UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SKULL VALLEY BAND OF GOSHUTE INDIANS OF UTAH, *et al.,* Plaintiffs, v. U.S. BANK NATIONAL ASSOCIATION, Defendant.	Case No. 1:20-cv-01704 (JPO)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION TO REMAND THIS ACTION TO STATE COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statute **Page(s)**

PRELIMINARY STATEMENT

Plaintiffs, by and through their undersigned counsel, respectfully submit this reply memorandum of law in further support of their motion to remand.[1] This case is not at all about the U.S. Government, Ginnie Mae, the IRS or any federal interest. Putting aside the complexity of the underlying financial transaction, the "parties legal dispute is really quite simple." *CeCe & Co. Ltd v. U.S. Bank N.A.*, 153 A.D.3d 275, 279 (1st Dep't 2017). It is about a rogue trustee - - Defendant - - breaching a contract and misappropriating the fruits of the contract belonging to Plaintiffs, as the First Department has now twice found. Defendant seeks to avoid the well-reasoned decisions in *Cece* and *NMC Residuals* by conjuring up various purported federal interests that fail to satisfy Defendant's substantial burden and, in doing so, lay bare that the only interest Defendant is seeking to protect is its own self-interest in pocketing in excess of $50 million of Plaintiffs' funds.

Defendant's opposition ("Opp.") strays well beyond its Notice of Removal and merely serves to underscore the absence of federal question jurisdiction here. It is not seriously disputed that Federal law does not create Plaintiffs' sole claim for breach of contract and that the Complaint does not assert a federal claim or violation. In addition, Defendant fails to raise any substantial question of federal law with its hodgepodge of dead-end arguments which, unsurprisingly, focus on protecting its compensation. Indeed, requiring Defendant to pay back the money it owes to

[1] Unless otherwise set forth herein, the defined terms contained herein shall have the same meanings ascribed to them in Plaintiffs' Opening Brief ("Opening Br.") [DE 28]. Defendant mischaracterizes Plaintiffs' position. Plaintiffs advised Defendant that they would be happy to litigate this matter in this Court *if there was subject matter jurisdiction*. Further, much of the "three months" alluded to by Defendant relates to the additional time requested by and provided to Defendant to respond to the Complaint [DE 9 and 14]. While Defendant cavalierly boasts about prevailing on summary judgement (which Plaintiffs' dispute), it did not even move to dismiss the Complaint.

Plaintiffs hardly spells calamity for Ginnie Mae or the standard operative agreements. Nor does the mere existence of the Governing Law Provision make this a federal case. Defendant must still establish a substantial federal interest, which it has not done, as parties cannot contractually agree to create subject matter jurisdiction.

Moreover, Defendant utterly fails to articulate or demonstrate any actual, significant conflict between state law and a federal interest, as required. There is none. Defendant's contention that this Court must unilaterally canvass federal laws and rule them out one-by-one obviously misstates the applicable standard and Defendant's substantial burden of establishing subject matter jurisdiction in its Notice of Removal (Opening Br. at 4-5 and fn. 2). In fact, Defendant itself does not even believe there is federal question jurisdiction here. *See* Kraut Decl., Ex. 2, p. 3 ("Ginnie Mae has no financial interest in the call right nor control over the decision by the trustee whether to exercise the call right.") and Opening Br. at 2 (Defendant did not seek to remove the virtually identical First Department cases).

At base, Defendant seemingly seeks to invoke a non-existent federal question standard that would sweep into federal court virtually any contract between private parties that reference or apply a federal regulation or guideline. As described in more detail below, the Court should decline Defendant's invitation to greatly expand federal question jurisdiction and grant Plaintiffs' motion to remand.

ARGUMENT

A. The Governing Law Provision Does Not Provide Federal Question Jurisdiction

The Governing Law Provision fails to supply the necessary basis for federal question jurisdiction. Defendant incorrectly suggests that subject matter jurisdiction can be created by agreement or consent of the parties and that the Governing Law Provision requires this Court to

"analyze federal law and determine that no federal law applies."[2] (Opp. at 7). While no one questions this Court's expertise, Defendant cannot simply raise the mere existence of the Governing Law Provision and put the Court to work, without pointing to any specific federal statute or federal claim being asserted by Plaintiffs (and none are alleged), to meet its heavy burden.[3] In fact, Defendant cannot even articulate what precisely Plaintiffs' purported claim would be under federal law if they had decided, as masters of their own complaint, to assert a federal law claim.

