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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 FIRST AMENDED ADVERSARY COMPLAINT

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PRELIMINARY STATEMENT

Defendant Balboa Insurance Company ("Balboa") respectfully submits this memorandum of law in support of its motion to dismiss the claims asserted against it in the First Amended Adversary Complaint ("AC") filed by Plaintiff American Residential Equities, LLC ("ARE" or "Plaintiff"). The AC primarily focuses on alleged breaches of a Servicing Agreement between Defendant GMAC Mortgage LLC ("GMAC") and ARE, pursuant to which GMAC provided servicing functions for residential mortgage loans that ARE held title to as trustee. Nearly all of the allegations as to Balboa stem from an alleged "Kickback Scheme" whereby GMAC obtained, pursuant to its duties under the Servicing Agreement, property insurance from Balboa for at least some of the mortgage properties; Balboa allegedly gave secret "kickbacks" to GMAC that effectively reduced the premiums initially paid by GMAC for this insurance; and, pursuant to the Servicing Agreement, GMAC then charged ARE for the insurance premiums, which it allegedly inflated to include the amount of the purported kickbacks. Based on this alleged scheme, ARE asserts four tort claims against Balboa, and seeks damages based on the amount of the alleged "kickbacks" included in the insurance premiums it paid.

The filed rate doctrine bars the four claims against Balboa to the extent they are based on the alleged "Kickback Scheme." That doctrine holds that any filed rate, *i.e.*, a rate subject to approval by a regulatory agency, is *per se* reasonable and cannot be challenged in a private civil suit. Here, the insurance premiums ARE paid -- although no specific mortgaged properties or insurance policies are identified -- are filed rates, because they were calculated from rates that complied with state insurance laws and, where necessary, were approved by applicable state regulators. ARE's claims based on the "Kickback Scheme" directly challenge those premiums, because in order to award damages the Court would need to determine the difference between the premiums, and what the premiums would have been absent the allegedly improper

"kickbacks." As the Second Circuit has repeatedly held, the filed rate doctrine bars a court from undertaking this task, and the Court therefore should dismiss ARE's claims against Balboa. *See* Point II, *infra*.

The only other allegations asserted against Balboa are that it somehow "caused" GMAC to obtain unnecessary insurance policies and not pursue valid insurance claims. The AC offers no detail whatsoever to support these conclusory allegations, and the four tort claims therefore fail to the extent they are based on them. *See* Point III, *infra*. Finally, although the Court need not reach the issue, ARE's claims are untimely. *See* Point IV, *infra*. For all of these reasons, the Court should dismiss the AC 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 GMAC, filed a petition under Chapter 11 of the Bankruptcy Code in this Court. On November 9, 2012, ARE filed the Adversary Complaint against GMAC and Balboa. That complaint asserted a single claim, for fraud, against Balboa. On March 22, 2013, after both Defendants had filed motions to dismiss, ARE filed the AC. The AC added Ally Financial, Inc., GMAC's alleged parent, as a Defendant and asserted five additional counts, but omitted the fraud claim initially asserted against Balboa.

According to the AC, ARE holds title as trustee to a pool of residential mortgage loans

that were serviced by GMAC pursuant to a Servicing Agreement signed by ARE and GMAC in July 2004. AC ¶¶ 1, 20, 26, 28-29. This agreement established GMAC's servicing obligations concerning the loans. *Id.* ¶ 28. The AC primarily focuses on GMAC's alleged breach of a number of its obligations under the Servicing Agreement, and asserts eight claims against GMAC or Ally arising from those alleged breaches. *Id.* ¶¶ 74-119, 130-34 (Counts I-VII, X).

The allegations involving Balboa are as follows. GMAC's duties under the Servicing Agreement included ensuring that the mortgaged properties were adequately insured, *id.* ¶ 28, and purchasing property insurance (known as "force placed insurance" or "lender placed insurance" ("LPI")) for the properties if the owners of the properties failed to maintain adequate insurance, *id.* ¶ 36. Pursuant to its obligations under the Servicing Agreement, GMAC obtained lender placed insurance from Balboa for some unidentified, mortgage properties and initially advanced the money to pay the insurance premiums, and "GMAC then charged ARE for the premiums charged by Balboa." *Id.* ¶ 38.

