IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

U.S. BANK NATIONAL ASSOCIATION, in its capacity as Indenture Trustee and not in its individual capacity,	)	
Plaintiff,	)	
v.	)	C.A. No. 112-N
U.S. TIMBERLANDS KLAMATH FALLS, L.L.C., U.S. TIMBERLANDS FINANCE CORP. n/k/a FIBER FINANCE CORP., U.S. TIMBERLANDS YAKIMA, L.L.C., U.S. TIMBERLANDS HOLDINGS GROUP, L.L.C. n/k/a CASCADES RESOURCE HOLDINGS GROUP, L.L.C., U.S. TIMBERLANDS SERVICES COMPANY, L.L.C., n/k/a TIMBER RESOURCES SERVICES, L.L.C., JOHN M. RUDEY, ALAN B. ABRAMSON, AUBREY L. COLE, GEORGE R. HORNIG, ROBERT F. WRIGHT, and WILLIAM A. WYMAN,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Submitted: May 26, 2004
Decided: July 29, 2004

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LAMB, Vice Chancellor.

I.

This action arises from a suit by an indenture trustee seeking a declaration that the issuer violated several provisions of the indenture by entering into transactions with a related third party. The trustee alleges that these transactions were completed to the detriment of the issuer, and for the benefit and personal gain of the defendants. The trustee further alleges breach of fiduciary duties, fraud (actual and constructive), and seeks injunctive relief against further transactions by the issuer with the related third party.

The defendants moved to dismiss the complaint on the ground that the trustee lacks standing to bring this action on behalf of the noteholders. For the reasons that follow, the court concludes that the trustee has not adequately alleged grounds establishing its standing to maintain this action and dismisses the complaint without prejudice with leave to refile.

II.

A. The Parties

U.S. Bank National Association, the plaintiff indenture trustee ("Trustee"), is a nationally chartered banking association with its executive offices in Minneapolis, Minnesota.[1]

[1] The plaintiff is the successor in interest of State Street Bank and Trust Company, the original indenture trustee.

Defendant U.S. Timberlands Klamath Falls, L.L.C. ("Klamath" or the "Issuer") is a Delaware limited liability company with its principal place of business in Klamath Falls, Oregon. Klamath is in the timber business. The manager of Klamath is defendant U.S. Timberlands Services Company, L.L.C. ("Services"), a Delaware limited liability company.[2] Defendant U.S. Timberlands Finance Corp. ("Finance"), a Delaware corporation, is a wholly owned subsidiary of Klamath and was also an issuer of the notes. Defendant U.S. Timberlands Holdings Group, L.L.C. ("Holdings") is a Delaware limited liability company.[3] Defendant U.S. Timberlands Yakima L.L.C. ("Yakima") is a Delaware limited liability company. Yakima is also in the timber business.

Additionally, the five members of the board of directors of defendant Services are named as individual defendants: John M. Rudey,[4] Alan B. Abramson, Aubrey L. Cole, George R. Hornig, Robert F. Wright and William A. Wyman.[5]

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[2] On November 19, 2003, the manager changed its name to Timber Resources Services, L.L.C.

[3] On November 19, 2003, U.S. Timberlands Holdings Group changed its name to Cascade Resource Holdings Group, L.L.C.

[4] Rudey is also the chairman, CEO and president of Services. Rudey formed Klamath in 1996.

[5] Abramson and Wyman are also members of the conflicts committee of Services.

B. Background

In 1996, Rudey formed Klamath for the purpose of growing and selling timber to third parties. On November 17, 1997, Klamath issued $225 million in unsecured notes pursuant to an indenture (the "Indenture") for which U.S. Bank serves as indenture trustee. In 1999, Rudey formed Yakima, a company with essentially the same business as Klamath. According to the complaint, Yakima and Klamath are under the direct or indirect common control of Rudey.[6]

The Trustee filed its initial complaint on December 12, 2003 and its amended complaint on April 16, 2004.[7] Generally, the amended complaint challenges two sets of transactions between Klamath and Yakima: (1) contributions of timberlands by Klamath to Yakima in exchange for preferred interests in Yakima allegedly taking place in October 1999, February and June 2001, December 2002 and February 2003; and (2) sales of timberlands by Klamath to Yakima for cash between December 2001 and May 2003. Among other things, the complaint alleges that Rudey and other individual defendants used assets transferred from Klamath to Yakima to settle

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[6] The complaint alleges the following: Rudey owns the three limited liability companies that constitute Holdings; Holdings owns 99% of U.S. Timberlands Company, L.P. (the "Partnership"); until July 2003, Klamath was 99% owned by the Partnership and 1% owned by Services; and, Holdings and the Partnership together indirectly own Yakima.

