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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: ST. FRANCIS' HOSPITAL, POUGHKEEPSIE, NEW YORK, *ET AL.*, DEBTORS.	)	Case No. 13-37725 (CGM) Chapter 11 (Jointly Administered)
CHAD J. SHANDLER, AS PLAN ADMINISTRATOR FOR THE CONFIRMED CHAPTER 11 PLAN OF ST. FRANCIS'S HOSPITAL, POUGHKEEPSIE, NEW YORK, *ET AL.*, PLAINTIFF, vs. WELLS FARGO BANK, NATIONAL ASSOCIATION, BENEFICIARIES JOAN ACKERSON, SADAF AHSAN, SHEHNAZ ALI, JASON BARLOW, MARK BODACK M.D., DIANNE BUCHMAN, SHAWNEEN BUCKLEY, PATRICIA CHURNA, MICHAEL CUNNINGHAM, THOMAS CURCIO, WILL DE LA PENA, CONSTANCE DEFREEST, DENNIS DEVEREUX, PATRICIA DUL, TERESA EGITTO, MAUREEN FAILLACE, CHARLES FAVERIO, KARIN FEIN, JAMES FESTA, JOAN GAMBESKI,	)	Adv. Pro. No. 14-09007 (CGM)

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DEFENDANTS.

MOTION OF DEFENDANTS, HELEN RINAUDO, JASON BARLOW AND ROBERT SAVAGE, TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, made applicable by Rule 7012 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), Defendants Helen Rinaudo, Jason Barlow and Robert Savage (the "Moving Defendants") respectfully submit this motion (the "Motion") to dismiss the claims asserted against the Moving Defendants in the Amended Complaint of Plaintiff, Chad J. Shandler, as Plan Administrator for the Confirmed Chapter 11 Plan of St. Francis' Hospital, Poughkeepsie, New York, ("Plaintiff") [Docket No. 89] in the above-captioned adversary proceeding (the "Adversary Proceeding"), under the United States Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code"), and state as follows:

I. INTRODUCTION

At issue in this Motion are four of the five claims raised Plaintiff's Amended Complaint.[1] Among other things, Plaintiff seeks: (1) contribution and/or indemnification from certain alleged plan fiduciaries and beneficiaries under the Employee Retirement Income Security Act of 1974 ("ERISA"), 19 U.S.C. § 1001, *et seq.*, and federal common law, and; (2) contribution and/or indemnification from certain alleged plan fiduciaries and beneficiaries under New York law; (3) breach of fiduciary duty against certain alleged plan fiduciaries and beneficiaries under New York law; and, (4) negligence and gross negligence against certain alleged plan fiduciaries and beneficiaries under New York law.

As discussed further below, Plaintiff's Amended Complaint relies almost entirely on conclusory allegations and formulaic labels which should not be given credence by the Court. Plaintiff continually re-asserts, in conclusory fashion, that Defendants failed to properly implement, manage and/or supervise the deferred compensation plan at issue, however, Plaintiff offers no facts regarding where, when, how or by whom this alleged mismanagement occurred.

[1] Plaintiff's Amended Complaint also contains a claim for declaratory relief. The Moving Defendants, represented by different counsel, will be filing an answer with the Court regarding this claim.

In fact, the only specific acts cited by Plaintiff relate to the signatures of two defendants on documents over 10 years ago. Plaintiff's Amended Complaint fails to meet well established, post-*Twombly* pleading standards and, therefore, is insufficient to support Plaintiff's claims.

Plaintiff has not, and cannot, plead any of its claims arising under ERISA, federal common law or and New York law. Plaintiff has not, and cannot, make out its claims for contribution and indemnification under ERISA, federal common law or New York law because Plaintiff has not alleged that it is a potentially liable joint tortfeasor. Moreover, Plaintiff will be unable to demonstrate any liability on behalf of the Moving Defendants under ERISA because (1) the only misconduct alleged by Plaintiff, even if true, was performed by the St. Francis' Board of Trustees (the "Board") as part of its "settlor function" (not its fiduciary function) and (2) the deferred compensation plan was, at all times, administered in accordance with its terms. Further, Plaintiff's state law claims for breach of fiduciary duty, negligence and gross negligence are barred by New York's business judgment rule. Finally, even if the business judgment rule does not insulate the Moving Defendants, Plaintiff has failed to plead sufficient facts to support his claims arising New York law.

Therefore, the Moving Defendants respectfully request that the Court grant the Motion and dismiss Plaintiff's Amended Complaint with prejudice in its entirety.

II. BACKGROUND

St. Francis's Hospital ("St. Francis'" or the "Debtor") commenced this Adversary Proceeding [Docket No. 1] seeking a declaratory judgment as to whether the amounts held by the Indenture Trustee in connection with a certain deferred compensation plan (the "Deferred Compensation Plan" or the "Plan"), related adoption agreement and trust agreement, constitute property of the estate. More specifically, Debtor seeks a determination as to whether the funds

are not estate property, by virtue of section 541 of the Bankruptcy Code, and more specifically section 541(b)(7), which excludes amounts withheld and received by an employer for payment as contributions to a "deferred compensation plan under section 457 of the Internal Revenue Code of 1986." *See* 11 U.S.C. §§ 541(b)(7)(A) & (B).

