Docket #0043 Date Filed: 5/22/2013

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	
RESIDENTIAL CAPITAL, LLC et al.,	Case No. 12-12020 (MG)
Debtors.	Chapter 11
	(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
Plaintiff,	
v.	
GMAC MORTGAGE, LLC, as successor by merger to GMAC Mortgage Company, BALBOA INSURANCE COMPANY, and ALLY FINANCIAL, INC.,	
Defendants.	

PLAINTIFF ARE'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT BALBOA'S MOTION FOR DISMISSAL

STORCH AMINI & MUNVES PC
2 Grand Central Tower
140 East 45th Street, 25th Floor
New York, N.Y. 10017
Tel: (212) 490-4100
Fax: (212) 490-4208

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules and Other Authorities

Plaintiff American Residential Equities, LLC ("ARE") respectfully submits this Memorandum of Law in Opposition to the Motion to Dismiss the First Amended Complaint (the "Balboa Motion") brought by defendant Balboa Insurance Company ("Balboa").[1]

PRELIMINARY STATEMENT AND FACTUAL BACKGROUND

Balboa's strategy is to paint itself as a bystander to GMAC's misconduct, despite the fact that it profitted from its own intentional and systematic participation in that misconduct by abusing its control over force-placed insurance via the payment of undisclosed kickbacks to benefit both Balboa and GMAC. This strategy is unavailing. GMAC was from 2004 to 2010 the servicer for various portfolios of mortgage loans (and also the underlying properties post-foreclosure) owned and/or managed by ARE. Cplt. ¶ 2.[2] GMAC had arranged to have force-placed insurance on these assets obtained as and when necessary from Balboa, not just for the ARE portfolios but for all of the various portfolios of mortgage loans GMAC serviced. Cplt. ¶ 38. (Force-placed insurance is supposed to be obtained to protect a loan owner such as ARE from the risk of uncompensated damage to the value of its collateral when borrowers default on their contractual obligation to maintain insurance on the property in an amount sufficient to protect the mortgage lender.) Unbeknownst to ARE, Balboa was paying GMAC kickbacks in order to distort GMAC's practices related to force-placed insurance for Balboa's benefit in multiple ways, including: a) paying inflated premiums (including not seeking value for money

[1] Yesterday, ARE filed a separate opposition ("Opp. To GMAC Motion") to the separate motion to dismiss the Amended Complaint herein filed by defendant GMAC Mortgage, LLC ("GMAC" or the "Debtor"). All arguments being made in that separate brief are incorporated herein to the extent applicable. Both the Debtor and Balboa previously filed motions to dismiss directed at the original Complaint filed by predecessor counsel in this adversary proceeding, but the Amended Complaint was filed before those motions were fully briefed or argued, and the Court accordingly never had occasion to address the arguments raised in those mooted motions. Consistent with the usage of the Amended Complaint, as used herein "ARE" refers to the plaintiff in both its individual and representative capacities, together with the underlying investment vehicles (called "Beneficiaries" in the Amended Complaint) it is authorized and duty-bound to represent in this dispute.

[2] See also Opp. to GMAC Motion at 2-4 (giving more detailed factual background).

by considering alternative sources of such insurance coverage at more reasonable prices) (Cplt. ¶ 49); b) insuring properties for more than their true value (thus enhancing the premium flow to Balboa without any corresponding benefit to ARE) (Cplt. ¶ 50); c) placing, in some instances, force-placed insurance on properties already adequately insured (Cplt. ¶ 52); and d) failing to pursue legitimate claims for payment against Balboa for ARE-owned properties that GMAC had insured with Balboa (Cplt. ¶ 50).

In addition to actual cash payments laundered through affiliated third parties, Balboa provided some of the kickbacks to GMAC in the form of free services. Specifically, Balboa caused employees of its own affiliate to be covertly embedded within GMAC performing GMAC's own duties (owed to ARE and its other mortgage-servicing clients) with regard to insurance tracking and administration. Cplt. ¶¶ 41-42. This was an in-kind kickback inducing GMAC to steer business to Balboa, because GMAC would otherwise have had to spend considerable financial and management resources performing these functions in-house with its own personnel – costs it would not have been permitted to pass through to ARE but would have been required to absorb as part of the overhead intended to be covered by the basic servicing fee it was charging ARE. Cplt. ¶ 42.

Further, the scheme created an inherent but concealed conflict of interest, since these embedded Balboa personnel had an obvious incentive to promote Balboa's own interests, and proceeded to do exactly that. Cplt. ¶ 53. By bribing GMAC to outsource its own insurance-handling functions to Balboa's designees, Balboa caused those designees to purchase excessive amounts of costly insurance from Balboa, and caused GMAC to fail to pursue legitimate insurance claims on ARE's behalf that Balboa would otherwise been obligated to pay. ARE did

not first learn of this scheme until 2012, in the middle of prior litigation against GMAC that was terminated by the automatic stay upon the filing of GMAC's chapter 11 case. Cplt. ¶ 60.

Balboa first seeks to immunize itself from any liability whatsoever by hiding behind the so-called "filed rate doctrine." But even if the legal and factual predicate for the possible applicability of the doctrine had been laid—and it has not—numerous courts have held that this ploy simply does not work to protect insurers or others who have corrupted the insurance procurement process by the payment of concealed kickbacks. In such a situation, the question is not whether the rates charged are "unreasonable" in the abstract, but whether Balboa manipulated the *process* by which ARE was caused to pay them.

Moreover, much of the damage caused by the fraudulent conspiracy between Balboa and GMAC was not limited to premiums set at excessively high rates. For example (Cplt. ¶ 39-49), in many instances properties were deliberately over-insured, and there is no possible basis for contending that the filed rate doctrine immunizes a scheme to pile a $200,000 insurance policy onto a property worth at most only $100,000. Whether the excessive amount charged would have been "reasonable" for a hypothetical property actually worth $200,000 is neither here nor there. Likewise, the Amended Complaint alleges damage because Balboa manipulated GMAC's insurance-handling processes to preclude the pursuit on ARE's behalf of valid insurance claims Balboa would have had to pay; but liability for preventing the payment of valid claims cannot possibly be avoided by contending that the "reasonableness" of the premiums previously charged for the coverage is beyond judicial review.

As to the substantive causes of action set forth against Balboa in the Amended Complaint, the unjust enrichment claim is essentially identical (indeed, factually stronger) to one sustained by the Southern District of Florida just last year in a class action brought against

Balboa for precisely the same misconduct – a kickback scheme involving GMAC-serviced mortgage loans (in that instance alleging economic harm to the borrowers, as opposed to the loan owners in this case who were stuck with the inflated bills *after* the borrowers defaulted). After its motion to dismiss was rejected, Balboa immediately moved to settle that case rather than defend its conduct on the merits.

Balboa's quibbles with the pleading of the other causes of action set forth against it (for tortious interference with ARE's contract with GMAC and for derivative liability for GMAC's various torts on aiding and abetting and civil conspiracy theories) are likewise groundless. Balboa ignores the plain language of the Amended Complaint in arguing that certain elements of the claims for tortious interference with contract and aiding and abetting were inadequately pled, and relies solely on disputed Pennsylvania law for its only argument against the claim for civil conspiracy. As such, these claims should be sustained by the Court.

ARGUMENT

I. THE FILED RATE DOCTRINE DOES NOT IMMUNIZE THE MISCONDUCT ALLEGED HERE

As described in more detail below, attempts by insurers to hide behind the filed rate doctrine in the face of allegations that they have paid improper kickbacks to secure business have been rejected by numerous courts all over the country in fact patterns strikingly similar to the one alleged here. But before even addressing the substance, it is worth noting that Balboa has utterly failed to lay the legal and factual predicate one would think necessary for the doctrine to even potentially apply. The core of the doctrine is that, in specified circumstances, any *rate* approved

by a 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).[3]

Balboa simply asks the Court to assume without evidence or argument that every premium it charged with respect to every relevant ARE property located anywhere in the U.S. over a multi-year period was calculated, and correctly calculated, in accordance with a rate that had been properly approved by a relevant regulator. One would think that, at a minimum, Balboa would cite some statutory authority from all relevant jurisdictions setting forth the rate approval process (and presumably prohibiting insurers from charging different or lower premiums for the relevant line of business based on market forces and/or their own independent business judgment), and have attached a stack of administrative decisions which this Court could take judicial notice of giving specific approval to the rates Balboa was permitted to charge for force-placed insurance in each potentially relevant jurisdiction for each potentially relevant time period.[4] *See, e.g. Dolan v. Fidelity Nat'l Title Ins. Co.*, 365 F. App'x 271 (2d Cir. 2010); *Simon v. Keyspan Corp.*, 694 F.3d 196 (2d Cir. 2012). Balboa has not done so.[5] By contrast, in the *Wegoland* case, on which Balboa relies as controlling Second Circuit authority, the plaintiffs' entire theory appears to have been that the rates charged by the defendant telephone companies

[3] Indeed, the Second Circuit in *Wegoland* describes (27 F.3d at 18, emphasis added) the filed rate doctrine as limited to barring "suits against regulated *utilities* grounded on the allegation that the rates charged by the *utility* are unreasonable." Balboa is simply not a regulated "utility" by any stretch of the imagination, and certainly has not met its burden of demonstrating that the various regulatory regimes it may or may not be subject to in the various relevant jurisdictions in which it operates are indistinguishable from the prototypical utility regulation regime the Second Circuit was addressing.

[4] Our understanding is that the ARE portfolios included properties (or mortgage loans secured by properties) located in at least 46 separate states.

[5] Interestingly enough, in the *Ulrich* case (described below in Section II) where Balboa's motion to dismiss was denied, it appears not to have even raised the filed rate doctrine in its motion papers. Unless this was a severe failure of lawyering by Balboa's counsel in that case (including counsel appearing pro hac vice from the BuckleySandler firm that also represents Balboa in this case), this tactical omission certainly raises questions as to whether the relevant regulatory regime – essentially the same as in this case, as *Ulrich* involved a proposed class of borrowers whose mortgages were serviced by GMAC who had been victimized by Balboa's kickback scheme resulting in overpriced force-placed insurance – made the invocation of the filed rate doctrine even plausible.

to their telephone customers had indisputably been set via regulatory approval, but that the relevant regulators had been fraudulently induced to approve excessive rates because the defendants had provided misleading financial information to the regulators in the rate-setting process.

