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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,	(Joint Administration)
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. Pro. No. 12-01934 (MG)
Plaintiff,	
v.	
GMAC MORTGAGE, LLC, as successor by merger to GMAC Mortgage Company, BALBOA INSURANCE COMPANY, and ALLY FINANCIAL, INC.,	
Defendants.	

DEFENDANT ALLY FINANCIAL INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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Defendant Ally Financial Inc. ("AFI") respectfully submits this Memorandum of Law in support of its Motion to Dismiss all of the claims asserted against it by American Residential Equities, LLC, individually and in its capacity as Trustee (collectively, "ARE") in its First Amended Complaint (the "AC," ECF No. 26).

PRELIMINARY STATEMENT

Nearly three years after it first filed this case against GMAC Mortgage, LLC ("GMACM") in Florida, ARE has now sued AFI claiming that AFI "***may***" have received money from GMACM. Speculation that a party "may" have received money is not enough to state a plausible claim for relief. Accordingly, ARE's claims against AFI should be dismissed.

In June 2010, ARE sued GMACM in the United States District Court for the Southern District of Florida alleging that GMACM breached its obligations to ARE to service a pool of residential mortgage loans under a Servicing Agreement, dated as of July 29, 2004, between ARE, as owner of certain loans, and GMACM, as servicer of a loan portfolio consisting of over 2,600 mortgages (the "Servicing Agreement"). (*See* Florida Complaint, ECF No. 35-9, at ¶¶ 1, 26, 28-29; Servicing Agreement (with amendments) (Ex. B to the AC), ECF No. 26-2-4.)

On November 9, 2012, six months after GMACM's bankruptcy filing, ARE recommenced this case as an adversary proceeding against GMACM and Balboa Insurance Company ("Balboa"), an insurance company that issues force-placed or lender-placed insurance ("LPI") policies covering residential mortgage lenders if their borrowers fail to insure their properties. The complaint asserted contract and tort claims against GMACM alleging that GMACM violated its obligations under the Servicing Agreement, as well as claims against GMACM and Balboa alleging that Balboa paid kickbacks to GMACM and that this somehow resulted in overcharges to ARE under the Servicing Agreement. (Complaint, ECF No. 1)

Then, on March 22, 2013, nearly three years after it first commenced this action in Florida, ARE filed the AC adding AFI for the first time as a defendant. The AC is long on allegations of wrongdoing by GMACM and Balboa, and short on specifics as to AFI. ARE's claims against AFI are nothing more than a litigant seeking a deep pocket after years of fruitless pursuit of a debtor. Unable to allege that AFI had ***any role*** with respect to the Servicing Agreement or in the alleged kickbacks, ARE is relegated to alleging, in conclusory fashion, that AFI is liable to ARE because:

- monies that ARE now claims GMACM was required to hold "in trust" for ARE under the terms of the Servicing Agreement ("Trust Assets"), which were allegedly wrongfully withheld, retained or diverted by GMACM, "may" later have "come into [AFI's] possession" (AC, ¶¶ 4, 8, 62, 75, 80-81, 87-88, 93-94, 98-99, 103-05, 111-12);

- GMACM committed "fraud and fraudulent inducement" in connection with the alleged kickback scheme, and this somehow entitles ARE not only to recover damages from GMACM but also "to a judgment against [AFI] for the turnover to ARE of all Trust Assets that may have come into [AFI's] possession as a result of this fraud and fraudulent inducement . . . ." (AC, ¶¶ 114-19);

- AFI "aided and abetted" GMACM in allegedly committing "numerous torts" in connection with the kickback scheme because kickback payments, like other transactions of AFI and its subsidiaries, allegedly passed through "the global cash management system [AFI] maintained and operated for the use of all of its subsidiaries and affiliates" (AC, ¶¶ 111, 133); and

- GMACM's corporate veil should be pierced, permitting ARE to recover from AFI. (AC, ¶¶ 63-73)

These allegations fail to state a claim upon which relief can be granted against AFI. ***First,*** ARE's repeated, conclusory, tentative, hypothetical allegation that AFI is liable to ARE to the extent that Trust Assets "***may***" have come into AFI's possession fails to allege ***any*** facts against AFI, let alone "enough facts to state a claim to relief that is plausible on its face," as required by the United States Supreme Court's seminal decision in *Bell Atlantic Co. v. Twombly*, 550 U.S. 544, 570 (2007).

Second, ARE's "aiding and abetting" claim against AFI cannot state a claim against AFI because Pennsylvania law, which governs this claim, does not recognize a claim for "aiding and abetting." Further, even if Pennsylvania law recognized such a claim, or the law of another state that recognizes such a claim were applicable, ARE's allegations that AFI aided and abetted GMACM's allegedly tortious conduct because kickback payments allegedly passed through "the global cash management system" that AFI "maintained and operated for the use of all of its subsidiaries and affiliates . . ." (AC, ¶¶ 111, 133), fail to set forth sufficient facts to create a "plausible" claim that AFI rendered "substantial assistance" to GMACM in the commission of any tort or had "actual knowledge" of any alleged wrongful conduct by GMACM, both of which are required to plead a claim for "aiding and abetting." The AC also fails to state a claim against AFI for "aiding and abetting" because, as explained in GMACM's Motion for Dismissal of Adversary Proceeding (the "GMACM Motion," ECF No. 35), the AC fails to state a claim against GMACM.[1]

[1] The GMACM Motion is incorporated by reference herein to the extent applicable.

