Docket #0046 Date Filed: 6/6/2013

Hearing Date: June 12, 2013

BUCKLEYSANDLER LLP
Ross E. Morrison
1133 Avenue of the Americas, Suite 3100
New York, New York 10036
Telephone: 212.600.2315
Facsimile: 212.600.2405

Counsel for Defendant Balboa Insurance Company

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 REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED ADVERSARY COMPLAINT

1212020130606000000000032

TABLE OF CONTENTS

Page

ARGUMENT **1**

I. THE FILED RATE DOCTRINE BARS ARE'S CLAIMS **1**

II. THE AC FAILS TO STATE ANY CLAIMS AGAINST BALBOA. **7**

A. Balboa's Choice of Law Analysis Necessarily Relies on the Alleged Facts. **7**

B. ARE Has Not Alleged An Aiding and Abetting Claim Against Balboa. **8**

C. ARE Has Not Alleged a Civil Conspiracy Claim Against Balboa. **9**

D. ARE Has Not Alleged a Tortious Interference Claim. **9**

E. ARE Has Not Stated a Claim for Unjust Enrichment. **10**

CONCLUSION **10**

TABLE OF AUTHORITIES

Page(s)

Cases

Abels v. JPMorgan Chase Bank, N.A.,
678 F. Supp. 2d 1273 (S.D. Fla. 2009) 6

Alston v. Countrywide Fin. Corp.,
585 F.3d 753 (3d Cir. 2009) 6

Appel v. Kidder, Peabody & Co.,
628 F. Supp. 153 (S.D.N.Y. 1986) 8

Cannon v. Wells Fargo Bank, N.A.,
No. C-12-1376 EMC, 2013 WL 132450 (N.D. Cal. Jan. 9, 2013) 6

Ellsworth v. U.S. Bank, N.A.,
No. C 12-02506 LB, 2012 WL 6176905 (N.D. Cal. Dec. 11, 2012) 6

Gallo v. PHH Mortgage Corp.,
Civil No. 12-1117 (NLH/KMW), 2012 WL 6761876 (D.N.J. Dec. 31, 2012) 6

Gipson v. Fleet Mortg. Grp.,
232 F. Supp. 2d 691 (S.D. Miss. 2002) 6

Kunzelmann v. Wells Fargo Bank, N.A.,
2013 WL 139913 (S.D. Fla. Jan. 10, 2013) 6

Kunzelmann v. Wells Fargo Bank, N.A.,
No. 9:11-cv-81373-DMM, 2012 WL 2003337 (S.D. Fla. June 4, 2012) 6

Lamm v. State St. Bank & Trust Co.,
889 F. Supp. 2d 1321 (S.D. Fla. 2012) 8

Lawrence v. Bank of Am., N.A.,
No. 8:09–cv–2162–T–33TGW, 2010 WL 3467501 (M.D. Fla. Aug. 30, 2010) 8

Logan v. Salem Baptist Church of Jenkintown,
No. 1-cv-0144, 2010 WL 3364203 (E.D. Pa. Aug 17, 2010) 9

Lorah v. SunTrust Mortg., Inc.,
No. 08-0703, 2010 WL 5342738 (E.D. Pa. Dec. 17, 2010) 9

Marcus v. AT&T Corp.,
138 F.3d 46 (2d Cir. 1998) 4, 7

Oldcastle Precast, Inc. v. VPMC, Ltd.,
No. 12-6270, 2013 WL 1952090 (E.D. Pa. May 13, 2013) 9

Roberts v. Wells Fargo Bank, N.A.,
No. 4:12-cv-200, 2013 WL 1233268 (S.D. Ga. Mar. 27, 2013) 5, 6

Schilke v. Wachovia Mortgage, FSB,
705 F. Supp. 2d 932 (N.D. Ill. 2010) 5

Stevens v. Citigroup Inc.,
No. CIV.A. 00-3815, 2000 WL 1848593 (E.D. Pa. Dec. 15, 2000) 6

Tube City IMS , LLC v. Severstal U.S. Holding, LLC,
No. 5:12CV31, 2013 WL 828175 (N.D. W. Va. Mar. 6, 2013)..... 10

Virgilio v. Ryland Gr., Inc.,
680 F.3d 1329 (11th Cir. 2012)..... 10

Wegoland Ltd. v. NYNEX Corp.,
27 F.3d 17 (2d Cir. 1994)..... 4, 7

Williams v. Duke Energy International, Inc.,
681 F.3d 788 (6th Cir. 2012)..... 7

Wright v. Ernst & Young LLP,
152 F.3d 169 (2d Cir. 1998)..... 2

Defendant Balboa Insurance Company ("Balboa") respectfully submits this Reply Memorandum of Law in support of its motion to dismiss the claims asserted against it in the First Amended Adversary Complaint ("AC").