[7] The plaintiff filed a first amended complaint and answering brief after the defendants filed a motion to dismiss the original complaint and an opening brief in support of that motion. The defendants thereafter filed a motion to dismiss the first amended complaint on the same grounds as had supported the motion to dismiss the original complaint.

lawsuits brought against them and to finance a going private transaction involving U.S. Timberlands Company L.P. In addition, the amended complaint alleges that the Issuer made the November 2003 semiannual interest payment in December 2003 (although during the 30-day grace period) and only after liquidating assets to raise the cash. The amended complaint does not otherwise allege that the Issuer has failed to make a payment of interest or principal on the notes or that the Trustee has ever given notice of default under the terms of the Indenture.

The amended complaint is in five counts. Count I is asserted against Klamath and seeks a declaratory judgment that the transactions at issue violated the Indenture. Count II alleges breach of fiduciary duties by the Individual Defendants for approving the contributions of timberlands in exchange for preferred interests. Counts III and IV are asserted against all the defendants and seek the avoidance of the transfers, a constructive trust over the timberlands transferred to Yakima and damages on the grounds that the transfers are fraudulent conveyances under the Uniform Fraudulent Transfer Act adopted by both Delaware and Oregon.[8] Counts III and IV are based respectively on the theories of actual and constructive fraud. Count V is asserted against Klamath and seeks

[8] Pursuant to § 11.11 of the Indenture, New York law governs.

injunctive relief against further transfers by Klamath to Yakima or other related entities.

The defendants have moved to dismiss the amended complaint on the grounds that because there has not been an Event of Default under the Indenture the Trustee lacks standing to assert the claims. The court agrees that the amended complaint does not adequately allege circumstances giving the Trustee standing to maintain this action, and, therefore, does not reach the remaining arguments in favor of dismissal. However, because the Trustee may be able to cure its lack of standing, the dismissal will be without prejudice and with leave to amend within 30 days.

III.

A. Standard Of Review

When considering a motion to dismiss, the court is to assume the truthfulness of all well pleaded allegations of fact in the complaint.[9] Although "all facts of the pleadings and reasonable inferences to be drawn therefrom are accepted as true . . . neither inferences nor conclusions of fact unsupported by allegations of specific facts . . . are accepted as true."[10] That is, "[a] trial court

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[9] *Grobow v. Perot*, 539 A.2d 180, 187 & n.6 (Del. 1988).
[10] *Id.*

need not blindly accept as true all allegations, nor must it draw all inferences from them in [the nonmoving party's] favor unless they are reasonable inferences."[11] On a motion to dismiss, the court may consider for certain limited purposes the contents of documents that are referred to in the complaint.[12] Accordingly, on this motion to dismiss the court takes judicial notice of the Indenture.

B. The Trustee Lacks Authority To Bring The Complaint

1. The Claim Pursuant To The Indenture

The complaint alleges that the Issuer violated sections 4.8, 4.10, and 4.11 of the Indenture by entering into the challenged transactions with Yakima.[13] While controverting the merits of these claims, the Issuer also raises the threshold contention that the Trustee lacks standing to sue.[14] This is so, the Issuer argues, because the Trustee did not give Klamath notice of a default and the opportunity to cure, as is required by the Indenture, before it initiated this action.

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[11] *Id.*

[12] A court may consider, for limited purposes, documents that are "integral to or incorporated by reference in the complaint." *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000) (citing *In re Santa Fe Pac. Corp. S'holders Litig.*, 669 A.2d 59, 69-70 (Del. 1995)).

[13] The Trustee states in the amended complaint at ¶ 79 that it "reserves the right to seek a declaration from the Court that the Issuer violated Section 4.16 of the Indenture."

