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The Business Court of Texas,
1st Division

PRESTON HOLLOW CAPITAL, LLC; and PHCC LLC, *Plaintiffs*	§	
v.	§	Cause No. 25-BC01B-0030
TRUIST BANK FORMERLY KNOWN AS BRANCH BANK & TRUST, *Defendants*	§	

OPINION AND ORDER

Syllabus[1]

This opinion addresses (i) whether Title 9 of the Texas Property Code (Trust Code) applies to the parties' trust indenture created in connection with a bond offering and, depending on the outcome, (ii) the nature of defendant trustee's duties (contractual, common law, and statutory).

[1] *This syllabus is for the reader's convenience; it is not part of the court's opinion; and it is not legal authority.*

Opinion

[¶ 1] The primary issue here is whether indenture documents executed as part of a bond financing arrangement created an express trust imposing formal fiduciary duties on the bond trustee. Creation of an express trust (other than by a declaration of trust) requires the grantor to completely transfer legal title to the trust property to the trustee to hold for a beneficiary's benefit. Because the bond documents here do not transfer legal title, (i) the bond documents did not create an express trust and (ii) the documents' terms define the bond trustee's duties to the bond holders.

[¶ 2] In January 2017, Branch Bank & Trust Company (BB&T), now Truist Bank, agreed to act as trustee in a bond offering issued to raise money to develop a senior living facility. Preston Hollow Capital, LLC and PHCC LLC (collectively, Preston Hollow) purchased more than $21 million in senior bonds. Preston Hollow first sued Truist in Dallas District Court in May 2023 before the parties agreed in July 2025 to refile the suit here.

[¶ 3] In October 2025, the parties briefed issues concerning (i) the scope of Truist's applicable legal duties as bond trustee to Preston Hollow as a bond purchaser, (ii) the validity of the trust agreement's punitive damage waiver, and (iii) Truist's post-resignation duties to Preston Hollow after new trustees were appointed.

[¶ 4] The court previously ruled on the latter two issues. *See Preston Hollow Cap., LLC v. Truist Bank*, 2025 Tex. Bus. 55, 729 S.W.3d 46 (1st Div.). This opinion addresses the first issue. The court also asked the parties to address whether Preston Hollow could assert separate claims for breach of fiduciary duty and breach of trust given their similar elements.

[¶ 5] Having considered the pleadings; the applicable law; and the parties' briefings, submissions, and oral arguments, the court concludes that the Trust Code does not govern Truist's duties as trustee in the bond offering.

[¶ 6] Accordingly, Truist did not owe Preston Hollow statutory Trust Code duties. Instead, Truist's duties were generally limited to those defined by the contracts governing the parties' relationship. Therefore, whether a party may separately plead breach of fiduciary duty and breach of trust is moot because a claim for breach of trust arises from only a relationship governed by the Trust Code.

I. Background

A. The Bond Offering

[¶ 7] Unless otherwise indicated, the court assumes these facts from Preston Hollow's pleadings are true.

[¶ 8] Senior Care Living VI, LLC was created to develop and operate a senior living center called *Inspired Living at Sugar Land* (the Project).[2] Senior Care financed the Project with public bond financing.[3]

[¶ 9] BB&T was the initial trustee under (i) the Master Indenture between BB&T and Senior Care and (ii) the Bond Indenture between BB&T and the conduit bond issuer, Woodloch Healthcare Facilities Development Corporation (collectively, the Bond Documents).[4] Defendant Truist is BB&T's successor.[5] For convenience, the court refers to BB&T as Truist.

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[2] Plaintiff's First Amended Petition (FAP) ¶ 9(a). Preston Hollow filed a Second Amened Petition (SAP) on August 13, 2026. The SAP added new factual allegations but did not add any new causes of action. Because this Opinion and Order address only legal issues, the SAP does not change the court's analysis at this time.

[3] *See* FAP ¶s 1, 10(a)-(c).

[4] FAP ¶ 11(b); Truist's October 27, 2026, 166(g) Motion (Truist's 166(g) Mot.), Exhibit A (Master Indenture) and Exhibit B (Trust Indenture).

[5] FAP ¶ 11(a).

[¶ 10] Although Woodloch issued the bonds pursuant to the Bond Indenture,[6] Senior Care was the ultimate bond Obligor.[7]

[¶ 11] Woodloch loaned the bond proceeds to Senior Care under a loan secured by most of Senior Care's assets.[8] Woodloch also assigned its rights and interests under the Bond Documents and loan proceeds to Truist.[9]

[¶ 12] To protect the gross revenue collateral pledge, Senior Care and Truist executed an Account Control Agreements (ACA) whereby Truist held all ACA-created bank accounts into which Senior Care was to deposit its gross receipts and gross revenue.[10]

[¶ 13] Pursuant to its rights, Preston Hollow controlled the bond funds during the facility's construction.[11]

[¶ 14] The Project was substantially completed by late 2017, and Senior Care started leasing by early 2018.[12]

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[6] FAP ¶ 11(b).
[7] FAP ¶ 12(a).
[8] FAP ¶ 12(c).
[9] FAP ¶ 12(d).
[10] FAP ¶s 12(e)-(f).
[11] FAP ¶s 16-17.
[12] FAP ¶ 18.

[¶ 15] Beginning in 2019, Preston Hollow learned of multiple alleged Senior Care defaults.[13] Specifically, Senior Care failed to pay (i) the Project's general contractor, resulting in a lien against the property and (ii) the Project's property taxes.[14] So, Preston Hollow directed Truist to send default notices to Senior Care.[15]

[¶ 16] On March 18, 2019, Preston Hollow issued a Letter of Direction to Truist stating that (i) Truist was not to act under the loan or Bond Documents unless Preston Hollow expressly directed Truist to do so and (ii) in return Preston Hollow would indemnify Truist.[16]

[¶ 17] A week later, Preston Hollow issued a Directions to Trustee and Indemnification Letter (D&I Letter) to Truist that similarly instructed Truist to not act unless directed and included an indemnifier provision.[17]

[¶ 18] Truist alleges it acted consistently with both letters' directives.[18]

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[13] FAP ¶s 19-21.
[14] FAP ¶s 20-21.
[15] FAP ¶ 22.
[16] Defendant's Answer and Counterclaims (DAAC) ¶s 25-28.
[17] DAAC ¶s 29-33.
[18] DAAC ¶ 34.

[¶ 19] When Senior Care refused to cure its defaults, Preston Hollow directed Truist to accelerate the bonds and loan, which Truist did on May 31, 2019.[19]

[¶ 20] Preston Hollow then sued Senior Care and Bouldin.[20]

[¶ 21] On July 12, 2019, Truist appointed two successor trustees, and resigned five days later.[21]

[¶ 22] After Truist resigned, Preston Hollow asked Truist if Senior Care had deposited its gross revenues into the account required by the Bond Documents and ACA (Blocked Account).[22] Truist disclosed that Senior Care never did so.[23] Preston Hollow later learned that Truist's representative approved Senior Care's deviation from the Bond Documents' and ACA's strict requirements.[24]

B. Preston Hollow's Claims

[¶ 23] Preston Hollow alleges (i) breach of fiduciary duty, (ii) breach of trust, (iii) breach of contract, (iv) fraudulent transfer (TUFTA), and

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[19] FAP ¶ 23.
[20] DAAC ¶ 36.
[21] FAP ¶ 25.
[22] FAP ¶ 27.
[23] FAP ¶ 28.
[24] FAP ¶ 29.

(v) conspiracy claims against Truist.[25] This Opinion and Order addresses only the first three claims.[26]

[¶ 24] Preston Hollow asserts that Truist, as trustee, owed fiduciary duties to "Preston Hollow and other bondholders as the beneficiaries of the Project."[27] Preston Hollow further alleges that:

> The Bond Documents spell out specific duties [Truist] owed as trustee and specify that there are no limits on these duties once an Event of Default occurred, regardless of whether [Truist] received written notice of default.[28]
>
> The Bond Documents also stipulate that they do not immunize [Truist] from its own negligence, negligent failure to act, or willful misconduct.[29]
>
> Texas law also imposes duties on trustees like [Truist], several of which are applicable here and not subject to contractual waiver. While provisions in the Bond Documents purport to limit [Truist]'s duties in certain circumstances, these limitations are unenforceable. Texas law prohibits waiver of certain duties, including the duty to act in good faith and in accordance with the purpose of the trust. And the limitations set out in the Bond Documents are inapplicable when an Event of Default has occurred and is continuing. [Truist] owed Plaintiffs fiduciary duties that could not be, and were not, waived.[30]

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[25] *See generally* FAP § VII (Causes of Action and Remedies).
[26] The court previously issued an April 28, 2026, Order addressing the viability of Preston Hollow's TUFTA and conspiracy claims considering BUSINESS & COMMERCE CODE Chapter 24's statue of repose.
[27] FAP ¶ 34(f).
[28] FAP ¶ 35 (citing Master Indenture § 8 *et seq.*).
[29] FAP ¶ 36 (citing Master Indenture § 8.01(c)).
[30] FAP ¶ 37.