Third, ARE lacks standing to prosecute its veil-piercing claims against AFI because those claims allege only "generalized" injury to the Debtors' estates, not "particularized" injury to ARE. Therefore, the Debtors have exclusive standing to prosecute those claims. Although ARE attempts to remedy this deficiency by alleging, in conclusory fashion, that AFI "cause[d] GMAC[M] to fail to honor its legal obligations to ARE" (AC, ¶ 72) and "[t]he injuries suffered by ARE as a result of [AFI's] abuse of its control and domination of GMAC[M] with respect to how GMAC[M] carried out its Servicer's Duties and other legal obligations to ARE are unique and personal to ARE, and were not suffered by GMAC[M]'s other creditors as a group" (AC, ¶ 73), those allegations are conclusory and therefore cannot possibly state a claim against AFI. Moreover, even if ARE had standing to assert a veil-piercing claim against AFI—which it does not—ARE could not recover any damages from AFI based upon its veil-piercing allegations because ARE's underlying claims against GMACM fail to state a claim upon which relief can be granted.

Fourth, the "filed-rate doctrine" requires dismissal of ARE's fraud and "aiding and abetting" claims against AFI.

Fifth, many of the claims asserted by ARE are barred by the applicable statutes of limitation.

BACKGROUND

The claims in this adversary proceeding arise out of the Servicing Agreement between GMACM and ARE. The material terms of that agreement are set forth at paragraphs 4-11 of the GMACM Motion and will not be repeated here. AFI was not a party to the Servicing Agreement. (Servicing Agreement, ECF No. 26-2-4)

After litigating with GMACM for nearly two years in Florida and litigating with GMACM and Balboa in this Court for another four months, on March 22, 2013, ARE filed the AC, which names GMACM, Balboa and AFI (GMACM's indirect parent through Residential Capital, LLC ("ResCap")) as defendants. The AC asserts the following claims against AFI:

- Count II asserts a breach of contract claim against GMACM alleging that the Servicing Agreement "is a valid, binding contract between ARE and GMAC[M]" and that GMACM breached the Servicing Agreement in numerous ways. (AC ¶¶ 82-87) Although this Count is entitled "Breach of Contract against GMAC[M]," the final sentence of this Count alleges that "ARE is entitled to a judgment against [AFI] for the turnover to ARE of all Trust Assets that ***may*** have been diverted by GMAC[M] and come into [AFI's] possession as a result of these breaches of contract . . ." (AC ¶ 88, emphasis supplied) Such a speculative theory fails to state a claim against AFI.

- Counts I and III-VI assert claims against GMACM and AFI for declaratory judgment, conversion, breach of fiduciary duty, turnover and an accounting, based upon allegations that GMACM violated the Servicing Agreement by failing to pay certain Trust Assets to ARE. Each of these Counts purports to assert a claim against AFI based solely upon a conclusory, tentative, hypothetical allegation that "Trust Assets" that were allegedly "wrongfully diverted" by GMACM "***may***" have been "improperly transferred by GMAC[M] to [AFI]," have been "wrongfully diverted to [AFI]," or have "come into [AFI]'s possession." (AC, ¶¶ 81, 94, 99, 104, 112) There is no specificity whatsoever with respect to AFI.

- Count VII asserts a claim against GMACM and AFI for "fraud and fraudulent inducement" in connection with the "kickbacks" that GMACM allegedly received from Balboa. (AC, ¶¶ 36-55, 113-19) ARE alleges that these "kickbacks" were the result of a "long-standing concealed arrangement" between GMACM and Balboa, and took two forms: (1) cash payments by Balboa to an unidentified GMACM affiliate (referred to in the AC as the "John Doe Affiliate"), and (2) free "tracking" services (which involve determining whether or not borrowers have purchased property insurance as required by their mortgages) that were allegedly provided to GMACM at no cost by a Balboa affiliate, Newport Management Corporation. (AC ¶¶ 39-42) The AC alleges that GMACM is liable to ARE for fraud because GMACM provided ARE with monthly statements that included LPI premiums as a subcomponent of GMACM's servicing "advances" for which ARE had responsibility but "did not disclose the existence and amount of the kickbacks that GMAC[M] was [allegedly] receiving from Balboa and their inflationary effect on the premiums being charged." (AC ¶ 46) AFI is not alleged to have received any of the kickbacks or made any misrepresentations. Rather, the AC alleges only that "Trust Assets may have come into [AFI's] possession as a result of this fraud and fraudulent inducement . . . ." (AC ¶ 119) Such a speculative and conclusory allegation fails to satisfy not only Rule 9(b) but also Rule 8(a).

- Count X asserts a claim against AFI for "aiding and abetting" GMACM in committing "numerous torts in connection with the Kickback Scheme . . . including conversion, breach of fiduciary duty, and fraud and fraudulent inducement." (AC ¶¶ 130-34) The AC alleges that AFI is liable to ARE on this

Count because it "was aware of the Kickback Scheme" and "facilitat[ed] the laundering of improper payments from Balboa to GMAC[M] via the John Doe Affiliate via the global cash management system [AFI] maintained and operated for the use of all of its subsidiaries and affiliates, including both GMAC[M] and John Doe Affiliate." (AC ¶¶ 132-33) Pleading that a party maintained a cash management system, without pleading more, is insufficient to assert a plausible claim for anything.