ARGUMENT

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

As set forth in Balboa's opening memorandum, Balboa Mem. at 5-9, the filed rate doctrine bars ARE's claims against Balboa to the extent those claims are based on the alleged "Kickback Scheme" – *i.e.*, the purported scheme wherein Balboa allegedly gave "kickbacks" to GMAC (in the form of commission payments to a GMAC affiliate, and did not charge GMAC for loan "tracking" services), and GMAC then "inflated" the premiums applicable to the LPI policies it obtained from Balboa by the amount of the "kickbacks" before passing the premiums on to ARE. Although the AC fails to identify a single, mortgaged property in ARE's portfolio, in states where Balboa issued LPI policies for GMAC, any insurance premiums ARE may have paid for those policies were calculated using Balboa's LPI rates that complied with state insurance laws and, where required, received approval by applicable state regulatory authorities. ARE's claims based on the "Kickback Scheme" directly challenge the premiums: the claims allege that GMAC used the "kickbacks" to inflate the premiums, and in order to award damages the Court would need to determine the difference between those allegedly inflated premiums, and what the premiums would have been absent the alleged "kickbacks." As the Second Circuit has repeatedly held, the filed rate doctrine bars a court from undertaking this task.

In its opposition memorandum, ARE first contends that the filed rate doctrine does not apply because Balboa has not identified both the "relevant" jurisdictions where ARE's properties are located and the time periods when LPI was placed on the properties. Second, ARE argues that its claims based on the "Kickback Scheme" and inflated premiums it allegedly paid are

somehow not challenges to those premiums. Both of these arguments are meritless.

ARE's first argument that Balboa has "failed to lay the legal and factual predicate" for the filed rate doctrine by including in its motion "a stack of administrative decisions" from relevant jurisdictions and time periods indicating that LPI rates and the premiums calculated from those rates are filed rates, Pl. Mem. at 4-6, is completely disingenuous because it is *ARE*, and not *Balboa*, which knows the location of ARE's mortgaged properties and the dates LPI was placed on those properties. In order for Balboa to identify the specific LPI rates and any approvals by state regulators, it must know the geographic location of ARE's properties and the dates that those properties received LPI. However, the AC, like the original Complaint, fails to identify the location of even a single property, despite the fact that ARE admits that it could provide "much more detail" about its properties, including descriptions of "asset-specific problems." Pl. Mem. at 11. Indeed, the AC does not even allege more generally the state or states in which ARE's properties are located. The closest ARE comes to providing this detail is to state that "[o]ur understanding is that the ARE portfolios included properties (or mortgage loans secured by properties) located in at least 46 separate states." Pl. Mem. at 5 n.4. While ARE cannot amend its pleading through assertions in an opposition brief, *see, e.g.*, *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998), this statement does not provide the requisite details to permit Balboa to include in this Motion the applicable rate filings and approvals in all relevant jurisdictions.[1]

By contrast, in other LPI cases raising similar claims as ARE assets here, Balboa provided the court with copies of the relevant rate filings where the complaint alleged that

[1] In its opposition memorandum, ARE identifies three properties—two in New York and one in South Carolina—which it claims are examples of the generalized allegations in the AC. Pl. Mem. at 10-11. However, Balboa does not issue LPI in either of these jurisdictions and therefore ARE has no claim against Balboa based on these properties.

