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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Case No. 12-12020 (MG)
RESIDENTIAL CAPITAL, LLC, et al.,	Chapter 11
Debtors.	Jointly Administered
AMERICAN RESIDENTIAL EQUITIES, LLC, in its own individual capacity and in its capacity as Trustee under that certain American Residential Equities, LLC Master Trust Agreement dated August 8, 2005,	Adv. Case No. 12- 01934 (MG)
Plaintiff,	
v.	
GMAC MORTGAGE, LLC, as successor by merger to GMAC Mortgage Company, and BALBOA INSURANCE COMPANY,	
Defendants.	

DEFENDANT BALBOA INSURANCE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE ADVERSARY COMPLAINT

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Defendant Balboa Insurance Company ("Balboa") respectfully submits this memorandum of law in support of its motion to dismiss the single claim asserted against it in the Adversary Complaint filed by Plaintiff American Residential Equities, LLC ("ARE" or "Plaintiff"). The only claim against Balboa – indeed, the only substantive allegations concerning Balboa in the seven-count Adversary Complaint– is a claim for fraud, which also is asserted against Defendant GMAC Mortgage, LLC ("GMACM"). The fraud claim against Balboa should be dismissed because the Adversary Complaint fails to come close to pleading an actionable fraud claim against Balboa, let alone to meeting the enhanced pleading standards for such claims set forth in Fed. R. Bankr. P. 7009(b) and Fed. R. Civ. P. 9(b). Among other reasons, the Adversary Complaint fails to identify any alleged fraudulent misrepresentations or omissions by Balboa; any duty that Balboa had to disclose information to ARE, with which it had no relationship whatsoever; any fraudulent intent on the part of Balboa; and any justifiable reliance by ARE on any alleged misrepresentations or omissions by Balboa. In addition, ARE's claims are untimely because the only alleged accrual date pled for its fraud claim is 2004, and ARE filed its Adversary Complaint ("Compl.") in 2012, which is well after any applicable limitations period expired. For all of these reasons, the Court should dismiss the Adversary Complaint as to Balboa.

JURISDICTION AND VENUE

This Court has jurisdiction to consider this matter under 28 U.S.C. § 157(a) and 1334(b). This is a non-core proceeding under 28 U.S.C. § 157(b). However, pursuant to Local Bankruptcy Rule 7012-1, Balboa consents to the entry of final orders or judgment by the Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgment consistent with Article III of the United States Constitution. Venue of this adversary

proceeding before this Court is proper under 28 U.S.C. § 1409.

BACKGROUND

On May 14, 2012, debtors, including GMACM, filed a petition under Chapter 11 of the Bankruptcy Code in this Court. On November 9, 2012, ARE filed the Adversary Complaint against GMACM and Balboa. According to that Complaint, ARE holds title as trustee to a pool of residential mortgage loans that were serviced by GMACM pursuant to a servicing agreement signed by ARE and GMACM in July 2004. Compl. ¶¶ 1, 14, 19-20. This agreement established GMACM's servicing obligations concerning the loans, which among other things included ensuring that the mortgaged properties were adequately insured, *id.* ¶ 22, and purchasing property insurance (known as "force placed insurance" or "lender placed insurance") for the properties if the owners of the properties failed to maintain adequate insurance, *id.* ¶ 54. Pursuant to its obligations under the servicing agreement, GMACM obtained lender placed insurance from Balboa, and GMAC then charged ARE for the costs it incurred to Balboa for the insurance. *Id.* ¶ 56.

The Complaint primarily focuses on GMACM's alleged breach of a number of its obligations under its agreement with ARE, and asserts seven claims against GMACM arising from those alleged breaches. The only claim asserted against Balboa is a claim for fraud, which also is asserted against GMACM. *Id.* Count VI (¶¶ 53-70). That claim alleges that Balboa secretly '"kicked back' to GMAC . . . sums of money labeled as 'commissions,"' and that the cost of insurance premiums charged by Balboa to GMACM was inflated to include the amount of the "kickback." *Id.* ¶ 57. ARE alleges that GMACM charged ARE these inflated premium costs, and reimbursed itself for the costs out of ARE's monies. *Id.* ¶¶ 56, 60.