The AC also alleges that GMACM's corporate veil should be pierced, and ARE should be permitted to recover from AFI based upon ARE's claims against GMACM. (AC, ¶¶ 63-73) The AC alleges, among other things, that AFI "is separately directly liable for GMAC[M]'s misconduct as an alter ego due to its control and domination of GMAC[M] and its pre-bankruptcy asset stripping, all of which render it unjust for [AFI] to use the corporate form as a shield from liability for the misconduct at issue here." (AC ¶ 63) ARE may not assert such claims because, even if there were any merit to them (and there is none), they are property of the estates and ARE has no standing to assert them.

ARGUMENT

I. LEGAL STANDARD

Federal Rule of Bankruptcy Procedure 7012(b), which incorporates Fed. R. Civ. P. 12(b)(6), requires the Bankruptcy Court to dismiss an adversary proceeding if the plaintiff's complaint fails to state a claim upon which relief can be granted. To survive a motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. In order to meet this standard, a plaintiff must plead sufficient facts "to provide the 'grounds' of his 'entitle[ment] to relief,' [which] requires more than labels and

conclusions, and [for which] a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555 (citation omitted). Thus, a complaint cannot merely "le[ave] open the possibility that a plaintiff might later establish some 'set of undisclosed facts' to support recovery." *Id.* at 561 (citation omitted). Moreover, in deciding a motion to dismiss, a court is not required to accept "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements. . . ." *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009). *See also id.* at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."). The AC should be dismissed as to AFI because, at best, it presents labels, conclusions and formulaic recitations of elements, not a plausible claim for relief.

II. DELAWARE LAW GOVERNS ARE'S EFFORT TO PIERCE THE CORPORATE VEIL AND PENNSYLVANIA LAW GOVERNS THE OTHER ASPECTS OF ARE'S CLAIMS AGAINST AFI.

Unless a case implicates important federal bankruptcy policy, bankruptcy courts should apply the choice-of-law rules of the forum state. *Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 601-02 (2d Cir. 2001). New York courts use "interest analysis" to determine which state's law governs a claim or issue. *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372 (S.D.N.Y. 2010).

Under New York choice of law principles, the law of the jurisdiction where a corporation is incorporated "determines when the corporate form will be disregarded and liability will be imposed on shareholders." *Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993) ("Because a corporation is a creature of state law whose primary purpose is to insulate shareholders from legal liability, the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away.") (citations omitted). *See also Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1459 (2d Cir. 1995); *In re BHS&B Holdings, LLC*, 420 B.R. 112, 133 (Bankr.

S.D.N.Y. 2009). Debtors GMACM and ResCap are Delaware limited liability companies and AFI is a Delaware corporation. (AC, ¶¶ 11, 13) Thus, Delaware law governs ARE's attempt to pierce the corporate veil.

In contrast, Pennsylvania law governs the other aspects of ARE's claims. 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 and internal quotation marks 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 Group, 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 to ARE's claims against AFI (other than its veil-piercing claims) for several reasons. ***First***, this case involves more significant contacts with Pennsylvania than with any other potential jurisdiction. GMACM has its principal place of business in Pennsylvania. (AC ¶ 11) As the AC recognizes, GMACM is the primary alleged

participant in the alleged wrongful conduct. (AC ¶ 3 ("The crux of this proceeding is based on GMAC[M]'s numerous breaches of the Servicing Agreement and related tortious conduct in which the other defendants participated.")) Moreover, the Servicing Agreement between ARE and GMACM, which underlies all of ARE's claims and sets forth the scope and breadth of the relationship between GMACM and ARE, is governed by Pennsylvania law. (*See* AC Ex. B-1, § 13.07.) In contrast, the other contacts are scattered: AFI is a Delaware corporation with its principal place of business in Michigan (AC, ¶ 13), and ARE is a Delaware limited liability company formerly headquartered in Florida. (*Id.* ¶ 10)

Second, it is unclear from the allegations in the AC where any alleged injury could have occurred. Because ARE, pursuant to a Master Trust Agreement (AC Ex. A), is allegedly 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 to ARE. (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 Appel v. Kidder, Peabody & Co.*, 628 F. Supp. 153, 156 (S.D.N.Y. 1986) (holding that injury was inflicted in Connecticut where 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. It is therefore unclear where any alleged injury occurred. In light of Pennsylvania's more significant contacts to ARE's claims, and its interest in regulating the allegedly tortious conduct of GMACM, which is

based in Pennsylvania, arising under a contract under Pennsylvania law, the Court should apply Pennsylvania law to ARE's claims against AFI.

III. THE AC FAILS TO STATE A DIRECT CLAIM AGAINST AFI.

ARE purports to assert direct claims against AFI for declaratory judgment, conversion, breach of contract, breach of fiduciary duty, turnover, accounting and fraud, based upon allegations that AFI "may" have received Trust Assets. (*See* AC, Counts I-VII) It also purports to assert a claim against AFI for "aiding and abetting" GMACM in the commission of "numerous torts . . . including conversion, breach of fiduciary duty and fraud and fraudulent inducement." (AC, Count X). These allegations fail to state a "plausible" claim against AFI.