The Official Committee of the Unsecured Creditors (the "Committee") answered the Debtor's Complaint and asserted defenses, counterclaims, and cross-claims. Among other things, the Committee brought three crossclaims against various members of the Board of Trustees of St. Francis, an officer of St. Francis, and beneficiaries of the Deferred Compensation Plan [Docket No. 23] (the "Committee's Response"). Specifically, the Committee brought crossclaims which were nearly identical to Counts I-III of Plaintiff's Amended Complaint; seeking a declaratory judgment as well as contribution and/or indemnification from certain alleged plan fiduciaries and beneficiaries under both ERISA and New York common law.

The Moving Defendants filed a Motion to Dismiss the crossclaims raised in the Committee's Response [Docket No. 73]. The Moving Defendants argued, *inter alia*, that the Committee lacked standing to bring claims on behalf of the debtor, lacked standing to bring claims under ERISA and had failed to adequately plead its claims for contribution and indemnification under either federal or New York common law.

Pursuant to the Stipulation and Order dated October 2, 2014 [Docket No. 88], the parties agreed, *inter alia*, that: (1) the Plan Administrator would be substituted as Plaintiff; (2) the Plan Administrator would file an Amended Complaint; and (3) all pending motions to dismiss would be deemed withdrawn without prejudice.

Each of the Moving Defendants, among others, was named as a defendant. Plaintiff asserts that Robert Savage and Jason Barlow were each members of the Board of Trustees of St.

Francis "during all or some portion of the period beginning 2002 through late 2013." (Amended Complaint at ¶¶ 1, 8). Plaintiff also asserts that Helen Rinaudo was the Vice President of Human Resources of St. Francis and was involved with the execution of the Deferred Compensation Plan. (Id. at ¶ 9). Plaintiff alleges that each of the Moving Defendants is a beneficiary of the Plan. (Id. at ¶ 1). In addition, Plaintiff alleges that Messrs. Savage and Barlow and Ms. Rinaudo are members of a group of Defendants identified in Plaintiff's Amended Complaint as the "Directors and Officers Defendants" (the "D&O Defendants").

Count I of the Amended Complaint seeks a declaratory judgment that funds held in connection with the Deferred Compensation Plan are, in fact, property of the Debtor's estate. (Id. at ¶¶ 48-57). In Count II, Plaintiff seeks contribution and/or indemnification against the D&O Defendants under ERISA and federal common law. (Id. at ¶¶ 58-61). In Count III, Plaintiff seeks contribution and/or indemnification against the D&O Defendants under New York common law. (Id. at ¶¶ 62-65). In Count IV, Plaintiff alleges the breach of fiduciary duty by the D&O Defendants under New York common law. (Id. at ¶¶ 66-70). In Count V, Plaintiff alleges negligence and gross negligence by the D&O Defendants under New York common law. (Id. at ¶¶ 71-75).

In seeking declaratory judgment, Plaintiff argues that the Deferred Compensation Plan does not meet the requirements of Section 457 of the Internal Revenue Code and, as such, is the property of the Debtor's estate, not the property of the Plan beneficiaries. (Id. at ¶ 52). Plaintiff alternatively pleads that, should the Court find that the Plan funds are not property of the Debtor's estate, the D&O Defendants are liable for contribution and/or indemnification based on their "fail[ure] to appropriately manage and/or supervise the implementation and operation of the Plan." (Id. at ¶ 60).

The actual factual allegations are scant. Plaintiff alleges that, although the Board authorized the Deferred Compensation Plan only to be offered to "management and highly compensated" employees, the Plan was, in fact, offered to all St. Francis employees. (Id. at ¶ 60). Plaintiff generally alleges that D&O Defendants (a) permitted the Deferred Compensation Plan to be implemented in a manner inconsistent with Board's authorization and (b) failed to appropriately manage and/or supervise the implantation and operation of the Plan. (Id. at ¶¶ 60).

In conclusory fashion, Plaintiff alleges that the D&O Defendants are liable to St. Francis' bankruptcy estate for contribution and indemnity, including attorneys' fees. (Id. at ¶ 61). In a similar manner, Plaintiff alleges in conclusory fashion that D&O Defendants' conduct in adopting and administering the Plan constituted a breach of their fiduciary duty to St. Francis' and/or was negligent and/or grossly negligent. (Id. at ¶¶ 70, 75).