But in any event, numerous courts have specifically rejected the contention that the filed rate doctrine immunizes manipulation of the insurance-placement process via concealed kickbacks. Such cases have multiplied in recent years, as kickback abuses related to force-placed insurance have come to light. In *Gallo v. PHH Mortgage Corp.*, 2012 WL 6761876 (D.N.J. Dec. 31, 2012), for example, a defendant's attempt to shield itself from liability related to the receipt of kickbacks in connection with force-placed insurance was denied precisely because "'the filed rate doctrine simply does not apply' in circumstances where plaintiffs 'challenge [the defendant's] allegedly wrongful conduct, not the reasonableness or propriety of the rate that triggered that conduct." *Gallo*, 2012 WL 6761876 at * 4, *citing Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 765 (3d Cir. 2009); *see also Williams v. Duke Energy Intern., Inc.*. 681 F.3d 788, 797 (6th Cir. 2012) (finding that "the filed rate doctrine bars challenges to the reasonableness of a filed rate" but not "payments made outside of the rate scheme.")

Likewise, in *Cannon v. Wells Fargo Bank, N.A.*, 2013 WL 132450 at * 9 (N.D.Cal. Jan. 9, 2013), kickback claims against a mortgage servicer related to force-placed insurance were not barred by the doctrine because the plaintiff was not challenging a rate as excessive in the abstract, but was rather challenging the manipulation of the insurance-placement process. As the court put it at length:

> Where a plaintiff is not challenging a rate as excessive, but rather the manipulation of the rate, the filed-rate doctrine does not apply. . . . For example, if insurance were available from a number of carriers at different rates —all subject to filed-rates—the filed-rate doctrine would not protect a loan servicer

> who chooses a carrier and a policy with a rate higher than others simply to receive a kickback not available from other carriers. A claim of manipulation could lie irrespective of the fact that the rate charged by the carrier is protected under the filed-rate doctrine.

Cannon, 2013 WL 132450 at * 9.

Courts across the country have made the identical distinction between challenges to insurance rates as such and challenges to kickback schemes, holding that the filed rate doctrine cannot be used to immunize participants in kickback schemes. *See e.g., Ellsworth v. U.S. Bank, N.A.*, 2012 WL 617905 at * 13 (N.D.Cal. Dec. 11, 2012) ("[J]ust because the damages are based on increased costs incurred as a result of the alleged kickback scheme does not transform a challenge to conduct and practices into a challenge tothe premiums."); *Kunzelman v. Wells Fargo Bank, N.A.*, 2012 WL 2003337 at * 3 (S.D.Fla. June 4, 2012) (plaintiff is "not challenging the rates filed by Defendants' insurers. Rather, Plaintiff challenges the manner in which Defendants select insurers, the manipulation of the force-placed insurance process, and the impermissible kickbacks that were included in the premiums."); *Abels v. JPMorgan Chase Bank, N.A.*, 678 F.Supp.2d 1273, 1277 (S.D.Fla. 2009) ("Plaintiffs are not complaining that they were charged an excessive insurance rate, they are complaining that the defendant bank acted unlawfully when it chose this particular insurance company and this particular rate."); *Gipson v. Fleet Mortg. Grp., Inc.*, 232 F.Supp.2d 691, 707 (S.D.Miss. 2002) ("The court is not persuaded that the filed rate doctrine bars a claim such as this, which is not so much a challenge to the rate itself as it is to the lender's right under the lending contract to place insurance in such a manner as to cause its borrowers' payment of unnecessary fees."); *Stevens v. Citigroup, Inc.*, 2000 WL 1848593 (E.D.Pa. Dec. 15, 2000) ("Plaintiff does not appear to challenge the excessiveness of any one rate of insurance. Instead, plaintiff challenges the way in which the defendants' chose the insurance at issue.")

As the *Gallo* court pointedly noted, there is no "authority to demonstrate that such pre-arranged side agreements are similarly filed with, approved by, or regulated and monitored in some way by a governing regulatory agency" like the filed rates themselves. 2012 WL 6761876 at *6. Certainly Balboa does not contend that its kickback payments to GMAC were subject to any regulatory approval process.[6] Indeed, New York's insurance regulators have been conducting a high-profile investigation into kickback practices in the force-placed insurance industry presumably because of precisely this sort of (apparently widespread) arrangement that have long been concealed from regulators.[7]

Furthermore, *Wegoland* itself makes clear (27 F.3d at 19) that one key justification for the filed rate doctrine is because of the crucial principle in most regulated industries of

---

[6] The cases cited by Balboa uniformly address the dismissal of causes of action pertaining directly to *rates* regulated by regulatory agencies; not one addresses a cause of action based on a kickback scheme separate and apart from the regulatory rate-approval process. In *Dolan*, 365 F. App'x 271, for example, the filed rate doctrine was implicated by a class action suit alleging a *price fixing* conspiracy against title insurance companies. Similarly, in *Keyspan*, 694 F.3d 196, a consumer of electricity alleged a collusive scheme between electricity companies to *increase capacity prices.* In both of these cases, the causes of action directly implicated the prices and/or rates of a regulated industry; neither case addressed a kickback scheme independent of the regulatory rate-setting process.

It should be noted that *Dolan* is an unpublished and non-precedential decision. When the Second Circuit more recently issued a published precedential decision in *Galiano v. Fidelity Nat. Title Ins. Co.*, 684 F.3d 309, 313 (2d Cir. 2012), which involved almost identical factual allegations of price-fixing in the title insurance industry (albeit different liability theories), it specifically noted (*Id.* at 313 n. 6) that it was affirming the district court's dismissal on one ground only and thus avoiding offering any opinion on the correctness of the district court's alternative holding that the filed rate doctrine justified dismissal of the claims there. *Dolan* in any event is factually very similar to the cases from the Southern District of Florida and Northern District of Illinois, which the *Cannon* court (2013 WL 132450 at * 7) correctly analyzed and distinguished as having no bearing on the proper analysis of the very different fact pattern presented by schemes in which mortgage servicers are induced by kickbacks to steer force-placed insurance business to specific insurers.

[7] *See, e.g., A Mortgage Practice Gets a Closer Look by Regulators*, N.Y. Times (March 27, 2013) (available at http://www.nytimes.com/2013/03/27/business/economy/regulators-review-costs-of-force-placed-insurance.html) (describing various federal and state investigations and quoting New York's chief insurance regulator as saying "Our investigation found that insurers and banks built a network of troubling relationships and payoffs that helped drive premiums sky-high. Those improper practices created significant conflicts of interest and saddled homeowners, taxpayers and investors with millions of dollars in unfair and unnecessary costs.'"); *Settlement to Benefit Borrowers*, N.Y. Times (Apr. 14, 2013) (available at http://www.nytimes.com/2013/04/14/realestate/a-settlement-to-benefit-certain-borrowers-in-new-york.html) (describing agreement of one of Balboa's major competitors to pay $14 million penalty to New York Department of Financial Services to settle allegations of abuses related to force-placed insurance; also noting ongoing investigations by other major states as well as hearings conducted by National Association of Insurance Commissioners).

"nondiscrimination," i.e. that all of the regulated utility's similarly-situated customers should pay the approved rate – no more and no less. A kickback scheme completely undermines that rationale. Assume, to give a simple example, that force-placed insurance for a given property at Balboa's (supposedly) government-approved rate would be $5,000 per year, but Balboa is willing to provide GMAC with $1,000 in kickbacks to secure that business. Balboa is thus willing as a business matter to insure the property for $4,000 – at variance with the approved rate it relies on, and in a fashion that discriminates against other customers where Balboa is actually netting the full $5,000. The problem, however, is that Balboa's willingness to discount its rates is not flowing through to either the mortgage borrower who is nominally being charged the full $5,000, or the loan owner such as ARE who will predictably be stuck with the tab as a result of the borrower's default.

But separate and apart from the inapplicability of the filed rate doctrine to kickback schemes, the doctrine additionally makes no sense on its face as applied to much of the misconduct here. As already noted, the abstract reasonableness of a rate has nothing to do with how much insurance coverage is appropriate as opposed to excessive for a given property, and one of the systematic abuses carried out by the Balboa/GMAC conspiracy was to systematically over-insure properties, driving up income to Balboa (and kickback income to GMAC) without providing any corresponding benefit to ARE, because the property's true value (often depressed as a result of the general collapse of the real estate market in 2007 and thereafter) would cap ARE's maximum possible recovery in the event of a claim even if the nominal policy limit was much higher. Setting policy limits in excess of the maximum possible claim that ARE could hope to be paid in the event the property were totally destroyed by fire or other hazard

represented pure (and entirely undeserved) profit for Balboa and GMAC – profit that in no way was the result of regulatory approval.

Finally, Balboa does not even try to explain how the filed rate doctrine could possibly shield it from liability for using its embedded personnel at GMAC to discourage the timely pursuit and recovery of valid insurance claims against Balboa for ARE's benefit, which was yet another systematic abuse enabled by the kickback scheme and obviously has nothing whatsoever to do with the abstract reasonableness of the premiums charged.

II. THE CAUSES OF ACTION ALLEGED AGAINST BALBOA ARE SUFFICIENTLY PLED

Fed. R. Civ. P. 8(a), incorporated here by Fed. R. Bankr. P. 7008, requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Notice pleading does not require prolixity or the sort of evidentiary detail that would be set forth at trial (or in opposition to a summary judgment motion). *See Stephenson v. PricewaterhouseCoopers, LLP*, 768 F.Supp.2d 562, 570 (S.D.N.Y. 2011), *citing Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (finding that Rule 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader entitled to relief,' in order to 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'") The Complaint clearly specifies the damages suffered by ARE as a result of Balboa's actions, and alleges the various forms of misconduct performed by Balboa. Cplt. at ¶¶ 36-55.