A. ARE's Allegations That AFI "May" Have Received Trust Assets Are Insufficient to State a Claim Against AFI.

ARE purports to assert claims for declaratory judgment, breach of contract, conversion, breach of fiduciary duty, turnover, accounting and fraud against both GMACM and AFI, based solely upon its repeated, conclusory, tentative, hypothetical allegation that "Trust Assets" allegedly wrongfully diverted by GMACM ultimately "***may***" have come into AFI's possession. *See, e.g.*, AC ¶ 81 ("To the extent it ***may*** be determined that Trust Assets were improperly transferred by GMAC[M] to [AFI], ARE is entitled to a declaratory judgment that such Trust Assets remain the property of ARE."); AC ¶ 88 ("ARE is entitled to a judgment against [AFI] for the turnover to ARE of all Trust Assets that ***may*** have been diverted by GMAC[M] and come into [AFI's] possession as a result of these breaches of contract . . . ."); AC ¶ 94 ("ARE is entitled to a judgment against [AFI] for the turnover to ARE of all Trust Assets that ***may*** have come into [AFI's] possession as a result of GMAC[M]'s conversion . . . ."); AC ¶ 99 ("ARE is entitled to a judgment against [AFI] for turnover to ARE of all Trust Assets that ***may*** have come into [AFI's] possession as a result of these breaches of fiduciary duty . . . ."); AC ¶ 104 ("Some

of these Trust Assets ***may*** have been wrongfully diverted to [AFI]. They remain ARE's property in [AFI's] hands, and [AFI] has no valid excuse to refuse to remit these funds to ARE immediately."); AC ¶ 112 ("To the extent these accountings and/or other discovery reveals that [AFI] has come into possession of wrongfully diverted Trust Assets, ARE is entitled to a judgment directing [AFI] to provide an accounting of such Trust Assets that came into its possession."). [Emphasis supplied as to each.] These allegations fail to allege ***any facts*** against ARE—let alone "enough facts to state a claim to relief that is plausible on its face," as required by *Twombly*, 550 U.S. 544 at 570. Indeed, these allegations do not even set forth "legal conclusions" alleging that AFI acted wrongfully in any manner. At best, these allegations merely "le[ave] open the possibility that [ARE] might later establish some 'set of undisclosed facts' to support recovery," which is precisely what *Twombly* teaches "will not do." *Id.* at 555, 561 (citation omitted). Accordingly, the AC fails to state a claim against AFI for declaratory judgment, breach of contract, conversion, breach of fiduciary duty, turnover, accounting and fraud, and each of these claims should be dismissed.

B. ARE's Fraud Claim Against AFI Should Be Dismissed Because it Fails to Comply with Fed. R. Civ. P. Rule 9(b).

Rule 9(b) of the Federal Rules of Civil Procedure requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." To satisfy this requirement, a complaint must "specify the time, place, speaker, and content of the alleged misrepresentations[,] . . . explain how the misrepresentations were fraudulent and 'plead those events which give rise to a strong inference that the defendant[] had an intent to defraud, knowledge of the falsity, or a reckless disregard for the truth.'" *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 191 (2d Cir. 2001). *See also Gowan v. Novator Credit Mgmt. (In re Dreier LLP)*, 452 B.R. 467, 477 (Bankr. S.D.N.Y. 2011) ("The Second Circuit has stated that the complaint

must: '(1) detail the statements (or omissions) that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) were fraudulent.'") (quoting *Harsco Corp. v. Segui*, 91 F.3d 337, 347 (2d Cir. 1996)). Moreover, "[a]lthough the second part of Rule 9(b) permits scienter to be pleaded, the pleader must 'allege facts giving rise to a strong inference of fraudulent intent.'" *Gowan*, 452 B.R. at 477 (quoting *Shields v. Cititrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). A complaint must satisfy these requirements as to each defendant. *Apex Maritime Co. v. OHM Enters.*, 2011 U.S. Dist. LEXIS 35707, at *5-6 (S.D.N.Y. Mar. 30, 2011) ("'[W]here multiple defendants are asked to respond to allegations of fraud, the complaint should inform each defendant of the nature of his alleged participation in the fraud.'") (quoting *DiVittorio v. Equidyne Extractive Indus. Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987)).

The AC fails to indicate that AFI made any of the representations upon which ARE's fraud claim is based or that AFI had any other role in the alleged fraud, and it fails to set forth facts giving rising to a "strong inference of fraudulent intent" on the part of AFI. Instead, ARE merely alleges that "Trust Assets . . . may have come into [AFI's] possession as a result of this fraud and fraudulent inducement." (AC, ¶ 119) Thus, the AC fails to "state with particularity, the circumstances constituting [the] fraud" by AFI, and ARE's fraud claim should be dismissed.

C. The AC Fails to State A Claim Against AFI for "Aiding and Abetting."

Unable to allege that AFI itself did anything wrong, ARE also asserts a claim against AFI for "aiding and abetting" GMACM in allegedly "commit[ting] numerous torts in connection with the Kickback Scheme . . . including conversion, breach of fiduciary duty, and fraud and fraudulent concealment." (AC, at Counts X, ¶¶ 130-34) This Count fails to state a claim upon which relief can be granted against AFI.

As an initial matter, many decisions have held that Pennsylvania law, which governs ARE's aiding and abetting claims against AFI (*see* Section II above), does not recognize a cause of action for "aiding and abetting" in the commission of a tort. *See, e.g., Zafarana v. Pfizer Inc.*, 724 F. Supp. 2d 545, 560 (E.D. Pa. 2010); *Buckley v. Deloitte & Touche USA LLP*, 2007 U.S. Dist. LEXIS 37107, at *35-36 (S.D.N.Y. May 21, 2007); *Fleet Nat'l Bank v. Boyle,* 2005 U.S. Dist. LEXIS 44036, at *33 (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). Moreover, to the extent certain other decisions may have concluded that Pennsylvania law recognizes an "aiding and abetting" claim, or the Court may find that Florida law governs ARE's aiding and abetting claims against AFE, ARE's allegations are woefully deficient. Certain decisions have suggested that if Pennsylvania were to recognize an aiding and abetting claim, it would apply RESTATEMENT OF THE LAW (SECOND) OF TORTS § 876(b) (1979) and require that:

> (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, 2007 U.S. Dist. LEXIS 84508, at *20-21 (W.D. Pa. Nov. 15, 2007) (citations and internal quotation marks omitted).

