiffs fundamentally misconstrue Section 1.2 and its role within the larger structure of the Indentures. Section 1.2 simply provides definitions for certain terms, so that the parties can know the meaning of such terms when they are used elsewhere in the agreement. This is made clear in the introductory paragraph to Section 1.2, which states that "[t]he terms defined in this Section 1.2, *whenever used in this Indenture and in all Supplemental Indentures* . . . shall have the meanings herein specified, unless the context clearly otherwise requires." SUMF ¶248. It is the usage of these terms in other parts of the agreement that establish the respective rights and duties of the parties—not the definitions themselves. Had the parties intended the definitions to be stand-alone provisions establishing substantive rights and duties independent of the provisions of the covenants of the Indenture, they would have said so, and they did not.

In order to determine the duties that U.S. Bank had with respect to Investment Securities, the starting point of analysis must be to determine where the term is used in the substantive covenants of the Indentures. Apart from its definition in Section 1.2, the term "Investment Securities" appears in just four sections:

- Section 5.1 states that WLCC "shall invest the moneys in the Corporation Account only in Investment Securities."

- Section 5.8(b) provides that, upon WLCC's written instruction, U.S. Bank shall "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."

- Section 5.8(d) indicates that, for the purpose of determining the amount of money in certain funds, the securities held in such funds "shall be valued annually as of the end of the Fiscal Year at their market value in accordance with the methods set forth in the definition of Investment Securities herein."

- Section 8.2 requires WLCC to "maintain its corporate existence and its rights, powers, franchises, permits and licenses as necessary to own the Annuity Investment and any Investment Securities and own and operate any Project Collateral."

The fundamental flaw in Plaintiffs' breach of contract claim based on the definition of Investment Securities is that the Annuity Investment was not owned by U.S. Bank, was not held by U.S. Bank, and was not required to be—and was not—deposited by U.S. Bank into any of the accounts established or described in Sections 5.1 or 5.8(b).[9] The bond proceeds initially went into the "Settlement Account" established by Section 2.12, and it was out of the Settlement Account that the purchase price was paid for the Annuity Investments. The Settlement Account is not mentioned or referenced in Sections 5.1 or 5.8(d), so the definition of Investment Securities has no applicability to the Settlement Account. In other words, the definition of Investment Securities has no bearing on what,

[9] It is worth noting here that even if the Annuity Investment had been deposited into an account established or described in Section 5.1 (and it was not), there is a discrepancy between the portion of the definition of Investment Securities that seems to require that the Annuity Investment be valued "monthly" and Section 5.8(d) which requires that an Annuity Investment deposited into an account established pursuant to Section 5.1 shall be valued "annually."

if anything, U.S. Bank must do (or not do) with respect to the Annuity Investment purchased with funds from the Settlement Account pursuant to Section 2.12. Notably, Section 2.12 itself does not use the term Investment Securities; nor does it remotely suggest that U.S. Bank has any duty to value or cause to be valued the Annuity Investment purchased pursuant to that provision.

It might have been different if a provision that U.S. Bank had proposed be included in the Indentures had, in fact, been included. But it was not. On August 15, 2014, U.S. Bank proposed to Dilworth and GT that the following provision be included in the Indentures:

> (p) The Trustee is authorized and directed to *accept the Annuity Investment as an Investment Security* and the Annuity Investment and the revenues from any Project Facility (as directed by the Corporation) as security for the Bonds . . . .

SUMF ¶272. Had this provision been included, the Trustee would have had the duty to "accept" the Annuity Investment as an Investment Security, and having so "accepted" it might arguably have had a duty to reach agreement with WLCC on valuing the Annuity Investment monthly. However, since the provision was not included in the Indentures, U.S. Bank had no such duty.