The ARE-managed portfolios serviced by GMAC included in excess of 2,500 separate assets (either mortgage loans secured by specific real estate or specific real estate assets acquired as a result of foreclosure), and Balboa improperly benefited by insurance-related misconduct in connection with at least several hundred of those assets. Obviously, much more detail could be

provided beyond the details included in the Complaint, with descriptions of asset-specific problems such as, for example:

- The placement of an excessive amount of force-placed insurance (compared to the actual and deteriorating value of the property) on the property at 246 South Third Avenue in Mount Vernon, New York, in or about 2008.
- The placement of force-placed insurance in or about 2007 and 2008 on the property at 218-44 110th Avenue in Queens Village, New York that had been severely damaged by a fire in 2006 in an amount so excessive that it could only have been reasonable before the house had burned down.
- The failure to timely pursue any insurance claim for substantial storm damage in early 2007 to the property located at 42 Kelly Road in Sheldon, South Carolina, which was known to GMAC/Balboa shortly after it occurred but not discovered by ARE until years later.

However, Balboa cites no authority whatsoever suggesting such a heightened, property-by-property level of detail is necessary at the pleading stage where, as here, the abuses were systematic in nature.[8]

A. Balboa's Disingenuous Attempt to Shop for Favorable Law Should Be Rejected

Florida law should govern this dispute. Balboa's choice of law analysis is transparently driven by its desire to shop for favorable law, in particular, Pennsylvania's unusually short

[8] Obviously, not only litigants but courts can disagree as to exactly how much particularity is required at the pleading stage in a given context, and we believe that substantially greater (although, we would submit, unnecessary) particularity could be provided via a further amendment if the Court were to so prefer. Likewise, to the extent the Court were to agree with Balboa's contentions that there are any other technical defects in pleading we would request an opportunity to cure any such issues by a further amendment. We note that the court never ruled on the adequacy of the original Complaint (and Balboa's motion directed against it was mooted before ARE even filed an opposition brief), so this is the first pleading in the dispute whose legal sufficiency will actually be the subject of a judicial ruling.

statute of limitations. *See* Infra, Section II(C). That argument could not support dismissal in any event due to the tolling allegations set forth in the Amended Complaint (Cplt. ¶¶ 56-60). Balboa argues that Florida law is substantively equivalent to Pennsylvania law; that said, Balboa simply does not provide a non-speculative basis to establish that Pennsylvania's law should be applied here to the exclusion of that of the various other relevant jurisdictions.[9] Given the concealed and conspiratorial nature of the dealings between Balboa and GMAC (which were headquartered in different states), it is hardly ARE's fault that it has not pinpointed precisely where all of the relevant misconduct took place (and indeed if our preliminary understanding that the trust accounts maintained by GMAC for ARE's benefit were located in New York proves accurate, that is yet another potentially significant jurisdiction). By contrast, New York often recognizes the situs of injury as the dispositive factor in tort choice of law. *Devore v. Pfizer, Inc.*, 58 A.D.3d 138 (1st Dep't 2008) (applying law of jurisdiction where injury was suffered for purposes of New York choice-of-law analysis); *Heineman v. S&S Machinery Co.*, 707 F. Supp. 86, 88 (E.D.N.Y. 1989) (situs of place of injury for choice-of-law analysis in fraud claim is typically plaintiff's residence). Here, that has the advantage of unambiguously being Florida.[10] Nor is the "injury" here theoretical or abstract. The result of Balboa's misconduct was that the amount of funds wired by GMAC into ARE's Florida bank accounts was reduced dollar-by-dollar by the damage Balboa's action caused and/or that the amounts wired by ARE out of its Florida bank

[9] Balboa is not a party to the key contract between ARE and GMAC and does not attempt to invoke the choice-of-law clause of that contract which in any event, for the reasons separately briefed in response to GMAC's motion, does not apply to the tort claims.

[10] Balboa's attempt to muddy the waters on this issue (Motion at 11) is disingenuous. The question is not where the ultimate individual investors in the various ARE-affiliated entities (called "Beneficiaries" throughout the Amended Complaint) reside, but where those business entities (typically structured as LLC's) were headquartered and managed at the relevant time. Our understanding is that it was Florida. When one tries to identify the situs where a corporate entity has suffered economic loss, pointing out that some or even most of its shareholders may not live in the same state as the company's headquarters is neither here nor there.

accounts to GMAC (in months where the misconduct led to invoices showing a net amount due from rather than to ARE). Cplt. ¶ 46.

B. Balboa Has Already Litigated and Lost the Question of Unjust Enrichment Liability In This Exact Fact Pattern

Balboa does not argue that the unjust enrichment claim is barred under any statute of limitations, and its specious arguments that the necessary elements of the claim have not been set forth here were rejected just last year when its motion to dismiss was denied in *Ulrich v. GMAC Mortgage, LLC et al.*, No. 11-62424, Docket No. 76 (S.D.Fla. Aug. 15, 2012), attached hereto as Exh. A. *Ulrich* involved Balboa's misconduct in GMAC-serviced mortgages in paying kickbacks (as well as embedding personnel to manipulate the process) to increase the flow of force-placed insurance premiums to itself. The Florida district court had no difficulty (Exh. A at 2-3) finding the key elements satisfied. Because the class plaintiffs were billed for force-placed insurance issued by Balboa as a result of Balboa's undisclosed payment of kickbacks to GMAC "(1) Plaintiff conferred a direct benefit to Balboa, (2) Balboa had knowledge of the benefit, (3) Balboa accepted and retained the benefit, and (4) the circumstances were such that it would be inequitable for Balboa to retain the benefit without paying for it."[11] The same is alleged here. Cplt. ¶¶ 49-50.[12] The *Ulrich* court specifically rejected Balboa's claim that it was immune from liability because it had not dealt directly with the plaintiff homeowner (who instead dealt directly with GMAC, but with the resulting funds funneled to Balboa).

More strikingly, the *Ulrich* court rejected Balboa's claim that the plaintiff had not "conferred a direct benefit" on Balboa because the plaintiff had been billed for the force-placed

[11] *Ulrich* applies Florida law, but Balboa itself argues that Florida law and Pennsylvania law are not materially different on this subject. (Motion at 17.)

[12] These are substantially the same elements of the cause of action set forth in Balboa's Motion at 17-18.

insurance premiums but not actually paid them. Here, by contrast, ARE's case is stronger than the *Ulrich* plaintiff's, because it has alleged that it actually has paid such premiums – precisely because when the borrower defaults (which is unsurprisingly often the case in a situation where the borrower has failed to maintain their own insurance coverage on the subject property) the insurance premiums advanced by GMAC are simply added onto ARE's tab and thus deducted from the cash GMAC would otherwise have paid over to ARE. Cplt. ¶ 46. Having lost its motion to dismiss in *Ulrich*, Balboa was unable or unwilling to defend its actual conduct with respect to the GMAC-serviced mortgages involved in that case, but hastily initiated settlement discussions, with final court approval of a certified class settlement occurring earlier this month. *See Ulrich*, Docket No. 105 (S.D.Fla. May 10, 2013), attached hereto as Exh B.

Furthermore, Balboa's contention that it had no direct relationship with ARE is particularly ridiculous given that, as alleged in the Amended Complaint, Balboa's personnel were inserted into GMAC and performed as if they were GMAC employees. Balboa was, in fact, in direct contact with ARE as its employees covertly operated from within GMAC.

C. The Other Claims Against Balboa Are Not Time-Barred

Even if Balboa were correct that the claims asserted against it other than unjust enrichment were subject to a short two-year limitations period (it is obvious that its choice-of-law arguments are intended to, e.g., avoid Florida's longer limitations periods, such as four years for fraud: Fla. Stat. 95.11(3)(j)), the Amended Complaint specifically pleads that Balboa's misconduct was not discovered until late 2011. Cplt. ¶ 59. Balboa does not appear to contend that tolling pursuant to the "discovery rule" is legally inapt here; instead, it merely claims that further unspecified factual details are not particularized in the complaint. However, Balboa is unable to cite to any authority demonstrating that the Amended Complaint's detailed allegations

about the uncovering of the kickback scheme are not sufficient under the discovery rule to prevent the limitations period from having begun to run earlier, because courts do not require such specificity in this context. "The application of equitable tolling turns on questions of fact that are often difficult to resolve on a motion to dismiss…[g]enerally, the applicability of equitable tolling depends on matters outside the pleadings, so it is rarely appropriate to grant a Rule 12(b)(6) motion to dismiss (where the review is limited to the complaint) if equitable tolling is at issue." *In re Allou Distributors, Inc.*, 387 B.R. 365, 398 (Bankr. E.D.N.Y. 2008), *citing Hoffkins v. Orleans Boces,* 2007 WL 1288210, at *2 (W.D.N.Y.2007); *see also In re Everfresh Beverages, Inc.*, 238 B.R. 558, 577 (Bankr. S.D.N.Y. 1999) ("The question of whether a statute of limitations should be equitably tolled is necessarily a factual one and is often not ripe for consideration on a motion to dismiss.")

Balboa certainly points to no publicly-available information that it contends should have put ARE on notice of the kickback scheme any earlier, nor does it explain what investigation ARE could or ought to have conducted at what earlier stage that would have uncovered these intentionally concealed facts. Indeed, Balboa completely ignores the particularized allegation (Cplt. ¶ 58) that it was GMAC's improper stonewalling in providing discovery in prior litigation commenced in 2010 that delayed receipt, even with judicial assistance, of information regarding Balboa's improper practices relating to force-placed insurance prior to 2012.[13]

[13] Balboa's reference (Motion at 19-20) to ARE's contractual right of audit is particularly perplexing because as is set forth in the papers submitted with GMAC's motion to dismiss, GMAC refused to permit ARE to carry out such an audit, leading ARE to file a motion in the middle of its pre-bankruptcy litigation against GMAC seeking specific performance of that contractual audit right, a motion GMAC successfully opposed. *See Order Denying Plaintiff's Motion For Judgment On The Pleadings,* Case No. 10-21943, Docket No. 55 (S.D.Fla. March 7, 2011), attached hereto as Exh. C. This simply confirms that ARE was diligently attempting to investigate (including by seeking to enlist judicial assistance), but was being stonewalled.