Balboa issued an LPI policy for a specific property on a specific date. *See, e.g., Rothstein v. GMAC Mortgage LLC*, 12 Civ. 3412 (AJN) (S.D.N.Y) (attaching Balboa's New Hampshire rate filing and approval as exhibits to Balboa's motion to dismiss); *Hall v. Bank of America*, No. 12 Civ. 22700-FAM (S.D. Fla.) (same as to Balboa's rate filing and approval in Florida) (both attached to the accompanying Declaration of Ross E. Morrison, dated June 6, 2013). In any event, in any state where Balboa issued LPI policies for GMAC, Balboa complied with applicable state insurance laws and, where required, state regulators approved Balboa's insurance rates. Accordingly, the Court can find the filed rate doctrine applies to Balboa's insurance rates -- including the premiums calculated from those rates -- and should not countenance ARE's disingenuous efforts to avoid the doctrine by hiding behind its failure to identify even a single property in the AC.[2]

Second, ARE's argument that its "Kickback Scheme" allegations do not challenge the premiums it paid, but rather the "manipulation of the insurance-placement process," Pl. Mem. at 6-10, is belied by the plain language of the AC and the damages ARE seeks, and is in direct contravention of Second Circuit precedent. As noted, the "Kickback Scheme" focuses on alleged "kickbacks" from Balboa to GMAC which GMAC allegedly used to "inflate" the LPI premiums GMAC charged to ARE, and ARE's claims challenging this purported scheme thus directly challenge as excessive the premiums it paid.[3] AC ¶ 39. Indeed, the AC repeatedly refers

[2] If the Court finds it necessary, Balboa can provide the Court with any applicable rate filings and approvals, as it did in the *Rothstein* and *Hall* cases, as soon as ARE identifies the jurisdictions where its properties are located and the dates those properties received LPI. In addition, Balboa chose not to include with this Motion rate filings and approvals from *all* of the various jurisdictions in which it issued policies for GMAC, in part to avoid burdening the Court with numerous filings and approvals, many of which are hundreds of pages in length, and which might be completely irrelevant to this action if ARE's properties are not located in a particular jurisdiction and/or LPI was not placed on the property during the time period covered by a particular filing and approval.

[3] Similarly, as ARE admits, ARE's contention that GMAC did not consider "alternative sources" to

to inflated or overpriced LPI premiums and rates. *See, e.g.*, *id.* ¶¶ 6, 32(h), 49, 55(a), 138, 143.

Moreover, any claims arising from this alleged "Kickback Scheme" implicate the filed rate doctrine because ARE ultimately is seeking as damages a refund of a portion of the LPI premiums it paid, *i.e.*, the portion attributable to the alleged "kickbacks." As the Second Circuit and numerous other courts have held, no matter how a claim may be characterized, where an award of damages "would implicate the nondiscrimination and nonjusticiability strands of the filed rate doctrine . . . [then] that [] doctrine therefore bars such claims." *Marcus v. AT&T Corp.*, 138 F.3d 46, 60 (2d Cir. 1998); *see Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 21-22 (2d Cir. 1994) (filed rate doctrine barred fraud claims that a telephone company had inflated its filed rates with fraudulent costs because a court would need to determine the difference between "what part of the rate previously deemed reasonable was a result of the fraudulent acts" in order to award damages, thereby implicating the nonjusticiability prong of the filed rate doctrine, and an award of damages would lead to plaintiffs paying less than other ratepayers, violating the nondiscrimination prong of the doctrine); *see also* Balboa Mem. at 4. Here, assuming for example that ARE's properties are located in Florida, any judicial inquiry into ARE's allegations will require a review of Balboa's filed and approved Florida LPI rates, because the alleged "kickbacks" were a portion of the insurance premiums paid by ARE, which themselves are calculated from these rates.[4] And 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 filed and approved LPI rate, but would be paying less than that rate. The filed rate doctrine is designed to prevent both of these results.

---

obtain LPI insurance, Pl. Mem. at 1-2, also is a claim that it paid inflated premiums.

[4] In its opposition, ARE argues that the commissions, which ARE pejoratively labels "kickbacks," "were [not] subject to any regulatory approval process." Pl. Mem. at 8. ARE is incorrect; in fact, commissions are a component of Balboa's rate filings in jurisdictions where it is required to file its rates. *See, e.g.*, Morrison Decl. Ex. 2, at 44 (Florida rate filings).