Significantly, McGinnis, WLCC's counsel, testifies that "[a]t the time the indentures were drafted I did not understand this provision to require the Trustee and WLCC to value the annuities monthly," and that, upon re-reading the Indenture recently, his "understanding is unchanged" because "the value of the Annuity Investment itself was fixed within the contract constituting the Annuity Investment." SUMF ¶253. Anderson, Burnham's

counsel, also did not understand Section 1.2 to "require WLCC or the Trustee to value the Annuity Investment monthly." *Id.*

From a practical perspective, it would have been difficult, if not impossible, for U.S. Bank to perform this duty given that the Indentures did not (1) give U.S. Bank an ownership or security interest in the Annuity Investment itself; (2) grant U.S. Bank custody of the Annuity Investment; or (3) provide for the Annuity Investment to be deposited into one of accounts or funds established by the Indentures and maintained by U.S. Bank. Rather, the parties intended for WLCC to remain the sole owner of the Annuity Investments, as evident from Section 8.2 (which obligates WLCC to "maintain its corporate existence and its rights, powers, franchises, permits and licenses *as necessary to own the Annuity Investment*"). Since U.S. Bank had neither possession of, nor an ownership interest in, the Annuity Investment itself, it would have made no sense for U.S. Bank to have a duty to value it on a monthly basis.

Finally, Plaintiffs argue that U.S. Bank had a duty to make sure an agreement to value the Annuity Investment was formed. But there is no express language in the Indentures imposing such a duty, so it would have to be implied, and Section 10.1 of the Indentures disclaims the existence of any implied duties.

C. The Indentures Did Not Require U.S. Bank to Investigate Material Deficiencies and Inconsistencies in the Documents

Plaintiffs allege that U.S. Bank breached the Indentures by failing to investigate "material omissions and inconsistencies in the Indentures and other offering documents." (ECF No. 1 ¶61.)

The Indentures imposed no duty on U.S. Bank to perform any such investigation. Such a duty would directly conflict with Section 10.1, which provides that U.S. Bank is accepting the trusts "only upon and subject to the following express terms and conditions" and that "no implied covenants or obligations shall be read into this Indenture against" U.S. Bank. The provision goes on to explicitly state:

> [U.S. Bank] shall have no responsibility for the offering documents used in the sale of Bonds or for the security for the Bonds or the use of proceeds of the Bonds or representations made to the owners of the Bonds disbursed by [U.S. Bank] in according with this Indenture.

SUMF ¶262.

D. Plaintiffs Cannot Prove Damages Based on Disbursements to WLCC

In their Complaints, Plaintiffs do not make any reference to the disbursements made by U.S. Bank from the Project Fund pursuant to Section 5.7 of the Indentures. In their discovery responses, however, Plaintiffs appear to allege that U.S. Bank breached their contractual duties by disbursing moneys from the Project Fund to WLCC based on requisitions that did not satisfy the requirements of Section 5.7(b). Even assuming that Plaintiffs can establish that U.S. Bank breached the Indentures in this manner, Plaintiffs have offered no evidence—expert or otherwise—to date showing that they suffered damages from these alleged breaches. Accordingly, Plaintiffs cannot state a breach of contract claim based on any alleged breach of Section 5.7(b). *See Bowes Constr.*, 793 N.W.2d at 43 (damages is necessary element of a contract claim).

III. U.S. BANK CANNOT BE HELD LIABLE IN TORT OR CONTRACT FOR ACTIONS OR INACTIONS THAT SATISFY SECTION 10.3

In addition to the deficiencies noted above, Plaintiffs' negligence and contract claims cannot survive summary judgment because there is no evidence that U.S. Bank engaged in any conduct that would subject it to liability under Section 10.3 of the August 2014 and April 2015 Indentures. This provision places express limitations on U.S. Bank's liability for its actions or inactions with respect to the WLCC Bonds. Specifically, Section 10.3 of each Indenture states:

> [U.S. Bank] 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. [U.S. Bank] 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 . . . .

SUMF ¶264.