The Adversary Complaint also alleges that GMACM concealed this alleged "Kickback

Scheme," and committed "specific frauds," including failing to submit ARE's insurable claims to Balboa, failing to pursue such claims adequately, improperly delaying foreclosures, and causing ARE to obtain higher cost insurance policies, including lender placed insurance policies that were not necessary or were placed at inflated prices. *Id.* ¶¶ 63, 65, 68. As to Balboa, the Adversary Complaint broadly alleges that Balboa acted in concert with GMACM to commit these "specific frauds," but offers no factual support for this allegation. ARE also alleges that GMACM delegated functions under its agreement with ARE, including functions concerning insurance tracking and borrower correspondence regarding insurance, to Balboa, but that this alleged agency relationship was not disclosed to ARE. *Id.* ¶¶ 65-66.

MOTION TO DISMISS STANDARD

Federal Rule of Bankruptcy Procedure 7012(b), which incorporates Federal Rule of Civil Procedure 12(b)(6), permits a bankruptcy court to dismiss an adversary proceeding if a plaintiff's complaint fails to state a claim upon which relief can be granted. Under the Federal Rules, to survive a motion to dismiss, the pleadings must contain factual allegations sufficient "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Although a complaint's factual allegations are presumed to be true and construed in favor of the pleader, *Metro-Goldwyn-Mayer Home Entm't, Inc. v. Ames Dep't Stores, Inc.* (*In re Ames Dep't Stores, Inc.)*, 322 B.R. 238, 241 (Bankr. S.D.N.Y. 2005), a court "is 'not bound to accept as true a legal conclusion couched as a factual allegation."' *Enron Corp. v. Credit Suisse First Boston Int'l (In re Enron Corp.)*, 328 B.R. 58, 64 (Bankr. S.D.N.Y. 2005) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A claim should be dismissed "when the plaintiff's allegations, taken as true, along with any inferences that flow from them, are insufficient as a matter of law." *Dibbern v. Adelphia*

Comc'ns Corp. (In re Adelphia Commc'ns Corp.), 325 B.R. 89, 98 (Bankr. S.D.N.Y. 2005) (citing *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993)).

ARGUMENT

PLAINTIFF'S FRAUD CLAIM AGAINST BALBOA FAILS TO MEET APPLICABLE PLEADING STANDARDS AND IS TIME BARRED.

A. ARE's Allegations Do Not Meet the Heightened Pleading Standard Required of Fraud Claims.

ARE's conclusory allegations and vague assertions of fraud do not satisfy the heightened pleading requirements of Federal Bankruptcy Rule 7009(b). When a plaintiff alleges fraud, Rule 7009(b), which incorporates Fed. R. Civ. P. 9(b), imposes a heightened pleading standard that requires the complaint to describe the circumstances constituting fraud "with particularity." *Ross v. A.H. Robins Co.*, 607 F.2d 545, 557 (2d Cir. 1979); *see Ticketplanet.com v. TPAC, LLC (In re Ticketplanet.com)*, 313 B.R. 46, 59 (Bankr. S.D.N.Y. 2004) (stating pleading requirements under Bankruptcy Rule 7009(b) and Fed. R. Civ. P. 9(b) apply to common law fraud claim in bankruptcy court). In particular, to state a fraud claim, a "complaint must identify the time, place, speaker, and sometimes even the content of any alleged misrepresentations." *See Shane v. Marceca (In re Marceca)*, 127 B.R. 328, 332 (Bankr. S.D.N.Y. 1991) (citing *Ouaknine v. MacFarlane*, 897 F.2d 75, 79 (2d Cir. 1990)). Plaintiffs "may not simply point to a bad result and allege fraud." *In re Chambers Dev. Secs. Litig.*, 848 F. Supp. 602, 616 (W.D. Pa. 1994). Furthermore, where, as here, a complaint accuses more than one defendant of fraud, each defendant must be informed of the nature of his alleged participation in the fraud. *See DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987) (finding allegations as to defendants generally were inadequate to assign liability to specific defendants for allegedly fraudulent misrepresentations).