The weakness in Defendant's position is further underscored by its exclusive, yet mistaken, reliance upon two out-of-circuit, outlier cases - - *World Sav. & Loan Ass'n v. Fed. Home Loan Bank of S.F.*, 2012 WL 1941155 (N.D. Cal. Aug. 19, 2002) and *Danis Indus. Corp. v. Fernald Envtl. Restoration Mgmt. Corp.*, 947 F. Supp. 323 (S.D. Ohio 1996) (Opp. at 8-9). Even these cases, however, fail to support Defendant's position. In *Danis*, where, unlike here, plaintiff characterized its own claims as federal claims, the court recognized that "the mere inclusion of a choice-of-law provision in a contract does not ensure that the federal question at issue is 'substantial.'" *Danis*, 947 F. Supp. at 328 ("[T]he parties may not 'confer jurisdiction' upon the Court by agreement."). *World Sav. & Loan Assn'n* involves an appeal of an arbitration award, where the court found, without explanation, that "[t]he underlying contract between the parties

[2] Defendant's reliance on *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981) is mistaken as the Supreme Court found that "nothing in the language, structure, legislative history, or underlying policies of OCSLA suggests that Congress intended federal courts to exercise exclusive jurisdiction over personal injury actions arising under OCSLA. The Texas courts had jurisdiction over this case." *Id.* at 485.

[3] *See e.g. Hovensa, L.L.C. v. Technip Italy S.p.A.*, No. 08-CV-1221-NRB, 2009 WL 690993, 2009 U.S. Dist. LEXIS 21191, at *13-14 (S.D.N.Y. Mar. 16, 2009) ("[A]lthough the parties purported to contract to jurisdiction in this court, their effort was unavailing. Federal courts are courts of limited jurisdiction and may not entertain matters over which they do not have subject-matter jurisdiction. Subject-matter jurisdiction cannot be waived by the parties, nor can it be created by the consent of the parties." (Internal citations omitted)).

provides that Federal common law governs disputes arising thereunder" and, citing to *Danis*, also states that "the United States had a substantial interest in the contract being litigated." *Id.* at *8. However, unlike Plaintiffs here, the plaintiff in *World Sav. & Loan Ass'n* did not dispute this latter issue concerning the United States' substantial interest and Defendant here further fails to supply the purported "Applicable Law of the United States" it claims to apply, leaving it to the Court to find it for Defendant. *Id.* Nothing in *Danis* or *World Sav. & Loan Assn'n* supports a finding of a substantial federal interest here and to the extent they fail to address the requirement to also demonstrate an actual, significant conflict between state law and a federal interest, they do represent the applicable standard which is heightened where, as here, the United States is not a party to the dispute.[4]

Moreover, *Danis* and *World Sav. & Loan Assn'n* are not even representative of out-of-circuit decisions on this issue. For instance, in *Control Sys. Research v. Atmospheric Tech. Servs. Co.*, No. CIV-17-965-W, 2018 U.S. Dist. LEXIS 232179 (W.D. Okl. Mar. 7, 2018), the court reviewed a governing law provision[5] closer to the one at issue here and concluded that it could not "find that federal law—either through statute or common law—created Control Systems' causes of action for breach of contract, promissory estoppel and unjust enrichment" and "failed to demonstrate that its causes of action pose a substantial question of federal law or that its right to

[4] *See O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 87, 114 S. Ct. 2048 (1994); *Woodward Governor Co. v. Curtiss-Wright Flight Systems, Inc.*, 164 F.3d 123, 127-28 (2d Cir. 1998); and *Kurzon v. Democratic Nat'l. Comm.*, No. 16-cv-4114-JPO, 2017 WL 2414834, 2017 U.S. Dist. LEXIS 85031, at *7 (S.D.N.Y. June 2, 2017) cited in the Plaintiffs' Opening Brief.