[¶ 25] Preston Hollow does not assert an independent negligence claim but asserts that Truist's "breaches of fiduciary duty, trust, and contract [] were the result of [Truist]'s negligence, negligent failure to act, and/or willful misconduct toward Preston Hollow."[31]

C. The Parties' Arguments

[¶ 26] Truist moved pursuant to Rule 166(g) seeking three rulings:

> i. [Truist] had no obligation to monitor Senior Care's compliance with Senior Care's separate contractual obligations and is not liable for Senior Care's breaches,
>
> ii. [Truist] had no obligation to advise Preston Hollow of defaults by Senior Care in the absence of a written notice in the form described in the Bond Documents, and
>
> iii. Actions by [Truist]'s officer Greg Yanok, as pled, did not violate [Truist]'s fiduciary or contractual obligations.[32]

[¶ 27] In particular, Truist argues that the Bond Documents' terms limited its duties—including duties to monitor Senior Care or advise Preston Hollow of defaults—absent written notice of an Event of Default.[33] The parties agree that the Bond Documents demand higher duties once an Event of Default has occurred. However, because the parties negotiated for a written

[31] FAP ¶ 46.
[32] Truist's 166(g) Mot. at 3. The court previous address the other issued raised by Truist in its October motion. *See Preston Hollow*, 2025 Tex. Bus. 55.
[33] Truist's 166(g) Mot. at 13-19.

notice standard, Truist argues that its alleged actual knowledge of Senior Care's failure to deposit funds in the Blocked Account did not trigger those higher duties of care.[34] Finally, Preston Hollow argues that Senior Care could not justifiably rely on Truist's officer Greg Yanok's alleged approval of Senior Care's deviation from the Bond Documents.[35]

[¶ 28] Preston Hollow argues that (i) the Bond Documents could not disclaim Trust Code § 111.0035(b)'s minimum standard that a trustee must act in good faith and in furtherance of the trust's purpose and (ii) issues of good faith are inherently factual, precluding resolution under Rule 166(g).[36] Additionally, Preston Hollow argues that the Bond Documents' terms make Truist always liable for its own negligence or willful misconduct.[37]

[¶ 29] So, Preston Hollow argues it may assert claims that Truist's failures to monitor Senior Care or advise Preston Hollow of Senior Care's defaults were either done (i) in bad faith or (ii) negligently/willfully, regardless of whether Truist received any written notice.[38]

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[34] Truist's 166(g) Mot. at 17-20.
[35] Truist's 166(g) Mot. at 23-24.
[36] Preston Hollow's November 17, 2025, Response to Truist's 166(g) Motion (Preston Hollow's 166(g) Resp.) at 16-17. For the avoidance of doubt, the court is not deciding any fact issues in this Opinion and Order.
[37] Preston Hollow's 166(g) Resp. at 18-19.
[38] *See, e.g.*, FAP ¶s 36, 46, 57, 60, 63, 66.

[¶ 30] During a hearing on the Rule 166(g) motion, Truist suggested that the Trust Code might not apply because this financing arrangement was akin to a security arrangement, not an express trust. The court invited briefing.

[¶ 31] Truist argues that the Trust Code does not apply here because the Bond Documents (i) operate as a security instrument, and therefore are not "an express trust only," and (ii) do not convey legal title to Truist.[39]

[¶ 32] Preston Hollow responds that the Bond Documents are multi-purpose documents, including acting as a security instrument, and they manifest the required intent to create a fiduciary relationship.[40] Preston Hollow further argues that it is not fatal to an express trust for legal title to be vested in both Senior Care and Truist.[41]

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[39] Truist's January 14, 2026, Motion Regarding the Trust Code (Truist's Trust Code Mot.) at 13, 19; Truist's March 20, 2026, Reply in Support of Trust Code Motion at 7, 13, 16.
[40] Preston Hollow's February 13, 2026, Response to Truist's Trust Code Motion (Preston Hollow's Trust Code Resp.) at 15-20, 26-30.
[41] Preston Hollow's Trust Code Resp. at 15-16.

II. LEGAL STANDARDS

A. Texas Rule of Civil Procedure 166(g)

[¶ 33] The trial court "may in its discretion" direct the parties to appear before it for a pretrial conference to consider, among other things, "[t]he identification of legal matters to be ruled on or decided by the court." TEX. R. CIV. P. 166(g). Rule 166's purpose is to "assist in the disposition of the case without undue expense or burden to the parties." *Id.*

[¶ 34] Rule 166(g) thus "authorizes trial courts to decide matters that though ordinarily facts questions, have become questions of law because 'reasonable minds cannot differ on the outcome.'" *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., LLC*, 546 S.W.3d 648, 653 (Tex. 2018) (quoting *Walden v. Affiliated Comput. Servs., Inc.*, 97 S.W.3d 303, 322 (Tex. App.—14th Dist. 2003, pet. denied)). When a Rule 166(g) order disposes of claims in this fashion, the order is akin to a summary judgment order, and [appellate courts] review the order de novo. *Id.* If the non-movant has raised a fact issue on the claim, dismissal under Rule 166(g) is not proper. *See McCreight v. City of Cleburne*, 940 S.W.2d 285, 288 (Tex. App.—10th Dist. 1997, writ denied).

B. Contract Construction

[¶ 35] A court's primary objective when construing contracts "is to ascertain and give effect to the parties' intent as expressed in the instrument." *U.S. Polyco, Inc. v. Tex. Cent. Bus. Lines Corp.*, 681 S.W.3d 383, 387 (Tex. 2023) (quoting *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 763 (Tex. 2018)); *see also Equinor Energy LP v. Lindale Pipeline, LLC*, 731 S.W.3d 324, 327 (Tex. 2026).

[¶ 36] Usually, courts deem the contract alone to express the parties' intent because it is objective, not subjective, intent that controls. *Polyco*, 681 S.W.3d at 387. To that end, courts will examine and consider the entire writing, seeking as best they can to harmonize and give effect to all its provisions so that none will be rendered meaningless. *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 157-58 (Tex. 1951).

[¶ 37] With unambiguous contracts, courts "can determine the parties' rights and obligations under the agreement as a matter of law." *Inwood Nat'l Bank v. Fagin*, 706 S.W.3d 342, 347 (Tex. 2025) (per curiam) (quoting *ACS Invs., Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997)); *see also Equinor Energy*, 731 S.W.3d at 327.

[¶ 38] A written contract is unambiguous if it is so worded that it can be given a definite or certain meaning when considered in context of the circumstances surrounding its execution and as applied to the matter in dispute. *URI*, 543 S.W.3d at 765. Context is a permissible indicator of meaning, and courts are to harmonize and give effect to all contract terms by analyzing them regarding the whole contract. *Polyco*, 681 S.W.3d at 390. Context "is not [] confined to the two-dimensional contractual environs" of the document itself but also includes the business context and realities the words are meant to address. *Board of Regents of the Univ. of Tex. Sys. v. IDEXX Labs., Inc.*, 691 S.W.3d 438, 443-45 (Tex. 2024) (per curiam).

C. Statutory Construction

[¶ 39] A court's primary purpose in statutory construction is to implement the Legislature's intent by giving effect to every word, clause, and sentence. *Sunstate Equip. Co. v. Hegar*, 601 S.W.3d 685, 689-90 (Tex. 2020) (citation omitted). Indeed, statutory text is the "first and foremost" indication of legislative intent. *Greater Hous. P'ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015). Thus, courts apply the words' common, ordinary meaning unless (i) the text supplies a different meaning or (ii) the common meaning produces absurd results. *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018).

[¶ 40] Further, courts derive statutory meaning from the entire statute. TEX. GOV'T CODE § 311.021(2); *Janvey v. Gold Channel, Inc.*, 487 S.W.3d 560, 572 (Tex. 2016). So, courts "presume the Legislature chose statutory language deliberately and purposefully," *Crosstex Energy Servs. L.P., v. Pro Plus, Inc.*, 439 S.W.3d 384, 390 (Tex. 2014), and that it likewise excluded language deliberately and purposefully, *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).

III. DISCUSSION

[¶ 41] The court first addresses whether the Trust Code governs the parties' legal relationship. Concluding it does not, the court next addresses the scope of Truist's legal duties. Finally, because the Trust Codes does not apply, whether a plaintiff may simultaneously plead breach of fiduciary duties and breach of trust is moot.

A. Issue One – Does the Trust Code Apply

1. Agreements to which the Trust Code Applies

[¶ 42] Texas law governs the Bond Documents.[42] The Texas Trust Code states:

> For the purposes of this subtitle, a "trust" is an express trust only and does not include: (1) a resulting trust; (2) a constructive trust; (3) a business trust; or (4) a security instrument such as a deed of trust, mortgage, or security interest as defined by the Business & Commerce Code.

TEX. PROP. CODE (Trust Code) § 111.003.

[¶ 43] Preston Hollow admits that the Bond Documents operate at least as a security instrument, as well as an express trust in its view.[43] Truist argues the documents therefore do not establish "*an express trust only*," and thus the Texas Trust Code does not apply.[44] That is, according to Truist, a true express trust cannot also serve any other purpose and still be an express trust. The court disagrees with Truist.

[¶ 44] By putting "trust" in quotes, § 111.003 distinguishes the type of "trusts" the Trust Code applies to from other types of equitable trusts or

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[42] Master Indenture § 11.02; Bond Indenture § 1208; Truist's Trust Code Mot. App'x. at 5.
[43] Preston Hollow's Trust Code Resp. at 26-28.
[44] Truist's Trust Code Mot. at 13-14 (emphasis original); *see also* Truist's March 20, 2026, Reply in support of Trust Code Mot. at 7.

arrangements that also use the word "trust," like a deed of trust, or collateral "trustee." *See, e.g.*, TEX. PROP. CODE § 51.0001(8) ("Trustee" is a person "authorized to exercise the power of sale under the terms of a security instrument" for purposes of liens under the Property Code). Thus, the word "trust" in Trust Code § 111.003 means only "an express trust," and "does not include" in its definition other concepts that also use the word "trust" or "trustee."

[¶ 45] But an express trust may include the settlor's ownership rights to a mortgage or security interest as part of the trust's property. *See* RESTATEMENT (THIRD) OF TRUSTS § 40 cmt. b (2003) ("The basic rule: any property may be trust property. ... [Thus,] legal or equitable present interests in real or personal property for life or for a term of years, and presently existing future interests, whether legal or equitable, whether reversionary interests, executory interests, or remainders (contingent, vested, or vested subject to being divested), may be held in trust."); *see also* Trust Code § 111.004(12) ("'Property' means any type of property, whether real, tangible or intangible, legal, or equitable[.] ... The term also includes choses in action, claims, and contract rights[.]"); *Hill v. Wolfe*, 184 S.W.2d 489, 491 (Tex. App.—8th Dist.

1944, writ refused w.o.m.) ("It is elementary that a chattel mortgage lien on tangible personal property is a property right.").

[¶ 46] Accordingly, the Bond Documents do not fail to create an express trust because they might *also* include a security instrument. But there still must be an express trust separate and apart from the security instrument for the Trust Code to apply.

2. Requirements of an Express Trust

[¶ 47] "A[n express] trust is created only if the settlor manifests an intention to create a trust." Trust Code § 112.002. Accordingly, "[a]bsent a clear intent to create a trust," courts will not create one. *Chapman Childs. Tr. v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 438 (Tex. App.—14th Dist. 2000, pet. denied).

[¶ 48] An "express trust" means:

> a fiduciary relationship with respect to property which arises as a manifestation by the settlor of an intention to create the relationship and which subjects the person holding title to the property to equitable duties to deal with the property: (A) for the benefit of another person; or (B) for a particular purpose, in the case of a trust subject to Subchapter F.