The most recent decision to apply the filed rate doctrine to LPI illustrates these principles. In *Roberts v. Wells Fargo Bank, N.A.*, No. 4:12-cv-200, 2013 WL 1233268, at *13 (S.D. Ga. Mar. 27, 2013), a borrower alleged that the LPI premiums she paid had been inflated by "kickbacks," and argued, as ARE does here, that she was not challenging the LPI rates *per se* but rather the manipulation of those rates. *Roberts* characterized this distinction as "dubious" and held that the filed rate doctrine barred the claims because the borrower's damages:

> can only be measured by the difference between the premiums she paid and what the premiums would have been absent the allegedly illegal "commissions, kickbacks, and free services" they contained . . . . To calculate that amount "would, in effect, result in a judicial determination of the reasonableness of the premium Roberts paid." *See Hill*, 364 F.3d at 1317. And if the legislature has vested in the [state insurance regulator] authority to make that determination, allowing Roberts's requested relief would disrespect that statutory grant of rate setting authority. . . .

Id. at *13. Likewise, in *Schilke v. Wachovia Mortgage, FSB*, 705 F. Supp. 2d 932, 942-45 (N.D. Ill. 2010), the court, relying on the Second Circuit's *Wegoland* and *Marcus* decisions, held that the filed rate doctrine applied to and barred damages claims identical to those raised by ARE here because the claims "effectively seek a refund of a portion of the [LPI insurance] premiums paid by Plaintiff," and "an award of damages [would] effectively allow[] the plaintiff to pay a different rate than other customers." *Id.* at 944 (citation omitted). ARE's challenges to the "Kickback Scheme" effectively seek a refund of a portion of the LPI premiums it paid.

The LPI cases cited by ARE, *see* Pl. Mem. at 6-7, do not save ARE's claims. Unlike the *Roberts* and *Schilke* decisions, most of the cases cited by ARE contain little or inapposite reasoning concerning the filed rate doctrine, and/or fail to address why a damages award for claims alleging that LPI premiums included "kickbacks" would not, in effect, allow ARE to pay less for its insurance than non-plaintiffs, and require a judicial determination of the reasonableness of the premiums. *See Abels v. JPMorgan Chase Bank, N.A.*, 678 F. Supp. 2d

1273, 1276-77 (S.D. Fla. 2009) (finding filed rate doctrine inapplicable based on argument that defendant was a bank and not an insurer, and thus not subject to sufficient administrative oversight); *Kunzelmann v. Wells Fargo Bank, N.A.*, No. 9:11-cv-81373-DMM, 2012 WL 2003337, at *2-3 (S.D. Fla. June 4, 2012) (relying on *Abels* and finding filed rate doctrine inapplicable without mentioning the effect of a damages award); *Kunzelmann v. Wells Fargo Bank, N.A.*, 2013 WL 139913, at *11-12 (S.D. Fla. Jan. 10, 2013) (in subsequent decision, *Kunzelmann* court held that if alleged kickbacks were included in premiums, than filed rate doctrine could bar claims challenging the kickbacks); *Cannon v. Wells Fargo Bank, N.A.*, No. C-12-1376 EMC, 2013 WL 132450, at *8-9 (N.D. Cal. Jan. 9, 2013) (relying on *Abels* and the first *Kunzelmann* decision and failing to address the effect of a damages award); *Ellsworth v. U.S. Bank, N.A.*, No. C 12-02506 LB, 2012 WL 6176905, at *12-13 (N.D. Cal. Dec. 11, 2012) (considering whether filed rate doctrine applied as a matter of California statutory law); *Gipson v. Fleet Mortg. Grp.*, 232 F. Supp. 2d 691, 707 (S.D. Miss. 2002) (rejecting application of filed rate doctrine in cursory manner with no discussion of damages); *see also Roberts*, 2013 WL 1233268, at *12 (declining to follow *Kunzelmann* and *Abels* because neither was "persuasive," and noting those cases accepted arguments that the filed rate doctrine did not apply "without much elaboration"). In addition, in *Gallo v. PHH Mortgage Corp.*, Civil No. 12-1117 (NLH/KMW), 2012 WL 6761876, at *4-5 (D.N.J. Dec. 31, 2012), the court held that it was bound by Third Circuit precedent holding that the filed rate doctrine does not apply where the allegations challenge wrongful conduct, rather than the reasonableness of a filed rate. *Id.* at *4 (citing *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 765 (3d Cir. 2009)); *see also Stevens v. Citigroup Inc.*, No. CIV.A. 00-3815, 2000 WL 1848593 (E.D. Pa. Dec. 15, 2000) (determining that plaintiff's challenge to the manner in which Citigroup had selected an insurer did not

implicate the filed rate doctrine without much elaboration or any discussion of damages).[5] In the Second Circuit, courts are required to focus on whether an award of damages will implicate the doctrine, irrespective of what alleged conduct is at issue. *See Marcus*, 138 F.3d at 60; *Wegoland*, 27 F.3d at 21-22. As noted, the damages ARE seeks based on the "Kickback Scheme" implicate the doctrine.