[5] That governing law provision states: "Irrespective of the place of performance, this subcontract and federal clauses incorporated into the subcontract shall be construed and interpreted according to the federal common law of government contracts as enunciated and applied by federal judicial bodies and boards of contract appeals. To the extent that the federal common law of government contracts is not dispositive or other clauses are in dispute, the subcontract shall be governed and construed in accordance with the laws of the State of Oklahoma."

relief necessarily depends upon resolution of federal law." *Id*. at *6-7. The same holds true here. *See also Stevens Aviation. Inc. v. DynCorp International, LLC*, No. 6:09-2314, 2009 WL 2997413, 2009 U.S. Dist. LEXIS 84286 (D. SC Sept. 15, 2009) (Court rejects defendant's argument based on choice of law provision's "federal common law" language as impact on national security failed to raise a substantial federal interest and plaintiff limited claims to state law claims).

Similarly, in *Michigan Finance Authority v. Kiebler*, No. 13-CV-597, 2013 WL 3938507, 2013 U.S. Dist. LEXIS 106276 (W.D. Mich. July 30, 2013), the court analyzed a choice of law provision in a promissory note that was written and regulated by the United States Department of Education, which incorporates Higher Education Act, 20 U.S.C. § 1001 *et seq.*, and provides that "[t]he terms of this [promissory] note shall be interpreted in accordance with the applicable federal statutes and regulations, and the guarantor's policies. Applicable state law, except as preempted by federal law, may provide for certain borrower rights, remedies, and defenses." *Id.* at *11. The court there determined that such a provision does not demonstrate a substantial federal interest, as argued by Defendant here, but rather "only recognizes a truism: federal law applies where it exists, and, otherwise, state law governs." *Id.* at *12. Here, federal law does not exist and Plaintiffs' breach of contract claim is governed by "THE INTERNAL LAWS OF THE STATE OF NEW YORK" pursuant to the Governing Law Provision.

Likewise, in *S. Park Motor Lines, Inc. v. Kaiser Hill Co., L.L.C.*, Civil Action No. 05-cv-02577-MSK-MEH, 2006 U.S. Dist. LEXIS 107359 (D. Col. Apr. 4, 2006), the court was tasked with interpreting a choice-of-law provision from a subcontract entered into between private litigants that pertained to a prime government contract which states that "This Subcontract shall be enforced and interpreted, irrespective of the place of performance, by applying the federal law of government contracts. To the extent that federal law is not dispositive of an issue the laws of

the State of Colorado shall be applied." *Id.* at *4-5. The court there found that the subcontract between the two private parties is, as here, "too far removed from issues of uniquely federal concern to call for the application of federal common law" and that the "well-pleaded complaint alleges only state law claims… notwithstanding any agreement between the parties that the federal law would apply to their contractual relationship. *Id.* at *10, 12.

Aside from piecemeal parentheticals from *Danis* and *World Sav. & Loan Assn'n*, Defendant does not even attempt to identify any actual, significant conflict between the application of state law and Ginnie Mae's supposed substantial federal interest in Plaintiffs' breach of contract claim. Indeed, there is none and Defendant does not even believe there is one.[6]

Nevertheless, Defendant bootstraps its attenuated reliance on *Danis* and *World Sav. & Loan Assn'n* with an insupportable claim that the application of New York law would somehow frustrate the purposes of the Governing Agreements because it would purportedly impact Defendant's trustee fee (*i.e.*, "[I]t would [purportedly] erode U.S. Bank's bargained-for-compensation." (Opp. at 8)). The terms of Defendant's trustee fee, however, are set forth in the Trust Agreement and does not: (i) include misappropriating funds belonging to Residual Holders, (ii) raise any substantial federal interest (only Defendant's self-interest) or (iii) present any actual, substantial conflict between New York and federal law.[7] *See Empire HealthChoice Assur., Inc. v.*

[6] Defendant seemingly relies upon an unquoted portion of a purported statement by a Ginnie Mae "senior vice president" while inexplicably ignoring the quoted statement of that same person that "Ginnie Mae has no financial interest in the call right nor control over the decision by the trustee whether to exercise the call right." Kraut Decl., Ex. 2, p. 3. Yet, Defendant fails to even attempt to explain how Ginnie Mae could possibly raise a substantial federal interest with "no financial interest" or "control." Nor does Ginnie Mae's role in the underlying transactions create a substantial federal interest and an actual, significant conflict between state law and a federal interest.