1. ARE's Allegations Are Insufficient to State a Claim for Fraud.

Under these heightened pleading standards, the Adversary Complaint fails to come close to alleging sufficient facts to establish a claim for common law fraud under Pennsylvania law.[1] To state a claim for fraud against Balboa, ARE had to plead facts to establish: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." *Rock v. Voshell*, 397 F. Supp. 2d 616, 622 (E.D. Pa. 2005) (citing *Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994)). ARE fails to plead sufficiently any of these elements in the Adversary Complaint.

First, ARE does not allege a single affirmative misrepresentation or false statement by Balboa in the seventeen paragraphs of its fraud claim. *See* Compl. ¶¶ 53-70. ARE refers to its reliance on the "premise that GMACM and Balboa had conducted their business fairly" and alleges the defendants were "making a secret profit," but these allegations do not constitute misrepresentations by Balboa, let alone material ones. Compl. ¶¶ 59, 61. Similarly, none of the "[s]pecific frauds committed by GMAC" identified in the Adversary Complaint are affirmative

[1] Bankruptcy courts should apply the choice of law rules of the forum state unless the case implicates important federal bankruptcy policy. *In re Gaston & Snow*, 243 F.3d 599, 605 (2d Cir. 2001). New York choice-of-law rules first require an analysis of whether a true conflict exists between the laws of potentially applicable jurisdictions. *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 492 (S.D.N.Y. 2001) (citation omitted). If a conflict does exist, an interest analysis is applied in order to determine which jurisdiction has the greatest concern with the specific issue raised in the litigation, taking into account the contacts of the parties and occurrences, policies underlying each jurisdiction's rules, the strength of the governmental interests embodied in these policies, and the extent to which these interests are implicated by the contacts. *Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 337 (2d Cir. 2005). In particular, for claims based on fraud, courts typically focus on the "place where the injury was inflicted," as opposed to the place where the fraudulent act originated." *Rosenberg v. Pillsbury Co.*, 718 F. Supp. 1146, 1150 (S.D.N.Y. 1989) (citing *Sack v. Low*, 478 F.2d 360, 365-66 (2d Cir. 1973) (interpreting New York law)). Here, ARE alleges that its fraud claim arises under Pennsylvania law. *See* Compl. ¶ 12. GMACM, which maintains its principal place of business in Pennsylvania, *id.* ¶ 7, likewise has assumed in its motion to dismiss the Adversary Complaint that Pennsylvania law applies to the common law claims. *See* GMACM Motion to Dismiss, at 13 n. 5 (ECF No. 18). Given these circumstances, and the fact that the Adversary Complaint fails to allege where ARE maintains its principal place of business, for purposes of this motion only Balboa assumes Pennsylvania law applies.

misrepresentations, and in any event, they concern only alleged actions by GMACM, not by Balboa. *Id.* ¶ 65 (alleging that "[s]pecific frauds committed by GMAC . . . include[] GMAC's intentional failure to submit insurable claims of ARE to Balboa, failure of GMAC to adequately pursue submitted claims of ARE to Balboa, GMAC causing ARE to obtain insurance from Balboa for higher value policies than necessary or reasonable, and/or causing ARE to obtain policies from Balboa where forced-placed insurance was not warranted or was placed at inflated prices."). The failure to identify any misrepresentations on the part of Balboa, let alone the specific time, place and speaker of such a misrepresentation, is fatal to ARE's fraud claim. *See U.S. ex rel. Sanders v. American-Amicable Life Ins. Co. of Texas*, No. 03-4327, 2007 WL 2032914, at *8 (E.D. Pa. July 12, 2007) (holding that complaint which "is devoid of any allegation of an affirmative misrepresentation" cannot state a claim for fraud); *see also Morilus v. Countrywide Home Loans, Inc.*, 651 F. Supp. 2d 292, 308 (E.D. Pa. 2008) (dismissing fraud claim where misrepresentations were not attributed to defendant); *Hart v. Univ. of Scranton*, 838 F. Supp. 2d 324, 329 (M.D. Pa. 2011) (same).