D. The Necessary Elements of the Other Claims Against Balboa Are Set Forth Consistent With the Requirements of Notice Pleading

After fighting over choice-of-law, Balboa does not establish that the Amended Complaint fails to state a claim even if the Court agreed to apply Pennsylvania (nor does Balboa seriously argue in the alternative that Florida law is any better for it, which would make its choice-of-law position seem foolish rather than merely irrelevant to these issues).[14]

i. The Complaint Adequately Pleads A Claim For Tortious Interference With Contract

As conceded by Balboa, "[t]o state a claim for tortious interference with contractual relations under Pennsylvania law, a plaintiff must allege (1) the existence of a contractual relationship; (2) the defendant's intent to harm the plaintiff by interfering with that contractual relationship; (3) the absence of a privilege or justification for the interference; and (4) damages from the interference." *Douglas v. Osteen*, 317 Fed.Appx. 97, 100 (3d Cir. 2009). Balboa does not dispute the pleading of any of these elements except for intent.[15]

Rather, Balboa's sole argument for the dismissal of this claim is that ARE failed to "allege that Balboa acted with specific intent to harm ARE." Motion at 16. The Complaint, however, explicitly and without reservation pleads that Balboa *intentionally* set up a scheme with GMAC whereby GMAC would breach its contractual obligations to ARE. Cplt. at ¶ 138. While Balboa suggests that the Complaint must plead some degree of malicious intent on Balboa's part to harm ARE, that is simply not the law. "It is important to note that a plaintiff is not required to show malice in the defendants' actions, nor that the defendants possessed any specific intent to

[14] While Balboa claims (Motion at 12) that it does not concede that the Amended Complaint states a claim as to the underlying torts by GMAC that Balboa is being sued for aiding and abetting and/or participating in via civil conspiracy, it does not make any affirmative arguments as to the inadequacy of the pleading of those claims.

[15] Balboa's general arguments about alleged lack of factual specificity regarding the hundreds of separate incidents of insurance-related abuses from which it profited at ARE's expense and the purported immunity conferred by the filed rate doctrine have already been addressed above.

harm the plaintiff's business relations." *Tube City IMS, LLC v. Severstal U.S. Holding, LLC*, 2013 WL 828175 at * 3 (N.D.W.Va March 6, 2013) (applying Pennsylvania law), *citing Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Div.*, 281 Pa. Super. 560, 422 A.2d 611, 622 n. 11 (Pa. Super. 1980).

Balboa's interference with ARE's contract with GMAC was plainly intentional because Balboa knew "that the interference [was] certain or substantially certain to occur as a result of [its] action." *Tube City*, 2013 WL 828175 at *3. Balboa does not, and cannot, argue that in establishing the kickback scheme with GMAC, it was unaware of the implications that scheme would have on ARE.[16] Moreover, Fed. R. Civ. P. 9(b) (made applicable here via Fed. R. Bankr. P. 7009) provides (emphasis added) that "malice, *intent*, knowledge, and other conditions of a person's mind may be alleged generally."

ii. The Complaint Adequately Pleads A Claim For Civil Conspiracy

Balboa seems to concede that ARE has sufficiently plead the core elements of civil conspiracy under Pennsylvania (and Florida) law, and focuses exclusively on an occasionally cited,[17] but by no means uniform, additional legal requirement that a defendant acted with the "sole purpose" of harming the plaintiff. (Motion at 14-15). However, when applying Pennsylvania law, courts consistently decline to impose this supposed "sole purpose"

[16] To the extent Balboa argues that the fact the kickback scheme originated prior to the date ARE first did business with GMAC means it cannot have intended to harm ARE as such, its position is absurd. ARE does not claim to have been the sole victim of the kickback arrangements between Balboa and GMAC – Balboa and GMAC presumably sought to profit at the expense of *all* of GMAC's non-affiliated servicing customers who would ultimately bear the economic brunt of these improper practices, the identity of which might vary somewhat over time as the scheme went on. Balboa unsurprisingly cites no authority that an intent to injure an entire general class of victims (such as a co-conspirator's customers) confers immunity from liability because it was not specifically focused on each victim as an individual.

[17] According to Balboa, the Complaint must plead that "(1) two or more defendants conspired with a common purpose to do (a) an unlawful act, or (b) a lawful act by unlawful means or for an unlawful purpose; (2) defendants committed an overt act in furtherance of the conspiracy; and (3) the plaintiff suffered legal damages." *Long v. Bank of America*, 2013 WL 315733 at * 3 (E.D.Pa. Jan. 28, 2013), *citing Weaver v. Franklin County*, 918 A.2d 194, 202 (Pa.Commw.Ct. 2007). These elements are all set forth here.

requirement, and instead apply the relevant facts to the elements of the law. *See, e.g.*, *Oldcastle Precast, Inc. v. VPMC, Ltd.*, 2013 WL 1952090 at * 13 (E.D.Pa. May 13, 2013); *Lorah v. SunTrust Mortg., Inc.*, 2010 WL 5342738 at * 5 (E.D.Pa. Dec. 17, 2010); *Logan v. Salem Baptist Church of Jenkintown*, 2010 WL 3364203 at * 4 (E.D.Pa. Aug 17, 2010). Indeed, Balboa's contention that the "sole purpose" element by definition cannot be present whenever a conspirator hoped to derive some benefit from its participation in the conspiracy makes no sense.[18]

Furthermore, by relying solely on the "sole purpose" quirk found in some unrepresentative Pennsylvania cases, and conceding the remaining elements of the claim under both Pennsylvania and Florida law, Balboa offers absolutely no basis for dismissing ARE's civil conspiracy claim should the Court decline to apply Pennsylvania law, as urged in Section II(A) above.

iii. The Complaint Adequately Pleads A Claim For Aiding And Abetting

First, Balboa's claim that it is somehow uncertain whether aiding and abetting liability even exists under Pennsylvania law is, to put it politely, highly disingenuous in light of what the Pennsylvania Supreme Court has said on that very subject. *Official Committee of Unsecured Creditors of Allegheny Health Education and Research Foundation v. PriceWaterhouseCoopers,* 989 A.2d 313, 327 n. 14 (Pa. 2010) ("Under present Pennsylvania law as established by the Commonwealth Court as the highest appellate court which has reached the issue, aiding and abetting a breach of fiduciary duty is a recognized cause of action."); *citing Koken v. Steinberg,* 825 A.2d 723, 732 (Pa.Commw. 2003); *see also Sovereign Bank v. Valentino,* 914 A.2d 415, 477

[18] No doubt the overwhelming majority of participants in most conspiracies, whether civil or criminal, are motivated at least in part by self-interest and hope to profit (whether financially or otherwise) from their involvement in promoting the conspiracy's illegitimate goal. Balboa advances no plausible rationale for a rule under which civil conspiracy liability would apparently only be applicable to sociopaths who wish others to be injured for the sheer pleasure of it while selflessly foregoing any possible financial gain.

(Pa.Super.Ct. 2007) (holding that under § 876 of the Restatement [Second] of Torts, a defendant is liable for aiding and abetting fraud if it "knowingly and substantially assisted [the primary tortfeasor] in his scheme to defraud" the plaintiff).[19]

Even before *Allegheny Health*, the Third Circuit had explicitly recognized a claim for aiding and abetting a breach of fiduciary duty under Pennsylvania law. *Huber v. Taylor,* 469 F.3d 67, 79 (3d Cir. 2006). A number of federal district courts have held likewise. *See, e.g., Laufen Int'l, Inc. v. Larry J. Lint Floor & Wall Covering, Inc.,* No. 10 Civ. 199, 2010 WL 1714032, at *5 (W.D.Pa. Apr. 27, 2010); *Matlack Leasing, LLC v. Morison Cogen, LLP,* Civ. A. No. 09–1570, 2010 WL 114883, at *11 (E.D.Pa. Jan. 13, 2010).

Under Pennsylvania law, Balboa can be held liable for aiding and abetting GMAC if "(1) there was a breach of duty owed to another, (2) the alleged aider and abettor knew of the breach, and (3) it substantially assisted or encouraged the primary tortfeasor [here, GMAC] in effecting the breach." *Matlack*, 2010 WL 114883 at * 11; *Lichtman v. Taufer*, 2004 WL 1632574 at * 8 (Pa.Ct.Com.Pl. July 13, 2004). Balboa first claims that ARE failed to plead that it had "actual knowledge" of GMAC's breach of its fiduciary duty to ARE, Motion at 12-13, and then argues that ARE failed to plead it provided "substantial assistance" to GMAC. In so arguing, Balboa chooses to willfully ignore the language of the Complaint, which pleads:

> "Balboa was aware of the Kickback Scheme, was aware that the Kickback Scheme was concealed from ARE and the public at large, was aware that GMAC was wrongfully and tortiously obtaining unearned monies from ARE in connection with the Kickback Scheme, and was aware that the continuing concealment of the scheme was integral to its success... Balboa knowingly and substantially participated in GMAC's tortious conduct related to the Kickback

[19] The *Allegheny Health* opinion was issued in a somewhat unusual procedural posture where the Pennsylvania Supreme Court was answering certified questions from the Third Circuit and the viability of aiding and abetting liability as such was not itself within the scope of the questions certified. At a minimum, this language indicates that the Pennsylvania Supreme Court agrees that the federal courts should give *Erie* deference to the rulings of Pennsylvania's intermediate appellate court recognizing such liability.