III. ARGUMENT

A. The Dismissal Standard for Failure to State a Claim

Upon a motion to dismiss under Bankruptcy Rule 12(b)(6), a court may dismiss a complaint where a Plaintiff has failed to state a claim upon which relief can be granted. *See* FED. R. BANKR. P. 7012(b)(6). Bankruptcy Rule 12(b)(6) incorporates by reference Rule 12(b)(6) of the Federal Rules of Civil Procedure. In ruling on a motion under Rule 12(b)(6) for failure to state a claim, the Supreme Court has emphasized the importance of the pleading requirements set forth in the Federal Rules of Civil Procedure and the attendant standards courts should use when deciding motions to dismiss. In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), the Supreme Court held that "a plaintiff's obligations to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (internal citations omitted). "Factual allegations must

be enough to raise a right to relief above the speculative level." *Id.* A plaintiff is required to plead facts in a complaint that show an entitlement to relief that is "plausible on its face." *Id.* at 570.

Shortly after deciding *Twombly*, the Court elaborated on the "plausibility" requirements in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). A court is to "draw on its judicial experience and common sense" when deciding whether a complaint states a plausible claim for relief. *Id.* at 679.

The Second Circuit Court of Appeals has similarly found that Courts are not "bound to accept conclusory allegations or legal conclusions masquerading as factual conclusions." *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011)(citing *Rolon v. Henneman*, 517 F.3d 140, 149 (2d Cir. 2008) (Sotomayor, J.)). Moreover, this Court has found that conclusory allegations "are not entitled to the assumption of truth" and "are not entitled to any weight" when evaluating a motion to dismiss. *See Aguilar v. Immigration & Customs Enforcement Div. of the U.S. Dep't of Homeland Sec.*, 811 F. Supp. 2d 803, 816 (S.D.N.Y. 2011) (citing *Iqbal*, 556 U.S. at 678).

B. Plaintiff Has Not Pled A Cognizable Claim Under ERISA

1. Plaintiff's Claims for Contribution and Indemnification under ERISA and Federal Common Law Must Fail Because Plaintiff Has Failed to Allege that It is a Joint Tortfeasor with the D&O Defendants.

Under general trust law, contribution or indemnification is only available between two co-liable parties.[2] *See* RESTATEMENT (SECOND) OF TRUSTS § 258 (1959); George

[2] Because "ERISA abounds with the language and terminology of trust law," the federal common law of ERISA is guided by principles of trust law. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110–11 (1989) (citing 29

Gleason Bogert, THE LAW OF TRUSTS AND TRUSTEES § 701 (2d ed. rev. 1982). "According to [Restatement (Second) of Trusts] § 258, where co-trustees are liable for 'a breach of trust,' each is entitled to contribution from the other unless one trustee is 'substantially more at fault than the other' in which case such trustee shall indemnify the co-trustee who is substantially less at fault." *Pierce v. P&A Admin. Servs., Inc.*, 2011 WL 2261116, *12-13 (W.D.N.Y. June 6, 2011).

The Second Circuit has held that a fiduciary who is sued by a plan participant or beneficiary for negligent administration of a deferred compensation plan may sue another plan fiduciary for indemnification or contribution if the first fiduciary is found liable to the plan participants. *See Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 18 (2d Cir. 1991). Significantly, however, even if such claim is actionable, it may only be asserted by the alleged tortfeasor (*i.e.* the Deferred Compensation Plan fiduciary).

Similarly, "a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability." *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 87 (1981).

Here, Plaintiff is not a jointly liable fiduciary who may bring a claim against the D&O Defendants. As set forth in *Pierce*, both contribution and indemnification claims under general trust law are premised on the shared liability of co-trustees. *See Pierce*, 2011 WL 2261116 at *12-13. Plaintiff has not pled, nor can it, that St. Francis' or any other entities which Plaintiff represents is even potentially liable to any other party for the conduct alleged in the instant

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U.S.C. §§ 1002(7) ("participant"), 1002(8) ("beneficiary"), 1002(21)(A) ("fiduciary"), 1103(a) ("trustee"), 1104 ("fiduciary duties")). The traditional rules of trust law should be incorporated into ERISA provisions through the federal common law of ERISA. *Maher v. Strachan Shipping Co.*, 817 F.Supp. 43, 45 (E.D. La. 1993) (citing *Chemung*); *Jones v. Trevor, Stewart, Burton and Jacobsen, Inc.*, 1992 WL 252137, at *4 (N.D. Ga. Aug. 21, 1992) (citing same).

complaint. Importantly, Plaintiff has not been compelled by any court to pay damages to any third party. Therefore, because Plaintiff is not a jointly-liable tortfeasor, its claims for contribution and indemnification under ERISA and the federal common law of ERISA fail as a matter of law. Thus Count II of the Amended Complaint should be dismissed with prejudice.

2. The Allegations of the Amended Complaint Fail to Demonstrate That Moving Defendants Are Liable Under ERISA.

a. The D&O Defendants Were Performing a Settlor Function and Are Not Liable as Fiduciaries

Even if Plaintiff was jointly liable, which it is not, Plaintiff has not, and cannot, demonstrate that the Moving Defendants are liable under ERISA for any of the conduct alleged in Plaintiff's Amended Complaint. The facts pled by Plaintiff do not demonstrate any conduct by the D&O Defendants which was performed in a fiduciary capacity under ERISA or the federal common law of ERISA. Plaintiff's scant facts are limited to the signing and execution of the Plan in 2003, which is considered part of the "settlor function" performed by the D&O Defendants and which does not give rise to any cognizable claim for relief under ERISA.