The AC alleges that in 2003, before ARE entered into its servicing contract with GMAC, GMAC and Balboa began a "Kickback Scheme," *id.* ¶ 43, "pursuant to which Balboa 'kicked back' to GMAC, directly or indirectly, money and other things of value," *id.* ¶ 39. ARE contends that these "kickbacks" took two forms: (1) cash payments by Balboa to an unidentified GMAC affiliate; and (2) "tracking" services provided by a Balboa affiliate, Newport Management Corporation ("Newport"), at no cost to GMAC. *Id.* ¶¶ 39-41. ARE alleges that Balboa/Newport's role in providing such tracking services was concealed because their personnel "misrepresented" themselves as GMAC employees to borrowers. *Id.* ¶ 42. The AC contends that "the kickbacks improperly inflated the cost of the insurance, as the premiums charged by Balboa to GMAC were . . . increased to include the amount of the kickbacks." *Id.*

¶ 39. In addition, as part of this "Kickback Scheme," GMAC also allegedly provided ARE with monthly statements that included LPI premiums as a subcomponent of GMAC's servicing "advances" for which ARE had responsibility. *Id.* ¶ 46. ARE contends that these monthly statements were false and misleading because they did not disclose the "existence and amount of the kickbacks that GMAC was [allegedly] receiving from Balboa and their inflationary effect on the premiums being charged." *Id.*

Apart from the alleged "Kickback Scheme," the only other substantive allegations concerning Balboa are that Balboa "used the Balboa/Newport personnel covertly embedded within GMAC to benefit itself by causing unnecessary or excessive force-placed insurance to be obtained, and . . . causing valid insurance claims . . . not to be appropriately pursued." *Id.* ¶ 50. No specific examples or further details of either assertion are provided.

Based on the alleged "Kickback Scheme," and the allegations that Balboa somehow caused GMAC to obtain unnecessary LPI insurance or not pursue insurance claims, the AC asserts four tort claims against Balboa, all of which are derivative of the claims against GMAC: aiding and abetting (Count VIII); civil conspiracy (Count IX); tortious interference with contract (Count XI); and unjust enrichment (Count XII).

ARGUMENT

I. LEGAL 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, 663 (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." *In re Adelphia Comm'cns Corp.*, 359 B.R. 54, 59 (Bankr. S.D.N.Y. 2006) (citation omitted).

II. THE FILED RATE DOCTRINE BARS ARE'S CLAIMS.

The filed rate doctrine mandates dismissal of ARE's claims against Balboa to the extent those claims are based on the "Kickback Scheme," *i.e.*, that the insurance premiums ARE paid for the LPI provided by Balboa were improperly inflated by alleged "kickbacks." Indeed, that doctrine bars any claims seeking damages based on the premiums, because those premiums were calculated from insurance rates that complied with state insurance laws and, where required, were approved by applicable state regulatory authorities.

"Simply stated, the doctrine holds that any 'filed rate' – that is, one approved by the governing regulatory agency – is *per se* reasonable and unassailable in judicial proceedings brought by ratepayers." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994). The doctrine's rationale is two-fold. First, the doctrine preserves a regulator's authority to determine the reasonableness of rates and prohibits courts from second-guessing a regulator's determination in that regard. *Id.* at 19; *see Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2d Cir. 1998); *Roussin v. AARP, Inc.*, 664 F. Supp. 2d 412, 415 (S.D.N.Y. 2009). Second, the doctrine ensures that regulated entities charge only those rates that have been approved and thereby prevents discrimination against certain consumers. *Marcus*, 138 F.3d at 59; *Wegoland*, 27 F.3d

at 21 ("[A]pplication of the filed rate doctrine prevents discrimination in rates . . . because victorious plaintiffs would wind up paying less than non-suing ratepayers.") (citing *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156, 163-64 (1922)). The combined force of both justifications, often referred to as the nonjusticiability and nondiscrimination prongs, has given rise to an extremely robust doctrine whose "fortification against direct attack is impenetrable." *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1225 (9th Cir. 2007). Whenever either prong is implicated by a claim, the filed rate doctrine applies. *See Dolan v. Fid. Nat'l Title Ins. Co.*, 365 F. App'x 271, 276 (2d Cir. 2010) (citing *Marcus*, 138 F.2d at 62). Moreover, the applicability of the doctrine "does not depend on the culpability of the defendant's conduct or the possibility of inequitable results." *Simon v. KeySpan Corp.*, 694 F.3d 196, 205 (2d Cir. 2012) (citation and internal quotation marks omitted). "Rather, the doctrine is applied strictly to prevent a plaintiff from bringing a cause of action even in the face of apparent inequities whenever either the nondiscrimination strand or the nonjusticiability strand underlying the doctrine is implicated" by the claim. *Marcus*, 138 F.3d at 59 (citation omitted).