> Scheme by, among other things, paying the kickbacks and structuring the payments in a way calculated to avoid detection…Balboa further knowingly and substantially participated in GMAC's tortious conduct by virtue of [its] personnel acting on its behalf causing GMAC to purchase at ARE's expense force-placed insurance that was unnecessary, excessive and/or overpriced…"

Complaint, ¶ 122-123.[20]

The Complaint pleads both Balboa's knowledge of the ongoing scheme, and its active participation in it and its concealment of it from ARE. Indeed, GMAC's willingness to outsource its performance of its own contractually-required obligations to ARE to covertly embedded Balboa personnel simply underscores both points – because GMAC's misconduct (in e.g. overpaying for unnecessary insurance while also failing to pursue valid claims) was being carried out on GMAC's behalf by Balboa-affiliated personnel seeking to benefit Balboa, the knowledge and actions of those personnel are attributable to Balboa and constitute substantial assistance.

[20] As noted above, Rule 9(b) expressly permits a defendant's knowledge and similar state-of-mind elements to be pled in general terms.

CONCLUSION

For the foregoing reasons, the Balboa Motion should be denied in its entirety.

Dated: May 23, 2013
New York, New York

STORCH AMINI & MUNVES PC

By: s/John W. Brewer
Avery Samet, Esq.
John W. Brewer, Esq.
2 Grand Central Tower
140 East 45th Street, 25th Floor
New York, NY 10017
Tel: (212) 490-4100
Fax: (212) 490-4208

Counsel for Plaintiff

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-62424-Civ-SCOLA

CHRISTINA ULBRICH,

Plaintiff,

vs.

GMAC MORTGAGE, LLC, *et al.*,

Defendants.
_____/

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

THIS MATTER is before the Court on Defendant Balboa Insurance Service, Inc.'s Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 25.) For reasons explained in this Order, the Defendant's Motion to Dismiss is Denied.

Plaintiff, Christina Ulbrich brought this Complaint, as an individual and as a representative of a class, against Defendants GMAC Mortgage LLC and Balboa. This matter has been stayed as to GMAC pending the resolution of its bankruptcy action. (Order, ECF No. 56.) Plaintiff asserts a claim of unjust enrichment against Defendant Balboa. (Compl. ¶ 7, ECF No. 1.) The parties agree that the mortgage at issue is serviced by GMAC and requires borrowers to maintain insurance on their property. (Compl. ¶¶ 19, 20, ECF No. 1, Def.'s Mot. Dismiss, ECF No. 25.) Further, if a borrower fails to maintain insurance, GMAC may forcibly place insurance on their property. (*Id.*) The premiums for these forced-placed insurance policies are charged to the borrower's mortgage escrow account. (Compl. ¶ 34, ECF No. 1.)

The forced-placed insurance policies at issue were purchased through Balboa. (Compl. ¶¶ 29, 32, ECF No. 1.) The policies were backdated, meaning they were applied retroactively to cover periods of time which had already passed. (Compl. ¶¶ 29, 32, ECF No. 1.) The premiums associated with these policies were charged to Plaintiff's mortgage escrow account.[1] (*Id.*) Plaintiff alleges that GMAC received kickbacks and commissions in connection with Balboa's placement of these policies. (Compl. ¶¶ 30, 33, ECF No. 1.) Further, Plaintiff alleges that Balboa "performed insurance tracking services for GMAC, and communicated with GMAC

[1] Plaintiff alleges that although GMAC has cancelled the first policy it has yet to refund any portion of the second backdated policy.

borrowers on behalf of GMAC when their existing coverage was deemed to be deficient" by GMAC and Balboa.[2] (Compl. ¶ 57, ECF No. 1.)

Plaintiff alleges that Balboa's retention of the "handsome premium payments [obtained] through improper means" would be unjust and inequitable. (Compl. ¶ 115, ECF No. 1.) Accordingly, Plaintiff asserts that Balboa would be unjustly enriched if allowed to retain the payments. (Compl. ¶ 111, ECF No. 1.) Defendant Balboa filed a Motion to Dismiss for failure to state a claim pursuant to Rule 12(b)(6). To survive a motion to dismiss, a plaintiff must articulate enough facts, which the court accepts as true, "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (abrogating *Conley v. Gibson*, 355 U.S. 41 (1957)). Although this does not require detailed factual allegations, the complaint must show more than a "sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

When considering a motion to dismiss, the court must construe the facts in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). Accordingly, Balboa's denials of Plaintiff's allegations (Def.'s Mot. Dismiss 5, ECF. No. 25) will not be considered by the Court. The proper vehicle for the denial of allegations is in an answer, not a motion to dismiss. *See* Fed. R. Civ. P. 8(b)(1). In this case, Plaintiff has successfully stated a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). To state a claim for unjust enrichment, Plaintiff must show: (1) Plaintiff conferred a direct benefit to Balboa, (2) Balboa had knowledge of the benefit, (3) Balboa accepted and retained the benefit, and (4) the circumstances were such that it would be inequitable for Balboa to retain the benefit without paying for it. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009).

First, Balboa alleges that Plaintiff's claim fails because Plaintiff has not paid any portion of the premiums charged to her escrow account, and thus, Plaintiff did not confer any benefit to Balboa. (Def.'s Mot. Dismiss 7, ECF No. 25.) In contrast, Plaintiff contends that the charges to her escrow account, which reflect premium payments due, are enough to show a benefit was conferred. (Pl.'s Reply 5, ECF No. 37.) The court agrees with Plaintiff. Further, if Plaintiff has "alleged that [she] conferred a benefit, whether a benefit was actually conferred is a factual

---

[2] Plaintiff summarizes a statement by a former Balboa employee describing that when a customer calls GMAC the customer is actually speaking to a Balboa employee. (Compl. ¶ 57, ECF No. 1.) Further, GMAC's mailing addresses are actually three Balboa post office boxes. (*Id.*)

question that cannot be resolved on a motion to dismiss." *Abels v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 1273, 1279 (S.D. Fla. 2009). Therefore, it is enough that Plaintiff has alleged that she conferred a benefit to Balboa.[3] *See id.*

Second, Balboa alleges that even if a benefit was conferred, it was not a direct benefit. (Def.'s Mot. Dismiss 7, ECF No. 25.) Although Balboa incorrectly asserts that Plaintiff failed to meet the Rule 9(b) heightened pleading standard, it correctly asserts that Plaintiff must allege that she conferred a direct benefit. *Century Sr. Servs. v. Consumer Health Ben. Ass'n*, 770 F. Supp. 2d 1261, 1267 (S.D. Fla. 2011). However, direct contact between Balboa and Plaintiff is not required to find that Balboa directly benefited. *See Romano v. Motorola, Inc.*, No. 07-60517, 2007 WL 4199781, at *2 (S.D. Fla. Nov. 26, 2007) ("Defendant erroneously equates direct *contact* with direct *benefit*."). Plaintiff alleged that she had direct contact with GMAC (Compl. ¶ 19, ECF No.1), and that Balboa gave GMAC kickbacks. (Compl. ¶¶ 30, 33, 114, ECF No.1.)

Further, Plaintiff alleged that Balboa charged Plaintiff inflated premiums for the forced-placed coverage and "skim[ed] the excess for themselves." (Compl. ¶ 59, ECF No. 1.) Therefore, drawing all inferences in favor of Plaintiff, the allegations are sufficient to show that Plaintiff, by paying the allegedly excessive premiums, conferred a direct benefit on Balboa. *See Williams v. Wells Fargo Bank, N.A.*, No. 11-21233, 2011 WL 4901346, at *5 (S.D. Fla. Oct. 14, 2011) (stating that "to preclude an unjust enrichment claim merely because the 'benefit' passed through an intermediary before being conferred on a defendant" would be unjust); *cf. W. Coast Life Ins. Co. v. Life Brokerage Partners LLC*, No. 08-80897, 2009 WL 2957749, at *11 (S.D. Fla. Sept. 9, 2009) (finding no benefit was conferred where plaintiff alleged only that defendant "received compensation for its role in the transactions.").

Balboa also contends that even if Plaintiff conferred a direct benefit, Plaintiff's claim fails because Plaintiff could have avoided the inflated premiums "by heeding the multiple notifications she received." (Def.'s Mot. Dismiss 9, ECF No. 25.) The Court does not agree. Plaintiff does not allege that the forced placement of insurance alone amounts to unjust enrichment. *See Williams*¸ 2011 WL 4901346, at *6; *Cf. Lass v. Bank of Am., N.A.*, No. 11-

[3] Balboa attempts to distinguish *Abels* from the instant case, stating that unlike in *Abels* "Plaintiff has not alleged that [Balboa] is accruing any interest on her unpaid insurance premiums nor that [Balboa] has any recourse against Plaintiff if she never pays." (Def.'s Reply 4, ECF No. 40.) This distinction is inapposite. The accrual of interest merely increases the benefit conferred and the availability of recourse does not affect Balboa's alleged benefit.

10570, 2011 WL 3567280, at *7 (D. Mass. Aug. 11, 2011) (finding that the defendant's retention of a fee received for force placing insurance "was not inequitable due to the undisputed fact that plaintiff received multiple notices that if she did not purchase the required insurance, it would be purchased for her and a fee might be assessed for that purchase.").

Instead, Plaintiff argues that Balboa's manipulation of this process supports an unjust enrichment claim. (Compl. ¶ 59, ECF No. 1.). In *Williams*, this Court explained "the fact that Plaintiffs, had they maintained insurance coverage on their properties, could have avoided being subject to this manipulation does not render the claim insufficient, nor would such an argument serve the principles of equity and justice that the unjust-enrichment claim is intended to promote." 2011 WL 4901346, at *6. Thus, Plaintiff's allegations that Balboa charged "inflated premiums" and "secured handsome premium payments through improper means by offering GMAC kickbacks" are sufficient to state a claim for unjust enrichment. (Compl. ¶¶ 59, 114, ECF No. 1.)

Lastly, Balboa alleges that Plaintiff's claim fails because Plaintiff received adequate consideration, and thus, there can be no claim for unjust enrichment. *Baptista v. JP Morgan Chase Bank, N.A.*, 640 F.3d 1194, 1198 n.3 (11th Cir. 2011). Balboa claims that the second insurance policy is not worthless because it was only backdated six months. (Def.'s Reply 5, ECF No. 40.) Therefore, Balboa argues that because the policy was "substantially prospective" it was not worthless and thus, Balboa is entitled to some compensation. (*Id.*) However, whether the consideration received by Plaintiff was, in fact, adequate should not be resolved at the pretrial phase. *Williams*, 2011 WL 4901346, at *5.