To the extent that Plaintiff is attempting to base its fraud claim against Balboa on a fraudulent omission, the Adversary Complaint likewise fails to identify any specific omission by Balboa, let alone one that could be deemed fraudulent. The Adversary Complaint alleges that GMACM "allowed Balboa to take over its own servicing functions in all aspects of evaluating insurance needs," that this was a "clear conflict" because Balboa would financially benefit, and that "the existence of this agency relationship was never disclosed to Plaintiffs." Compl. ¶ 66. While it is unclear whether ARE is contending that Balboa should have disclosed the fact that it allegedly carried out GMACM's functions under its agreement with ARE, the Adversary Complaint neither offers any specific facts about any such alleged omission nor does it allege

that Balboa improperly carried out any such functions, and this purported omission therefore cannot serve as the basis for a fraud claim. Likewise, while it is unclear if ARE is alleging that Balboa did not disclose the fact that it purportedly "inflated its insurance premiums so that it could offer a kickback to loan servicers such as GMAC," Compl. ¶ 64, there are no facts alleged about such an omission sufficient to support a fraud claim.

In any event, any purported omissions by Balboa cannot serve as the basis for a fraud claim because ARE does not allege that Balboa had any duty of any kind to ARE. It is well established that an omission can only be fraudulent when there is an independent duty to disclose the allegedly omitted information. *See, e.g.*, *Estate of Evasew*, 584 A.2d 910, 913 (Pa. 1990) (fraud by omission requires independent duty of disclosure); *Daniel Boone Area Sch. Dist. v. Lehman Bros., Inc.*, 187 F. Supp. 2d 400, 408 (W.D. Pa. 2002) (same). Thus, to state a claim for fraud, an assertion of an omission must be accompanied by a duty to speak. *Drapeau v. Joy Tech., Inc.*, 670 A.2d 165, 171 (Pa. 1996). "This duty does not normally arise unless there is a confidential or fiduciary relationship between the parties." *Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc.*, 40 F. Supp. 2d 644, 656 (W.D. Pa. 1999) (citations omitted); *City of Harrisburg v. Bradford Trust Company*, 621 F. Supp. 463 (M.D. Pa. 1985) (omission is actionable only where a party is under an obligation to disclose the information because of a fiduciary or confidential relationship to the party seeking disclosure) (concurring op.). Here, the Adversary Complaint does not allege that Balboa had any relationship of any kind with ARE, let alone a confidential or fiduciary one that would give rise to a duty to disclose. In such circumstances, the Court should dismiss ARE's fraud claim. *See Sunquest Info Sys., Inc.*, 40 F. Supp. 2d at 656 (complaint that fails to allege duty to disclose fails to state claim for fraud by omission).

Second, Plaintiff's fraud claim against Balboa also fails because the Adversary Complaint fails to allege sufficiently that Balboa had any fraudulent intent. The Adversary Complaint alleges that "Balboa, with malice, intentionally inflated its insurance premiums so that it could offer a kickback to loan servicers such as GMAC . . . " Compl. ¶ 64. As an initial matter, a conclusory allegation about a party's intent, *i.e.*, that Balboa acted with "malice," cannot satisfy ARE's pleading obligations. *See Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (plaintiff must plead specific factual allegations and may not rely on either "bald assertions" or "vague and conclusory allegations"); *Andrew v. Ivanhoe Fin., Inc.*, No. CIV.A. 07-729, 2007 WL 2844937, at *5 (E.D. Pa. Sept. 28, 2007) ("generalities and legal conclusions concerning fraud are simply insufficient to survive a motion to dismiss"). Moreover, even putting aside the fact that the allegation is conclusory and devoid of factual support, the only intent ARE attributes to Balboa is an intent to benefit loan servicers, and there is no allegation that Balboa had an intent to deceive or defraud ARE. ARE's fraud claim against Balboa therefore fails for this reason as well. *See Vives v. Rodriguez*, 849 F. Supp. 2d 507, 522-23 (E.D. Pa. 2012) (finding fraud insufficiently plead where no factual allegations supported conclusory statements of scienter); *Duane Morris, LLP v. Todi*, No. 001980, 2002 WL 31053839, at *4 (Pa. Com. Pl. Sept. 3, 2002) (dismissing fraud claim where complaint did not plead any facts to establish intent to defraud).