The premiums applicable to Balboa's LPI policies are filed rates. Although the AC fails to identify the location of any of the mortgaged properties that ARE holds title to, in states where Balboa issued LPI policies for GMAC, Balboa complied with state laws concerning filing of insurance rates, and, where required, applicable state regulatory authorities approved the rates for use. In Florida, for example, Balboa's LPI rates have been filed with and approved by the Florida Office of Insurance Regulation ("OIR"), the administrative agency charged under Florida law with responsibility for determining whether property insurance rates are "excessive, inadequate, or unfairly discriminatory." *See* Fla. Stat. Ann. §§ 624.302, 624.307, 627.031(1)(a), 627.0629 (West 2013); *Progressive Express Ins. Co. v. Reaume*, 937 So. 2d 1120, 1122 (Fla.

Dist. Ct. App. 2006) (noting "OIR has primary jurisdiction over the setting of insurance rates.").[1] Balboa followed the applicable process in every other state where it issued LPI policies.

Because the rates for any Balboa LPI policies placed on properties that ARE holds title to complied with applicable state insurance laws, the filed rate doctrine prohibits ARE from challenging those filed rates, any specific component of the rates, or the premiums calculated from the rates in a private civil action. The crux of ARE's claims involving Balboa is that Balboa and GMAC concocted a scheme to inflate the LPI premiums, whereby Balboa paid "kickbacks" to GMAC in the form of commissions to a GMAC affiliate and did not charge GMAC for loan "tracking" services, and GMAC then inflated the premiums by the amount of these "kickbacks" and passed them to ARE. *See* AC ¶¶ 32(h), 37, 39-42. Again using Florida as an example (given that the AC fails to identify any mortgaged properties), these allegations clearly implicate the nondiscrimination and nonjusticiability strands of the filed rate doctrine. First, any judicial inquiry into these allegations will require a review of Balboa's filed and approved LPI rates, because the alleged "kickbacks" were a portion of the insurance premiums paid by ARE, which themselves are calculated from these rates. Second, if ARE was able to recover as damages the portions of the LPI premiums that allegedly included the alleged "kickbacks," it would not pay the LPI rate filed and approved by Florida's OIR, but would be paying less than that rate. The filed rate doctrine is designed to prevent both of these results.

[1] The Florida Insurance Code sets forth specific requirements for insurers submitting proposed rates. That Code provides that an admitted property insurer must file with the OIR "[a] copy of rates, rating schedules, rating manuals, premium credits or discount schedules, and surcharge schedules, and changes thereto . . . ." Fla. Stat. Ann. § 627.062(2)(a) (West 2013). The OIR then assesses the reasonableness of the rate based on enumerated factors, and it may find a rate to be "excessive, inadequate, or unfairly discriminatory." *Id.* § 627.062(14)(e). "If the [OIR] finds that a rate or rate change is excessive, inadequate, or unfairly discriminatory, the [OIR] shall issue an order of disapproval specifying that a new rate or rate schedule, which responds to the findings of the [OIR], be filed by the insurer." *Id.* § 627.062(14)(h).

See, e.g., *Bryan v. BellSouth Comm'cns, Inc.*, 377 F.3d 424, 430 (4th Cir. 2004); *Stevens v. Union Planters Corp.*, No. Civ.A. 00-CV-1695, 2000 WL 33128256, at *3 (E.D. Pa. Aug. 22, 2000) (allegation of kickbacks in forced hazard insurance scheme barred by filed rate doctrine); *Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418, 1429 (S.D. Fla. 1997) (dismissing plaintiffs' kickback claim against title insurer pursuant to filed rate doctrine because claim was nothing more than challenge to title insurance rates set by state regulators); *Calico Trailer Mfg. Co. v. Ins. Co. of N. Am.*, No. LR-C-93-717, 1994 WL 823554, at *6 (E.D. Ark. Oct. 12, 1994) (filed rate doctrine barred plaintiffs' challenge to insurance rates as inflated as result of conspiracy among defendant insurance companies).

Indeed, the Second Circuit and other courts have held that the filed rate doctrine compels the dismissal of fraud claims in very similar circumstances to those presented here. In *Wegoland*, telephone ratepayers brought RICO and fraud claims, alleging that their phone company had fraudulently inflated its filed and approved phone rates. 27 F.3d at 18. Similar to ARE's claims here, the ratepayers claimed that the company had hidden the fact that a portion of its costs on which the rates were based upon were fraudulent and not real costs, and that the company therefore had overcharged them by the amount of these costs. *Id.* The Second Circuit held that the filed rate doctrine precluded these claims, noting:

> The fact that the remedy sought can be characterized as damages for fraud does not negate the fact that the court would be determining the reasonableness of rates and that any attempt to determine what part of the rate previously deemed reasonable was a result of the fraudulent acts would require determining what rate would have been deemed reasonable absent the fraudulent acts, and then finding the difference between the two.