[14] The Issuer contends that the challenged transactions do not violate sections 4.8 and 4.10 because these sections apply only to restricted subsidiaries and Yakima is an affiliate of Klamath, not a restricted subsidiary. Additionally, the Issuer argues that section 4.11 expressly permits the challenged transactions.

An indenture trustee derives its powers and rights from the indenture itself,[15] and such trustee is limited to those powers specifically articulated therein.[16] In this case, New York law governs the Indenture,[17] and under New York law "[i]nterpretation of indenture provisions is a matter of basic contract law."[18] Here, the general duties of the Trustee are defined in section 7.1 of the Indenture, providing, in relevant part, as follows:

> *If an Event of Default has occurred and is continuing, the Trustee shall exercise such of the rights and powers vested in it by this Indenture,* and use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.[19]

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[15] *See Meckel v. Cont'l Resources, Co.*, 758 F.2d 811, 816 (2d Cir. 1985) ("Unlike the ordinary trustee, who has historic common-law duties imposed beyond those in the trust agreement, an indenture trustee is more like a stakeholder whose duties and obligations are exclusively defined by the terms of the indenture agreement.").

[16] *See Cont'l Bank, N.A. v. Caton*, 1990 WL 129452, at *4 (D. Kan. Aug. 6, 1990) ("Whether the Trustee has the authority to bring the claims in this suit on behalf of the bondholders must be decided from the terms of the Trust Indenture. The rights and powers of the Trustee are a function of the Trust Indenture and cannot be generally expanded in contradiction of the Indenture by reference to broad common law principles."); *Central Bank of Denver, N.A. v. Deloitte & Touche*, 928 P.2d 754, 755 (Colo. Ct. App. 1996), *cert. granted*, ("Whether an indenture trustee is authorized to sue is determined by the terms of the indenture of trust.").

[17] Indenture § 11.11.

[18] *Angelo, Gordon & Co., L.P. v. Allied Riser Communications Corp.*, 822 A.2d 1065, 1070 (Del. Ch. 2002) (citation omitted).

[19] Emphasis added.

Of particular relevance, section 6.3 of the Indenture grants the trustee the authority to sue the Issuer but ties that power to the occurrence of an Event of Default, as follows:

> *If an Event of Default occurs and is continuing*, the Trustee may pursue any available remedy (under this Indenture or otherwise) to collect the payment of principal or interest on the Notes or to enforce the performance of any provision of the Notes, or this Indenture.[20]

Finally, the phrase "Event of Default" is defined by section 6.1 of the Indenture, providing that an Event of Default occurs if there is a failure to make a required payment of principal (subsection (a)) or interest (subsection (b)), or, pertinently among other things, if there is a:

> (c) failure to perform or observe any other term, covenant or agreement contained in the Notes, any Subsidiary Guarantee or the Indenture . . . and such default continues for a period of 60 days *after written notice of such default* requiring the Issuers to remedy the same shall have been given . . . .[21]

Reading these provisions together, it is clear that if there is no failure to make a required payment, the Indenture makes the Trustee's authority to sue dependent upon the giving of notice of a default and passage of the 60-day cure period.

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[20] *Id.*

[21] *Id.*

The Trustee does not allege a failure to make a required payment and does not allege that it has given the required notice of default.[22] Therefore, it follows that the Trustee lacks the power to initiate suit under the terms of the Indenture, as there has been no Event of Default.

Notwithstanding the limited remedy provisions found in the Indenture, the Trustee asserts that it has broad powers to protect the holders of the notes covered by the Indenture.[23] The court cannot accept this argument, as the powers of the Trustee are defined by and limited by the terms of the Indenture. The power of the Trustee to sue the Issuer pursuant to section 6.3 is contingent on the occurrence of an Event of Default. In the absence of circumstances not present in this case, notice to the Issuer is required under section 6.1(c) and the passage of the 60-day cure period is necessary before an Event of Default can arise. Without notice, there is no Event of Default, and without an Event of Default, the Trustee has no power to bring any claim.