Third, because ARE fails to allege any misrepresentations by Balboa, ARE necessarily fails to allege the element of justifiable reliance on a misrepresentation. And even if the Adversary Complaint had alleged a fraudulent omission by Balboa -- which it does not-- the absence of any duty running from Balboa to ARE would have made any reliance by ARE on such an omission unreasonable. *See Cara Corp. v. Continental Bank (In re Cara Corp.)*, 148

B.R. 760, 774-75 (Bankr. E.D. Pa. 1992) (noting that it is not reasonable to rely on a party to disclose facts where the party does not have a disclosure obligation); *see also ScanSource, Inc. v. Datavision--Prologix, Inc.*, No. CIV.A. 04-CV-4271, 2005 WL 974933 (E.D. Pa. Apr. 26, 2005) (dismissing fraud claim where reliance plead with insufficient particularity). For all of these reasons, the Court should dismiss Plaintiff's fraud claim against Balboa.

2. The Adversary Complaint Does Not State a Claim for Aiding and Abetting Fraud.

Although the Adversary Complaint does not specifically allege an aiding and abetting fraud claim, any such claim would fail. *See, e.g.,* Compl. ¶ 61 ("GMAC, aided and abetted by Balboa, grossly violated its duties owed to ARE . . ."). As an initial matter, Pennsylvania courts have not recognized an aiding and abetting cause of action. *See e.g.*, *Fleet Nat. Bank v. Boyle*, No. CIV.A. 04CV1277LDD, 2005 WL 2455673 (E.D. Pa. Sept. 12, 2005); *Jack Greenberg, Inc. v. Grant Thorton LLP (In re Jack Greenberg, Inc.)*, 240 B.R. 486, 524 (Bankr. E.D. Pa. 1999).

Even if Pennsylvania courts recognized an aiding and abetting claim, ARE's allegations are woefully deficient.[2] Pursuant to Section 876(b) of the Restatement of Torts a cause of action for aiding and abetting consists of the following: "(1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation." *Gilliland*, 2007 WL 4105223, at *7-8. The Adversary Complaint contains no specific facts that would establish that Balboa had any information regarding GMACM's relationship or interactions with ARE, let

[2] Some courts in Pennsylvania have suggested that if Pennsylvania were to recognize an aiding and abetting claim, they would follow the Restatement requirements. *See Gilliland v. Hergert*, No. 2:05-CV-01059, 2007 WL 4105223, at *7-8 (W.D. Pa. Nov. 15, 2007) (predicting that Pennsylvania would rely on the Restatement requirements if it recognizes a cause of action for the tort of aiding and abetting generally); *see also Chicago Title Ins. Co. v. Lexington & Concord Search & Abstract, LLC*, 513 F. Supp. 2d 304, 318 (E.D. Pa. 2007) (noting absence of any evidence to suggest that Pennsylvania Supreme Court would not adopt cause of action for aiding and abetting breach of fiduciary duty.").

alone knowledge that GMACM purportedly breached any duty to ARE, or that Balboa provided assistance or encouragement to do the same. In jurisdictions that recognize an aiding and abetting claim, the absence of such allegations would be fatal to the claim. *See e.g., Casey v. U.S. Bank National Ass'n.*, 26 Cal. Rptr. 3d 401, 408-09 (Cal. Ct. App. 2005) (dismissing aiding and abetting claim where complaint contained no allegations that defendant had actual knowledge of the primary wrong the defendant substantially assisted); *In re Cascade Inter. Secs. Litig.*, 840 F. Supp. 1558, 1565 (S.D. Fla. 1993) (dismissing claim for aiding and abetting fraud asserted against defendant with no independent duty to plaintiff because there were no allegations that defendant acted with a conscious and specific motivation to aid the fraud).

Similarly, the allegation that GMACM "allowed Balboa to take over its own servicing functions," Compl. ¶ 66, would not suffice to state an aiding and abetting claim. As noted, ARE does not allege that Balboa did anything wrong in allegedly performing these servicing duties, or even that the delegation was prohibited or in variance with a representation made by any of the parties involved. Furthermore, there are no allegations connecting the delegation of servicing responsibilities to the so-called "Kickback Scheme." Simply put, these allegations are wholly irrelevant because the Adversary Complaint does not allege that Balboa did anything improper. *Cf. Caplen v. Sec. Nat'l Servicing Corp., Inc.*, 514 F. Supp. 2d 746, 752 (E.D. Pa. 2007) *aff'd sub nom. Caplen v. SN Servicing Corp.*, 343 F. App'x 833 (3d Cir. 2009) ("[t]he defendants' exercise of their contractual rights under the note and mortgage cannot be fraud.").