Id. at 21 (internal citation and quotation marks omitted). The Second Circuit further emphasized that regulators are best suited to inquire into and uncover purported fraud, and that allowing private plaintiffs to bring challenges to allegedly fraudulent rates would lead to discrimination

among ratepayers. *Id.* at 21-22; *see also Marcus*, 138 F.3d at 60 (rejecting fraud claims challenging a filed rate under the filed rate doctrine because plaintiffs who were able to "recover damages would effectively receive a discounted rate for phone service," and a court would be required to determine a reasonable rate); *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1316 (11th Cir. 2004) ("Even if such a challenge does not, in theory, attack the filed rate, an award of damages to the customer-plaintiff would, effectively, change the rate paid by the customer to one below the filed rate paid by other customers.") (citing *Marcus*, 138 F.3d at 60).

Wegoland compels dismissal of ARE's claims here: like the *Wegoland* plaintiffs, ARE alleges that the LPI premiums they paid, which are calculated from filed LPI rates, included fraudulent "kickbacks," and it seeks damages based on those purported overcharges. Allowing ARE's claims to proceed would necessarily enmesh the Court into determining what portion of the premiums previously deemed reasonable were the result of the "Kickback Scheme" – an inquiry that is only the proper province of regulators. *Wegoland*, 27 F.3d. at 21 ("Apart from participating in the political process and filing complaints with the regulatory agencies, individual ratepayers simply have no role in attacking the reasonableness of filed rates."). Accordingly, the Court should dismiss ARE's claims against Balboa to the extent they seek damages based on this alleged scheme.

III. THE AMENDED COMPLAINT FAILS TO STATE ANY CLAIMS AGAINST BALBOA.

In addition to its claims based on the "Kickback Scheme," all of which are barred by the filed rate doctrine, *see* Point II, *supra*, the AC also alleges that Balboa caused GMAC to fail to pursue valid insurance claims and to place unnecessary insurance on mortgaged properties. AC ¶¶ 32(h) and (i), 50. ARE pleads no other facts about these allegations, and it therefore is difficult to discern whether the filed rate doctrine also bars ARE's claims to the extent they are

based on them. Regardless, these bare-bones allegations cannot support any of the four tort claims alleged against Balboa.

A. The Court Should Apply Pennsylvania Law.

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, 491-92 (S.D.N.Y. 2001). For tort claims, if a conflict does exist, New York applies an interest analysis that focuses on two inquiries: "(1) what are the significant contacts and in which jurisdiction are they located; and (2) whether the purpose of the law is to regulate conduct or allocate loss." *Amusement Indus., Inc. v. Stern*, 693 F. Supp. 2d 327, 339 (S.D.N.Y. 2010) (citations omitted). Where conduct regulating rules are at issue, New York law usually applies the law of the place of the tort. *Lee v. Bankers Trust Co.*, 166 F.3d 540, 545 (2d Cir. 1999). "The place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred." *Discover Grp., Inc. v. Lexmark Int'l, Co.*, 333 F. Supp. 2d 78, 85 (E.D.N.Y. 2004) (citations and internal quotation marks omitted). In addition, 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 19 N.Y. Jur. 2d *Conflict of Laws* § 40 (1982)); *see also Sack v. Low*, 478 F.2d 360, 365-66 (2d Cir. 1973) (interpreting New York law).

The Court should apply Pennsylvania law. First, this case involves more contacts with Pennsylvania than other potential jurisdictions. GMAC has its principal place of business in Pennsylvania, AC ¶ 11, Balboa is headquartered in California, *id.* ¶ 12, and ARE is headquartered in Florida, *id.* ¶ 10. However, GMAC is the primary participant in the alleged

wrongful conduct. *Id*. ¶ 3 ("The crux of this proceeding is based on GMAC's numerous breaches of the Servicing Agreement and related tortious conduct in which the other defendants participated."). In addition, the Servicing Agreement between ARE and GMAC, which forms the basis for most of the ARE's claims, and sets forth the scope and breadth of GMAC and ARE's relationship, is governed by Pennsylvania law. *See* AC Ex. B-1, § 13.07.

Second, based on the AC's meager allegations, it is unclear where the alleged injuries occurred. Because ARE, pursuant to a Master Trust Agreement, AC Ex. A, is only the trustee for a pool of mortgage loans owned by other parties, any claimed injuries from the alleged torts were to those loan owners, not ARE. *See* AC ¶ 22 ("[t]he Beneficiaries and other third parties, not ARE, are entitled to the earnings, avails and proceeds of the Assets held pursuant to the Trust Agreement"); *see also Appel v. Kidder, Peabody & Co.*, 628 F. Supp. 153, 156 (S.D.N.Y. 1986) (holding that injury was inflicted in Connecticut where the trust's beneficiaries were located rather than New York, the trustee's place of business); *Lang v. Paine, Webber, Jackson & Curtis, Inc.*, 582 F. Supp. 1421, 1425-26 (S.D.N.Y. 1984) ("the plaintiff's residence need not necessarily be the situs of the economic impact of the fraud, and the court can properly consider all relevant factors in determining where the loss is felt") (citation omitted). However, the AC fails to allege any facts concerning the location of the loan owners. Because it therefore is unclear where any alleged injury occurred, the Court should apply Pennsylvania law, rather than Florida or California law, given Pennsylvania's more significant contacts to this case.