The Second Circuit has noted that "[c]ourts have distinguished between fiduciary functions, which give rise to ERISA liability, and 'settlor' functions, which are akin to actions taken by the settlor of a trust and do not trigger ERISA liability. *Coulter v. Morgan Stanley & Co. Inc.*, 753 F.3d 361, 367 (2d Cir. 2014) (citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 890, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996)); *Flanigan v. Gen. Elec. Co.,* 242 F.3d 78, 88 (2d Cir. 2001). Further defining "settlor functions," the Second Circuit held that "'[s]ettlor' functions, in contrast [to fiduciary functions], include conduct such as establishing, funding, amending, or terminating a plan." *Id.*

The United States Supreme Court has similarly acknowledged the broad discretion afforded to plan "settlors" when holding: "[e]mployers or other plan sponsors are generally free

under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. When employers undertake those actions, they do not act as fiduciaries, but are analogous to the settlors of a trust." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443, 119 S. Ct. 755, 763, 142 L. Ed. 2d 881 (1999) (internal citations omitted). The Second Circuit subsequently made clear that, "[p]lan sponsors, therefore, have no fiduciary duties—and thus face no liability for breach of fiduciary duty—when they adopt, modify, or terminate." *Fisher v. JP Morgan Chase & Co.*, 703 F. Supp. 2d 374, 381 (S.D.N.Y. 2010) *aff'd,* 469 F. App'x 57 (2d Cir. 2012) (internal quotations omitted).

Here, the only conduct alleged by the Plaintiff with any specificity reflects conduct of the Moving Defendants in their capacity of settlors of the Plan who are not subject to liability. Though not specifically raised as part of the ERISA count of the Amended Complaint, Plaintiff alleges that Defendants Savage and Rinaudo signed the Adoption Agreement and the Trust Agreement on behalf of St. Francis on June 23, 2003. (Amended Comp. at ¶ 68). As discussed further below, the remainder of Plaintiff's generalized allegations of misconduct are entirely conclusory and should not be considered. *See e.g., Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011)(the Court is not "bound to accept conclusory allegations or legal conclusions masquerading as factual conclusions."). Plaintiff's allegations that Defendants Savage and Rinaudo signed the Adoption Agreement and the Trust Agreement, even if true, only demonstrates that they performed a "settlor function" in creating the Plan. As the Second Circuit has held, "'settlor' functions…do not trigger ERISA liability." *Coulter*, 753 F.3d at 367 (internal citations omitted). As Plaintiff has failed to plead any conduct attributable to Defendants Savage and Rinaudo which extends beyond their "settlor" capacity in establishing the Plan, there can be no claim for any liability under ERISA and no claim for contribution or indemnification under

the federal common law of ERISA. Significantly, Plaintiff does not attribute any specific conduct whatsoever to Defendant Barlow, and, as such, any claims arising under ERISA or the federal common law of ERISA against Mr. Barlow must similarly be dismissed. Accordingly, Count II of the Amended Complaint must be dismissed with prejudice.

b. Plaintiff Has Not – And Cannot – Plead Any Breach of ERISA Fiduciary Duty Because The Plan Was Administered In Accordance With Its Terms.

Even if the Court were to accept Plaintiff's woefully deficient allegations that the D&O Defendants somehow mismanaged the Plan, and if the Court were to then construe these allegations as a potential breach of fiduciary duty under ERISA, Plaintiff has still failed to state a claim because, at all times, the Plan was administered in accordance with its terms.

Plaintiff's allegations regarding the D&O Defendants alleged failure to administer the Plan is confined to two entirely conclusory sentences. (*See* Amended Comp. ¶ 60). In short, Plaintiff alleges that the D&O Defendants administered the Plan in "a manner inconsistent with such authorization." (*See* id.). This allegation is entirely irrelevant to the Plaintiff's claim of liability under ERISA because the Plan was duly administered in accordance with its own terms, regardless of what may have been stated in the authorization.

Section D of the Plan's Adoption Agreement, attached to Plaintiff's Amended Complaint as Exhibit "B", (the "Adoption Agreement") sets forth which employees may participate in the Plan.[3] (*See* Amended Comp. ¶ 11). Of the three definition options available, the adopted Plan indicates that:

> "Employee" shall mean:…for non-electing church plans not subject to ERISA, any employee working 20 or more hours per week who perform services for and receives any type of compensation from Employer for whom services are rendered. The following are the additional requirement

[3] In ruling on a motion to dismiss, the Court may consider documents attached to the complaint. *See Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152–53 (2d Cir. 2002).

> or limitations, if any, of employees to be eligible to participate in the Plan: Employee required to maximize contribution to 403(b) plan.