[7] The Trust Agreement provides that the Trustee shall be entitled to a specific percentage of the principal and interest distributions made on the Trust Assets. *See* Trust Agreement, Complaint, Ex. A at Schedule C. When the principal balances on a given trust are less than 1% of the original balances, the fees to the Trustee can be less than the Trustee's costs in performing its administrative services. *See* Complaint, ¶ 23. For this

McVeigh, 547 U.S. 677, 682 (2002) ("[E]mpire has not demonstrated a significant conflict between an identifiable federal interest and the operation of state law. Unless and until that showing is made, there is no cause to displace state law, much less to lodge this case in federal court.").

B. The Government Does Not Have A Substantial Interest

Defendant's five-fold argument concerning the U.S. Government's purported substantial federal interest is without merit. First, Defendant argues that Plaintiffs' interpretation of the Governing Agreements would strip Defendant of part of its compensation and "may" make it necessary for "Ginnie Mae to increase or expand other components of the Trustee's compensation to offset this unintended reduction." (Opp. at 9-10). Initially, the suggestion that it "may" impact Defendant's compensation is hardly an actual or concrete substantial federal interest of the U.S. Government. Further, Defendant's trustee compensation, while perhaps a significant interest for *itself*, raises no substantial question of federal law either. Also, as described, *supra*, Defendant's compensation is a set formula based upon a percentage of the principal and interest distributions. It does not include misappropriation of the Residual Holder's interest, as the First Department has now twice found, and there is no federal interest at all in promotion of such misappropriation.

Second, Defendant posits that because "Ginnie Mae is a third-party beneficiary of each Trust Agreement" it has an "interest" in the subject contract (Opp. at 10). However, a mere "interest" in a contract is not tantamount to a substantial, let alone identifiable, federal interest, and Defendant fails to supply any substantial federal interest raised by Plaintiffs' breach of contract claim. Further, the cases relied on by Defendant are inapposite. *See United States v. Jacobs*, 304

---

reason, the Trust Agreement allows the Trustee to effect an early termination or Clean-Up Call when the principal balances on a given trust are less than 1% of the original balances, which is likely what an unquoted statement that Defendant attributes to John Getchis likely meant when referring to "potential compensation." That purported statement hardly supports Defendant's misappropriation and extinguishment of Plaintiffs' interests as Residual Holders of the Trusts at issue.

F. Supp. 613, 620 (S.D.N.Y. 1969) (federal question jurisdiction based on the United States' well-pleaded Complaint alleging causes of action under federal statutes); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001) (analyzing a proposed intervenor's interests in the subject agreement, pursuant to F.R.C.P. 24).

Third, Defendant asserts that the U.S. Government has a substantial interest in a dispute between private litigants based on certain Ginnie Mae guarantees not at issue here. As previously described, "residuary security holders had no such guarantee of payment." (Opening Br. at 9). Defendant inadvertently admits the inapplicability of the guarantee by quoting snippets of a Base Offering Circular which discuss the guarantee for the timely payment of "principal and interest" (which refers to Regular Holders who are entitled to such payments by the terms of the Governing Agreements) (Opp. at 4, fns. 7 and 8) while simultaneously acknowledging that Residual Securities "have no principal balance and do not accrue interest." (Opp. at 4). Additionally, any such guarantee fails to raise any substantial federal interest concerning Plaintiffs' breach of contract claim *against Defendant* for pocketing the residual funds. This argument is diluted even further by Defendant's contrary argument that Plaintiff is not entitled to the residual funds in dispute (and thus any purported guarantee).[8]

Fourth, Defendant presents fragmented excerpts from the Standard Terms and baldly concludes, without more, or even any citation to legal authority, that "[a]ny of these provisions, let alone all of them, demonstrates Ginnie Mae's substantial interest in the Ginnie Mae

[8] *See JP Morgan Chase Bank, NA v. Hunter Group, Inc.*, No. 10-CV-00917-JFB-ETB, 2010 WL 5313547, 2010 U.S. Dist. LEXIS 134338, at *9-10 (E.D.N.Y. Dec. 20, 2010) ("Defendants attempt to invoke the Small Business Act against plaintiff by stating that plaintiff… seeks 'to recover damages under agreements secured by the same property' as the SBA loan. That does not change the fact that the [subject agreements] have nothing to do with the SBA loan. Plaintiff's claims are for breach of contract governed by state law, not federal law.").