B. The Amended Complaint Fails To State Any Claims Against Balboa Under Pennsylvania Law.

1. ARE Fails to State a Claim Against Balboa for Aiding and Abetting.

The Amended Complaint fails to state a claim that Balboa aided and abetted GMAC's purported commission of the torts of conversion, breach of fiduciary duty, and fraud and

fraudulent inducement. As an initial matter, Pennsylvania courts have not recognized an aiding and abetting cause of action. *See e.g., Fleet Nat'l Bank v. Boyle*, No. Civ.A. 04CV1277LDD, 2005 WL 2455673, at *8 (E.D. Pa. Sept. 12, 2005); *Waslow v. Grant Thorton LLP (In re Jack Greenberg, Inc.)*, 240 B.R. 486, 523-24 (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 elements:

> (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 v. Hergert, No. 2:05-cv-01059, 2007 WL 4105223, at *8 (W.D. Pa. Nov. 15, 2007) (citations omitted). The AC does not meet these requirements.[3]

First, the AC does not allege that Balboa had "actual knowledge" of the underlying wrongdoing. *See Lawrence v. Bank of Am., N.A.*, No. 8:09–cv–2162–T–33TGW, 2010 WL 3467501, at *3 (M.D. Fla. Aug. 30, 2010).[4] Where, as here, the defendant has no duties of

[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*, 2007 WL 4105223, at *7-8 (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 Chi. 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").

[3] Although only alleged against GMAC, Balboa does not concede that the AC sufficiently alleges conversion, breach of fiduciary duty, fraud, and fraudulent concealment claims against GMAC, as necessary to support ARE's derivative claims against Balboa. As set forth in Points II, III and IV herein, the claims asserted against Balboa fail for additional reasons.

[4] Although Balboa maintains that Pennsylvania law should apply to ARE's claims, *see* Point III(A), *supra*, Florida law is cited here because Pennsylvania has not expressly recognized the tort of aiding and abetting, and there is little to no case law in that jurisdiction concerning that tort.

disclosure to the plaintiff, then the complaint must allege that the defendant acted with "a high degree of scienter, that is, with a 'conscious intent' to aid the [the tort]." *In re Cascade Int'l Secs. Litig.*, 840 F. Supp. 1558, 1565 (S.D. Fla. 1993), *on reconsideration*, 894 F. Supp. 437 (S.D. Fla. 1995) (citations omitted). The AC never alleges that Balboa intended to aid GMAC by somehow causing GMAC to place unnecessary insurance or fail to pursue insurance claims. To the contrary, the AC alleges that both actions were taken to benefit Balboa. AC ¶ 50. In addition, it is neither logical nor plausible to conclude that Balboa entered into a relationship with GMAC in 2003 with the conscious intent to aid and abet GMAC's alleged commission of torts against ARE, where that entity had no connection to GMAC until 2004, when it entered into the Servicing Agreement.

Second, the AC does not allege facts to supports its legal conclusion that Balboa provided substantial assistance to GMAC. *See Bruhl v. PriceWaterhousecoopers Int'l*, No. 03-23044-Civ., 2007 WL 983263, at *9-10 (S.D. Fla. Mar. 27, 2007) (holding that complaint failed to state a claim for aiding and abetting without clear factual allegations detailing the substantial assistance that was provided); *In re Cascade Int'l Secs. Litig.*, 840 F. Supp. at 1566 (substantial assistance not alleged against law firm whose client had allegedly violated securities laws in connection with stock sale where law firm did not "actively participated in soliciting sales or negotiating terms of the deal on behalf of a client. . . .") (citation omitted). Here, the AC alleges that GMAC was the entity responsible for over-insuring loans within the Trust and for failing to initiate and pursue valid insurance claims. *See* AC ¶¶ 32(h) and (i), 55 (alleging "GMAC's repeated and systematic failure to pursue the collection of valid insurance claims against Balboa"). Similarly, the AC asserts that Balboa "caus[ed]" GMAC to overinsure and fail to pursue claims, *id.* ¶ 123, which implicates GMAC as the primary actor. Moreover, although the AC alleges that Balboa

"used the Balboa/Newport personnel covertly embedded within GMAC" to cause unnecessary insurance to be placed or valid claims not to be pursued, *id.* ¶ 50, the AC does not explain how Balboa personnel were covertly embedded -- whatever that phrase means -- what these personnel did, or how they aided GMAC. In the absence of such allegations, or even a single specific example, the AC fails to plausibly allege that Balboa provided substantial assistance to GMAC in engaging in any such tortious activity. Accordingly, the Court should dismiss the aiding and abetting claim.