See Exhibit "B" to Amended Complaint at p. 4. Significantly, the Adoption Agreement does not reflect the election to define "Employee" as "a select group of management or highly compensated employees as determined by the Employer from time to time." *See id.*

Therefore, Plaintiff's allegation that the D&O Defendants did not administer the Plan according to its terms is belied by the plain language of the Adoption Agreement and must be rejected. Moreover, to the extent Plaintiff's claim for contribution and indemnification is based on a claim of breach of fiduciary duty for failing to administer the Plan in accordance with its terms, such a claim is baseless and must also be dismissed.

3. ERISA Preempts Plaintiff's State Law Claims for Contribution and Indemnification.

Should the Court find that ERISA applies to the Plan, as Plaintiff argues that it does in Count II of its Amended Complaint, ERISA's preemption provision would control and subject the Committee's state law claims for contribution and indemnification to dismissal.

Section 514(a) of ERISA provides that the statute "supersede(s) any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). This provision expressly preempts any state law claim that relates to an employee benefit plan, resolving any question regarding conflicts of law in favor of ERISA. *See Wurtz v. Rawlings Company, LLC.*, 933 F.Supp.2d 480, 501-02 (E.D.N.Y. 2013) ("Where such statutory conflict presents itself. . . Congress has answered, and quite clearly: ERISA. . ."). A law is related to an employee benefit plan "if it has a connection with or reference to such a plan." *Williams Ins. Trust v. Travelers Ins. Co.*, 50 F.3d 144, 148 (2d Cir. 1995) (quoting *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985)). Any state law claim that "duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to

make the ERISA remedy exclusive and is therefore pre-empted." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004). A state law can relate to a benefit plan for preemption purposes "even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990).

As noted above, Count II of Plaintiff's Amended Complaint, seeking contribution and indemnification under ERISA and federal common law, should be dismissed for failure to state a claim. Further, as the claims in Count III for contribution and indemnification arising under New York law relate specifically to the Plan, such claims should be dismissed as preempted under section 514 of ERISA.

C. Plaintiff Has Failed to State Claims for Contribution, Indemnification, Breach of Fiduciary Duty, Negligence and Gross Negligence under New York Law.

To the extent the state law claims are not preempted, Plaintiff has failed to plead, and will be unable to plead, any cognizable claims under New York Law. In Count III, Plaintiff alleges nearly identical claims for contribution and indemnification under New York law which fail for the same reasons discussed above. In Counts IV and V, Plaintiff alleges breach of fiduciary duty and negligence/gross negligence, respectively. Each of these claims fails because Plaintiff has failed to plead any facts which would rebut the applicability of the business judgment rule, a rule which extinguishes any potential liability for any of the Moving Defendants.

1. Plaintiff Has Failed to Plead Cognizable Claims For Contribution and Indemnification Under New York Law.

a. Plaintiff's Claim for Contribution Must Fail Because Plaintiff and the D&O Defendants Are Not Joint Tortfeasors.

Should the Court find that ERISA does not apply or does not preempt Plaintiff's state law claims for contribution and indemnification, Plaintiff has failed to plead claims for contribution

or indemnity under New York law for reasons similar to those related to the ERISA claims stated above.

Rule 1401 of the New York Civil Practice Law and Rules ("C.P.L.R.") defines a claim for contribution and provides, in relevant part, as follows:

> Claim for contribution…. Two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

N.Y. C.P.L.R. 1401 (2014). C.P.L.R. 1401 anticipates contribution where there are "two or more persons subject to liability for damages." *Id.* C.P.L.R 1402 confirms the that the statute anticipates that contribution is to be sought by parties who have been held liable for damages attributable to multiple parties. N.Y. C.P.L.R. 1402 (2014) ("The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party.")

New York case law further establishes that, only a defendant who is or may be liable to a plaintiff may file a claim for contribution and/or indemnity against a joint tortfeasor. *See Dole v. Dow Chem. Co.*, 30 N.Y.2d 143 (1972) ("The conclusion reached is that where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party."); *Malette v. Loblaws*, 402 N.Y.S.2d 474, 477 (App. Div. 3d Dep't 1978); *Mensch v. Conservative Gas Div., Nat'l Propane Corp.*, 504 N.Y.S.2d 377, 379 (Sup. Ct. Nassau Cty. 1986) ("Contribution applies when two or more joint tort-feasors have shared, albeit in various degrees, in the responsibility by their conduct or omission in causing an accident in violation of their duties they respectively owed to the injured person."); *Schauer v. Joyce*, 54 N.Y.2d 1, 5

(1981) (finding that the relevant question is whether each party owed a duty to the plaintiff, and by breaching their respective duties, contributed to the plaintiff's ultimate injuries).