Finally, the filed rate doctrine applies to ARE's claims to the extent they are premised on the alleged "Kickback Scheme." As noted in its moving memorandum, Def. Mem. at 5, 9-10, Balboa does not argue that the doctrine bars ARE's claims – to the extent they are intelligible -- that Balboa somehow caused GMAC to fail to pursue valid insurance claims and to place unnecessary or excessive insurance on mortgaged properties; rather, as set forth below, the AC's few and vague contentions as to those claims are insufficient to state any such claims against Balboa.

II. THE AC FAILS TO STATE ANY CLAIMS AGAINST BALBOA.

A. Balboa's Choice of Law Analysis Necessarily Relies on the Alleged Facts.

Contrary to ARE's assertion that Balboa's choice of law analysis was "transparently driven by [a] desire to shop for favorable law," Pl. Mem. at 11, Balboa properly based its analysis on the meager allegations of the AC. The AC asserts multiple claims based on state common law, yet fails to make any allegations concerning the state law applicable to those claims. ARE does not quibble with Balboa's stated choice of law framework, but rather argues

[5] *Williams v. Duke Energy International, Inc.*, 681 F.3d 788, 797 (6th Cir. 2012), a case not involving LPI, also is inapposite because the plaintiffs there alleged that the energy company defendant had entered into side agreements with certain companies whereby they received kickbacks not to challenge the energy company rates. Those alleged kickbacks were not part of the expenses included in the rate filing itself, as is the case with Balboa's LPI rates. Finally, plaintiff's reference to New York regulatory hearings concerning LPI, Pl. Mem. at 8 n.7, only further demonstrates why the filed rate doctrine bars its claims. *See 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.").

that the place of injury was "unambiguously" Florida, *id.* at 12, based on its "understanding" that the Beneficiaries of the ARE Trust "were headquartered and managed" in Florida, *id*. at 12 n.10. However, the AC fails to include any such allegations concerning the Beneficiaries. For the reasons stated in its opening memorandum, *see* Balboa Mem. at 10-11, the allegations actually contained in the AC indicate that Pennsylvania has the most significant contacts to ARE's claims, and the Court therefore should apply Pennsylvania law.

B. ARE Has Not Alleged An Aiding and Abetting Claim Against Balboa.

Even assuming that aiding and abetting is a freestanding tort recognized under Pennsylvania law,[6] ARE's AC fails to state a claim because it does not allege that Balboa had sufficient knowledge that it was assisting GMAC's commission of any tort. *See* Balboa Mem. at 12. The AC nowhere alleges that Balboa had knowledge of GMAC's specific fiduciary or other obligations to ARE, or that by obtaining LPI from Balboa, GMAC allegedly violated those obligations. *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) (holding that a general awareness of alleged tortfeasor's actions was not sufficient to state a claim for aiding and abetting); *Lamm v. State St. Bank & Trust Co.*, 889 F. Supp. 2d 1321, 1332-33 (S.D. Fla. 2012) (holding that where "factual allegations at most establish that State Street should have known of the underlying breaches," the complaint failed to state an aiding and abetting claim). ARE likewise fails to allege that Balboa provided substantial assistance to GMAC. The only allegation that ARE identifies to support this element is that GMAC allegedly outsourced some unspecified servicing tasks to Balboa employees. Pl. Mem. at 19-20. However, this allegation is inadequate because it lacks sufficient

[6] Plaintiff cites to cases recognizing the tort of aiding and abetting a breach of fiduciary duty. Pl. Mem. at 18. In pointing out that aiding and abetting had not been recognized as a tort in Pennsylvania in its moving memorandum, Balboa Mem. at 12, Balboa referred to the general claim for aiding and abetting any tort, because the AC asserts that Balboa is liable for aiding and abetting GMAC in the commission of multiple torts, and not only for the specific tort of breach of fiduciary duty.

detail regarding what assistance Balboa allegedly provided to GMAC. *See* Def. Mem. at 13-14.