While Section 10.3 acknowledges that U.S. Bank is not completely immune from negligence claims, there is nothing in this provision that concedes or otherwise recognizes that U.S. Bank owes any extracontractual duties to Bondholders, like Plaintiffs, or anyone else. Moreover, as stated in the second sentence quoted above, Section 10.3 serves as an absolute bar to any negligence or breach of contract claim against U.S. Bank that is premised on (1) any action "taken by [U.S. Bank] in good faith and reasonably believed by it to be within the discretion or power conferred upon it"; or (2) any action "omitted to be

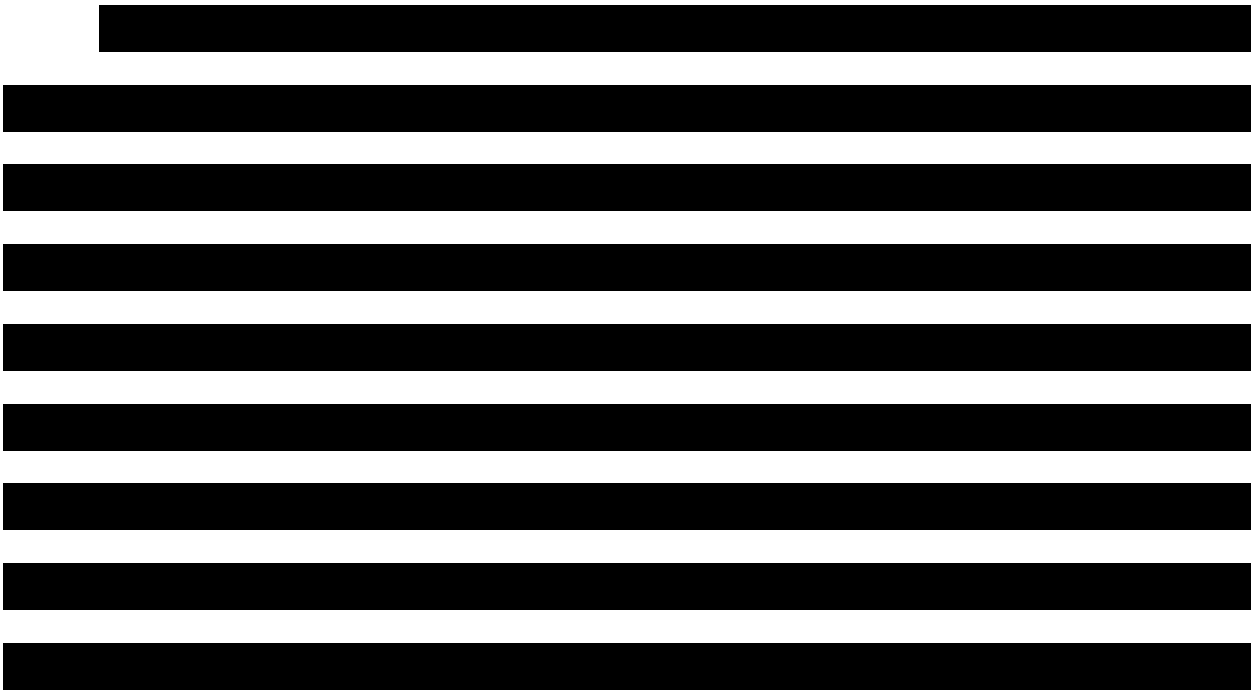
taken by [U.S. Bank] in good faith and reasonably believed by it not to be within the power or discretion conferred upon it."

As stated above, the Indentures do not define the phrase "good faith." Based on the South Dakota Supreme Court's discussion of the term in *Domson*, "good faith" can be viewed as meaning "honesty in fact." 918 N.W.2d at 404.

Here, there is ample evidence showing that U.S. Bank's actions and inactions with respect to the WLCC Bonds satisfy the good faith and reasonable belief requirements of Section 10.3. Just as importantly, the record is completely devoid of any evidence proving that U.S. Bank failed to conduct itself with "honesty in fact" or did not reasonably believe that its actions or inactions were proper based on the power and discretion conferred upon it.