Trust Code § 111.004(4).

[¶ 49] Although "[t]echnical words of expression" are not essential, "the beneficiary, the *res*, and the trust purpose must be identified." *Perfect Union Lodge No. 10, A.F. & A.M., of San Antonio v. Interfirst Bank of San Antonio, N.A.*, 748 S.W.2d 218, 220 (Tex. 1988); *see also id.* ("It is not absolutely necessary that legal title be granted to the trustee in specific terms.").

a. Transfer of Title Required

[¶ 50] A fundamental element of an express trust is that the "trustee holds legal title to the trust property, and the beneficiary holds equitable or beneficial title." *Inwood*, 706 S.W.3d at 348; *Miller v. Donald*, 235 S.W.2d 201, 205 (Tex. App.—2d Dist., 1950, writ. denied) ("It is elemental that to create an express trust the legal and equitable titles must be separate, the former being vested in a trustee and the latter in a beneficiary.").

[¶ 51] The parties disagree whether legal title must be entirely vested in the trustee for an express trust to be created, or whether the settlor can retain a measure of legal title.[45] Preston Hollow argues that it is permissible for both Senior Care and Truist to hold legal title to the Trust Estate[46] and that

[45] *See* Truist's Trust Code Mot. at 19; Preston Hollow's Trust Code Resp. at 15-16.
[46] *See* Preston Hollow's Trust Code Resp. at 18 (claiming the Bond Documents "established a structure where Senior Care and Truist jointly hold legal title to the trust estate"); *see*

the Bond Documents satisfy the required separation of legal and equitable title because they "creat[e] a split trust estate where Senior Care and Truist hold legal title to the Project trust estate, with bondholders holding equitable title."[47] However, as explained below, the court concludes that for an express trust to form (other than a declaration of trust), legal and equitable title must be divested from the settlor (Senior Care), with legal titled vested in the trustee (Truist) and equitable title vested in the beneficiary (bondholders).

[¶ 52] One way to create a trust is by "a property owner's inter vivos *transfer* of the property to another person as trustee for the transferor or a third person." Trust Code § 112.001(2) (emphasis added); *see Inwood*, 706 S.W.3d at 348 ("A party can *transfer* property through an inter vivos trust." (emphasis added)); *see also* Trust Code § 111.004(17) ("'Trust property' means property placed in trust by one of the methods specified in Section 112.001 or property otherwise *transferred to or acquired or retained* by the trustee for the trust." (emphasis added)). To "transfer" means "[a] conveyance of property or title

also id. at 15-16 (noting this is "an usual arrangement because trustees typically take sole legal title to trust property when a trust is created").

[47] Preston Hollow's Trust Code Resp. at 19.

from one person to another." *Transfer*, BLACK'S LAW DICTIONARY (12th ed. 2024).

[¶ 53] Indeed, "[i]t is basic trust law that 'for a trust to be a trust, the legal title of the [trust property] must immediately pass to the trustee, and beneficial or equitable interest to the beneficiaries.'" *Shearrer v. Holley*, 952 S.W.2d 74, 78 (Tex. App.—4th Dist. 1997, no writ.) (quoting *Cutrer v. Cutrer*, 334 S.W.2d 599, 605 (Tex. App.—4th Dist. 1960), *aff'd*, 162 Tex. 166, 345 S.W.2d 513 (1961));[48] *see also Long v. Long*, 252 S.W.2d 235, 247 (Tex. App.—6th Dist. 1952, writ ref'd n.r.e.) ("In any active trust the legal title and right of possession are vested in the trustee, and the beneficiary has the equitable title only, without possession or right of possession.").

[¶ 54] Bogert provides the following in a section titled "Transfer of property interest to trustee":

> If the settlor intends to make *one other [than] the settlor trustee*, he must *transfer to that person* the property interest to be held in trust before the trust administration can begin and before the person named as trustee can be trustee. If A, a fee-simple owner, desires to make B trustee of the land for C, B cannot begin the trusteeship *until the fee simple is vested in her*, nor can anyone else begin the performance of the trust duties without acquiring

[48] Notably, the supreme court cited *Cutrer* in *Perfect Union* for the point that "it is well established that the legal and equitable estates must be separated; the former being vested in the trustee and the latter in the beneficiary." 748 S.W.2d at 220.

> such a property interest. If the settlor has manifested an intent that B and B alone is to be trustee, and that he does not desire the trust to exist unless B is trustee, then *the transfer of the legal interest to B is necessary to the commencement of the trust*.

Bogert's The Law of Trusts and Trustees § 141 (May 2026 Update) (emphasis added).

[¶ 55] Here, there is no notion that Senior Care acted as trustee of the trust estate, *i.e.*, through a declaration of trust. *See* Trust Code § 112.001(1) (a second way to create a trust is a property owner's declaration that they hold property as trustee for another person). So, for the trust to form, the fee simple of the trust estate had to transfer from Senior Care to Truist. *See Fee Simple*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("the broadest property interest allowed by law").

[¶ 56] The necessary transfer of legal title usually also includes a transfer of possession of the trust property. *See Bogert's The Law of Trusts and Trustees* § 148 (May 2026 Update) ("[T]he transfer of possession to the trustee is [] the natural and usual thing, in order to give the trustee power to protect, manage, and to secure the income from the transferred property. But transfer of possession is not vital to the origin of the trust under the law of trusts."). Bogert explains:

> Transfer of possession of the trust property to the trustee is [] seen to be a vital element in trust creation only in those cases where the trust creation requires a conveyance to the trustee and the rules of conveyancing or property transfer demand that there be a change of possession to effectuate the particular transfer.

Id.

[¶ 57] For example, in gifts of tangible property there must be either a delivery of the property to the donee or a delivered deed of gift. *Id.*; *see Inwood*, 706 S.W.3d at 348 (effective inter vivos gift requires delivery of possession). Conversely, "[t]he modern law of real estate … does not require that the transferee of the land be put into possession in order to become the holder of a property interest in the land" as long as "the settlor has executed and delivered his deed." *Bogert's The Law of Trusts and Trustees* § 148 (May 2026 Update) (emphasis added). However, while possession of the trust *res* may not be vital, it has "some probative effect in establishing the fact that the settlor intended a completed trust." *Id.*

[¶ 58] Preston Hollow cites the supreme court's opinion in *Perfect Union* for the proposition that "it is not absolutely necessary that legal title be granted to the trustee in specific terms" to create an express trust. 748 S.W.2d at 220.[49] However, while it may be true that no "specific terms" are required, the court finds no law supporting the notion that legal title does not need to leave the settlor and transfer to the trustee one way or another (other than in a declaration of trust).

b. "Trusts" to Secure Payment Distinguished

[¶ 59] As Trust Code § 111.003 acknowledges, the word "trust" can be used in a variety of contexts that do not implicate the Trust Code. That is, § 111.003(4) lists several "security instrument[s]" that are not considered "trusts" for Trust Code purposes: a deed of trust, mortgage, or security interest as defined by the Business & Commerce Code.

[¶ 60] "A deed of trust is a deed conveying title to real property to a trustee as security until the grantor repays a loan" and confers a "power to sell on default." *Woodhaven Dr. 1401 Land Tr. v. Citibank, N.A.*, No. 05-17-01393-CV, 2018 WL 6629586, at *4 (Tex. App.—5th Dist., Dec. 19, 2018, no pet.). A mortgage is a "lien against property that is granted to secure an obligation (such as a debt) and that is extinguished upon payment or

[49] Preston Hollow's Trust Code Resp. at 16 n.30.

performance according to stipulated terms." *Id.* (citing *Mortgage*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

[¶ 61] But as Bogert explains, "characterizing mortgagees as trustees … is inaccurate" because "[u]nlike a trustee, a mortgagee holds an interest in identified property for his or her benefit—not for the benefit of another." *Bogert's The Law of Trusts and Trustees* § 29 (May 2026 Update). Also, "a mortgagee has no proprietary interest, such as the right to dispose of the property, and no right of possession unless and until he acquires them by foreclosure of his lien." *State v. First Interstate Bank of Tex., N.A.*, 880 S.W.2d 427, 429 (Tex. App.—3d Dist. 1994, writ denied); *see also Taylor v. Brennan*, 621 S.W.2d 592, 593 (Tex. 1981) ("Texas follows the lien theory of mortgages. Under this theory the mortgagee is not the owner of the property and is not entitled to its possession, rentals or profits.").

[¶ 62] And a "security interest as defined by the Business & Commerce Code" means "an interest in personal property or fixtures which secures payment or performance of an obligation." TEX. BUS. & COM. CODE § 1.201(b)(35).

[¶ 63] Accordingly, each "security instrument" excluded from the Trust Code by § 111.003 shares the essential feature that it is granted to secure an obligation (such as a debt). *See Woodhaven*, 2018 WL 6629586, at *4. In comparison, an express trust is a fiduciary relationship regarding property which relationship subjects the person holding legal title to the property to equitable duties to deal with the property for another's benefit. *See* Trust Code § 111.004(4).

[¶ 64] Notably, neither party cites a Texas case addressing whether (i) a trust indenture established to hold a security interest for the benefit of bondholders in connection with a bond offering is an "express trust" under the Trust Code or (ii) an indenture trustee has fiduciary duties like a trustee of a true express trust. Accordingly, this is a matter of first impression.

[¶ 65] However, there is a line of cases distinguishing an "assignment for the benefit of creditors"—in which a trustee is transferred property as an intermediary for the purpose of reducing a debtor's property to cash to pay creditors—from a mortgage or deed of trust. The court concludes that the commentary and case law concerning assignments for the benefit of creditors provides helpful guidance here.

[¶ 66] The common law assignment for the benefit of creditors is a true (*i.e.*, express) trust of the assigned property, with the creditors as the beneficiaries and with a resulting trust to the settlor of any surplus. *See*

Bogert's The Law of Trusts and Trustees § 250 (May 2026 Update).[50] Bogert explains:

> "The assignment in trust for creditors is to be distinguished from a mere power of attorney to sell and from a mortgage, in that these transactions retain for the debtor some control of and interest in the property, while the true general assignment means an absolute and unlimited transfer of the property for the benefit of the creditors."

Id.