Agreements." (Opp. at 12). Defendant again misses the mark here as these provisions merely enumerate certain Ginnie Mae rights without any nexus to Plaintiffs' breach of contract claim and without enumerating any substantial federal interest or any significant, actual conflict between some federal policy or interest and the use of state law.

Fifth, Defendant claims that it was entitled to misappropriate in excess of $50 million from Plaintiffs based upon Defendant's self-serving and incorrect "belief" that Plaintiffs are "Disqualified Organization[s]."[9] Although not set forth in its Notice of Removal, Defendant now contends that Ginnie Mae and the Internal Revenue Service have a substantial interest as to "whether Plaintiffs **may** hold the certificates and whether the federal government receives all appropriate tax payments." (Opp. at 12-13) (Emphasis supplied). Defendant proffers no authority to support its contention that its "belief" of a purported tax issue supplies a substantial federal interest, nor does it raise an actual, significant conflict with New York law. Thus, under Defendant's flawed reasoning, every case would necessarily require an analysis of whether or not the U.S. Government is receiving appropriate tax payments in determining subject matter jurisdiction, which is inconsistent with the Court's limited jurisdiction and would improperly encourage parties to flood the federal courts with garden-variety state law claims like the one at issue here. More than that, Defendant's "standing" arguments appear to be set forth as the Second Defense and Twenty-Second Defense in Defendant's Answer [DE 14], but it is axiomatic that the mere existence or invocation of a federal defense does not furnish sufficient basis for jurisdiction to attach. Opening Br. at 5.

Defendant takes its fifth argument a tenuous step further by arguing that if a court applied New York law and found that Plaintiffs were entitled to hold the residual certificates "without

[9] Native American Tribes and Tribal entities are not included in the list of Disqualified Organizations.

paying federal income taxes" that would "frustrate the purposes of [a] provision of the Trust Agreement or transactions governed thereby." (Opp. at 13, fn. 17). This type of speculation fails to satisfy Defendant's burden. Yet again, Defendant goes well beyond the well-pleaded Complaint and Notice of Removal by first speculating about what a court may ultimately conclude, failing to identify a federal law or claim asserted by Plaintiffs and then failing to demonstrate what and how New York law is in an actual, significant conflict with any actual federal statute, law, rule or regulation. Defendant's hypothecations do not establish a significant conflict, let alone any conflict, between state and federal law. *See Luczaj v. Bd. of Directors of the Polish & Slavic Fed. Credit Union*, No. 10-CV-4070-BCM, 2010 WL 3767881, 2010 U.S. Dist. LEXIS 97034, at *6 (E.D.N.Y. Sep. 15, 2010) (Plaintiffs' "speculat[ion] that state laws vary and their application would yield inconsistent enforcement of credit union bylaws" did not demonstrate "any conflict, significant or otherwise, between a federal policy and the application of state law.").

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' motion to remand in its entirety and for such other and further relief in Plaintiffs' favor as this Court deems appropriate.

Dated: Mineola, New York
June 29, 2020

Respectfully submitted,

WELTZ KAKOS GERBI WOLINETZ VOLYNSKY LLP

By: /s/Irwin Weltz
Irwin Weltz
Thomas Scot Wolinetz
Robert B. Volynsky
170 Old Country Road, Suite 310
Mineola, New York 11501
Tel. 516-506-0561
irwin@weltz.law

SICHENZIA ROSS FERENCE LLP

By: /s/Michael H. Ference
Michael H. Ference
1185 Ave. of Americas, 37th Fl.
New York, NY 10036
Tel. 212-930-9700
mference@srf.law

Counsel for Plaintiffs