C. ARE Has Not Alleged a Civil Conspiracy Claim Against Balboa.

Although deficient in many ways, *see* Balboa Mem. at 14-15, the most obvious flaw with ARE's conspiracy claim is that it does not allege that Balboa's sole purpose was to harm ARE. ARE's argument that Pennsylvania courts "consistently decline to impose [the] supposed 'sole purpose' requirement" to civil conspiracy claims, Pl. Mem. at 18, is simply incorrect and unsupported by the cases it cites. *See id.* (citing *Lorah v. SunTrust Mortg., Inc.*, No. 08-0703, 2010 WL 5342738, at *5 (E.D. Pa. Dec. 17, 2010) (dismissing civil conspiracy claim because of "factual allegations that SunTrust acted to advance its own business interests, and not solely to injure Plaintiffs negate[d] any alleged intent to injure") (citations and internal quotation marks omitted); *Oldcastle Precast, Inc. v. VPMC, Ltd.*, No. 12-6270, 2013 WL 1952090 (E.D. Pa. May 13, 2013) (dismissing civil conspiracy claim but not considering the sole purpose requirement); *Logan v. Salem Baptist Church of Jenkintown*, No. 1-cv-0144, 2010 WL 3364203, at *2-4 (E.D. Pa. Aug 17, 2010) (finding that the complaint alleged a claim for malicious prosecution, including that the defendants acted with malicious intent)). Because ARE does not dispute that the AC alleges multiple non-malicious motivations for Balboa's alleged conduct, *see* Balboa Mem. at 14-15 (citing AC ¶ 50), the civil conspiracy claim fails as a matter of law.

D. ARE Has Not Alleged a Tortious Interference Claim.

ARE's failure to adequately plead the element of intent is also fatal to its tortious interference claim against Balboa. Balboa's opening memorandum cited multiple cases from Florida and Pennsylvania state and federal courts holding that a plaintiff must establish that the defendant acted with specific intent to harm the plaintiff. *See* Balboa Mem. at 16. ARE's argument, Pl. Mem. at 16-17, that it need not plead malice confuses the requirements for a civil conspiracy claim, *see supra* Point II(C), with the requirements for a tortious interference claim,

which does not require allegations of malice but rather of a specific intent to harm. Indeed, the case cited by Plaintiff, *see Tube City IMS , LLC v. Severstal U.S. Holding,* LLC, No. 5:12CV31, 2013 WL 828175, at *3 (N.D. W. Va. Mar. 6, 2013) (Pl. Mem. at 16-17), imposes this exact requirement, and also explains that a plaintiff must include factual allegations to support generalized assertions of intent. Because ARE's factual allegations imply that Balboa had other motives – such as to advance its financial benefit or abide by the terms of its contract with GMAC – and not the specific intent to harm ARE, the claim fails.

E. ARE Has Not Stated a Claim for Unjust Enrichment.

In defending its unjust enrichment claim, ARE relies exclusively on *Ulbrich v. GMAC Mortgage, LLC*, No 11-cv-62424-RNS, ECF No. 76 (S.D. Fla. Aug. 15, 2012), in which the court denied a motion to dismiss such a claim filed by Balboa Insurance Services, a different entity than Balboa. *See* Pl. Mem. at 13-15. Even under Florida law, *Ulbrich* should not control here because that court failed to apply governing Eleventh Circuit precedent that requires a plaintiff to confer directly a benefit on a defendant in order to maintain an unjust enrichment claim. *See Virgilio v. Ryland Gr., Inc.*, 680 F.3d 1329, 1331 (11th Cir. 2012) (affirming dismissal of unjust enrichment claim where defendant received payment from and pursuant to contract with third party, who had previously received a payment from the plaintiff, because plaintiff did not make payment to and directly confer a benefit on defendant).[7]

CONCLUSION

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

[7] ARE's assertion that Balboa Insurance Services ("BIS") "hastily initiated settlement discussions" in *Ulbrich* after its motion was denied is both irrelevant and false. BIS chose to settle the case to avoid significant litigation expenses, and did not admit any liability.

Dated: June 6, 2013
New York, New York

Respectfully submitted,

BuckleySandler LLP
Counsel for Defendant Balboa Insurance Company

By: /s/ Ross E. Morrison
Ross E. Morrison
1133 Avenue of the Americas
Suite 3100
New York, New York 10036
Telephone: 212.600.2315
Facsimile: 212.600.2405
rmorrison@buckleysandler.com