[¶ 67] An important aspect of an assignment for the benefit of creditors is that "[t]he settlor has no interest in the trust property, except that the grantor is a resulting beneficiary if the *res* proves larger than necessary to satisfy the purposes of the trust." *Id.*

[¶ 68] Texas cases dating back over 150 years agree with Bogert. The Amarillo Court of Appeals provided the following summary of the differences:

> Over the years, the phrase "assignment for the benefit of creditors" has come to refer to or mean a particular type of conveyance. More importantly, it differs from a conveyance reflected in a mortgage or deed of trust. The latter generally describes a conveyance of an estate or property by way of pledge for the security of a debt and which estate ends upon payment of the debt. *Dwight v. Overton*, 35 Tex. 390, 408 (Tex. 1872). The

[50] Notably, § 250 is titled "Trusts used primarily for business purposes—Trusts to secure or pay creditors" and discusses bond trust indentures and assignments for the benefit of creditors. That Bogert discusses these two "trusts" in the same section supports the notion that the court should look to case law concerning assignments for the benefit of creditors to address this matter of first impression.

> former denotes a conveyance of all interest in and control over property by an insolvent debtor to its creditors in payment or discharge of debts. *Id.* at 408–09 (first observing that the deed conferred full and absolute power on the trustees, to sell and dispose of the lands, make deeds to purchasers, receive purchase money, and apply it to the uses expressed in the instrument, and do and perform every act which the grantor himself could have done had he never executed the deed and then noting that mere mortgages lack such powers)[.]

Poole v. Poole, No. 07-18-00415-CV, 2019 WL 3952834, at *2 (Tex. App.—7th Dist. Aug. 21, 2019, no pet) (mem. op.).

[¶ 69] A key difference between mortgages or deeds of trust and assignments for the benefit of creditors is that the latter "involve[s] conveyances where the property conveyed is, in virtue of such conveyance, placed beyond the control of those making such assignment *and where no equity of redemption remains*." *Id.* (citing *Nat'l Debenture Corp. v. Adams*, 115 S.W.2d 757, 760 (Tex. Civ. App.—1st Dist. (Galveston) 1938, no writ.)) (emphasis added); *cf. Bogert's The Law of Trusts and Trustees* § 250 (May 2026 Update) (a defeasance clause is a standard term of trust indentures); *see also Defeasance*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("A condition upon the fulfillment of which a deed or other instrument is defeated or made void; a contractual provision containing such a condition.").

[¶ 70] *Poole* analyzes seven factors courts use to distinguish between a deed of trust or mortgage and an assignment for the benefit for creditors (which is a true trust). An arrangement is a deed of trust or mortgage if:

> 1) it does not provide that the trustee shall take possession of the property; 2) it impliedly provide[s] that possession shall remain in the grantor since the grantor retain[s] the duty of caring for, paying taxes upon, and keeping the premises in good condition; 3) it d[oes] not convey all of the grantor's property; 4) it authorize[s] the trustee to sell the property only in the event the grantor fail[s] to pay the creditors named in it; 5) the grantor retain[s] the ability to reclaim the property by paying the debt; 6) it provide[s] that any surplus be paid the grantor; and 7) the grantor [i]s not wholly insolvent when he execute[s] it.

2019 WL 3952834, at *2 (citing *O'Brien v. Perkins*, 276 S.W. 308, 311 (Tex. Civ. App.—7th Dist. 1925), *aff'd*, 285 S.W. 260 (Tex. Comm'n App. 1926, judgment adopted)).

[¶ 71] Because it is a matter of first impression whether a corporate trust indenture such as the Bond Documents is an express trust, the court concludes that the *Poole* factors help distinguish an express trust from a security instrument. The court applies the relevant factors to the Bond Documents in Part III(A)(3)(b)(ii), below.

[¶ 72] Finally, Preston Hollow argues that a "corporate indenture trust" is not on the list of things that a "'trust' … does not include" under

Trust Code § 111.003, and if the Legislature had intended to categorically exclude the Trust Code's application to indenture trusts, they would have said so.[51] *See Cameron*, 618 S.W.2d at 540 (word are presumed to be excluded from a statute on purpose). The court rejects that argument for the following reasons:

[¶ 73] For starters, the § 111.003 list of things that an express trust does not "include" is not exclusive. *See* TEX. GOV'T CODE § 311.005(13) ("'Includes' and 'including' are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded."). Further, the court does not conclude that a corporate indenture trust can never be, or include, an express trust, and its ruling is confined to the Bond Documents.

3. The Bond Documents do not create an express trust.

a. Introduction

[¶ 74] The court concludes that the Bond Documents do not create an express trust for two independent reasons: they do not (i) transfer the entire legal title of the Trust Estate to Truist nor (ii) demonstrate a manifest intent

[51] Preston Hollow's Trust Code Resp. at 30-31.

to create a fiduciary relationship concerning the Trust Estate between Truist and the bondholders.

b. The Bond Documents do not transfer full legal title to Truist.

i. The Bond Documents describe the Trust Estate as only a collection of security instruments/interests.

[¶ 75] The Master Indenture provides that "to secure payment of the Outstanding Obligations," and "in consideration of," *inter alia*, "One Dollar ($1.00) to the Obligor in hand paid by the Master Trustee," Obligor (*i.e.*, Senior Care) did thereby "grant, bargain, sell, alienate, remise, release, convey, assign, transfer, mortgage, hypothecate, pledge, set over, and confirm to the Master Trustee, forever, all and singular the following described properties, and grant a security interest therein":[52]

> GRANTING CLAUSE FIRST: All revenue, Accounts (including any Blocked Accounts), accounts receivable, and Gross Revenues of the Obligor …
>
> GRANTING CLAUSE SECOND: The real property described on Exhibit A hereto (the "Premises") and incorporated herein for all purposes, including, without limitation, all buildings, structures, fixtures, additions, enlargements, extensions, improvements, modifications or repairs now or hereafter located thereon …
>
> GRANTING CLAUSE THIRD: All of the rights, titles, interests and estates, now owned or hereafter acquired by the Obligor in and to any and all accounts, chattel paper, goods, documents,

[52] Truist's Trust Code Mot. App'x. at 461.

> instruments, general intangibles, deposit accounts, investment property, equipment, inventory, fixtures, and any and all other personal property of any kind or character … arising out of the operation and use of the improvements located on the Premises …
>
> GRANTING CLAUSE FOURTH: Any amounts on deposit from time to time in any fund or account created hereunder …
>
> GRANTING CLAUSE FIFTH: Any and all property that may, from time to time now or hereinafter, … be subjected to the lien and security interest hereof by the Obligor or by anyone in its behalf …[53]

[¶ 76] Collectively referred to as the "Trust Estate," the above were granted to the Master Trustee "TO HAVE AND TO HOLD, IN TRUST, WITH THE POWER OF SALE" subject to the condition that if Obligor "paid[] the Outstanding Obligations … the rights, titles, liens, security interests, and assignments herein granted shall cease, determine, and be void and this grant shall be released by the Master Trustee."[54]

[¶ 77] Additionally, the Master Indenture defines "Mortgage Property" to mean "the real property and personal property of the Obligor which is subject to the Lien and security interest of this Indenture pursuant to Granting Clause Second, Third or Fifth of this Indenture and the Deed of Trust."[55]

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[53] Truist's Trust Code Mot. App'x. at 461-63.
[54] Truist's Trust Code Mot. App'x. at 463.
[55] Truist's Trust Code Mot. App'x. at 475.

[¶ 78] As Truist argues,[56] "to have and to hold, in trust, with power of sale," is language routinely employed in security instruments, such as a deed of trust. *See Kimmons v. Hirsch*, No. 01-08-00646-CV, 2010 WL 3448043, at *3 (Tex. App.—1st Dist. Aug. 31, 2010, no pet.) (mem. op.) ("deed of trust creates only a lien on the mortgaged property and does not operate as a transfer of legal title," and thus only conveys an interest in the property that is secured by deeding the property to a trustee, who received it "in trust, with power of sale"); *see also* 14 WEST'S TEX. FORMS, REAL PROPERTY § 10.140 (2d ed.) (February 2026 Update) (deed of trust template including: "Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale … ").

[¶ 79] The Bond Indenture's Granting Clauses likewise state that "as security for payment of the principal of, and premium, if any, and interest on the Bonds when due," the Issuer (*i.e.*, Woodloch) "pledge[d] and assign[ed] to, and grant[ed] a security interest to the Bond Trustee in" the following (also collectively defined as the "Trust Estate"):

> (i) All rights, title and interest of the Issuer under, in and to the Loan Agreement, the Notes, and all revenues and receipts receivable by the Issuer therefrom …

[56] Truist's Trust Code Mot. at 10-11.

> (ii) All funds … including moneys, investment income and investments therein held by the Bond Trustee pursuant to the terms of this Bond Indenture, and any other moneys payable to the Bond Trustee by or for the account of the Issuer pursuant to the Notes and this Bond Indenture …
>
> (iii) Any and all other interests in real or personal property … of any kind specifically mortgaged, pledged or hypothecated, as and for additional security hereunder by the Issuer … in favor of the Bond Trustee ….[57]

[¶ 80] Like the Master Indenture, the Bond Indenture states that the Trust Estate is conveyed "for the equal and proportionate benefit and security of the Holders from time to time of the Bonds issued under and secured by this Bond Indenture."[58]

[¶ 81] The Bond Indenture further states that "if the Issuer … shall well and truly pay … the principal of the Bonds and the premium … then this Bond Indenture and the rights hereby granted shall cease, terminate, and be void."[59]

[¶ 82] Finally, the same day that the Master Indenture and Bond Indenture were executed, Senior Care executed a "Multiple Indebtedness Deed of Trust, and Assignment of Leases and Rents, Security Agreement and

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[57] Truist's Trust Code Mot. App'x. at 357-58.
[58] Truist's Trust Code Mot. App'x. at 358.
[59] Truist's Trust Code Mot. App'x. at 358.

Fixture Filing" for Truist's benefit for the same property described in the Master Indenture's granting clauses.[60]

[¶ 83] Accordingly, by their terms, the Bond Documents refer to Truist's interest in the "Trust Estate" as a collection of security interests.[61] Master Indenture § 4.01, titled "Title to Trust Estate and Mortgaged Property and Lien of this Instrument and Deed of Trust" further states:

> The Obligor has good and indefeasible title to the Trust Estate free and clear of any liens, charges, encumbrances, security interests and adverse claims whatsoever except Permitted Exceptions. The Obligor represents that it has the *right to mortgage* and otherwise pledge the Trust Estate, including the Mortgaged Property, and will warrant and defend to the Master Trustee, the title and *the lien of this Indenture and the Deed of Trust as a valid and enforceable mortgage thereon* and pledge thereof, subject to Permitted Exceptions. *This Indenture constitutes a valid and subsisting mortgage of and lien on the Trust Estate*, all in accordance with the terms hereof, subject to Permitted Exceptions.[62]

[¶ 84] However, the clearest expression of the parties' intent is contained in the bond offering's "Official Statement," which states:

> "[The notes] will be secured by a mortgage lien on the Community (the 'Mortgaged Property') granted to the Master

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[60] Truist's Trust Code Mot. App'x. at 622-26.