Moreover, a hallmark of contribution under New York law is that one party has been compelled to make some form of payment for which the party now seeks to recoup from other liable entities. *Picard v. JPMorgan Chase & Co.*, 460 B.R. 84, 98-99 (S.D.N.Y. 2011) *aff'd sub nom. In re Bernard L. Madoff Inv. Sec. LLC*., 721 F.3d 54 (2d Cir. 2013) ("New York's statutory contribution scheme requires some form of compulsion; that is, the party seeking contribution must have been compelled in some way, such as through the entry of a judgment, to make the payment against which contribution is sought.") (internal citation omitted).

As discussed above, Plaintiff has not alleged that it is subject to any, even potential, liability in connection with the instant action. Therefore, Plaintiff is not, and will never be, a joint tortfeasor who shares liability with D&O Defendants for the harm allegedly resulting from the conduct alleged in Plaintiff's Amended Complaint. Moreover, Plaintiff has not been compelled to pay damages to any party for which it can now seek remuneration from the D&O Defendants. Therefore, Plaintiff's claim in Count III for contribution under New York law must be dismissed with prejudice.

b. Plaintiff's Claim for Indemnification Must Fail Because Plaintiff and the D&O Defendants Are Not Joint Tortfeasors.

Similarly, Plaintiff has also failed to sufficiently plead a claim for indemnification under New York law. To allege a cause of action for indemnity (1) the party seeking indemnity and the party from whom the indemnity is sought must have breached a duty to a third person, and (2) a duty to indemnify must exist between the two said parties. *Highland Holdings & Zito I, LP v. Century/ML Cable Venture*, 2007 WL 2405689, at *4 (S.D.N.Y. Aug. 24, 2007). Under New York law, there can be no claim for indemnity where there is no existing duty to indemnify

among the parties between whom indemnification is sought. *See id.* Plaintiff has not – and cannot – allege that there was any legal obligation of the D&O Defendants to indemnify Plaintiff. *See Perkins v. Eastman Architects*, P.C., 769 F.Supp.2d 322, 329 (S.D.N.Y. 2011) (citing *Dora Homes, Inc. v. Epperson*, 344 F.Supp.2d 875, 894 (E.D.N.Y. 2004)) ("a third party action for indemnity does not lie against one who has not violated a duty owed to plaintiff in the primary action."). Therefore, based on the lack of joint liability and the absence of any indemnification agreement between the parties, Plaintiff's claim in Count III for indemnification under New York law should be dismissed with prejudice.

2. Plaintiff's Claims Against the D&O Defendants Are Barred by New York's Business Judgment Rule.

Plaintiff's remaining claims each seek to hold the D&O Defendants liable for their alleged failure to properly implement, manage and/or supervise the Plan. Plaintiff alleges separate claims of breach of fiduciary duty, negligence and gross negligence. Under New York law, however, directors and officers are protected by the business judgment rule against liability for the actions taken in good faith. Plaintiff has not alleged sufficient facts to rebut the application of the business judgment rule nor has Plaintiff pled any conduct on behalf of the D&O Defendants to which would not be protected by the business judgment rule..

a. Relevant Facts Pled in Plaintiff's Amended Complaint

Plaintiff generally alleges that the D&O Defendants were negligent, grossly negligent and/or breached their fiduciary duties of loyalty based on their conduct "in connection with the implementation, operation, and/or administration of the Plan." (Amended Complaint ¶¶ 67, 72). As discussed above, a party pleading a claim must provide the grounds for his entitlement to relief, not just "labels and conclusions, and a formulaic recitation [of a claim's elements]," *Twombly*, 550 U.S. at 545, or "'naked assertion[s]' devoid of 'further factual enhancement.'"

Iqbal, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (alteration in original). In evaluating a motion to dismiss, conclusory allegations "are not entitled to any weight." *Aguilar v. Immigration & Customs Enforcement Div. of the U.S. Dep't of Homeland Sec.*, 811 F. Supp. 2d 803, 816 (S.D.N.Y. 2011). "A court can thus begin its analysis of the sufficiency of pleadings by 'identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.'" *Id.* (citing *Iqbal*, 556 U.S. at 678).

Significantly, the Court is not "bound to accept conclusory allegations or legal conclusions masquerading as factual conclusions." *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011)(citing *Rolon v. Henneman*, 517 F.3d 140, 149 (2d Cir. 2008) (Sotomayor, J.)); *see also In re Bausch & Lomb Inc. ERISA Litig.*, 2008 WL 5234281, at *8 (W.D.N.Y. Dec. 12, 2008) ("the allegations set forth against the … [d]efendants qualify as unwarranted inferences and unsupported conclusions cast in the form of factual allegations that a Court may reject when examining 12(b) (6) motions to dismiss.") (internal quotations omitted).