For example, Plaintiffs allege that U.S. Bank failed to perform necessary KYC/AML-related tasks prior to the issuance of the August 2014 and April 2015 Bonds. [redacted] Under the Internal Revenue Code, tax exempt bonds issued by Native American Tribes are treated identically to bonds issued by the fifty States. SUMF ¶5. Other statutes treat Native American Tribes as States

as well. SUMF ¶180. The WLCC Bonds were also listed with the Municipal Securities Regulatory Board ("MSRB"), which was created by Congress "with a mandate to protect municipal securities investors, municipal entities and the public interest."[10] *Id.* If the WLCC Bonds were not municipal securities, they could not have been listed with the MSRB. Thus, it is not surprising that Anderson believed that, "[a]s a governmental body and a state equivalent, any bonds issued by WLCC are properly considered 'governmental bonds' based upon [his] experience." *Id.*



Plaintiffs also allege that U.S. Bank should not have used the wire transfer information contained in an email from Burnham's counsel when it wired the funds to purchase the Annuity Investment for the August 2014 Bonds. As discussed above,

[10] http://www.msrb.org/msrb1/pdfs/Role-and-Jurisdiction-of-MSRB.pdf; *see also* Securities Exchange Act of 1934, § 15B, 15 U.S.C. § 78o-4.

however, there was no contractual prohibition which negated U.S. Bank's belief that it was proper for Burnham's counsel to provide this wire transfer information to U.S. Bank. The reasonableness of this belief has been confirmed by evidence showing that all three of the highly experienced bond lawyers representing Burnham, WLCC, and U.S. Bank in that transaction expected that Burnham or its counsel would provide this wire transfer information to U.S. Bank directly—and that all three saw nothing wrong with that. SUMF ¶¶287-294. Notably, in the subsequent WLCC Bond transactions, the Closing Statements (which were signed by WLCC, Burnham, and U.S. Bank) contained the exact same wire transfer information for the purchase of the Annuity Investments, making clear that all of these parties acknowledged that it had been appropriate to use this wire transfer information for the August 2014 Bond transaction as well. SUMF ¶¶428-429. U.S. Bank's reliance on the wire transfer information provided by Burnham's counsel was reasonable and taken in good faith—and there is no evidence in the record demonstrating otherwise.

With respect to the allegation that U.S. Bank failed to enter into an agreement with WLCC to value the Annuity Investments on a monthly basis, there is no evidence of dishonesty or bad faith here either. As discussed above, because the Annuity Investments were not deposited into the accounts specified in Sections 5.1 or 5.8 of the Indentures, U.S. Bank reasonably and in good faith did not enter into such an agreement with WLCC because the Indentures did not under the facts present here impose any such obligation on U.S. Bank to do so. In his declaration, Anderson—who drafted the Indentures—makes clear that he did not believe that such a valuation was required. SUMF ¶253. WLCC's lawyer agrees. *Id.* Moreover, any agreement to perform a monthly valuation would have

been impossible since the Annuity Investment only required WAPCC to provide an account statement to WLCC on a quarterly basis. ECF 1-6, at 12. Further, there is no basis to assume that Plaintiffs' losses would have been avoided by a monthly valuation agreement because the funds sent to WAPCC were misappropriated less than a month after the August 2014 and April 2015 Bonds were issued and because Dunkerley and Galanis fabricated false statements for the Annuity Investments when WAPCC was ultimately pressed to provide account information. SUMF ¶¶443-454. Dishonesty indisputably occurred, but it was not dishonesty that U.S. Bank knew about or for which it had responsibility to ferret out.