[61] *See, e.g.*, Truist's Trust Code Mot. App'x. at 475 ("'Mortgaged Property' means the real property and personal property of the Obligor which is subject to the Lien and security interest of this Indenture pursuant to Granting Clause Second, Third or Fifth of this Indenture and the Deed of Trust.").

[62] Truist's Trust Code Mot. App'x. at 498.

> Trustee pursuant to a Multiple Indebtedness Deed of Trust … and a security interest in the Gross Revenues of the Obligor and the Funds established under the Master Indenture, to the extent and in the manner provided in the Master Indenture."[63]

[¶ 85] In express terms, the Official Statement referred to the "Trust Estate" conveyed by the Master Indenture as a series of security interests:

> Pursuant to the Master Indenture, the Obligor has pledged and granted to the Master Trustee (a) *a security interest* in all revenue, accounts receivable, and Gross Revenues of the Obligor, with certain limited exceptions, (b) *a security interest* in all personal property owned or hereafter acquired by the Obligor, (c) *a security interest* in the real property described in the Master Indenture, (d) *a security interest* in the amounts on deposit in any fund or account established under the Master Indenture, and (e) *a security interest* in any other property from time to time subjected to the lien of the Master Indenture (the "Trust Estate").[64]

[¶ 86] The five items listed above align with the Master Indenture's five granting clauses.[65]

[¶ 87] Finally, the Bond Documents and related documents show that Truist was not taking outright title or ownership of the property included in the Trust Estate. For instance, Master Indenture § 7.16 states that "[a]ny provision of this Indenture to the contrary notwithstanding, the Master

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[63] Truist's Trust Code Mot. App'x. at 24; *see also id.* (referring to the "lien and security interests created by the Master Indenture"), *id.* at 40 (same).
[64] Truist's Trust Code Mot. App'x. at 40 (emphasis added).
[65] *See* ¶ 75 above.

Trustee shall not be obligated to take title to any real property included in the Trust Estate."[66] Furthermore, the Official Statement states in clear terms that "[t]he Obligor will own and operate the Community."[67]

ii. The *Poole* Factors

[¶ 88] Five of the seven *Poole* factors are relevant to this analysis: (i) Senior Care kept possession of the property, (ii) Senior Care retained a duty to take care of, pay taxes for, and maintain the property, (iii) Truist had the power to sell the property only upon default, (iv) Senior Care retained the ability to reclaim the property by paying the debt, and (v) and surplus from a sale of the property would be paid to Senior Care. *See* 2019 WL 3952834, at *2. Together these factors identify the Bond Documents as a security instrument only, and not a true express trust.

[¶ 89] **Possession:** The Bond Documents establish that Senior Care was going to keep possession of and manage the Trust Estate. As noted above, the Official Statement states that Senior Care will "operate the Community."[68] Section 7.04 further states that Master Trustee shall "enter and take

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[66] Truist's Trust Code Mot. App'x. at 535.
[67] Truist's Trust Code Mot. App'x. at 25.
[68] Truist's Trust Code Mot. App'x. at 25.

possession of[] the Trust Estate … to hold, operate, and manage" only upon an Event of Default.[69]

[¶ 90] **Maintenance:** Senior Care was also responsible for developing and managing the property. The Official Statement details who would serve as the Project's contractor, architect, construction monitor, developer, and manager.[70] None of whom were Truist, and all of whom were under Senior Care's direct or indirect control.[71] Master Indenture § 4.06 requires Senior Care to cause the Property "to be maintained and kept in good condition." Senior Care further covenanted that it "shall exercise operational and management control, including day-to day business decisions, with respect to the Property" and "shall not abandon the Property, or [] close or otherwise cease to operate the Property."[72] And Senior Care was required to pay taxes for the Project.[73]

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[69] Truist's Trust Code Mot. App'x. at 529.
[70] Truist's Trust Code Mot. App'x. at 26-28.
[71] Truist's Trust Code Mot. App'x. at 26-28.
[72] Truist's Trust Code Mot. App'x. at 569-60 (included in a schedule to the Master Indenture titled "Other Covenants"), *see id.* at 570-71 (stating Obligor shall complete within a reasonable time any facilities on the property, keep the same in good condition or repair or rebuild where necessary, pay all operating costs, operate the property, etc.).
[73] Truist's Trust Code Mot. App'x. at 499-500 (Master Indenture § 4.05).

[¶ 91] **Power of Sale:** Master Trustee had the power to sell the property only upon an Event of Default.[74]

[¶ 92] **Defeasance:** Senior Care could reclaim the property by paying the debt.[75]

[¶ 93] **Surplus:** Upon an Event of Default and property sale, after all other persons are paid, Senior Care was entitled to the surplus of the sale.[76]

[¶ 94] Accordingly, the Bond Documents meet all the relevant *Poole* factors distinguishing a security instrument from a true trust. *See Poole*, 2019 WL 3952834, at *2.

iii. The First Court of Appeals

[¶ 95] Finally, Preston Hollow argues that the First Court of Appeals has "already examined the Bond Documents, summarizing the nature and effect of the Bond Documents, and Truist's trustee role thereunder" and concluded that Truist held legal title to funds generated by the Project in trust for the benefit of the bondholders.[77]

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[74] Truist's Trust Code Mot. App'x. at 529-31 (Master Indenture § 7.05).
[75] Truist's Trust Code Mot. App'x. at 463 (Master Indenture Granting Clauses).
[76] Truist's Trust Code Mot. App'x. at 537-38 (Master Indenture § 7.21).
[77] Preston Hollow's Trust Code Resp. at 6-7, 27 (citing *Senior Care Living VI, LLC v. Preston Hollow Cap., LLC*, 695 S.W.3d 778, 817 n.24 (Tex. App.—1st Dist. 2024, pet. denied).

[¶ 96] The court disagrees because (i) the First Court of Appeals never determined whether the Trust Code applies to the parties' arrangement nor examined the nature of Truist's duties under the Bond Documents and (ii) while the court concluded that Senior Care could not sue for conversion of funds held by Truist because Senior Care did not own, possess, or have an entitlement to possess those funds, the court did not conclude that *Truist* owned the funds. *See Senior Care Living VI*, 695 S.W.3d at 817. The court was silent on who the owner was, but it might have reasonably concluded that the bondholders were the owners. *See id.* And Senior Care was not in possession, or entitled to possession, of the funds under the Bond Documents.

iv. Conclusion

[¶ 97] The Bond Documents have key aspects of a security arrangement: (i) their purpose is to secure a debt, (ii) the power to sell is only upon default, (iii) Senior Care could extinguish the instrument upon repayment of the debt, and (iv) Senior Care was entitled to any surplus upon a sale of the property. *See Poole*, 2019 WL 3952834, at *2; *Woodhaven*, 2018 WL 6629586, at *4; *First Interstate Bank of Tex.*, 880 S.W.2d at 429; *Taylor*, 621 S.W.2d at 593. And the Bond Documents and related documents expressly state that Senior Care will "own" the property and refer to the Trust Estate as a collection of security interests.[78]

[¶ 98] Accordingly, the court concludes the entire "Trust Estate" consists of only a collection of security interests, which under Texas law do not transfer full legal title, and so no express trust was formed. *See Taylor*, 621 S.W.2d at 593.

[¶ 99] Further, while the court concluded above that a trust is not excluded from the Trust Code because it "includes" a security instrument, there must be some trust *res other than* a security instrument.[79] Because that is not so here, the Trust Code does not govern the Bond Documents.

c. The Bond Documents do not reflect an intent to create a fiduciary relationship.

i. The Intent Requirement

[¶ 100] A second basis exists to conclude that the Bond Documents do not comprise an express trust; the Bond Documents do not demonstrate an intent to create a fiduciary relationship between Truist and the bondholders regarding the Trust Estate.

[78] Truist's Trust Code Mot. App'x. at 25.
[79] *See* Part III(A)(1) above.

[¶ 101] To create an express trust, there must be a manifested intent to create a fiduciary relationship between the trustee and beneficiary regarding some property.[80]

[¶ 102] Generally, a fiduciary relationship "applies to any person who occupies a position of peculiar confidence towards another," and because of that position is expected to (i) act with integrity and fidelity and (ii) deal fairly and in good faith with the intended beneficiary. *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 512 (Tex. 1942); *see also Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—13th Dist. 1994, writ denied) ("A trustee's fundamental duties include the use of the skill and prudence which an ordinary, capable, and careful person will use in the conduct of his own affairs as well as loyalty to the trust's beneficiaries.").

[¶ 103] Truist argues that the Bond Documents do not manifest an intent to create a fiduciary relationship because corporate indenture trustee relationships generally lack such an intent.[81] Instead, the Bond Documents' purpose was to secure a debt.[82] Truist further argues that the various

[80] *See* ¶ 47 above.
[81] Truist's Trust Code Mot. at 20-21, 24-30.
[82] Truist's Trust Code Mot. at 20-21.

contractual limits on Truist's duties under the Bond Documents demonstrate that the parties did not intend to create a traditional trustee/beneficiary relationship.[83]

[¶ 104] Preston Hollow responds that the Bond Documents' "repeated use of terms like 'Trustee,' 'Trust Estate,' and 'in trust,' along with Truist's formal acceptance of the trusts,[] manifests clear intent to form a fiduciary relationship."[84] Further, Preston Hollow highlights Master Indenture §§ 7.07 and 7.09, which specifically state that upon an Event of Default the Master Trustee may bring suit "in its own name as trustee of an *express trust*."[85] Finally, Preston Hollow highlights that upon an Event of Default, Truist has heightened duties to exercise its rights and powers "using the same degree of care and skill as a reasonably prudent man under the same circumstances," which "mirror[s] trustee fiduciary duties."[86]

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[83] Truist's Trust Code Mot. at 21-23. Truist also argued that the Bond Documents' lack of a specific reference to and incorporation of the Trust Code further confirms a lack of intention to create an express trust. *Id.* at 23-24. However, the court is unpersuaded by this argument because there is no such requirement.