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[22] The Trustee also refers to section 6.1(g)(v) of the Indenture that defines an Event of Default to include a statement by the Issuer that "admits in writing its inability to pay debts as the same become due." According to the amended complaint, the Issuer's Form 10-Q for the third quarter of 2003 contained such an admission when the Issuer disclosed that it had to "monetize sufficient assets to be in a position to make the interest payment." This provision of the Indenture is not helpful to the Trustee, as the quoted statement is not an admission of the Issuer's inability to pay debts. In fact, the amended complaint admits that the required interest payment was made within the stipulated grace period.

[23] Pl.'s Answering Br. in Opp'n to Def.'s Mot. to Dismiss at 16.

In addition, the court is unable to accept the Trustee's suggestion that the filing of the complaint is itself adequate notice of an Event of Default. As other courts have recognized, accepting this argument would effectively read the notice provision straight out of the Indenture.[24] Very simply, "the filing of [the

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[24] Section 6.1(c) clearly states that an Event of Default under that subsection does not occur until 60 days after written notice is given, and section 6.3 states that the Trustee cannot pursue "any available remedy (under this Indenture or otherwise)" unless an Event of Default "occurs and is continuing." The parties have contracted to a pre-suit notice provision, and the court sees no reason to rewrite the terms of their agreement. *See Fiore v. Fiore*, 389 N.E. 2d 138, 139 (N.Y. 1979) ("The court may not rewrite a term of a contract by interpretation when that term is clear and unambiguous on its face.").

Moreover, courts routinely enforce such contractual pre-suit notice provisions. *See Harper v. Del. Valley Broadcasters*, 743 F. Supp. 1076 (D.Del. 1990), *aff'd*, 932 F.2d 959 (3d Cir. 1991) (holding that a partner could not unilaterally determine that the other partner was in breach without first providing notice and an opportunity to cure as required by the terms of a partnership agreement); *Medspan Shipping Servs., Ltd. v. Prudential Lines*, 541 F. Supp. 1076, 1079 (E.D. Pa. 1982) ("The filing of a complaint does not serve the purpose which the parties intended written notice of default to serve. The complaint clearly claims default, but the filing of it does not afford the receiving party the opportunity to cure its default in a non-litigious manner. Instead, the complaint puts the parties and the world on notice that voluntary cure is unlikely and that the parties cannot solve their dispute without resort to the courts."); *Int'l Bus. Machines Corp. v. Comdisco, Inc.*, 1991 WL 269965, at *9 (Del. Super. Dec. 4, 1991) (citing *Medspan Shipping Servs.* and *Del. Valley Broadcasters*, with approval for the proposition that filing a complaint is not adequate notice because there is no ability to cure in a non-litigious manner); *see also Prudential Ins. Co. of America v. Hilton Hotels Corp.*, 1996 WL 340002 (S.D.N.Y. June 19, 1996) (holding that where a partnership agreement expressly requires written notice and an opportunity to cure and the partner fails to comply with this notice provision governing defaults required dismissal of the claims from the alleged defaults).

The sole authority cited by the Trustee for the proposition that the complaint constitutes adequate pre-suit notice as required by the terms of the Indenture, *Broad v. Rockwell Int'l Corp.*, 614 F.2d 418 (5th Cir. 1980), was vacated. 618 F.2d 396 (5th Cir. 1980). On rehearing en banc, the Court of Appeals for the Fifth Circuit disagreed with the panel's construction of the indenture and declined to reach the argument that the filing of a class action was adequate notice of default under the terms of that indenture. 642 F.2d 929, 960 n.27 (5th Cir. 1981). Therefore, this court adheres to the well-reasoned decisions discussed above holding that a pre-suit notice provision in a contract should be given meaning, as it evidences the clear intent of the parties to require written notice of default before the Trustee may pursue litigation.

complaint] does not afford the receiving party the opportunity to cure its defaults in a non-litigious manner."[25] The relevant remedy provisions clearly evidence an intent that litigation be pursued only after notice and an opportunity to cure. It follows that the Trustee did not have authority to bring these claims when it did. Therefore, the court will grant the defendants' motion to dismiss with regard to claims for violation of the Indenture.[26]