2. The Amended Complaint Does Not State a Claim for Civil Conspiracy.

ARE's civil conspiracy claim against Balboa is equally flawed. Pennsylvania law provides that the elements of a civil conspiracy are "(1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; and (3) actual legal damage." *Becker v. Chi. Title Ins.* Co., No. Civ.A. 03-2292, 2004 WL 228672, at * 13 (E.D. Pa. Feb. 4, 2004) (citation omitted).[5] Under Pennsylvania law, a plaintiff also must allege that the defendant's "sole purpose . . . is to cause harm to the party who has been injured." *Id.* (citing *Thompson Coal Co. v. Pike Coal Co.*, 412 A.2d 466, 472 (Pa. 1979)). "Where the facts show that a person acted to advance his own business interests, and not solely to injure the party injured, those facts negate any alleged intent to injure." *Id.*

The civil conspiracy claim against Balboa fails under these standards. Indeed, the AC does not allege that Balboa acted with the "sole purpose," *Becker*, 2004 WL 228672, at *13, to

[5] Florida law has the same basic requirements. *See Raimi v. Furlong*, 702 So. 2d 1273, 1284 (Fla. Dist. Ct. App. 1997) ("A civil conspiracy requires: (a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts done under the conspiracy.") (citations omitted).

injure ARE. ARE's allegations make clear that Balboa's alleged actions were motivated, at least in part, by Balboa's desire to advance its own financial interests. *See* AC ¶ 50 ("Balboa also used the Balboa/Newport personnel covertly embedded within GMAC to benefit itself by causing unnecessary or excessive force-placed insurance to be obtained, and by causing valid insurance claims . . . not to be appropriately pursued"); ¶ 127 ("Balboa committed numerous overt acts . . . for Balboa's benefit").

The civil conspiracy claim also fails because the Amended Complaint does not allege any actual and concrete damages that are not barred by the filed rate doctrine. The AC never explains, nor provides a single example of its allegations that Balboa caused GMAC to obtain unnecessary insurance and not pursue valid insurance claims, and it therefore is impossible to discern whether any real damages resulted from this alleged conduct. Accordingly, the Court should dismiss the civil conspiracy claim.

3. The Amended Complaint Fails To State a Claim for Tortious Interference With Contract.

The Amended Complaint fails to state a claim that Balboa tortiously interfered with the ARE-GMAC Servicing Agreement. Under Pennsylvania law, to prevail on a claim for tortious interference with existing contractual relationships, a party must prove:

> (1) the existence of a contract . . . between the plaintiff and a third party; (2) purposeful action by the defendant, specifically intended to harm an existing relationship or intended to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; [and] (4) legal damage to the plaintiff as a result of the defendant's conduct. . . .

Acumed LLC v. Advanced Surgical Servs., Inc., 561 F.3d 199, 212 (3d Cir. 2009) (citing *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 530 (3d Cir. 1998)).[6]

[6] The requirements under Florida law for this claim are substantially the same. *See Romika-USA, Inc. v. HSBC Bank USA, N.A.*, 514 F. Supp. 2d 1334, 1339 (S.D. Fla. 2007) (listing elements of tortious

The AC does not allege that Balboa had the requisite intent to state a tortious interference claim. Pennsylvania law requires a plaintiff to allege not just that a defendant had the intent to interfere but also that the defendant had a specific intent to bring about a particular result. *B.T.Z., Inc. v. Grove*, 803 F. Supp. 1019, 1023-24 (M.D. Pa. 1992) (dismissing tortious interference claim where complaint "fail[ed] to allege that defendants had either an intent to harm plaintiff or a substantial certainty that plaintiff would suffer harm"); *see also Total Care Sys., Inc. v. Coons*, 860 F. Supp. 236, 241 (E.D. Pa. 1994) ("[I]ntent . . . may be shown where the actor knows an injury is certain or substantially certain to occur as a result of his action.") (citing *Reliable Tire Distrib., Inc. v. Kelly Springfield Tire Co.*, 592 F. Supp. 127, 139 (E.D. Pa. 1984)).[7] The AC does not allege that Balboa acted with the specific intent to harm ARE, let alone facts to support such a conclusion. At best, ARE alleges that Balboa took actions for its own financial benefit -- causing GMAC to obtain unneeded LPI and not pursue valid insurance claims -- that also negatively impacted ARE. In addition, as noted above, the AC never explains, nor provides a single example of its allegations that Balboa caused GMAC to obtain unnecessary insurance and not pursue valid insurance claims, and there is no basis to determine whether any damages resulted from this alleged conduct. Because these allegations are insufficient to state a claim for tortious interference, the Court should dismiss this claim.