Similarly, under Florida law, "[i]f . . . a cause of action [for aiding and abetting fraud] does exist, then the following are the elements that must be established by the plaintiff: (1) there existed an underlying fraud; (2) the defendant had knowledge of the fraud; and (3) the defendant provided substantial assistance to advance the commission of the fraud." *Bruhl v. Price Waterhousecoopers Int'l*, 2007 U.S. Dist. LEXIS 21955, at *32 (S.D. Fla. 2007).

The AC fails to satisfy these requirements. ***First***, as explained in the GMACM Motion, the AC fails to state a claim against GMACM for fraud, conversion or breach of fiduciary duty arising out of the alleged kickbacks. Thus, the AC fails to allege an underlying "wrongful act."[2]

Second, the AC fails to allege any facts supporting the legal conclusion that AFI provided "substantial assistance" to GMACM in committing any tort. *See Lawrence v. Bank of America, N.A.*, 2010 U.S. Dist. LEXIS 89539, at *7-8 (M.D. Fla. Aug. 30, 2010) (citations omitted) (allegedly providing "wire transfer capability" and "'banking platform'" insufficient to plead a "plausible" claim of "substantial assistance in the commission of wrongdoing"), *aff'd* 2012 U.S. App. LEXIS 777 (Jan. 11, 2012); *Bruhl*, 2007 U.S. Dist. LEXIS 21955, at *32 (complaint failed to state a claim for aiding and abetting without clear factual allegations regarding "substantial assistance" provided); *In re Cascade Int'l Secs. Litig.*, 840 F. Supp. 1558, 1566 (S.D. Fla. Dec. 15, 1993) ("substantial assistance" not alleged against law firm whose client had allegedly violated securities laws in connection with stock sale where law firm had not "actively participated in soliciting sales or negotiating terms of the deal on behalf of a client. . . .") (citation omitted). Here, the sole basis of ARE's contention that AFI "aided and abetted" conduct of GMACM is a conclusory, non-specific allegation that kickback payments passed through the "global cash management system [AFI] maintained and operated for the use of all of its subsidiaries and affiliates, including both GMAC[M] and John Doe Affiliate." (AC, ¶¶ 111, 133)

Importantly, far from supporting a valid cause of action, a parent's use of a global cash management system—which merely functions as a clearinghouse for transactions— is indicative

[2] Significantly, although ARE alleges that AFI aided and abetted GMACM in committing conversion and breach of fiduciary duty in connection with the "Kickback Scheme," ARE's conversion and breach of fiduciary duty claims make no reference to that alleged scheme. Thus, ARE cannot state a "plausible" claim against AFI for aiding and abetting acts of conversion or breaches of fiduciary duty in connection with that scheme.

of a "usual parent-subsidiary relationship," *United States v. Bliss*, 108 F.R.D. 127, 132 (E.D. Mo. 1985) (claim that parent "manipulated cash flows through a cash management system" did not indicate anything more "than a usual parent-subsidiary relationship"); *Hillsborough Holdings Corp. v. Celotex Corp. (In re Hillsborough Holdings Corp.)*, 166 B.R. 461, 471 (Bankr. M.D. Fla. 1994) ("the cash management system was totally consistent with sound business practices widely recognized in the corporate business world"), and is insufficient to support an alter ego claim. *See, e.g., Fletcher*, 68 F.3d at 1459 ("Courts have generally declined to find alter ego liability based on a parent corporation's use of a cash management system."). Consequently, ARE's allegations regarding the existence of a global cash management system fail to allege "enough facts to state a claim to relief that is plausible on its face" that AFI provided "substantial assistance" to GMACM. *Twombly*, 550 U.S. at 570.

Third, the AC fails to set forth sufficient facts to allege that AFI had "actual knowledge" of any underlying wrongdoing by GMACM. *See Lawrence*, 2010 U.S. Dist. LEXIS 89539, at *7-10. Where, as here, the defendant has no duty of disclosure to the plaintiff, 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. at 1565 (citations omitted). Moreover, "'[w]hile the element of actual knowledge may be alleged generally, the plaintiff still must accompany that general allegation with allegations of specific[] 'facts that give rise to a strong inference of actual knowledge regarding the underlying fraud.'" *Lawrence v. Bank of Am., N.A.*, 2010 U.S. Dist. LEXIS 89539, at *7 (quoting *Rosner v. Bank of China*, 2008 U.S. Dist. LEXIS 105984, at *15 (S.D.N.Y. Dec. 18, 2008)(quoting *JP Morgan Chase Bank v. Winnick*, 406 F. Supp. 2d 247, 253 (S.D.N.Y. 2005)). The AC fails to allege such facts. Thus, it fails to allege "enough facts to state a claim to relief that is plausible on its face" that

AFI had "actual knowledge" of any underlying wrongdoing by GMACM. *See Twombly*, 550 U.S. at 570.

Accordingly, ARE's claim against AFI for aiding and abetting should be dismissed.