2. The Claims For Breach Of Fiduciary Duty And Fraudulent Conveyance

The Trustee next argues that "Section 6.3 of the [I]ndenture is *not* an exclusive listing of the rights of the [T]rustee to protect the interests of the noteholders,"[27] and therefore the Trustee may pursue its claims for breach of fiduciary duty and fraudulent conveyance. For the proposition that it has broad authority to pursue non-contractual claims, the Trustee focuses on the language in section 6.3 that provides: "the Trustee may pursue any available remedy (under this Indenture *or otherwise*)."[28] The Trustee cites *In re Petition of First Interstate Bank of Denver, N.A.*[29] and *Fleet National Bank*

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[25] *Medspan Shipping Servs*, 541 F. Supp. at 1079.

[26] The court is aware that on May 17, 2004, the Trustee issued notice of Events of Default to the Issuer. The Trustee, however, has not yet pleaded that an Event of Default has occurred or is continuing, or that the required notice has been delivered to the Trustee.

[27] Letter from Daniel B. Rath, counsel for the Indenture Trustee, U.S. Bank N.A., to Vice Chancellor Lamb, Court of Chancery (May 19, 2004).

[28] Emphasis added.

[29] 767 P.2d 792 (Colo. App. 1988).

v. Trans World Airline, Inc.[30] to support this argument. Those cases do not support the Trustee's position that it has power to sue beyond that derived from the Indenture.

In *First Interstate Bank*, the Colorado court reviewed the authority of a probate court to allow the trustee to pursue a specific remedy not listed in the indenture.[31] In that case, the issuer was in default on the payments due on two series of bonds and had proposed a refinancing plan where sufficient funds would be generated to pay off one series but not the other. The trustee, after exhausting all viable alternatives, petitioned the court for instructions on how to proceed.[32] To the extent that *First Interstate Bank* stands for a trustee's authority to pursue remedies not explicitly listed in the indenture, such authority is limited to implementing the express purpose of the trust once the issuer is in default of payment and after the trustee has pursued all viable alternatives.[33] Certainly, if the

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[30] 767 F. Supp. 510 (S.D.N.Y. 1991).

[31] "[E]ven if refinancing were a deviation from the express terms of the trust, the probate court has the authority to order the trustee to pursue it." 767 P.2d at 796.

[32] The probate court found that "the trustee had explored all other alternatives in an effort to maximize payment to both classes of bondholders and had determined that refinancing was the only viable alternative to accomplish the purpose of the trust is supported by substantial evidence" and "that the trustee had 'no realistic alternative.'" *Id.*

[33] The same court in a subsequent decision narrowly construed the holding in *First Interstate Bank* as describing the authority of the probate court to allow a trustee to employ a specific remedy not listed in the indenture and also rejected the proposition that a trustee has inherent powers to sue even if in the best interests of the noteholders. *Central Bank of Denver*, 928 P.2d at 757 ("[E]ven assuming a third-party tort suit were in the bondholders' best interest, we reject trustee's contention that *In re Petition of First Interstate Bank, N.A.*, [] requires that all such actions be permitted under the indenture here.").

Issuer were in default in making payment, the Trustee would have broad powers under section 6.3 to pursue legal or equitable remedies.

Further, the Trustee's argument that the use of the word "otherwise" in section 6.3 somehow grants the Trustee authorization to pursue *non-contractual* claims simply ignores the subsequent limiting language of that section that the remedies pursued be to "collect" the notes or to "enforce the performance of" the notes or the Indenture.[34] As discussed, the Trustee's authority to act is defined by the terms of the Indenture, which requires that an Event of Default "occur[] and is continuing" before the Trustee "may pursue any available remedy."[35]