IV. THE ACTIONS OF U.S. BANK DID NOT PROXIMATELY CAUSE PLAINTIFFS' LOSSES

Even assuming that they prove the duty and breach elements of their negligence claims, a lack of good faith, and the breach element of their contract claims, Plaintiffs must still prove that U.S. Bank's conduct was the proximate cause of their losses. *Walther v. KPKA Meadowlands L.P.*, 581 N.W.2d 527, 537 (S.D. 1998). Plaintiffs cannot make this showing here because the connection between Plaintiffs' injuries and U.S. Bank's alleged conduct is too remote and because such injuries were caused by the fraudulent and criminal actions of third parties that were not foreseeable to U.S. Bank.

To prove proximate causation, a plaintiff must show that the harm suffered was "a foreseeable consequence" of the defendant's conduct and that the defendant's conduct was "a substantial factor in bringing about the harm." *Goff v. Wang*, 296 N.W.2d 729, 730 (S.D. 1980) (quotation marks omitted). As the South Dakota Supreme Court has explained,

"[t]he term 'proximate cause' contemplates an immediate cause which, in natural or probable sequence, produces the injury complained of." *Mulder v. Tague*, 186 N.W.2d 884, 887 (S.D. 1971). "This excludes the idea of legal liability based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury." *Id.*

Plaintiffs' causation theory here essentially amounts to this: U.S. Bank's alleged breaches of its contractual and extracontractual duties proximately caused Plaintiffs' injuries because if U.S. Bank had not committed such breaches, (1) it would have declined the appointment as indenture trustee, (2) the criminal conspiracy would have been discovered, and (3) the WLCC Bonds never would have issued. This is rank speculation.

Plaintiffs imagine that such things would have happened, but there is no evidence in the record to support their speculation. Moreover, this speculation relies upon a whole host of other unproveable assumptions. For instance, Plaintiffs assume, without any evidence, that WLCC would have decided to forego issuing the Bonds altogether if U.S. Bank had turned down the appointment as indenture trustee. But it is equally as plausible to assume that WLCC would have simply found another bank to serve as indenture trustee. Similarly, Plaintiffs assume that the criminal conspiracy would have been discovered if U.S. Bank had performed a monthly valuation of the Annuity Investments. But this presumes that U.S. Bank would have received accurate information from WAPCC—a presumption that conflicts with evidence in the record showing that WAPCC provided fabricated account information when asked to do so. To prove causation, Plaintiffs cannot simply tell a fantasy story about what might have happened. They need to use evidence

about what actually did happen to prove the requisite causal link between U.S. Bank's alleged conduct and their alleged injuries—and they cannot do so.

Plaintiffs' causation theory likewise ignores the predominant role that the fraudulent and criminal acts of third parties played in causing the Plaintiffs' alleged injuries. With respect to the August 2014 Bonds, Plaintiffs claim that Hughes breached its agreements with Birmingham Water, Washington Suburban, and RHCT by investing in the August 2014 Bonds. ECF 1 ¶ 16. Hirst pleaded guilty to securities fraud and investment advisor fraud, and conspiracy to commit both, as a result of his signing the trade tickets for those purchases knowing that it was improper to do so. SUMF ¶¶475-476. Dunkerley freely admitted to misappropriating the bond proceeds that had been deposited in WAPCC's account from the August 2014 Offering, and he pleaded guilty to a crime for doing so. SUMF ¶¶469-470.

Similarly, the undisputed record shows that—after OSERS consented to the merger of Hughes and Atlantic without doing any of its own due diligence on the new owners with whom it was entrusting over $125 million—Atlantic breached its agreement with OSERS by using money OSERS had invested in the Atlantic Feeder Fund to purchase the April 2015 Bonds for the Atlantic Master Fund. Morton pleaded guilty to securities fraud and investment advisor fraud for causing this purchase knowing that the transaction was rife with conflicts of interest that she failed to disclose. And just like he did with respect to the first bond issuance, Dunkerley misappropriated the bulk of the proceeds from the sale of the April 2015 Bonds as soon as that money was in WAPCC's control, a crime to which he has pleaded guilty.