[84] Preston Hollow's Trust Code Resp. at 20 (citing Truist's Trust Code Mot. App'x. at 160–61, 224, 357–58, 396, 461–64, 622–26).

[85] Preston Hollow's Trust Code Resp. at 23-24 (citing Truist's Trust Code Mot. App'x. at 196, 532-33) (emphasis added).

[86] Preston Hollow's Trust Code Resp. at 24 (citing Truist's Trust Code Mot. App'x. at 199, 244, 396, 538).

ii. Pre-Default Analysis

[¶ 105] The court agrees with Preston Hollow that the Bond Documents' stated intent was to secure assets for the bondholders' benefit so that those assets could be available to repay a loan.[87] In its capacity as Master Trustee, the Bond Documents defined Truist's duties.[88] And—before an Event of Default—Truist had to "perform such duties *and only such duties* as are specifically set forth in this Indenture" and had no implied obligations beyond the Master Indenture's express terms.[89] Those duties excluded a duty to monitor others' compliance with the Bond Documents.[90] And as discussed above, Truist had no responsibility to maintain the Property.[91]

[¶ 106] Preston Hollow argues that Truist "indisputably retained significant power and control over the Trust Estate" and therefore was "[f]ar

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[87] *See* Truist's Trust Code Mot. App'x. at 358, 461 (Master Indenture is "to secure the payment of the Outstanding Obligations and the performance of the covenants therein"); *see also* Preston Hollow's 166(g) Resp. at 20 (stating that "the purpose of the trust … was [at a minimum] to secure borrower's assets for the benefit of the bondholders, so that those assets would be used to repay the loan").

[88] *See* Part III(B)(2) below.

[89] *See* Truist's Trust Code Mot. App'x. at 538 (emphasis added).

[90] *See* Part III(B)(2)(a) below.

[91] *See* Part III(A)(3)(b)(ii) above.

from being a 'passive' or 'dry' trustee."[92] For example, the Bond Documents grant Truist the power to:

> (1) appoint co-trustees; (2) establish and manage multiple trust funds in accordance with their prescribed purposes; (3) distribute incoming payments according to detailed priority waterfall provisions; (4) accelerate payments upon default; (5) exercise remedies on behalf of bondholders, including foreclosure on property; and (6) institute trust-related legal proceedings in its own name as the "trustee of an express trust."[93]

[¶ 107] However, taking for example Truist's duties to "manage" and "distribute" Project funds, Truist lacked any discretion and instead its duties were tightly prescribed and ministerial. For instance, Master Indenture § 3.01 states that Truist "shall" distribute funds from the Revenue Fund according to fifteen detailed steps, ending with any remaining amounts deposited in the Surplus Fund "to be applied as provided in Section 3.04."[94] Section 3.04 in turn details nine payment priorities that "shall be applied by Master Trustee."[95] Pending disbursement of funds, "the Master Trustee shall promptly invest … such amounts in accordance with Section 3.07," which

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[92] Preston Hollow's Trust Code Resp. at 17 (citing *Nolana Dev. Ass'n v. Corsi*, 682 S.W.2d 246, 249 (Tex. 1984); *Tex. Petroleum Land Mgmt., LLC v. McMillan*, 641 S.W.3d 831, 841 n.3 (Tex. App.—11th Dist. 2022, no pet. h.)).
[93] Preston Hollow's Trust Code Resp. at 17-18.
[94] Truist's Trust Code Mot. App'x. at 491-92.
[95] Truist's Trust Code Mot. App'x. at 494-95.

states the money may be invested only in "Permitted Investments" upon Obligor's request.[96] And § 3.01 reiterates that funds held by Truist "shall be held in trust and applied *solely as provided*" by these sections.[97] Therefore, the "control" Truist had was purely ministerial.[98] *Cf. Dipprey v. Double Diamond*, 637 S.W.3d 784, 805 (Tex. App.—11th Dist. 2021, no pet.) ("[C]ontrol over funds belonging to others is the classic situation in which a fiduciary duty arises." (citation omitted)).

iii. Post-Default Analysis

[¶ 108] After an Event of Default (and assuming Truist received written notice of the same[99]), Truist had heightened duties to act akin to a traditional fiduciary. It also acquired heightened powers, such as to (i) accelerate debt payment; (ii) enter, take possession of, operate, and manage the Property; and (iii) instigate lawsuits in its own name and as trustee of an express trust.[100] However, the court concludes that—even post-Event of Default—the Bond Documents do not evidence an intent to give Truist the

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[96] Truist's Trust Code Mot. App'x. at 492-93, 497.
[97] Truist's Trust Code Mot. App'x. at 492 (emphasis added).
[98] Truist's Trust Code Mot. App'x. at 490 (stating "all deposit accounts of the Obligor shall at all times be controlled by the Master Trustee").
[99] *See* Part III(B)(4) below.
[100] *See* Truist's Trust Code Mot. App'x. at 529 (Master Indenture § 7.04), 532 (Master Indenture § 7.07), 533 (Master Indenture § 7.09).

type of control that is emblematic of creating fiduciary duty. *Dipprey*, 637 S.W.3d at 805.

[¶ 109] For instance, while Master Indenture § 7.02 states the Master Trustee may accelerate the debt, it is only "upon direction of the Noteholder Representative" and "subject to Section 7.16 and Section 7.20."[101] Section 7.20 allows the Noteholder Representative (Preston Hollow) to exercise in its own right any powers conferred to the Master Trustee by Master Indenture Article VII.[102]

[¶ 110] Section 7.16 is titled "Control by Holders of Obligations" and states that "Noteholder Representative ... shall have the right to direct the time, method, and place of conducting any proceeding for any remedy available to the Master Trustee or exercising any trust or power conferred on the Master Trustee."[103]

[¶ 111] And while § 7.16(b) states that "the Master Trustee may take any other action deemed proper" by it, it may only do so to the extent "not inconsistent with [Noteholder Representative's] direction."[104]

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[101] Truist's Trust Code Mot. App'x. at 527.
[102] Truist's Trust Code Mot. App'x. at 536.
[103] Truist's Trust Code Mot. App'x. at 535.
[104] Truist's Trust Code Mot. App'x. at 535.

[¶ 112] Accordingly, even post-default, Truist's powers were curtailed and subject to Preston Hollow's ongoing control, which is inconsistent with an express trust. *See* Trust Code § 112.034 (no trust is created if legal and equitable title merge into one individual); *Rife v. Kerr*, 513 S.W.3d 601, 614 (Tex. App.—4th Dist. 2016, pet. denied) (same). Accordingly, an Event of Default does not alter the court's conclusions.

iv. References to "Trust" and "Trustee"

[¶ 113] Regarding the Bond Documents repeated use of "trust" and "trustee," the supreme court examined a similar issue concerning the creation of an escrow in *Boozer v. Fischer*:

> To determine whether these parties created an escrow, we look to the parties' intent as expressed by the terms of their agreement. As usual when construing agreements, no magic words are necessary, but the words the parties used in their agreement—especially the word "escrow" itself—are the clearest indicators of that shared intent. While not dispositive or sufficient, the use of the word "escrow" indicates more clearly than any other their actual intention. This principle is merely a manifestation of our general approach to contracts. We also look to whether the agreement fits the basic elements of an escrow. As with other contracts, we may look to the objective circumstances of the escrow agreement's execution and the property's deposit as appropriate to help elucidate (but not to inject ambiguity into) the agreement's text.

674 S.W.3d 314, 324 (Tex. 2023) (internal quotes and cites omitted); *see also Nolana*, 682 S.W.2d at 249 (Tex. 1984) ("[T]he mere designation of a party as 'trustee' does not create a trust."); *Goldbaum v. Blum*, 15 S.W. 564, 565 (Tex. 1891) ("[T]he law looks not to the form but to the substance of a contract[.]").

[¶ 114] Furthermore, Trust Code § 111.003 acknowledges that the word "trust" is sometimes used in a variety of contexts that are distinct from the fiduciary relationship created by an express trust. *Cf.* TEX. PROP. CODE § 51.0001(8) (defining "Trustee" for purposes of defining persons with authority to exercise a power of sale in a real estate lien situation as one "authorized to exercise the power of sale under the terms of a security instrument").

[¶ 115] The Bond Documents twice state that Truist could bring suit "as trustee of an express trust."[105] However, two references to an "express trust" across hundreds of pages of contracts does not alter the intent expressed in the documents as a whole.[106] *See Myers-Woodward, LLC v. Underground*

[105] Truist's Trust Code Mot. App'x. at 196, 532-33).
[106] Truist's Trust Code Mot. App'x. at 532-33.

Servs. Markham, LLC, 716 S.W.3d 461, 472 (Tex. 2025) (we "discern th[e] intent" of the parties by "exam[ing] the entire document").[107]

[¶ 116] Therefore, the court concludes that the Bond Documents do not manifest an intent to create a fiduciary relationship between Truist and the bondholders with respect to the Trust Estate and therefore do not comprise an express trust.

4. Conclusion

[¶ 117] Accordingly, the court concludes that the Bond Documents did not create an express trust, and therefore Trust Code § 111.0035(b)'s minimum standard that a trustee must act in good faith and in furtherance of the trust's purpose does not apply in this case.

B. Issue Two – The Scope of Truist's Duties

1. Introduction

[¶ 118] The next step is to determine the scope of Truist's contract duties. Given that the Trust Code's unwaivable duties do not apply to the Bond Documents, the court is to give effect to the "written expression of the parties'

[107] Moreover, this language in the Master Indenture appears to mirror provisions of the Trust Indenture Act of 1939. *See* 15 U.S.C.A. § 77qqq (indenture trustee is authorized in the case of a default to file claims "in its own name and as trustee of an express trust").

intent" and enforce the deal the parties struck. *Sundown Energy LP v. HJSA No. 3, Ltd. P'ship*, 622 S.W.3d 884, 888 (Tex. 2021) (per curiam).

[¶ 119] The court's discussion begins with Truist's pre-default duties, including the Bond Documents' related limits. The court then discusses Truist's heightened, post-default duties. Finally, the court will discuss the notice Truist needed to receive to trigger its post-default duties.

2. Pre-Default Duties

a. Truist's Duties

[¶ 120] The parties' intent, as expressed by the Bond Documents' plain language, was that before an Event of Default Truist's duties were only those expressed in the documents.