B. ARE's Fraud Claim is Barred by the Statute of Limitations and Must Be Dismissed as Untimely.

ARE's fraud claim against Balboa also must be dismissed because it is barred by the applicable statutes of limitations. Statutes of limitations are considered matters of procedure, and a federal court sitting in diversity must look to the law of the forum state to determine which

statute of limitations applies. *Stafford v. Int'l Harvester Co.*, 668 F.2d 142, 147 (2d Cir.1981); *see also Morson v. Kreindler & Kreindler, LLP*, 814 F. Supp. 2d 220, 225 (E.D.N.Y. 2011). Under New York law, because ARE is not a citizen of New York, the Court must apply the shorter of (1) New York's period of limitations or (2) the statute of limitations applicable in Pennsylvania. *See* N.Y. C.P.L.R. § 202. Pennsylvania's statute of limitations for fraud is two years. 42 Pa. Cons. Stat. Ann. § 5524. In New York, the statute of limitations is the greater of six years from the date the cause of action accrued, or two years from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it. N.Y. C.P.L.R. § 213(8). Thus, a two year statute of limitations applies.

The only relevant date the Adversary Complaint identifies is 2004, when ARE and GMACM allegedly entered into their servicing contract. *See* Compl. ¶ 58. This is eight years before ARE filed its November 2012 Adversary Complaint, and thus ARE's fraud claim against Balboa is untimely. Moreover, the Adversary Complaint fails to include any allegations that would even remotely support an argument for tolling of the statute of limitations. The Adversary Complaint contains no allegations whatsoever to identify when ARE discovered the alleged fraud or should have discovered it by exercising due diligence, or even that ARE was unable to discover the fraud despite the exercise of due diligence. The absence of such allegations is fatal to any tolling argument. *See, e.g., Ingenito v. AC & S, Inc.*, 633 A.2d 1172, 1174 (Pa. Super. Ct. 1993) (refusing to toll the statute of limitations when a party had the means to discover a claim within his power but neglected to use them).

Moreover, any claim that the statute of limitations should be tolled because Balboa fraudulently concealed the alleged "Kickback Scheme," Compl. ¶ 63, fails because, as noted, Balboa did not have any duty to disclose to ARE. *See Bank of Am. Corp. v. Superior Court*, 130

Cal. Rptr. 3d 504, 511 (Cal. Ct. App. 2011) (dismissing fraud claim where defendant had no independent duty to disclose to its borrowers its alleged intent to defraud its investors by selling them mortgage pools at inflated values); *Sunquest Info. Sys., Inc.*, 40 F. Supp. 2d at 656 (finding no liability based on a failure to disclose information where no duty to speak existed); *In re Barrett Home Corp.*, 165 B.R. 50, 52 (Bankr. M.D. Fla. 1994) (holding that no actionable fraud occurred where there was no duty to speak). The applicable statute of limitations therefore bars ARE's fraud claim against Balboa.[3]

CONCLUSION

For the foregoing reasons, Balboa respectfully requests that the Court dismiss the Adversary Complaint as to Balboa.

Dated: New York, New York
March 1, 2013

Respectfully submitted,

BuckleySandler LLP
Counsel for Defendant Balboa Insurance Company

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[3] While the Amended Complaint does not contain a conspiracy claim, it does allege that GMAC and Balboa acted as "co-conspirators." Compl. ¶ 66. Because Plaintiff has not pled a valid fraud claim, any conspiracy claim likewise would fail. *See McKeeman v. Corestates*, 751 A.2d 655 (Pa. Super. Ct. 2000) ('"Absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act."') (quoting *Pelagatti v. Cohen*, 536 A.2d 1337, 1342 (Pa. Super. Ct. 1987)).