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[34] In *Regions Bank v. Blount Parrish & Co., Inc.*, 2001 WL 726989 (N.D. Ill. June 27, 2001), the trustee alleged that it had broad authority to pursue tort claims on behalf of the noteholders under the indenture. The remedy provision in *Regions Bank* is very similar to the language of section 6.3 and allows the trustee to pursue "any available remedy" in carrying out the purpose of the trust, which like section 6.3, is to collect on the notes or to enforce the indenture. In *Regions Bank*, the court, in holding that the trustee did not have the power to protect any and all rights of the bondholders or pursue the bondholders' tort claims, states that an indenture trustee has standing to bring tort claims on behalf of noteholders "only when the indenture carries a broad grant of authority to sue on behalf of the bondholders." *Id*. at *5. The court then cites *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 623 F. Supp. 1466 , 1483 (W.D. Wash. 1985), *aff'd*, 823 F.2d 1349 (9th Cir. 1987), for language broad enough to give the indenture trustee the authority to bring a tort claim on behalf of bondholders. In that case, the bond resolution allowed the trustee "to protect and enforce its rights and the rights of the holders of the Bonds under the Resolution . . . in the enforcement of any other legal or equitable right as the Bond Fund Trustee, being advised by counsel, shall deem most effectual to enforce any of its rights or the rights of the holders of the Bonds." Such broad language was not present in *Regions Bank* and is not found in section 6.3. Without such language, the trustee does not have inherent authority to bring all non-contractual claims.

[35] Indenture § 6.3. Further, the language of section 6.3 of this Indenture mirrors the language of 6.03 of the Model Indenture except that section 6.03 of the Model Indenture does not have the language "under this Indenture or otherwise." Notably, the comment to the *Revised Model Simplified Indenture*, 55 Bus. Law. 1115 (2000) (citing, ABF Indenture Commentaries at 225-26) explains that the reference to "any available remedy" in section 6.03 of the Model

In *Fleet National Bank*, the court granted a trustee's request for preliminary injunction precluding the issuer from making certain payments. However, the asserted claims for breach of indenture were based on the issuer's repeated failures to make principal and interest payments.[36] Moreover, the claims that supported the request for injunctive relief were contractual. Here, the Issuer has not once failed to pay the principal or interest on the notes, and the Trustee is pursuing non-contractual claims on behalf of the noteholders.[37]

The Trustee further argues that section 7.1(b) should be read as the only circumstance where its duties or powers are limited to the express provisions of the Indenture. Section 7.1(b) provides that, except during the continuance of an Event of Default,

> [t]he duties of the Trustee shall be determined solely by the express provisions of this Indenture and the Trustee need perform only those duties that are specifically set forth in this Indenture and no others, and no implied covenants or obligations shall be read into this Indenture against the Trustee.

Indenture "subsumes all of the customary phraseology," including "under this Indenture or otherwise by law." *Id.* at 43. Therefore, the Trustee's argument that there is independent meaning to the language "or otherwise" is without merit as the language "any available remedy" incorporates the phrase "or otherwise by law."

[36] 767 F. Supp. at 512.

[37] The court does not dispute that there are situations where a trustee has the authority to act in an expedited fashion without delay. For example, if the issuer fails to pay the principal of or premium on the notes as they come due, or the issuer fails to pay an installment of interest on the notes (with a 30-day grace period), then the trustee need only provide notice and "upon such declaration the principal and interest shall be due and payable immediately." Indenture § 6.1(a) and (b), 6.2. The Trustee's authority to act, however, is contingent on an Event of Default.

But section 7.1(b) is intended to protect the Trustee from liability to noteholders arising from its actions or, more likely, inaction *before* an Event of Default occurs. Reading section 7.1(b) as giving the Trustee blanket authority to pursue claims without express authorization in the Indenture directly contradicts the clear precedent that an indenture trustee's rights are defined by the relevant indenture, both before and after a default.[38]

The same reasoning applies to claims under the fraudulent conveyance laws brought by the Trustee on behalf of the noteholders. This court has held that fraudulent conveyance claims are subject to the no-action clauses often found in indenture agreements.[39] No-action clauses serve to limit the right of noteholders to bring suits "to protect issuers from the expense involved in defending lawsuits that are either frivolous or otherwise not in the economic interest of the corporation and

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[38] Further, section 7.1(b) mirrors section 7.01(b) of the *Revised Model Simplified Indenture*, 55 Bus. Law. 1115 (2000), and the comment on that section discusses the limited duties of a trustee before an Event of Default occurs: "The law is well established that prior to an event of default, the trustee's duties are limited to those explicitly set forth in the indenture." *Id.* Furthermore, as already discussed, the trustee here has not yet sufficiently complied with the terms of the indenture to establish an Event of Default. Regardless, although the duties of the trustee may change after an Event of Default, "the change does not authorize an indenture trustee to take actions not otherwise contemplated by the indenture." *Regions Bank*, 2001 WL 726989, at *6 ("While the Indenture itself may distinguish between the obligations of the trustee prior to and after a default, this court declines to find that post-default duties of the Trustee include rights of actions not specifically authorized by the Indenture.").