Having considered the parties' arguments, the complaint, and the relevant legal authorities, the Court finds that Plaintiff has adequately stated claim upon which relief may be granted. It is **ORDERED** that the Motion to Dismiss (ECF No. 25) is **DENIED**.

DONE and ORDERED in chambers, at Miami, Florida, on August 15, 2012.

ROBERT N. SCOLA, JR.
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of record

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-CIV-62424-SCOLA/SELZER

CHRISTINA ULBRICH, as an individual and as a representative of the classes,

Plaintiff,

v.

GMAC MORTGAGE, LLC, formerly known as GMAC MORTGAGE CORPORATION, and BALBOA INSURANCE SERVICES, INC.,

Defendants.
_____/

ORDER GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, GRANTING MOTION FOR ATTORNEYS' FEES, COSTS AND CLASS REPRESENTATIVE COMPENSATION, AND JUDGMENT

This matter came before the Court for a Final Approval Hearing on May 10, 2013, on Plaintiff's (1) Motion for Final Approval of Class Action Settlement; and (2) Motion for Attorneys' Fees, Costs, and Class Representative Compensation. Both of these motions were unopposed by Defendant Balboa Insurance Services ("BIS"), and no Settlement Class members objected to either motion. Having considered the motion papers, the proposed Settlement Agreement which the Court preliminarily approved on January 15, 2013, the arguments of counsel, the response of the Settlement Class to the Settlement Notice, and all proceedings in this action, and otherwise being fully informed in the premises as to the facts and the law,

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. All defined terms contained herein shall have the same meaning as set forth in the Settlement Agreement executed by the Parties and filed with the Court (ECF No. 98-2).

2. The Court approves the Settlement Agreement and the terms set forth therein.

3. The Court finds that the notice of the pendency of this Action as a class action, and of the proposed Settlement, was given to all Settlement Class members by the best means practicable under the circumstances, including mailing the Settlement Notice to Settlement Class members by U.S. mail and publishing the Settlement Notice, Settlement Agreement, and other

relevant documents on Class Counsel's website. The Settlement Notice (1) provided an overview of the nature of the action and the status of the litigation; (2) described Plaintiff's claims; (3) defined the Settlement Class certified by the Court, (4) summarized the terms of the Settlement, (5) set forth the language of the release, (6) discussed the compensation that Class Counsel and the Class Representative would be seeking, (7) expressly stated that Settlement Class members had until March 18, 2013 to opt-out or object to the Settlement, and explained how to opt-out or object, (8) notified Settlement Class members of their right to appear at the Final Approval Hearing, and explained the procedure for appearing at the Final Approval Hearing in-person or through an attorney; and (9) advised Class members of the binding effect of a class judgment on participating Settlement Class members if the Settlement was approved. The form and method of notifying the Settlement Class fully, fairly, accurately, and adequately advised Settlement Class members of all relevant and material information concerning the Action and the terms of the proposed Settlement, and fully satisfied the requirements of due process and Rule 23.

4. The Settlement was negotiated at arm's length, in good faith, by highly capable and experienced counsel, with full knowledge of the facts, law, and risks inherent in litigating the Action, and with the active involvement of the Parties.

5. The Settlement confers substantial benefits upon the Settlement Class members, is in the public interest, and will provide the Parties with repose from litigation.

6. The Settlement is fair, reasonable, and adequate, in the best interests of the Settlement Class, and satisfies the requirements for final approval under Rule 23(e). Specifically the Court finds that final approval of the Settlement is warranted in light of the following factors:

a. The benefits associated with the Settlement;

b. The risk, expense, complexity, and likely duration of litigation;

c. The reaction of the Settlement Class members to the Settlement;

d. The extent of discovery completed and stage of the proceedings; and

e. The testimony of Class Counsel and the Class Representative.

7. The persons who have validly requested exclusion from the Settlement Class are not members of the Settlement Class, shall have no rights or interests with respect to the Settlement, and shall not be bound by any orders or judgments entered in respect to the

Settlement. A list of those persons who have validly requested exclusion from the Settlement Class was previously filed with the Court on March 22, 2013 (ECF No. 100-1).

8. The Court has considered Class Counsel's request for an award of $216,666.67 in attorneys' fees. Having reviewed Class Counsel's fee application and all applicable legal authorities, the Court hereby approves the requested award of attorneys' fees in the amount of $216,666.67, and finds that the requested amount of fees is reasonable and appropriate. The Court initially had some concerns regarding the time billed by non-attorneys, however, at the May 10, 2013 hearing, Class Counsel clarified that nearly all of the time billed by non-attorneys was for work traditionally performed by an attorney (as opposed to administrative work that is usually deemed subsumed into an attorney's market rate). Even if the Court were to reduce all of the non-attorney time billed ($42,955.00) from Class Counsel's fees, the total itemized fees would still come out to $304,944.50. This amount is more than the $216,666.67 that Class Counsel is actually requesting. The analysis comes out the same if the Court were to further reduce even the attorney-time spent working on the bankruptcy file ($21,142.00) from Class Counsel's fees. With this reduction, the total fees would still be higher than the requested $216,666.67. The Court finds that time spent on the bankruptcy case involving GMAC is compensable even though GMAC is not a party to this settlement because the claims against GMAC and Balboa are so inexorably intertwined.

9. The Court also has considered Class Counsel's request for costs in the amount of $25,468.70, and finds the requested costs to be reasonable and appropriate. Accordingly, the Court hereby approves the requested costs in the amount of $25,468.70.

10. The Court has considered Plaintiff's request for Class Representative Compensation in the amount of $10,000. The Court finds this award to be justified under the facts of this case and the applicable legal authorities. Accordingly, the Court hereby approves the award of $10,000 to Ms. Ulbrich.

11. After Judgment becomes final, and within ten (10) days of the Settlement Effective Date, BIS shall make the payment prescribed by Paragraph 4.1 of the Settlement Agreement into a segregated Settlement Account established by Class Counsel.

12. Within fourteen (14) days of the Settlement Effective Date, Class Counsel shall distribute the funds in the Settlement Agreement in the manner prescribed by Paragraphs 4.2 through 4.4 of the Settlement Agreement.

13. As provided in the Settlement Agreement, all Settlement Class Members who did not properly and timely submit an opt-out form requesting exclusion are hereby permanently barred and enjoined from asserting, instituting, or prosecuting, either directly or indirectly, the Released Claims against the Released Parties.

14. Notwithstanding the entry of Judgment, this Court shall retain exclusive and continuing jurisdiction and exclusive venue with respect to the implementation, enforcement, construction, interpretation, performance, and administration of the Settlement.

15. If the Judgment of this Court does not become final, this Final Approval Order shall be rendered null and void, and shall be vacated nunc pro tunc. Neither the Settlement Agreement nor any act performed or document executed pursuant to or in furtherance of the Settlement, including seeking approval of the settlement and class certification: (1) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any claim of the Class Representative or any Settlement Class Member, or (2) is or may be deemed to be or may be used as an admission of, or evidence of, any wrongdoing, fault, omission, or liability of Defendants or the Released Parties, or any of them, in any proceeding in any court, administrative agency or other tribunal, except that the Released Parties may file the Judgment in any action that may be brought against any of them in order to support a defense based on principles of res judicata, collateral estoppel, release, settlement, judgment bar, reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim. Nothing in this paragraph shall preclude any party to the Settlement Agreement from using the Agreement, the Judgment, or any act performed or document executed pursuant to the Settlement Agreement in a proceeding to consummate, monitor, or enforce the Settlement Agreement, the terms of the Settlement, or the Judgment.

16. This Action is hereby **DISMISSED** with prejudice and, except as provided herein, without costs.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DONE and ORDERED in chambers, at Miami, Florida, on May 10, 2013.

ROBERT N. SCOLA, JR.
UNITED STATES DISTRICT JUDGE

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 1:10-CV-21943-GOLD/McALILEY

AMERICAN RESIDENTIAL
EQUITIES, LLC,

Plaintiff,

v.

GMAC MORTGAGE, LLC,

Defendant.

_____/

ORDER DENYING PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNT II OF THE COMPLAINT [ECF No. 36]

THIS CAUSE comes before the Court on Plaintiff's Motion for Judgment on the Pleadings (the "Motion"). [ECF No. 36]. Plaintiff American Residential Equities, LLC ("ARE") requests that this Court enter judgment on Count II of the Complaint for specific performance compelling Defendant GMAC Mortgage, LLC ("GMACM") to submit to an audit of its books and records. GMACM has filed its Response in Opposition to ARE's Motion, and ARE filed a Reply in support of its Motion. [ECF Nos. 43, 46]. For the reasons stated below, I deny ARE's Motion for Judgment on the Pleadings on Count II of the Complaint.

I. BACKGROUND

The following facts are undisputed. Plaintiff ARE acquires, holds, and liquidates residential mortgage loans which are secured by real property. [ECF No. 1 ¶ 6]. Defendant GMACM is in the business of servicing mortgage loans. [*Id.* ¶ 7]. On July 29, 2004, ARE and GMACM entered into a Servicing

Agreement, whereby GMACM, in exchange for certain representations and warranties made by ARE, agreed to service and administer various mortgage loans owned by ARE. [ECF No. 4-1; ECF No. 43, p.1].