As a general rule, a criminal act by a third party is a superseding cause sufficient to break the chain of causation. *Hilligoss v. Cross Cos.*, 228 N.W.2d 585, 586 (Minn. 1975). There is an exception to this rule when the criminal act is foreseeable. *Id.* If the criminal act is unforeseeable, though, it does not matter that the defendant's conduct afforded the third party the opportunity to commit the crime. *Fedie v. Travelodge Int'l, Inc.*, 782 P.2d 739, 742 (Ariz. Ct. App. 1989).

A crime is a normal and foreseeable consequence of a defendant's conduct only where (1) the situation created by the defendant's conduct provides a temptation to which a "recognizable percentage" of persons would yield; or (2) the temptation is created at a place where "persons of a peculiarly vicious type are likely to be." Restatement (2d) Torts § 448 cmt. b (1965). Neither requirement is plausibly implicated here, and Plaintiffs cannot offer evidence sufficient to create a genuine issue of material fact on either point.

Even if U.S. Bank had an obligation to understand the ownership situation of the investment managers, which it did not, it is undisputed that the sale of Hughes and the later merger of Hughes into Atlantic did not become matters of public record of which U.S. Bank could have been on notice until after the August 2014 Bonds and the April 2015 Bonds, respectively, had been issued. U.S. Bank could not possibly have foreseen that Hughes or Atlantic would be breaching contracts with their clients by investing in the August 2014 and April 2015 Bonds. Nor could U.S. Bank have foreseen that, once the money was turned over to WAPCC, Dunkerley—a former FDIC official—would steal it at Jason Galanis' direction. Indeed, in his declaration, Burnham's lawyer, Anderson, testified that he worked closely with Jason Galanis for a year and had no idea that Jason Galanis

had an interest in Hughes or Atlantic, or that he was involved in a complex fraudulent scheme. Likewise, Dunkerley himself did not know that any crime was being planned until Jason Galanis gave him instructions to steal the money, and this instruction was not made until after the August 2014 Bonds were issued and the money paid to WAPCC.

Given that neither Dunkerley (a participant in the crimes who has pleaded guilty to conspiracy) nor Anderson (a lawyer who worked closely with the alleged mastermind of the crimes) had any idea that criminal conduct was afoot or intended, how in the world could such criminal conduct have been foreseeable to U.S. Bank?

There is no basis on which to show that U.S. Bank should have suspected, let alone uncovered, this criminal scheme before the WLCC Bonds were issued. Indeed, even after Washington Suburban knew that its contract had been breached and strongly suspected fraud within a matter of only two weeks after the August 2014 Bond transaction, it took no steps to notify law enforcement, WLCC, or U.S. Bank of its concerns. Washington Suburban realized something was wrong more than a year before U.S. Bank had any inkling that a crime might have been committed, and it did nothing—yet it now wants U.S. Bank to pay for its loss.

A helpful analogy here is the "intended payee" rule, which is recognized by South Dakota, Minnesota, and Arizona courts. *See, e.g.*, *First Fed. Sav. & Loan Ass'n of Sioux Falls v. Union Bank & Tr.*, 291 N.W.2d 282, 286 (S.D. 1980); *Moler v. State Bank of Bigelow*, 223 N.W. 780, 782 (Minn. 1929); *Cont'l Bank v. Wa-Ho Truck Brokerage*, 595 P.2d 206, 213 (Ariz. Ct. App. 1979). Pursuant to this rule, "if a bank transfers a check without a proper endorsement but the transfer is to a person whom the drawer of the check

wanted (or would if consulted have wanted) to have the money, the bank is not liable for any loss the drawer may have suffered as a result of the transfer, since the transfer would have gone through even if the bank had insisted that the check be properly endorsed." *Conder v. Union Planters Bank, N.A.*, 384 F.3d 397, 401 (7th Cir. 2004). The rationale behind this rule is that "[i]mposing liability on someone who hasn't actually caused a harm (because the harm would have occurred anyway) creates incentives to take excessive, and therefore socially wasteful, precautions." *Id*. Here the undisputed evidence shows that Dunkerley controlled WAPCC as its president, that he controlled the WAPCC bank account to which U.S. Bank wired funds, and that WAPCC never complained to WLCC or U.S. Bank that it had not received the purchase price of the annuity; plainly, WAPCC was the intended recipient of the money, and it was the party that received the money.