The only facts pled by Plaintiff with any of the specificity required to meet the requirements set forth in *Twombly* and *Iqbal* deal with the alleged signing of the Resolution, Adoption Agreement and Trust Agreement by Defendants Savage and Rinaudo in June 2003. (Amended Complaint ¶¶ 68, 73).[4] The Plaintiff's Amended Complaint is entirely devoid of <u>any</u> facts regarding the nature of the alleged improper acts, where or when any such acts occurred and, significantly, which of the Moving Defendants allegedly perpetrated the acts. Such woefully inadequate allegations are specifically what *Twombly* and *Iqbal* are designed to stop at this stage of the proceeding. The facts which have been pled demonstrate conduct which is protected by New York's business judgment rule and which, alternatively, cannot support

[4] Notably, Plaintiff does not assert any facts attributing any specific conduct to Defendant Barlow and, indeed, Mr. Barlow was not even and officer or director in 2003.

Plaintiff's claims for breach of fiduciary duty, negligence or gross negligence under New York law.

b. New York's Business Judgment Rule

Plaintiff alleges that the estate will suffer damages if the Court rules that the Deferred Compensation Plan is the property of the beneficiaries. (Amended Complaint at ¶¶ 48-57). To hold the D&O Defendants liable for any damage to the estate, Plaintiff would have to establish conduct which was fraudulent or taken in bad faith and, thus, beyond the protection of the business judgment rule. Plaintiff has not alleged such conduct and, even if it had, it would have to overcome the presumption of the business judgment rule. *See e.g., Stern v. Gen. Elec. Co.*, 924 F.2d 472, 477 (2d Cir. 1991) (affirming motion to dismiss based on New York's business judgment rule where plaintiff had failed to alleged bad faith); *Weisman, Celler, Spett & Modlin v. Fein*, 225 A.D.2d 508, 508, 639 N.Y.S.2d 805, 805 (N.Y. App. Div. 1996) (affirming dismissal for failure to state a claim based on application of business judgment rule)

The business judgment rule, which protects actions taken by corporate directors and officers, is a presumption that "bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." *Auerbach v. Bennett*, 47 N.Y.2d 619, 629 (N.Y. 1979); *see also Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 702 (2d Cir. 1980).

To overcome the business judgment rule, a plaintiff must show that the fiduciary acted in bad faith or with fraudulent intent. *See In re Eugenia VI Venture Holdings, Ltd. Litig.*, 649 F. Supp. 2d 105, 126 (S.D.N.Y. 2008) *aff'd sub nom. Eugenia VI Venture Holdings, Ltd. v. Glaser*, 370 F. App'x 197 (2d Cir. 2010) (citing *In re Global Serv. Group LLC*, 316 B.R. 451, 461(Bankr.S.D.N.Y.2004)); *see also Crouse-Hinds Co.*, 634 F.2d at 702) (quoting *Treadway Cos. v. Care Corp.*, 638 F.2d 357 (2d Cir. 1980)) ("Under the business judgment rule, directors

are presumed to have acted properly and in good faith, and are called to account for their actions only when they are shown to have engaged in self-dealing or fraud, or to have acted in bad faith."); *In re Midway Jewish Ctr*., 838 N.Y.S.2d 879, 884 (Sup. Ct. Nassau Cty. 2007) ("Absent a showing of bad faith in the form of self-dealing, fraud, or unconscionability, a court will not overturn or invalidate the decisions made by directors.").

The New York Court of Appeals, in citing Section 717 of the Not-For-Profit-Corporation Law ("N-PCL"), has held that, "the Legislature has provided directors and officers [of a not-for-profit-corporation] with the protections of the business judgment rule." *Spitzer v. Grasso*, 11 N.Y.3d 64, 70 (2008); *Cuomo v. Lawrence*, 903 N.Y.S.2d 618, 619-20 (4th Dep't 2010) (citing N-PCL § 717, stating that, "[b]ecause officers of a not-for-profit corporation are protected by the business judgment rule, liability . . . requires a showing that the officer or director lacked good faith in executing his [or her] duties." (internal quotations omitted)); *In re Midway Jewish Ctr*., 838 N.Y.S.2d at 884 ("The Board of a Not- For-Profit Corporation enjoys the benefit of the business judgment rule which bars judicial review of actions taken in good faith and in the exercise of honest judgment "). *Cf. Schneiderman v. Moore*, 2012 WL 10057358, at *3 (Sup. Ct. N.Y. Cty. Sept. 17, 2012) (citing cases and N-PCL § 717) (holding that the business judgment rule, *per se*, does not apply to not-for-profit corporations, but rather "a standard of review that is analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate directors is apropos in the not-for-profit setting. This is because directors and officers are required to discharge the duties of their respective positions in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.").

Trustees constitute "directors" as is defined in the Not-For-Profit-Corporation Law. *See* N-PCL § 102(a)(6). Therefore, the business judgment rule applies to the actions of the trustees of a not-for-profit corporation as if such trustees were directors of the not-for-profit corporation. *See, e.g., Comm. to Save Polytechnic Univ. v. Bd. of Trustees of Polytechnic Univ.*, No. 7454-08, 2009 WL 222097, at *9 (Sup. Ct. Alb. Cty. Jan. 30, 2009) (applying the business judgment rule to the board of trustees of Polytechnic University); *Vacco v. Diamandopoulos*, 715 N.Y.S.2d 269 (Sup. Ct. N.Y. Cty. 1998) (applying N-PCL § 717 to trustees of a private university). Plaintiff has pled that Messrs. Savage and Barlow were trustees of St. Francis and that Ms. Rinaudo was Vice President of Human Resources during the relevant period. (Amended Complaint at ¶ 8-9). As such, they are each entitled to the protections of the business judgment rule.