IV. ARE CANNOT RECOVER FROM AFI ON ITS VEIL-PIERCING CLAIMS.

A. ARE Lacks Standing To Prosecute the Veil-Piercing Claims Asserted in the AC.

Upon the filing of a bankruptcy petition, "[e]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of [11 U.S.C.] § 541" and is therefore property of the estate. *Chartschlaa v. Nationwide Mut. Ins. Co.*, 538 F.3d 116, 122 (2d Cir. 2008), *cert. denied*, 555 U.S. 1213 (2009) (internal citations and quotations omitted). This includes all "causes of action owned by the debtor or arising from property of the estate." *Id.* It also includes third-party claims that allege a generalized injury to all creditors, rather than a particularized injury to one.

"If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action." *St. Paul Fire & Marine Ins. Co. v. PepsiCo., Inc.*, 884 F.2d 688, 701 (2d Cir. 1989) (finding that alter ego claim was a general claim that was property of the estate and therefore creditor had no standing to assert it). As this Court held in *McHale v. Alvarez (In re The 1031 Tax Group, LLC)*, 397 B.R. 670, 679 (Bankr. S.D.N.Y. 2008):

> "If the cause of action belongs to the estate, the trustee has exclusive standing to assert it; conversely, if the cause of action belongs solely to the ... creditors, the trustee has no standing to assert it." . . . "***When the trustee has standing to sue, the automatic stay prevents creditors or shareholders from asserting the claim notwithstanding that outside of bankruptcy, they have a right to do so.***" [Emphasis supplied, citations omitted.]

"The Second Circuit applies a two-part test to determine whether a cause of action belongs to the bankruptcy trustee and is considered property of the estate: (1) the claim must be one that the trustee has a right to assert under the applicable state law; and (2) the claim must be general to the corporation rather than personal to the creditors." *Flake v. Alper Holdings USA, Inc. (In re Alper Holdings USA, Inc.)*, 398 B.R. 736, 759 (S.D.N.Y. 2008) (citing *Kalb, Voorhis & Co.*, 8 F.3d at 132; *St. Paul Fire*, 884 F.2d at 700-02).

The first requirement—that the alter ego claim "must be one that the trustee has a right to assert under the applicable state law," *Flake*, 398 B.R. at 759—is clearly satisfied. Here, Delaware law governs ARE's attempt to pierce the corporate veil. Courts interpreting Delaware law have repeatedly found that a bankruptcy trustee or debtor-in-possession has the right to assert a veil-piercing or alter ego claim on behalf of the estate. *See Flake*, 398 B.R. at 759; *Rosener v. Majestic Management, Inc. (In re OODC, LLC)*, 321 B.R. 128, 137 (Bankr. D. Del. 2005). *See also Duke Energy Trading and Marketing, L.L.C. v. Enron Corp. (In re Enron Corp.)*, 2003 Bankr. LEXIS 330, at *11 (Bankr. S.D.N.Y. Apr. 17, 2003) ("the trustee or debtor-in-possession would have exclusive standing to maintain a Delaware corporation's alter ego claim of a general nature."); *Murray v. Miner*, 876 F. Supp. 512, 517 (S.D.N.Y. 1995) ("in the present action, the trustee has sole standing to raise all alter ego claims of a general nature asserted by . . . creditors"); *Raytheon Co. v. Boccard USA Corp.*, 369 S.W.3d 626, 633 (Tex. Ct. App. 2012) ("Federal courts have held that Delaware law allows a debtor corporation to pierce its own corporate veil, thereby giving a bankruptcy trustee or debtor-in-possession exclusive standing to assert an alter ego claim on behalf of the bankruptcy estate.") (citations omitted); *In re iPCS, Inc.*, 297 BR. 283, 298 (Bankr. N.D. Ga. 2003) (interpreting Delaware law and finding that estate representative had standing to assert an alter ego claim).

The second requirement—that the alleged injury be general and common to the corporation and its creditors and not particular to the claimant—is also satisfied here. *Labarbera v. United Crane and Rigging Services, Inc.*, 2011 U.S. Dist. LEXIS 20939, *16 (E.D.N.Y. Mar. 2, 2011) ("In determining whether a claim should be brought by the trustee or by the individual creditors, the court must consider whether the injury alleged is peculiar and personal to the claimant or is general and common to the corporation and creditors."); *Duke Energy*, 2003 Bankr. LEXIS 330, at *11 ("Where a claim is generalized, with no particularized injury stemming from it and where the claim may be brought by any creditor, the trustee or debtor-in-possession is the appropriate party to assert the claim and creditors are subject to the outcome of the action brought by the trustee or debtor-in-possession."); *Murray*, 876 F. Supp. at 517 (where a subsidiary is in bankruptcy and the creditor "aver[s] no particularized injury flowing from [the parent's] acts that [is] distinct from those suffered by other [the subsidiary's other] creditors," alter ego claims are the property of the bankruptcy estate and the estate "has sole standing to raise all alter ego claims of a general nature asserted by the [subsidiary's] creditors"); *Flake*, 398 B.R. at 760 ("The bankruptcy court correctly concluded [under Delaware law] that the alter ego claims alleged against [the parent] were 'general' and so were property of [the subsidiary's] estate.").