In sum, because Plaintiffs cannot establish proximate causation, summary judgment is appropriate on both their negligence claims and their breach of contract claims.

V. THE CLAIMS OF ATLANTIC FEEDER FUND AND ATLANTIC MASTER FUND ARE BARRED BY THE DOCTRINE OF *IN PARI DELICTO*

South Dakota recognizes the doctrine of *in pari delicto*, which provides that "a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." *Quick v. Samp*, 697 N.W.2d 741, 745 (S.D. 2005). The doctrine is "an application of the principle of public policy that [n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." *Id.* (alteration in original) (quotation marks omitted).

The doctrine applies even to a party who has a lesser degree of fault than others. *Id.* at 745-46 (holding that "*[t]he doctrine of pari delicto does not require equal degrees* of negligence" to preclude indemnity among joint tortfeasors). Thus, when a party "participates in obviously fraudulent conduct, the courts may not permit 'a fraudfeasor who invokes the court's jurisdiction to profit from his own fraud by recovering damages.'" *Id.* at 746. Further, the doctrine of *in pari delicto* is applicable to any cause of action regardless of whether it is pleaded as negligence or fraud. *Id.* at 747.

The undisputed record in this case shows that the entire April 2015 Bond issue was purchased by Atlantic Master Fund, using funds provided by Atlantic Feeder Fund, both of which were controlled by Atlantic. SUMF ¶¶43, 434. Atlantic, in turn, was controlled by Michelle Morton, its chief executive officer and part owner. Morton pleaded guilty to conspiracy to commit securities fraud and investment advisor fraud in connection with the Atlantic Master Fund's purchase of the April 2015 Bonds, SUMF ¶473, and it is alleged that Atlantic breached its investment management agreements with OSERS in connection with purchasing those bonds, SUMF ¶432. Therefore, because of their connection to Atlantic and Morton, the Atlantic Feeder Fund and the Atlantic Master Fund are *in pari delicto* and cannot make any recovery against U.S. Bank.

A host of cases with similar fact patterns have applied the *in pari delicto* doctrine to bar a plaintiff's recovery. *See, e.g., Grassmueck v. Am. Shorthorn Ass'n,* 402 F.3d 833, 841-42 (8th Cir. 2005) (fraud of individual who established investment partnerships attributed to the investment partnerships because they are deemed to have participated in individual's wrongdoing); *In re Dublin Secs., Inc.,* 133 F.3d 377, 380-81 (6th Cir. 1997)

(fraud of corporate principals precluded claims by corporation's bankruptcy trustee against law firm that allegedly assisted fraud). For the same reasons, U.S. Bank is entitled to summary judgment dismissing the claims of the Atlantic Feeder Fund and the Atlantic Master Fund on the basis of *in pari delicto.*

CONCLUSION

For all of the foregoing reasons, there is no genuine issue of material fact as to any of Plaintiffs' claims and U.S. Bank is entitled to a judgment of dismissal as a matter of law.

Respectfully submitted:

Dated: December 16, 2019

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CERTIFICATE OF COMPLIANCE

I, Timothy W. Billion, hereby certify that the foregoing memorandum complies with the limits set forth by the Court in Docket 91. I further certify that, in preparation of this memorandum, I used Microsoft Word 2016 and this word processing program has been applied specifically to include all text – including headings, footnotes, and quotations – except the caption, signature block, and this certification. I further certify that this document contains 17,907 words.

/s/ Timothy W. Billion