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interference claim as: (1) existence of contract; (2) defendant's knowledge of that contract; (3) defendant's intentional and unjustifiable interference with that contract; and (4) that plaintiff suffered damages as a result of defendant's interference).

[7] Florida law also requires a plaintiff to plead facts to establish "a specific intent to interfere with the [contractual] relationship," *see Chi. Title Ins. Co. v. Alday-Donalson Title Co. of Fla., Inc.*, 832 So. 2d 810, 814 (Fla. Dist. Ct. App. 2002) (citation omitted); *Lewis v. Seneff*, 654 F. Supp. 2d 1349, 1372 (M.D. Fla. 2009) ("Without sufficient allegations of a specific intention to induce a breach, Plaintiffs' claim for tortious interference must fail"), as well as facts to show that the defendant acted with actual malice, "spite, ill-will, or other bad motive." *Rockledge Mall Assocs., Ltd. v. Custom Fences of S. Brevard, Inc.*, 779 So. 2d 554, 557 (Fla. Dist. Ct. App. 2001) (citation omitted).

4. The Amended Complaint Fails to State a Claim for Unjust Enrichment.

The Amended Complaint fails to state a claim for unjust enrichment. In order to state a claim for unjust enrichment under Pennsylvania law, ARE had to allege that Balboa "either wrongfully secured or passively received a benefit that would be unconscionable for the party to retain without compensating the provider." *Fid. Nat'l Title Ins. Co. v. Craven*, Civil Action No. 12-4306, 2012 WL 5881856, at *10 (E.D. Pa. Nov. 21, 2012) (citations omitted); s*ee also Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 447 (3d Cir. 2000) (identifying three elements for unjust enrichment claims in Pennsylvania: (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value) (citation omitted).[8]

ARE has failed to state a claim because it has not identified any specific sums of money or other benefits that were allegedly conferred on Balboa. As noted, the AC does not identify a single property where Balboa allegedly caused GMAC to obtain an unnecessary LPI policy, or that had an insurable loss for which a claim was not submitted or fully pursued. This failure warrants dismissal of the unjust enrichment claim. *See, e.g., Iglesia Cristiana El Buen Samaritano, Inc. v. Guardian Servs. LLC*, No. 11-21888-CIV, 2011 WL 5854640, at *4 (S.D. Fla. Nov. 21, 2011) (dismissing claim for unjust enrichment for lack of standing where the claim was based on conduct that had yet to occur and might never occur at all); *Horn v. City of Chicago*, No. 85 C 6838, 1986 WL 8450, at *5 (N.D. Ill. July 25, 1986), *rev'd on other grounds*, 860 F.2d 700 (7th Cir. 1988) (putative class members who alleged receipt of demand notices seeking payment but not that any of those demands were satisfied lacked standing to sue for

[8] The elements for the claim are essentially the same under Florida law, with some additional nuances not implicated by the alleged facts. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009).

unjust enrichment and other claims).

ARE's unjust enrichment claim also is deficient because it fails to allege that any benefit Balboa received was at ARE's direct expense. Under Pennsylvania law, a claim for unjust enrichment lies "only when the plaintiff can show direct or misleading contact between the party retaining the benefit and the party providing it." *Goldsmith Assocs., Inc. v. Del Frisco's Rest. Grp., LLC*, No. 09-1359, 2009 WL 3172752, at *4 (E.D. Pa. Oct. 1, 2009) (citing *D.A. Hill v. Clevetrust*, 573 A.2d 1005, 1010 (Pa. 1990)). If the relationship between the plaintiff and defendant is too remote, it cannot sustain a claim for unjust enrichment. *Century Indem. Co. v. URS Corp.*, No. 08-5006, 2009 WL 2446990, at *6-9 (E.D. Pa. Aug. 7, 2009); *see also Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC*, 737 F. Supp. 2d 380, 444 (E.D. Pa. 2010) (rejecting an unjust enrichment claim as too remote where "any benefit from Plaintiff to Defendant was filtered through two independent layers of auditing").[9] The AC alleges no plausible basis to conclude that any benefit to Balboa was directly linked to ARE. Balboa's relationship and contractual agreement was with GMAC, and Balboa was compensated pursuant to that relationship. AC ¶¶ 38, 43. ARE's attempt to insert itself into the equation, in vague and largely incoherent terms, is not sufficient to state a claim for unjust enrichment. Accordingly, the Court should dismiss this claim.