When evaluating whether the injury alleged is "particular and personal" to a creditor, the question is not whether the harm alleged in the underlying lawsuit or in the bankruptcy was suffered only by one creditor because "[b]y such logic, all creditors' claims would be personal to the specific creditor." *Levey v. Sys. Div., Inc. (In re Teknek, LLC)*, 563 F.3d 639, 644 (7th Cir. 2009); *accord Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 1993 U.S. Dist. LEXIS 6558, at *20 (S.D.N.Y. May 14, 1993), *aff'd*, 8 F.3d 130 (2d Cir. 1993); *Gosconcert v. Hillyer*, 158 B.R. 24,

29 (S.D.N.Y. 1993). Rather, "[t]he relevant question is whether [ARE's] alter ego . . . claims could be made by other creditors, which requires an examination of the allegations supporting the [alter ego] claims." *Labarbera*, 2011 U.S. Dist. LEXIS 20939 at *18. Thus, a claim is personal "only if the conduct that supports [the] claim is the same conduct that directly harmed the creditor in the underlying cause of action." *Id.* at *19. *See also Koch Refining v. Farmers Union Cent. Exchange, Inc.*, 831 F.2d 1339, 1353-54 (7th Cir. 1987); *Flake*, 398 B.R. at 760; *Duke Energy*, 2003 Bankr. LEXIS 330, at *12.

The veil-piercing allegations in the AC raise precisely the type of claim that courts routinely hold to be "general" and the exclusive property of the bankruptcy estate. Those allegations describe, at most, "general" conduct that would have affected all creditors of GMACM and ResCap alike and could not have resulted in any particularized injury to ARE. In support of their attempt to pierce GMACM's corporate veil, ARE alleges, among other things, that:

- "[AFI] is separately directly liable for GMACM's misconduct as an alter ego due to its control and domination of GMAC[M] and its pre-bankruptcy asset-stripping, all of which render it unjust for Ally to use the corporate form as a shield from liability for the misconduct at issue here." (AC ¶ 63)
- AFI "improperly stripped" value "from the Debtors for the benefit of [AFI] and its still-solvent affiliates." (AC ¶ 64)
- "GMAC[M] itself has been transferred by [AFI] to be under ResCap's umbrella (thus rendering it an indirect rather than direct subsidiary of [AFI] itself) in 2005, at a time [AFI] had not yet disclosed its plans to abandon ResCap and the troubled business units it reallocated to ResCap." (AC ¶ 65)

- The court-appointed examiner is conducting "a sweeping investigation . . . into . . . numerous suspicious pre-petition transactions and their prejudicial impact on the Debtors and the Debtors' creditors, including ARE." (AC ¶ 66)

These are precisely the type of general allegations that any creditor could make and that courts have expressly identified as insufficient to render a veil-piercing claim personal. *See, e.g.*, *Flake*, 398 B.R. at 760; *Labarbera*, 2011 U.S. Dist. LEXIS 20939, at *20-26; *Kalb*, 1993 U.S. Dist. LEXIS 6558, at *19-24. ARE's veil-piercing claims cannot be personal to ARE because the AC does not include any nonconclusory allegations showing that the conduct supporting ARE's veil-piercing claims is the same conduct that directly harmed ARE in the underlying cause of action. *Kalb, Voorhis & Co.*, 1993 U.S. Dist. LEXIS 6558, at *19. The AC confirms that its veil-piercing allegations could be made by any creditor, by alleging that those allegations are the subject of the Examiner's investigation. (AC ¶¶ 66-67) Moreover, the Official Committee of Unsecured Creditors recently filed a motion seeking permission to prosecute veil-piercing claims that are similar to those asserted by ARE on behalf of the bankruptcy estate. (*In re Residential Capital, LLC*, Case No. 12020-mg, ECF No. 3412, April 11, 2013).[3] Accordingly, ARE's effort to pierce the corporate veil in order to recover from AFI is property of the bankruptcy estates, and ARE lacks standing to prosecute those claims.

Apparently attempting to create an argument that the veil-piercing allegations in the AC allege "particularized," rather than "generalized," injury, ARE makes the carefully worded assertions that "[AFI] abused its control and domination of GMAC[M] to cause GMAC[M] to fail to honor its legal obligations to ARE" and "[t]he injuries suffered by ARE as a result of [AFI]'s abuse of its control and domination of GMAC[M] with respect to how GMAC[M] carried out its Servicer's Duties and other legal obligations to ARE are unique and personal to

[3] While not germane to this Motion, AFI denies that there is any merit to the claim the Committee would assert.

ARE, and were not suffered by GMAC[M]'s other creditors as a group." (AC, ¶¶ 72, 73) However, these allegations are conclusory and fail to set forth any facts supporting a plausible claim that GMACM's corporate veil should be pierced on the ground that AFI caused GMACM to breach any obligations to ARE. *See, e.g., Youkelsone v. Wash. Mut., Inc. (In re Wash. Mut., Inc.)*, 2010 Bankr. LEXIS 2453, at *35-37 (Bankr. D. Del. Aug. 13, 2010) (conclusory allegations that holding company "controlled, supervised, directed, and completely dominated all of the Bank's financial operations, Bank's policies and business practices in respect to all transactions generated by the Bank" and "'completely directed, managed and controlled' the business affairs of the Bank" were insufficient support an alter ego claim because they "offer[ed] no factual allegations which would lead to a ***plausible inference*** that [holding company] directed [Bank] to engage in ***misconduct specifically related to the servicing of Youkelsone's mortgage***") (emphasis supplied). *See also FDIC v. CoreLogic Valuation Servs., LLC*, 2011 U.S. Dist. LEXIS 131956, at *27-30 (C.D. Cal. Nov. 14, 2011) (plaintiff failed to adequately allege alter ego liability where it simply "aver[red] in conclusory language that CoreLogic, First American Information Services, and First American Solutions directed and controlled EA's actions with regard to the appraisal services provided by EA to WaMu"); *Apex Maritime Co.*, 2011 U.S. Dist. LEXIS 35707, at *10 ("'[p]urely conclusory allegations cannot suffice to state a claim based on veil-piercing or alter-ego liability, even under the liberal notice pleading standard.'") (quoting *Apace Commc'ns, Ltd. v. Burke*, 522 F. Supp. 2d 509, 521 (W.D.N.Y. 2007) (quoting *In re Currency Conversion*, 265 F. Supp. 2d 385, 426 (S.D.N.Y. 2003))); *Robles v. Copstat Sec., Inc.*, 2009 U.S. Dist. LEXIS 112003, at *7 (S.D.N.Y. Dec. 2, 2009) ("Mere conclusory statements that a corporation is dominated or controlled by a shareholder are insufficient to pierce the corporate veil . . . ."); *Matter of Goldman v. Chapman*, 44 A.D.3d 938,