Return Date : March 29, 2013
Hearing Date: April 11, 2013

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Case No. 12-12020 (MG)
RESIDENTIAL CAPITAL, LLC, et al.,	Chapter 11
Debtors.	Jointly Administered
AMERICAN RESIDENTIAL EQUITIES, LLC, in its own individual capacity and in its capacity as Trustee under that certain American Residential Equities, LLC Master Trust Agreement dated August 8, 2005,	Adv. Case No. 12- 01934 (MG)
Plaintiff,	
v.	
GMAC MORTGAGE, LLC, as successor by merger to GMAC Mortgage Company, and BALBOA INSURANCE COMPANY,	
Defendants.	

NOTICE OF DEFENDANT BALBOA INSURANCE COMPANY'S MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING

PLEASE TAKE NOTICE that on March 1, 2013, Defendant Balboa Insurance Company ("Balboa"), a Defendant in the above-captioned adversary proceeding, filed a Motion for Dismissal of Adversary Proceeding as to Balboa ("Motion") with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") in the above-captioned adversary proceeding. A hearing to consider the Motion is scheduled for **April 11, 2013, at 10:00 a.m. (prevailing Eastern Time)** before the Honorable Martin Glenn, United States Bankruptcy Judge, in Courtroom 501 at the Bankruptcy Court, One Bowling Green, New York, New York 10004.

PLEASE TAKE FURTHER NOTICE that any objection to the Motion must be in writing, conform to the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules for the Southern District of New York, and the Notice, Case Management, and Administrative Procedures approved by the Bankruptcy Court [Docket No. 141], be filed electronically by registered users of the Bankruptcy Court's electronic case filing system, and be served, so as to be received no later than **March 29, 2013, at 4:00 p.m. (prevailing Eastern Time)**, upon (a) counsel for Balboa, BuckleySandler LLP, 1133 Avenue of the Americas, Suite 3100, New York, New York 10036 (Attn: Ross E. Morrison); (b) counsel for the Debtors, Morrison & Foerster LLP, 1290 Avenue of the Americas, New York, NY 10104 (Attn: Stefan W. Engelhardt and Norman S. Rosenbaum); (c) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, NY 10004 (Attn: Tracy Hope Davis, Linda A. Riffkin, and Brian S. Masumoto); (d) the Office of the United States Attorney General, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530-0001 (Attn: US Attorney General, Eric H. Holder, Jr.); (e) Office of the New York State Attorney General, The Capitol, Albany, NY 12224-0341 (Attn: Nancy Lord, Esq. and Neal Mann, Esq.); (f) Office of the U.S. Attorney for the Southern District of New York, 86 Chambers Street, New York, NY 10007 (Attn: Joseph N. Cordaro, Assistant U.S. Attorney.); (g) counsel for Ally Financial Inc., Kirkland & Ellis LLP, 153

East 53rd Street, New York, NY 10022 (Attn: Ray Schrock and Richard M. Cieri); (h) counsel to Barclays Bank PLC, as administrative agent for the DIP lenders, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY 10036 (Attn: Ken Ziman & Jonathan H. Hofer); (i) counsel for the committee of unsecured creditors, Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, NY 10036 (Attn: Kenneth Eckstein & Greg Horowitz); (j) counsel for Ocwen Loan Servicing, LLC, Clifford Chance US LLP, 31 West 52nd Street, New York, NY 10019 (Attn: Jennifer C. DeMarco and Adam Lesman); (k) Internal Revenue Service, P.O. Box 7346, Philadelphia, PA 19101-7346 (if by overnight mail, to 2970 Market Street, Mail Stop 5-Q30.133, Philadelphia, PA 19104-5016); and (l) Securities and Exchange Commission, New York Regional Office, 3 World Financial Center, Suite 400, New York, NY 10281-1022 (Attn: George S. Canellos, Regional Director).

PLEASE TAKE FURTHER NOTICE that if an objection to the Motion is not timely filed and served, the Bankruptcy Court may enter an order granting the relief requested in the Motion without further notice or opportunity to be heard afforded to any party.

Dated: New York, New York
March 1, 2013

Respectfully submitted,

BuckleySandler LLP
Counsel for Defendant Balboa Insurance Company

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