[¶ 121] Specifically, Master Indenture § 8.01(a) states that, "Except during the continuance of an Event of Default, the Master Trustee undertakes to perform such duties and only such duties as are specifically set forth in this Indenture and no implied covenants or obligations shall be read into this Indenture against the Master Trustee." *See* Bond Indenture § 901(a) (similar).

[¶ 122] This is a typical bond trustee indenture arrangement. *See Elliott Assocs. v. J. Henry Schroder Bank & Tr. Co.*, 838 F.2d 66, 68 (2d Cir. 1988) ("[A] trustee's pre-default duties are limited to those duties expressly provided in the indenture"); Steven L. Schwarcz, *Indenture Trustee Duties: The Pre-Default Puzzle*, 88 U. Cin. L. Rev. 659, 663 (2019) ("By far the dominant view … is that trustees have no fiduciary duties to investors prior to an Event of Default. Rather, their duties are ministerial and limited to the specific terms of the indenture." (citations omitted)).

[¶ 123] And, pre-default, Truist was not required to monitor Senior Care's compliance with the Bond Documents or investigate to discover any Events of Default: For example,

> Bond Trustee shall not be bound to ascertain or inquire as to the observance or performance of any covenants, conditions, or agreements on the part of the Issuer or on the part of the Obligor under the Loan Agreement or the Master Indenture or any other Bond Documents.

Bond Indenture § 901(c). Further,

> The Bond Trustee shall not be obligated to monitor or confirm, on a continuing basis or otherwise, the Obligor's or any other Person's compliance with the covenants described herein or the other Bond Documents or with respect to any reports or other documents filed hereunder or under any other Bond Document

Bond Indenture § 901(h). Similarly,

> It shall not be the duty of the Master Trustee, except as herein provided, to see that any duties or obligations herein imposed upon the Obligor or any other Person are performed.

Master Indenture § 8.03(i); *see also id.*, § 8.03(f) (similar).

[¶ 124] Finally, although Truist had a duty to notify the bondholders of "defaults" that "the Master Trustee [wa]s deemed to have knowledge as provided in Section 8.03(h)" (Master Indenture § 8.02), § 8.03(h) in turn states "[t]he Master Trustee shall not be deemed to have knowledge of any default … unless a Responsible Officer has actually received notice of such default in writing." Accordingly, at least pre-Event of Default, Truist was required to give notice to bondholders of only defaults for which it was itself was given written notice.

[¶ 125] Nonetheless, Preston Hollow argues that "[w]here Truist knows of a default … it would be illogical for another party lacking such knowledge (*e.g.*, Preston Hollow) … to be required to provide Truist with notice of the same as a condition precedent for Truist to be held liable for such misconduct."[108] But that is what the parties agreed to and "we do not protect parties from the consequences" of their own agreements. *See James Constr. Grp., LLC v. Westlake Chem. Corp.*, 650 S.W.3d 392, 403-04 (Tex. 2022) (internal quotation omitted); *see also id.* at 408 ("The bargained-for

[108] Preston Hollow's 166(g) Resp. at 26.

requirement of written notice necessarily serves a purpose beyond actual notice; otherwise, its inclusion is useless.").

[¶ 126] Accordingly, the court concludes that Truist had no duty to monitor Senior Care/Bouldin's compliance with the Bond Documents or advise bondholders of defaults absent a written notice in the form described in the Bond Documents. *See Nat'l Plan Adm'rs, Inc. v Nat'l Health Ins. Co.*, 235 S.W.3d 695, 703 (Tex. 2007) (a party is not in breach when taking actions expressly permitted by contract).

[¶ 127] However, those conclusions apply only before Truist receiving written notice of an Event of Default.

b. Truist's Own Negligence

[¶ 128] Finally, the parties debate this clause:

> No provision of this Indenture shall be construed to relieve the Master Trustee from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct[.]

Master Indenture § 8.01(c).

[¶ 129] Preston Hollow argues that § 8.01(c) means Truist could not be negligent in failing to investigate or notify the bondholders of Senior Care/Bouldin's defaults.[109] But Preston Hollow ignores § 8.01(c)(1), which

[109] Preston Hollow's 166(g) Resp. at 17-18.

states that "[§ 8.01(c)] shall not be construed to limit the effect of Subsection (a) of this Section." Section 8.01(a) is the provision discussed at ¶ 121 above that provides that pre-Event of Default Truist has *only* the duties specifically set forth in the Master Indenture.

[¶ 130] Construing the various provisions together as a whole, the court concludes that § 8.01(c) is a general standard of care Truist must comply with, but § 8.01(c) does not impose new duties or revive duties that the Bond Documents' other terms exclude. *Myers-Woodward*, 716 S.W.3d at 472 (construe contracts' provisions as a whole).

[¶ 131] Accordingly, because the Bond Documents state that Truist had no duty to monitor Senior Care/Bouldin's compliance with the Bond Documents or advise bondholders of defaults prior to receiving written notice of an Event of Default, Truist may not be found negligent/in breach under § 8.01(c) for failing to do the same. *Nat'l Plan Adm'rs*, 235 S.W.3d at 703 (no breach of duty when contract permits such actions).

3. Post-Default Duties

[¶ 132] The Bond Documents dictate that Truist has this post-Event of Default standard of care:

> In case any Event of Default has occurred and is continuing, the Master 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 reasonably prudent man would exercise or use under the circumstances in the conduct of his own affairs

Master Indenture § 8.01(b); Bond Indenture § 901(a) (similar).

[¶ 133] There is a dearth of law concerning this standard in the context of a trust indenture and whether it rises to the fiduciary duties of a common law trustee. Some sources say it does not. *See Meckel v. Cont'l Res. 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."); *see also* Steven L. Schwarcz, *Indenture Trustee Duties: The Pre-Default Puzzle*, 88 U. Cin. L. Rev. 659, 660 (2019) ("This Article hereinafter refers to indenture trustees performing that role as 'trustees,' without suggesting that they have, or should have, the fiduciary duties of a common law trustee."); *Bogert's The Law of Trusts and Trustees* § 250 (May 2026 Update) ("Several authors have assumed that the corporate trust mortgage creates some special trustee relationship which is different from the ordinary trustee relation.").

[¶ 134] Regardless, the parties agree that post-Event of Default, Truist owed the bondholders a higher standard of care than pre-Event of Default.[110]

[¶ 135] The court concludes that this party-defined contractual standard is akin to a traditional trustee's fiduciary standard of care to exercise its powers as an ordinary or reasonably prudent person would in Truist's circumstances. *See Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—13th Dist. 1994, writ denied) ("A trustee's fundamental duties include the use of the skill and prudence which an ordinary, capable, and careful person will use in the conduct of his own affairs."); *see also* Trust Code § 117.012 (the "prudent investor rule" may be invoked through language directing a trustee to "use[] the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs"]).

4. Was written notice to Truist required to trigger its heightened duties?

[¶ 136] Preston Hollow argues that any limits on Truist's duties became inapplicable when Senior Care did not deposit Project revenues into

[110] *See* Truist Trust Code Mot. at 24 (referring to "enhanced" post-default duties); Preston Hollow's Trust Code Resp. at 37 (arguing the "reasonably prudent man" standard "mirrors traditional fiduciary duties").

the Blocked Account—regardless of whether Truist received written notice of this default—because Master Indenture § 8.01(b)'s heightened duties omit a notice requirement.[111]

[¶ 137] Truist relies on Master Indenture § 8.03(h) to argue that it had knowledge of an Event of Default—thereby triggering its heightened duties under § 8.01(b)—*only if* it received written notice of any Event of Default.[112]

[¶ 138] The court agrees with Truist.

a. Master Indenture § 8.01(b)

[¶ 139] To begin, Preston Hollow is correct that Master Indenture § 8.01(b)'s plain terms do not explicitly require *notice* of an Event of Default to trigger Truist's heightened duties:

> In case any Event of Default has occurred and is continuing, the Master 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 reasonably prudent man would exercise or use under the circumstances in the conduct of his own affairs.

Master Indenture § 8.01(b); Bond Indenture § 901(a) (similar).

[¶ 140] However, the court concludes that Truist still had to have *knowledge* of an Event of Default to trigger its heightened duties.

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[111] FAP ¶ 39; *see also* Bond Indenture § 901(a) (similar).
[112] Truist's 166(g) Mot. at 18.

[¶ 141] While the parties did not squarely address whether a trustee under the Bond Documents may be subject to heightened duties without any knowledge of an Event of Default (whether actual, constructive, by notice, or otherwise), courts in other jurisdictions have required the trustee to have that knowledge, even if not expressly stated in the contract. *See Phoenix Light SF Ltd. v. Bank of New York Mellon*, No. 14-CV-10104 (VEC), 2017 WL 3973951, at *3 (S.D.N.Y. Sept. 7, 2017) ("Although the GAs do not specifically provide that the Trustee must have knowledge of an Event of Default before it is subject to a prudent person duty, the parties do not dispute, and the Court previously held, that the Trustee's prudent-person duty arises after the Trustee has knowledge of an Event of Default."). Ultimately, a party cannot be expected to comply with a duty of care it does not know it has.

[¶ 142] Regardless, here, Preston Hollow is alleging Truist had actual knowledge of the Event of Default, so the court assumes for now that some knowledge was required to impose heightened duties.[113]

b. Master Indenture § 8.03(h)

[¶ 143] Knowledge of an Event of Default is required to trigger Truist's heightened duties under § 8.01(b) (see directly above), and Truist relies on Master Indenture § 8.03(h) to argue it has that knowledge *only if* it received written notice of an Event of Default.[114] Section 8.03(h) provides that:

> The Master Trustee shall not be deemed to have knowledge of any default (as defined in Section 8.02 hereof) hereunder, except an Event of Default under Section 7.01(a), (b), (u) or (v) hereof, unless a Responsible Officer has actually received notice of such default in writing from the Obligor, the Holder of any Obligation or the Noteholder Representative, referencing the Obligations and describing such default and stating in the notice that a default has occurred.[115]

[¶ 144] Black's gives two definitions for "deem": (1) "To treat (something) as if (a) it were really something else, or (b) it has qualities that it does not have," and (2) "[t]o consider, think, or judge." *Deem*, BLACK'S LAW DICTIONARY (12th ed. 2024). Black's states that the first definition is preferred and the later should be avoided. *See id.*

[¶ 145] Under the first definition, Master Indenture § 8.03(h) can be paraphrased as saying "the Master Trustee shall not be treated as having

[114] Truist's 166(g) Mot. at 18.
[115] The primary Event of Default Preston Hollow relies on relevant to this Opinion and Order is § 7.01(c) ("the Obligor fails to make any deposit required pursuant to Article III"), so the exceptions do not apply. *See* FAP ¶ 39.

knowledge of any default *that it does not have* unless it or its agents receive written notice of such default" (emphasis added). Thus, that definition protects Truist from a finding of constructive knowledge, but would not prevent it from having actual knowledge of a default (*i.e.*, the provision does not apply to knowledge *it does have*). *Compare Knowledge*, BLACK'S LAW DICTIONARY (12th ed. 2024) (constructive knowledge, "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person") *with id.* (actual knowledge, "[d]irect and clear knowledge, as distinguished from constructive knowledge").