[9] Other jurisdictions, including Florida, impose similar requirements. *See Huntsman Packaging Corp. v. Kerry Packaging Corp.*, 992 F. Supp. 1439, 1446 (M.D. Fla. 1998) (noting that the benefit conferred on the defendant must be direct to prevail on a claim of unjust enrichment); *Century Senior Servs. v. Consumer Health Benefit Ass'n, Inc.*, 770 F. Supp. 2d 1261, 1267 (S.D. Fla. 2011) (dismissing unjust enrichment claim based on allegation that defendant received income "derived from" plaintiffs sale of products and attachments to the complaint showed that any benefit to defendant "gained from [plaintiff] was likely indirectly derived through other corporations doing business with [plaintiff]"); *Mandelbaum v. Fiserv, Inc.*, 787 F. Supp. 2d 1226, 1244 (D. Colo. 2011) (dismissing unjust enrichment claim under Colorado law for failure to allege direct link between plaintiffs and defendants' alleged benefit where complaint alleged that money a third party paid defendants came from plaintiffs' investment assets).

IV. ARE'S TORT CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS AND MUST BE DISMISSED AS UNTIMELY.

All of ARE's tort claims against Balboa also can be dismissed because they are 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, 147-48 (2d Cir. 1981); *see also Morson v. Kreindler & Kreindler, LLP*, 814 F. Supp. 2d 220, 225-26 (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 torts is two years. 42 Pa. Cons. Stat. Ann. § 5524. In New York, the statutes of limitations for torts vary by tort, *see* N.Y.C.P.L.R. §§ 214, 213(8), but in no case is it shorter than two years.[10] Thus, the two year statute of limitations from Pennsylvania applies to ARE's tort claims.

The AC alleges that ARE's relationship with GMAC began in 2004 and ended in 2010, AC ¶ 51, but the initial complaint was not filed until late 2012, more than eight years after ARE and GMAC allegedly entered into their Servicing Agreement, and more than two years after that relationship ended. ARE's tort claims, therefore, are untimely.

ARE's assertion in paragraphs 56-60 of the AC that the statute of limitations should be tolled is unpersuasive. The AC's unsupported legal conclusion that it could not have discovered the "Kickback Scheme" through the exercise of due diligence until less than two years prior to filing this lawsuit, AC ¶ 57, is not supported by factual allegations. The AC does not include any

[10] The statute of limitations for unjust enrichment claims is four years in Pennsylvania, *Cole v. Lawrence*, 701 A.2d 987, 989 (Pa. Super. Ct. 1997), and six years in New York. N.Y.C.P.L.R. § 213(2). It is not apparent from the face of the AC that ARE's unjust enrichment claim is time-barred, and Balboa reserves its right to assert the statute of limitations defense in the future.

facts regarding the steps ARE took to review GMAC's servicing records or investigate its business relationships, despite the fact that the Servicing Agreement gives ARE a right of access. *See* AC Ex. B-1, § 4.06 (Right to Examine Servicer Records). 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).

CONCLUSION

For the foregoing reasons, Balboa respectfully requests that the Court dismiss the claims asserted against Balboa in the First Amended Adversary Complaint.

Dated: April 26, 2013
New York, New York

Respectfully submitted,

BuckleySandler LLP
Counsel for Defendant Balboa Insurance Company

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Hearing Date: **June 12, 2013**
Objection Deadline: **May 24, 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 TO DISMISS THE FIRST AMENDED ADVERSARY COMPLAINT

PLEASE TAKE NOTICE that on April 26, 2013, Defendant Balboa Insurance Company ("Balboa"), a Defendant in the above-captioned adversary proceeding, filed a Motion to Dismiss the First Amended Adversary Complaint as to Balboa ("Motion") with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). A hearing to consider the Motion is scheduled for **June 12, 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 **May 24, 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, New York 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, New York 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: U.S. Attorney General, Eric H. Holder, Jr.);

(e) Office of the New York State Attorney General, The Capitol, Albany, New York 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, New York 10007 (Attn: Joseph N. Cordaro, Assistant U.S. Attorney);

(g) counsel for Ally Financial Inc., Kirkland & Ellis LLP, 153 East 53rd Street, New York, New York 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, New York 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, New York 10036 (Attn: Kenneth Eckstein & Greg Horowitz);

(j) counsel for Ocwen Loan Servicing, LLC, Clifford Chance US LLP, 31 West 52nd Street, New York, New York 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, New York 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: April 26, 2013
New York, New York

Respectfully submitted,

BuckleySandler LLP
Counsel for Defendant Balboa Insurance Company

By:/s/ Ross E. Morrison

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