Among other things, the Servicing Agreement provided for the following:

> **Section 4.06 Right to Examine Servicer Records**
>
> The Owner shall have the right to examine and audit any and all of the books, records, or other information of the Servicer, whether held by the Servicer or by another on its behalf, with respect to or concerning this Agreement or the Mortgage Loans, during normal business hours or as otherwise acceptable to the Servicer, upon reasonable advance notice; provided that the Owner shall not so audit more than once per quarter.
>
> **Section 6.01 Termination**
>
> . . . .
>
> (c) Servicer may terminate, at its sole option, the Agreement with respect to some or all of the Mortgage Loans or REO Property, without cause. Such termination shall not become effective until the earlier of: (i) 90 days after the date on which notice of termination is provided by the Servicer in writing and delivered to the Owner by registered mail, or (ii) successor shall have assumed the Servicer's responsibilities and obligations hereunder in the manner provided in Section 6.02.
>
> **Section 6.02 Transfer Procedures**
>
> In the event the Servicer is replaced pursuant to the terms of this Agreement, the Servicer agrees to cooperate reasonably with the Owner and with any party designated as the successor servicer or subservicer in transferring the servicing to such successor servicer. In addition, the Servicer shall be responsible for notifying the related mortgagors of any transfer of servicing in accordance with the requirements of RESPA and the Cranston Gonzalez National Affordable Housing Act of 1990. On or before the date upon which servicing is transferred from the Servicer to any successor servicer (the "Transfer Date"), the Servicer shall prepare, execute and deliver to the successor servicer any and all documents and other instruments, place in such successor's possession all Mortgage Loan Documents in the possession of the Servicer which are necessary or appropriate to effect the purposes of such notice of termination, including but not limited to the transfer and endorsement or assignment of the related Mortgage Loans and related documents. The Servicer shall reasonably cooperate with the Owner and such successor in effecting the termination of the Service's responsibilities and rights hereunder.

. . . .

> On the related Transfer Date, the Servicer shall comply with all of the provisions of this Agreement to effect a complete transfer of the servicing with respect to the related Mortgage Loans. Except as otherwise provided for in this Agreement, on the related Transfer Date for each related Mortgage Loan, this Agreement . . . shall terminate with respect to such Mortgage Loan.

[ECF No. 4-1].

On April 20, 2009, GMACM transmitted a letter to ARE evidencing its intent to terminate the Parties' Servicing Agreement, without cause, effective no later than July 31, 2009. [ECF No. 1 ¶ 13]. On May 1, 2009, GMACM issued a second letter, which superseded previous correspondence, alerting ARE that it would extend the termination date an additional four months, through November 30, 2009. [*Id.* ¶ 14]. This letter expressly stated that the termination date would become "effective the earlier of (i) November 30, 2009 or (ii) such other date as ARE notifie[d] GMACM that a successor servicer ha[d] assumed GMACM's responsibilities and obligations." [ECF No. 7, p. 24]. GMACM also demanded reimbursement for expenses and advancements made in connection with the Servicing Agreement. [ECF No. 36, ¶ 9]

ARE did not appoint a successor servicer before November 30, 2009, and GMACM continued to service ARE's loans after that date.[1] ARE requested that GMACM permit ARE to perform an audit of its books and records in accordance with Section 4.06 of the Servicing Agreement. [ECF No. 1 ¶¶ 18–20].[2] GMACM

[1] ARE remains silent as to why it failed to appoint a successor servicer on or before November 30, 2009, and GMACM offers no explanation why it continued to service the mortgage loans after that date.

[2] As discussed in more detail below, it is unclear when and how many times ARE made such a request.

refused to allow ARE to perform any such audits. [*Id.*]. On April 1, 2010, ARE sent GMACM a letter demanding that it cease servicing ARE's mortgage loans and REO properties; enclosed with the letter were specific instructions for transferring the servicing files to Acqura Loan Services ("ALS"), the successor servicer. [*Id.* ¶ 22].

On June 11, 2010, ARE filed this action against GMACM. In its Complaint, ARE alleged that GMACM violated the terms of the Servicing Agreement by failing to properly service the relevant loans and properties; purporting to terminate the Servicing Agreement; refusing an audit of its books and records; and failing to follow certain instructions to transfer loan servicing to another company. [*Id.* ¶¶ 11–24]. As such, Plaintiff filed a two-count complaint alleging (1) breach of contract, and (2) specific performance. [*Id.* ¶¶ 25–35]. GMACM filed an Answer and Counterclaims for breach of contract, unjust enrichment, breach of implied duty of good faith and fair dealing, defamation, conversion, and injunctive relief. [ECF No. 49].[3] On October 15, 2010, ARE filed the instant Motion for Judgment on the Pleadings on Count II of its Complaint. [ECF No. 36].

II. LEGAL STANDARD AND GOVERNING LAW

Under the Federal Rules of Civil Procedure, "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). Such relief is appropriate when there are no material facts in dispute and the moving party is entitled to judgment as a

[3] GMACM filed an Amended Answer after the Court granted ARE's Motion to Strike certain Affirmative Defenses listed in the original Answer. [ECF Nos. 7, 29, 44].

matter of law. *See Cannon v. City of West Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001); 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1367, at 206, 208, 216 (3d ed. 2004) ("As numerous judicial opinions make clear, a Rule 12(c) motion is designed to provide a means of disposing cases when the material facts are not in dispute between the parties . . . . The motion for a judgment on the pleadings only has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court. . . . [I]f the pleadings do not resolve all of the factual issues in the case, a trial on the merits would be more appropriate than an attempt at resolution of the case on a Rule 12(c) motion."). As with a motion under Rule 12(b)(6), a court that rules on a motion under Rule 12(c) must accept the nonmovant's allegations as true and view all facts in the light most favorable to the nonmoving party. *See Mergens v. Dreyfoos*, 166 F.3d 1114, 1117 (11th Cir. 1999); *Latecoere Int'l, Inc. v. U.S. Dept. of the Navy*, 19 F.3d 1342, 1357 (11th Cir. 1994); 2 MOORE'S FEDERAL PRACTICE § 12.38, at 12-137 (3d ed. 2010); 5C WRIGHT & MILLER, *supra* § 1368, at 230 ("It is axiomatic . . . that for purposes of the court's consideration of the Rule 12(c) motion, all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false.").

Federal courts are generally reluctant to grant a motion for judgment on the pleadings where a case presents ambiguous factual circumstances that necessitate proper factual findings by a jury. *See Greenberg v. Gen. Mills Fun*

Grp., Inc., 478 F.2d 254, 256 (5th Cir. 1973); 5C WRIGHT & MILLER, *supra* § 1367, at 259 ("[Unlike a 12(b) motion, a motion for judgment on the pleadings] is directed towards a determination of the substantive merits of the controversy; thus, federal courts are unwilling to grant a judgment under Rule 12(c) unless it is clear that the merits of the controversy can be fairly and fully decided in this summary manner."); *id.* § 1367, at 223 ("A number of cases decided by various federal courts around the country indicat[e] that it is necessary for the movant to show a clear right to a judgment on the pleadings . . . .").

III. DISCUSSION

ARE argues that its Count II for specific performance is appropriate for summary disposition at this stage of the proceedings because its Motion presents purely legal questions of contract interpretation. [ECF No. 36, p. 2]. According to ARE, Sections 4.06 and 6.02 of the Servicing Agreement provide it with an unambiguous right to audit GMACM through the "Transfer Date," which occurred in April 2010. [ECF No. 36, pp. 1–2, 6; ECF No. 46, p. 1]. ARE maintains that this audit right was not extinguished when GMACM sent ARE termination notices because the Agreement and all of its provisions, including the audit provision, remained binding until the "Transfer Date." In particular, Section 6.02 of the Servicing Agreement provides that "[e]xcept as otherwise provided for in this Agreement, on the related Transfer Date for each related Mortgage Loan, this Agreement . . . shall terminate with respect to such Mortgage Loan." [ECF No. 4-1]. ARE argues that the only "reasonable" or "common sense"

interpretation of the Servicing Agreement must be that it had a right to perform an audit up through April of 2010. [ECF No. 36, p. 6; ECF No. 46, p. 2].

I decline to grant ARE's Motion because factual disputes and gaps presented by the pleadings prevent me from facing the purely legal question of contract interpretation that ARE purports to present. Most importantly, ARE's pleadings and memoranda in support of its Motion do not state when or how many times it requested an audit of GMACM's books and records. In its Complaint, ARE provided the following on this issue:

> **GMACM Refuses an Audit of its Books and Records**
>
> In an effort to better understand the scope of GMACM's mismanagement of the Mortgage Loans and REO Properties, and to assess the amounts owed to it under the Servicing Agreement, ARE demanded an audit of GMACM's books and records relating to the Mortgage Loans and REO properties pursuant to Section 4.06 of the Servicing Agreement.
>
> GMACM refused ARE's demand for an audit.
>
> GMACM told ARE not only that its books, records, and information on ARE's Mortgage Loans and REO Properties would not be made available, but that ARE's auditors would not be allowed inside GMACM's buildings.
>
> [ECF No. 1 ¶¶ 18–20].

As is clear from this text, although ARE alleged that it made audit requests, it failed to allege when or how many times it did so. Likewise, in its Motion and in its Reply, ARE simply asserted that it requested an audit multiple times without providing any more details. [ECF No. 36, p. 6 ("ARE repeatedly requested an audit."); ECF No. 46, p. 5 (disagreeing with GMACM that the audit request letter it cited "was the only request")].

This factual omission precludes me from granting judgment for ARE. It is undisputed that ARE's right to audit GMACM's books and records originated

from, and only existed as a result of, the terms and conditions of the Servicing Agreement. Thus, it goes without saying that ARE could only invoke this right while the terms of the Agreement were in effect. The Parties originally executed the Agreement on July 29, 2004, and ARE sent a written demand to GMACM to finally transfer the files to another Servicer on April 1, 2010, so the outer limits of time when the terms of the Servicing Agreement could have been valid appear to be these two dates. As such, both Parties presumably would agree that an audit request outside of this window of dates would be improper. [ECF No. 1, pp. 3, 5]. On the other hand, if ARE had requested an audit before July 31, 2009—when GMACM first intended to terminate the Servicing Agreement—the Parties would probably also agree that the terms of the Agreement would have been in effect at the time of such an audit request.[4]

Given these outer limits, I recognize that if ARE made at least one audit request between July 31, 2009 and April 1, 2010, this factual scenario may present a legal question of contract interpretation as to whether the terms of the Servicing Agreement, which created the audit right to begin with, were still valid or had already been extinguished at the time of the audit request.[5] Nevertheless, I do not reach this pure legal question now because ARE as the movant has

[4] GMACM would probably dispute the *validity* of such an audit request on other grounds.