939, 844 N.Y.S.2d 126, 137 (2d Dep't 2007) ("The mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil."). Accordingly, ARE's veil-piercing allegations against AFI assert, at most, generalized injury, rather than injury that is particular to ARE, and ARE lacks standing to assert them.

B. ARE Cannot Recover From AFI Based Upon ARE's Claims Against GMACM Because the AC Fails to State A Claim Upon Which Relief Can Be Granted Against GMACM.

Even if the Court determines that ARE has pleaded a valid claim to pierce GMACM's corporate veil, in order to assert a claim based upon its veil-piercing allegations ARE must still have valid underlying claims against GMACM. As demonstrated in the GMACM Motion, which AFI incorporates herein by reference, the AC fails to state a claim against GMACM for numerous reasons, including the following:

(a) The AC fails to state a claim against GMACM for declaratory judgment or turnover (*see* Counts I and V) because these claims merely recast ARE's contract claim against GMACM, the AC fails to identify any assets held in GMACM's "Custodial Account," no express, implied or constructive trust was created for the benefit of ARE, and there was no a fiduciary or confidential relationship between ARE and GMACM. (GMACM Motion, ¶¶ 25, 27-35)

(b) The AC fails to state a claim against GMACM for an accounting (*see* Count VI) because ARE has an adequate remedy at law in the form of a claim for money damages and received the documents necessary to conduct an accounting through discovery in the Florida action. (GMACM Motion, ¶ 40)

(c) ARE's conversion claim against GMACM (Count III) is barred by the "gist-of-the-action" doctrine. (GMACM Motion, ¶¶ 41-42)

(d) ARE's fraud claim against GMACM (Count VII) fails to comply with Fed. R. Civ. P. 9(b) and is barred by the "gist-of-the-action" doctrine and the economic loss doctrine. (GMACM Motion, ¶¶ 44, 46)

(e) ARE's breach of fiduciary duty claim against GMACM (Count IV) fails to state a claim upon which relief can be granted because there was no fiduciary or confidential relationship between GMACM and ARE. (GMACM Motion, ¶¶ 35, 47-48)

Because ARE's claims against GMACM fail to state a claim upon which relief can be granted, ARE cannot recover from AFI on those claims even if the Court determines that ARE has standing to assert its veil-piercing claims against AFI.

V. THE FILED-RATE DOCTRINE BARS ARE'S FRAUD AND AIDING ABETTING CLAIMS AGAINST AFI.

As demonstrated at pages 5-9 of Balboa's Memorandum of Law in Support of its Motion to Dismiss the First Amended Adversary Complaint (the "Balboa Mem.," ECF No. 33),[4] the "filed-rate doctrine" bars ARE's claims to the extent they are based upon allegations that the premiums charged for LPI were improperly inflated by alleged "kickbacks." ARE's fraud and aiding and abetting claims against AFI are based upon such allegations. (AC, ¶¶ 114-19, 121-24) Accordingly, those claims should be dismissed.

VI. PLAINTIFFS' CLAIMS AGAINST AFI SHOULD BE DISMISSED AS UNTIMELY.

As explained in the GMACM Motion (at ¶¶ 43, 45, 49) and the Balboa Mem. (at 19-20), under the New York borrowing statute, CPLR § 202, Pennsylvania's two-year statute of

[4] AFI incorporates the Balboa Mem. herein by reference to the extent applicable.

limitations applicable to tort actions, 42 Pa. Cons. Stat. § 5524 (2013), governs ARE's tort claims. Because ARE's conversion, breach of fiduciary duty, fraud and aiding and abetting claims against AFI (Counts III, IV, VII and X) all arose, at the latest, when the relationship between ARE and GMACM terminated in 2010 (AC, ¶ 76), and ARE did not sue AFI until March 22, 2013, those claims are untimely.[5]

CONCLUSION

For the foregoing reasons, the Court should dismiss all of the claims asserted against AFI.

Dated: New York, New York
May 10, 2013

OTTERBOURG, STEINDLER, HOUSTON & ROSEN, P.C.

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[5] In the event the AC is intended to assert a breach of contract claim against AFI, that claim is time-barred to the extent it is based upon any conduct that took place more than four years before the filing of the AC on March 22, 2013. (*See* GMACM Motion, ¶ 25 n.12.) Similarly, ARE's declaratory judgment claim against AFI is time-barred to the extent it arises out of conduct that allegedly occurred more than four years before the filing of the AC on March 22, 2013. 42 Pa. Cons. Stat. § 5525(8); *Wiseman Oil Co. v. TIG Ins. Co.*, 2012 U.S. Dist. LEXIS 71138, at *5 (W.D. Pa. May 22, 2012).