[¶ 146] However, under the second definition, Master Indenture § 8.03(h) would prevent Truist from being "considered" to have knowledge of any default unless it received written notice of such default. That is, even if Truist had actual knowledge, we will not consider a fact as known until it has written notice. This is the construction Truist argues for.[116] It is consistent with other, non-legal dictionary definitions of "deem." *See Deem*, MERRIAM-WEBSTER.COM[117] ("to come to think or judge : consider"); *Deem*, CAMBRIDGE

[116] Truist's 166(g) Mot. at 16-17.
[117] https://www.merriam-webster.com/dictionary/deem (last visited Aug. 8, 2026).

DICTIONARY.COM[118] ("to consider or judge"); *Deem*, DICTIONARY.COM[119] ("to judge or consider").

[¶ 147] Preston Hollow argues that "it would be illogical for another party lacking [] knowledge [of an Event of Default] (e.g., Preston Hollow) … to be required to provide Truist with notice of the same as a condition precedent for Truist to be held liable."[120] But written notice can serve an important purpose—it removes uncertainty as to what level of duties Truist owed at any point in time. *Cf. Worsdale v. City of Killeen*, 578 S.W.3d 57, 76 (Tex. 2019) ("[A] determination of actual notice, albeit a question of law, always turns on the particular facts of a case. … Certainty can be achieved simply by giving formal notice[.]"). That § 8.03(h) might excuse Truist from heightened duties for Events of Default it actually knew of but did not receive written notice for is a foreseeable result if Truist's construction of the provision is correct. *James Constr. Grp.*, 650 S.W.3d at 403 (Texas courts do not protect parties from the consequences of their own agreements).

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[118] https://dictionary.cambridge.org/us/dictionary/english/deem (last visited Aug. 8, 2026).
[119] https://www.dictionary.com/browse/deem (last visited Aug. 8, 2026).
[120] Preston Hollow's 166(g) Resp. at 26.

[¶ 148] Preston Hollow further argues that it would be futile to give Truist written notice of that which it has actual knowledge of.[121] But the parties contracted for written notice and "when a contract requires written notice as a condition precedent to the right to enforce an obligation under the contract, substantial compliance with that requirement may not be achieved in the absence of a writing." *James Constr. Grp.*, 650 S.W.3d at 409.

[¶ 149] Normally, futility of notice arises when there has been a breach that is impossible to cure, thereby making notice of said breach futile. *See Duncan v. Woodlawn Mfg., Ltd.*, 479 S.W.3d 886, 898 (Tex. App.—8th Dist. 2015, no pet.). That is not the situation here and the court concludes the futility doctrine does not apply.

c. Analysis

[¶ 150] Neither party argued that the provision is ambiguous. Section 8.03(h) could have been written more clearly by not using "deem," but a contract is not ambiguous because a provision, "through the lens of hindsight, could have been more clearly stated." *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 130 (Tex. 2015). Where contract language is not ambiguous the

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[121] Preston Hollow's 166(g) Resp. at 27.

court is obligated to interpret it as a matter of law. *DeWitt Cnty. Elec. Co-op., Inc. v. Parks*, 1 S.W.3d 96, 100 (Tex. 1999).

[¶ 151] So, the court concludes that Master Indenture § 8.03(h) requires Truist to receive written notice even when it might have actual knowledge of an Event of Default to trigger its heightened duties under § 8.01(b). *See Phoenix Light SF Ltd. v. Bank of New York Mellon*, No. 14-CV-10104 (VEC), 2017 WL 3973951 (S.D.N.Y. Sept. 7, 2017).

[¶ 152] In *Phoenix Light*, the court addressed similar language in a series of Pooling and Service Agreement (PSA) trusts: "the Trustee shall not be deemed to have knowledge of an Event of Default until a Responsible Officer of the Trustee shall have received written notice thereof." *Id.* at *16 (citing PSA § 8.02(viii)). The court rejected the plaintiffs' argument that "deemed to have knowledge" meant only constructive knowledge, not actual knowledge, because in another PSA part discussing the trustee's duties, the trustee had to act if it had written notice *or actual knowledge*. *Id.* at *17 (citing *Shaw Grp. Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 124 (2d Cir. 2003) ("[A]n interpretation of a contract that has the effect of rendering at least one clause superfluous or meaningless ... is not preferred and will be avoided if possible.")).

[¶ 153] The court explained that, "If the Trustee's prudent person duty were to arise upon the Trustee's actual knowledge, or if Section 8.02(viii) intended to include 'actual knowledge,' then the PSA could have used the phrase 'actual knowledge' in Section 8.02(viii), as it did elsewhere." *Id.*

[¶ 154] Likewise, here the Bond Indenture provides that:[122]

> For purposes hereof, the Issuer shall not be deemed to have knowledge of any fact or the occurrence of any event unless and until its Authorized Officer has written notice thereof *or actual knowledge* thereof.

Bond Indenture § 102(m) (emphasis added).

[¶ 155] Bond Indenture § 102(m) refers to a different party (Issuer, *i.e.*, Woodloch), but the analysis is the same; when the parties wanted "knowledge" to include written notice or actual knowledge, they said so. *PopCap Games*, 350 S.W.3d at 708 ("The use of different language in different parts of a contract generally means that the parties intended different things.").

[¶ 156] So, the court concludes that the absence of an "actual knowledge" provision in Master Indenture § 8.03(h) was intentional. *City of*

[122] The court has previously concluded that the Master Indenture and Bond Indenture should be construed together. *Preston Hollow*, 2025 Tex. Bus. 55, ¶ 65.

Hous. v. Williams, 353 S.W.3d 128, 145 (Tex. 2011) (the "purposeful inclusion of specific terms in a writing implies the purposeful exclusion of terms that do not appear").

[¶ 157] Although the Bond Indenture's language is slightly different, it reaches the same result: "The Bond Trustee shall not be required to take notice or be deemed to have notice of any failure hereunder or any other Bond Documents … unless the Bond Trustee shall be notified of such failure by the Issuer or by the Series 2017A Majority Representative." Bond Indenture § 901(h).

[¶ 158] The phrase "required to take notice" is akin to constructive knowledge. *See Notice*, BLACK'S LAW DICTIONARY (12th ed. 2024) (constructive notice, "Notice arising by presumption of law from the existence of facts and circumstances that a party had *a duty to take notice of*[.]" (emphasis added)). However, because the court concludes that "shall not be … deemed to have notice" applies even where Truist had actual notice, Bond Indenture § 901(h)'s additional language does not change the result.

[¶ 159] Accordingly, the court concludes that the Bond Documents afforded Truist protections insofar that it would (i) not be considered to have knowledge of an Event of Default, thereby triggering its "reasonably prudent man" duties, or (ii) be required to give notice of defaults (as defined by Master Indenture § 8.02) without first receiving written notice of the same.

5. Conclusion

[¶ 160] The court grants-in-part Truist's requests for rulings as follows:

(i) Truist had no duty to monitor Senior Care's compliance with Senior Care's separate contractual obligations absent a written notice of an Event of Default in the form described in the Bond Documents and

(ii) Truist had no duty to advise Preston Hollow of Senior Care's defaults absent a written notice of an Event of Default in the form described in the Bond Documents.

[¶ 161] The court makes no factual determinations when or whether any Events of Default occurred or notice was given.

[¶ 162] The court denies without prejudice Truist's request for a ruling as a matter of law that Greg Yanok's actions, as pled, did not violate Truist's duties to Preston Hollow. The court is not convinced at this time that there are no fact issues that preclude the court from making that determination and the parties paid the issue minor attention in their briefs.

C. Issue Three – Breach of Fiduciary Duties v. Breach of Trust

[¶ 163] Breach of fiduciary duty and breach of trust have the same elements: (i) a fiduciary/trust relationship; (ii) the defendant's breach of a fiduciary/trust duty to the plaintiff; and (iii) some resulting injury to the plaintiff or benefit to the defendant. *Primexx Energy Opportunity Fund, L.P. v. Primexx Energy Corp.*, 2025 Tex. Bus. 9, 709 S.W.3d 619, 649 (1st Div.) (breach of fiduciary duty); *Quion Inv'rs, Inc. v. Gribble*, No. 14-21-00369-CV, 2023 WL 370493, at *5 n.2 (Tex. App.— 14th Dist. Jan. 24, 2023, no pet.) (breach of trust). In this case, Preston Hollow's claims are based on the same conduct.[123]

[¶ 164] Both parties agreed that breach of trust is a statutory claim arising out of the Trust Code. *See* Trust Code § 111.004(25).[124] Accordingly, this issue is mooted by the court's conclusion that the Trust Code does not apply to Preston Hollow's claims.

[123] *Compare* FAP ¶ 58(a)-(i) *with* FAP ¶ 67(a)-(i).

[124] *See* Preston Hollow's January 14, 2026, Breach of Trust Brief at 2, 5; Truist's February 4, 2026, Response to Breach of Trust Brief at 6-7.

IV. CONCLUSION

[¶ 165] The court grants-in-part and denies-in-part Truist's requests for legal rulings pursuant to TEX. R. CIV. P. 166(g) contained in its October 27, 2025, motion. *See supra* ¶s 160-62.

[¶ 166] The court dismisses Preston Hollow's Breach of Trust claim with prejudice.

[¶ 167] These conclusions apply during this case unless the court later modifies them based on new information.

It is so ORDERED.

Bill Whitehill

BILL WHITEHILL
Judge of the Texas Business Court,
First Division

SIGNED: August 14, 2026

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