[5] GMACM asserts that the Servicing Agreement terminated either on July 31, 2009, or at latest on November 30, 2009, in accordance with its letters of termination and with Section 6.01 of the Servicing Agreement. GMACM further asserts that its argument on this point is consistent with Section 6.02 of the Servicing Agreement, which provides that the Agreement shall terminate on the Transfer Date, because that section specifically provides for termination on the Transfer Date "*except as otherwise provided for in this Agreement.*" [ECF No. 43, p. 10 (emphasis added)].

provided *no dates whatsoever* as to when it requested an audit.[6] It is not the Court's responsibility to hypothesize or assume such critical facts and enter judgment on the pleadings based on such guesswork. To the contrary, judgment on the pleadings is only proper *where the movant demonstrates a "clear" right to such judgment*. *Greenberg*, 478 F.2d at 256–57 (reversing district court for granting motion for judgment on the pleadings in contractual dispute where right to relief as set forth in the pleadings was not clear); 5C WRIGHT & MILLER, *supra* § 1367, at 223 ("A number of cases decided by various federal courts around the country indicat[e] that it is necessary for the movant to show a *clear right to a judgment on the pleadings* . . . .") (emphasis added); *id.* § 1367, at 259 ("[Unlike a 12(b) motion, a motion for judgment on the pleadings] is directed towards a determination of the substantive merits of the controversy; thus, federal courts are unwilling to grant a judgment under Rule 12(c) *unless it is clear that the merits of the controversy can be fairly and fully decided in this summary manner*.") (emphasis added).

Unlike ARE, GMACM does cite a specific date when it asserts that ARE requested an audit of its books and records. According to GMACM, ARE transmitted a letter on Friday, March 5, 2010, demanding an audit pursuant to Sections 4.06 and 7.01 of the Servicing Agreement. [ECF No. 1 ¶ 18; ECF No.

[6] In its Reply, ARE seems to argue that the language of its Complaint permits the inference that it requested an audit before August 1, 2009. In particular, ARE cites paragraphs 18–20 of GMACM's Answer and argues that "GMACM admitted in its pleadings that it told ARE *before the effective Transfer Date* [that it would refuse an audit]." [ECF No. 46, p. 5]. Paragraphs 18–20 of GMACM's Answer refer to paragraphs 18–20 of the Complaint, but those paragraphs make no reference to the timing of an audit request.

36 ¶ 10].[7] The proposed audit was scheduled to take place the following Tuesday, March 9, 2010 and would "cover virtually all areas of GMACM's servicing processes: Collections, Loss Mitigation, Payment Posting, Foreclosure, Bankruptcy, REO, Property, Valuation, and Property Valuation." [ECF No. 43, ¶ 10]. According to GMACM, it declined ARE's audit request on March 8, 2010, arguing that it had already exercised its right to terminate the Servicing Agreement pursuant to Section 6.01(c) when it sent its termination letters on April 20 and May 1, 2009. [*Id.* ¶ 11].[8]

In support of this factual assertion, GMACM submitted a copy of the audit request letter ARE supposedly sent to it on March 5, 2010. [ECF No. 43-1]. GMACM argues that the letter provides issues of material fact precluding the Court from granting ARE's Motion because ARE failed to provide "reasonably advance notice" of the audit and because the scope of the proposed audit was beyond anything contemplated by Section 4.02 of the Servicing Agreement. [ECF No. 43, pp. 13–15]. I do not reach the issues presented by the substance of the letter because ARE disputes the existence and accuracy of the letter, calling it "unauthenticated," "hearsay," and "irrelevant." [ECF No. 46, p. 5].[9] I

---

[7] In its Amended Answer, GMACM also provides that "GMACM refused Plaintiff's [audit] demand because GMACM had unilaterally terminated the Servicing Agreement, pursuant to the express terms of the Agreement, *months prior to Plaintiff's audit demand*." [ECF No. 49, p. 7 (emphasis added)].

[8] GMACM's letter stated that, as provided for in Section 6.01(c) of the Servicing Agreement, the Servicing Agreement terminated on or about August 1, 2009, or 90 days after May 1, 2009, which was the date on which GMACM sent notice of termination.

[9] Plaintiff also argues that the letter should be "stricken." A court may order stricken from any pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). Courts recognize that motions to strike seek drastic relief and, therefore, disfavor them. *Augustus v. Bd. of Pub. Instruction*, 306 F.2d 862, 868 (5th Cir. 1962); *Holguin v. Celebrity Cruises, Inc.*, Case Nos. 10-20215, 10-20545, 10-20546, 2010 WL 1837808, at *1 (S.D. Fla. May 4, 2010) (refusing to strike alleged duties in plaintiffs' negligence count where

agree, however, with GMACM that this issue provides additional grounds for the denial of ARE's Motion because ARE's disagreement with GMACM about the content of the letter and the date and circumstances of the proposed audit provide a dispute of material fact. *Ortega v. Christian*, 85 F.3d 1521, 1524 (11th Cir. 1996) ("Judgment on the pleadings is proper when no issues of material fact exist, and the movant is entitled to judgment as a matter of law.").

Binding case law has long held that a district court in this circuit should not grant a motion for judgment on the pleadings where the movant requests specific performance unless the court is fully informed about the factual record, and no disputes of material fact exist.

> Specific performance is not grantable as a matter of right, but only as a matter of equity, and in the exercise of a sound and informed discretion *upon a knowledge of the whole facts*. Wherever, therefore, the truth of the matters bruited may lie, whether there is a real fire beneath, and accounting for, the smoke of the accusations is not a matter which ought to, or may be, determined on pleadings and without a trial of the facts.
>
> *Eristavi-Tchitcherine v. Lasser*, 164 F.2d 144, 145 (5th Cir. 1947) (reversing district court that had granted judgment on the pleadings for specific performance) (emphasis added).[10]

In short, disputes and factual uncertainty regarding how many times ARE requested an audit, when ARE requested an audit, and whether and to what extent the Parties were still operating under the terms of their agreement when

---

count alleged facts supporting duty of care). ARE does not provide citations to case law or any other authority explaining why I should invoke such "drastic" relief in this case. [ECF No. 31, p. 6]. Therefore, I decline to strike the letter.

[10] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981. District courts in other circuits have also reached similar conclusions. *See, e.g.*, *Liu v. Mund*, — F. Supp. 2d —, Case No. 09-cv-500, 2010 WL 3743944, at *8 (W.D. Wisc. Sept. 21, 2010) (denying plaintiff's motion for judgment on the pleadings requesting specific performance where plaintiff "did very little to show she is entitled to an order of specific performance" because "the decision to order specific performance is a question of equity and there are reasons to wait before imposing such a burden").

ARE requested an audit require that I deny ARE's Motion for Judgment on the Pleadings.

ARE's memorandum of law in support of its Motion provides additional grounds for denying the Motion. In particular, ARE failed to provide any substantive state law support for the relief it requests. It is well-established that actions for specific performance are governed by state law, not federal law. *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994) (noting that state law governs the specific performance of arbitration agreements in admiralty actions); *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 584 (6th Cir. 2007) (analyzing elements of specific performance under Michigan law where party in contractual dispute had moved for judgment on the pleadings requesting specific performance); *Mich. S. R.R. Co. v. Branch & St. Joseph Counties Rail Users Ass'n., Inc.*, 287 F.3d 568, 576 (6th Cir. 2002) ("[W]hat [Plaintiff] seeks in essence is the specific performance of the 1991 Agreement. This is purely a state law breach of contract action."); *Watson v. McCabe*, 527 F.2d 286, 288 (6th Cir. 1975) (holding that a case for the specific performance of an oral sales contract concerned "clearly non-federal matters").

ARE's Motion exclusively cites federal case law and provides no examination of relevant state law.[11] Nor does ARE provide any preliminary

[11] Furthermore, the cases cited by ARE in its Motion and Reply either do not properly support the Motion or are factually distinguishable. *See Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1359, 1368 (11th Cir. 1988) (affirming Federal Trade Commission's cease and desist order where parties filed cross-motions for summary decisions pursuant to Rule 3.24 of the Commission's Rules of Practice for Adjudicative Proceedings); *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 584–85 (6th Cir. 2007) (granting motion for judgment on the pleadings in contractual dispute regarding specific performance where the facts underlying the motion were "generally undisputed" and "not refuted" by any party); *Grife v. Allstate Floridian Ins. Co.*, 493 F. Supp. 2d 1249, 1250 (S.D. Fla. 2007) ("The parties concede that no factual dispute exists. Therefore, this

governing law analysis as to which state law would even apply to its request for specific performance. GMACM cited Florida law in its Response to ARE's Motion, but ARE failed to address these arguments in its Reply and instead relied entirely on one non-binding federal case from the Sixth Circuit. [ECF No. 43, pp. 11–12; ECF No. 46].[12]

For all of the reasons described above and viewing the facts in this case in the light most favorable to GMACM as I must under binding case law, I hold that ARE has not established a right to judgment on the pleadings with regard to Count II of its Complaint. Accordingly, it is hereby **ORDERED AND ADJUDGED** that

1. Plaintiff's Motion for Judgment on the Pleadings [ECF No. 36] is **DENIED**.
2. Defendant shall designate its expert witnesses within 30 days of this order in accordance with the Order issued January 26, 2011. [ECF No. 53].

DONE AND ORDERED, in chambers, in Miami, Florida, this 7 day of March, 2011.

---

entire case turns on the legal issue of contract interpretation."); *Connell Leasing Co. v. JF Equities Acquisition, Inc.*, 731 F. Supp. 1539, 1542 (S.D. Fla. 1989) (granting motion for summary judgment where no material questions of fact exist regarding the parties obligations under the relevant contract).

[12] Neither Party references the governing law clause in the Servicing Agreement at issue in this case or explains why it should or should not govern their dispute concerning specific performance. That clause provides that all aspects of the Agreement shall be governed by the substantive laws of the state of Pennsylvania. [ECF NO. 4-2 § 13.07].

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
U.S. Magistrate Judge Chris M. McAliley
All counsel of record