[39] *See Lange v. Citibank, N.A.*, 2002 WL 2005728 (Del. Ch. Aug. 13, 2002); *Feldbaum v. McCrory Corp.*, 1992 WL 119095, at *8 (Del. Ch. June 1, 1992).

its creditors."[40] The Indenture has a standard no-action clause that places complex procedural restrictions on the right of any noteholder to "pursue a remedy with respect to this Indenture or the Notes."[41] Only if a noteholder follows the prescribed procedure and the Trustee fails or refuses to act is a noteholder allowed to file suit. Reading this provision together with Section 6.3, the court concludes that the Trustee lacks standing to bring a claim for fraudulent conveyance unless one or more noteholders have complied with the procedural requirements of the no-action clause, including making demand on the Trustee.[42] Because the complaint does not allege such compliance, the court is unable to conclude that the

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[40] *Feldbaum*, 1992 WL 119095, at *6.

[41] Indenture § 6.6.

[42] *See LaSalle Nat'l Bank v. Perelman*, 141 F. Supp. 2d 451, 462 (D. Del. 2001) ("No-action provisions generally require that security holders satisfy certain criteria before bringing a suit without the authorization of a trustee appointed to protect their interests."). *See also Feldbaum*, 1992 WL 119095 at *22 ("[N]o matter what legal theory a plaintiff [debt-holder] advances, if the trustee is capable of satisfying its obligations, then any claim that can be enforced by the trustee on behalf of all bonds, other than a claim for recovery of past due interest or principal, is subject to the terms of a no-action clause of this type.").

The defendants dispute whether the non-contractual claims affect the noteholders equally and therefore whether the Trustee would have authority to act on their behalf. As support, the defendants cite *Brazlin v. W. Sav. And Loan Assoc.*, 1994 WL 374286 (D. Ariz. Jan. 28, 1984) and *Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 85 F.3d 970 (2d Cir. 1996). Neither *Brazlin* nor *Bluebird Partners* involve claims for fraudulent conveyance. The defendants also cite *Ceco Corp. v. Bar-Jay Assocs., Inc.*, 1974 Pa. D&C LEXIS 212 (C.P. Dauphin County 1974), discussing a creditor's right to act as a trustee only once a corporation is declared insolvent. These cases miss the mark. A fraudulent conveyance claim is entirely distinct from a general fraud or fraud in the inducement claim, and this court has held that a fraudulent conveyance claim *is* sufficiently related to the notes to fall under a trustee's duties pursuant to the indenture. Also, whether a creditor can be a trustee is not related to whether a trustee has standing to pursue claims on behalf of its noteholders.

Trustee has standing to maintain the claim for fraudulent conveyance. This same reasoning requires the dismissal of the claims for breach of fiduciary duty alleged in Count II.[43]

IV.

For the foregoing reasons, the defendants' motion to dismiss for lack of standing is GRANTED and the complaint is DISMISSED without prejudice. In accordance with Rule 15(aaa) of the Court of Chancery Rules, the dismissal will be without prejudice, as good cause has been shown to support a finding that dismissal with prejudice would not be just under the circumstances. Therefore, the court grants the Trustee leave to file an amended complaint within 30 days of the date hereof. IT IS SO ORDERED.

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[43] In *Lange*, the court dismissed the fraudulent conveyance and breach of fiduciary duties claims brought by the debentureholders because "they did not follow the contractually mandated procedures that must precede a suit of this kind." 2002 WL 2005728, at *1. The same reasoning applies here. Because the court concludes that, based on the allegations of the complaint, the Trustee lacks standing to sue, it does not reach the question whether the complaint adequately alleges circumstances amounting to insolvency to support a claim of breach of fiduciary duty brought on behalf of the creditors of Klamath, such as the noteholders.