Not only has the Plaintiff failed to plead sufficient facts to circumvent the business judgment rule, but it has failed to specifically identify virtually any alleged conduct on which its claims against these individuals are based.

Moreover, Plaintiff has not even attempted to overcome the presumption of good faith afforded to the Moving Defendants under the N-PCL. Even accepting Plaintiff's allegations as true for the purposes of this Motion, mere conclusory allegations that the Moving Defendants failure to perform their duties as trustees of the Deferred Compensation Plan does not come close to rising to the level of bad faith. Significantly, bad faith requires a showing of more than mere negligence. *See, e.g., In re Midway Jewish Ctr.*, 838 N.Y.S.2d at 884 (determining that bad faith may take the form of "self-dealing, fraud, or unconscionability").

Plaintiff also does not even attempt to allege that the Moving Defendants engaged in self-dealing, fraud, or unconscionability sufficient to establish bad faith on the part of the D&O Defendants in this matter. *See Spitzer v. Grasso*, 11 N.Y.3d at 70.

Therefore, the business judgment bars Plaintiff's claims against the Moving Defendants because the conduct alleged was performed in good faith and there has been no suggestion to the contrary. Accordingly, Counts IV and V of the Amended Complaint should be dismissed for failure to state a claim.

3. Plaintiff Has Failed to Plead Claims Against the Moving Defendants For Breach of Fiduciary Duty, Negligence or Gross Negligence Under New York Law.

Even if the Court finds that the business judgment rule does not apply in this case, Plaintiff has failed to plead cognizable claims for breach of fiduciary duty, negligence and gross negligence under New York law and, as such, the claims must be dismissed.

a. Plaintiff has Failed to Plead A Breach of Fiduciary Duty Under New York Law

Under New York law, a claim alleging breach of fiduciary duty must set forth three elements: (i) the existence of a fiduciary relationship, (ii) the breach of the fiduciary duty, and (iii) damages resulting from the breach. *In re Food Mgmt. Grp., LLC*, 380 B.R. 677, 711 (Bankr. S.D.N.Y. 2008) (citing *SCS Commc'ns, Inc. v. Herrick Co., Inc.,* 360 F.3d 329, 342 (2d Cir. 2004); *In re Grumman Olson Ind., Inc.,* 329 B.R. 411 (Bankr.S.D.N.Y.2005)).

Plaintiff has failed to identify conduct which constitutes a breach of fiduciary duty under New York law. As stated above, the only facts pled by Plaintiff which warrant consideration relate to the Defendant Savage's and Defendant Rinaudo's signature of various Plan-related documents in June 2003. Plaintiff labels this conduct as a failure to manage and/or supervise the Plan. Such conclusory labels should be disregarded. *See e.g, Faber*, 648 F.3d at 104. Plaintiff, however, offers no additional facts to explain or support how alleged signatures constituted a of breach any potential duty that may have existed between the parties. Therefore, Plaintiff's claim

for breach of fiduciary duty should be dismissed to the extent it is not barred by New York's business judgment rule.

b. Plaintiff Has Failed to Plead Negligence or Gross Negligence Under New York Law

Similarly, Plaintiff's scant facts cannot support its claims for negligence and/or gross negligence. Under New York law, "in order to state a claim for negligence sufficient to withstand a motion to dismiss, a plaintiff's complaint must allege: (i) the existence of a duty owed by defendant to plaintiff; (ii) breach of this duty; (iii) resultant injury to plaintiff; and, (iv) a causal relationship between defendant's conduct and plaintiff's injury." *In re Food Mgmt. Grp., LLC*, 380 B.R. 677, 714 (Bankr. S.D.N.Y. 2008) (citing *Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir.1998)).

Gross negligence, however, "differs in kind as well as degree from ordinary negligence; '[i]t is conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing.'" *See Sutton Park Dev. Corp. Trading Co. Inc. v. Guerin & Guerin Agency Inc.*, 297 A.D.2d 430, 431, 745 N.Y.S.2d 622, 624 (App. Div. 2002) (citing *Colnaghi, U.S.A. v. Jewelers Protection Servs*., 81 N.Y.2d 821, 823–824, 595 N.Y.S.2d 381, 611 N.E.2d 282 (N.Y. 1993) ; *see also Curley v. AMR Corp*., 153 F.3d 5, 13 (2d Cir. 1998). "Stated differently, a party is grossly negligent when it fails 'to exercise even slight care' or 'slight diligence' " *Ryan v. IM Kapco, Inc.*, 88 A.D.3d 682, 683, 930 N.Y.S.2d 627, 629 (2d Dep't 2011) (citing *Goldstein v. Carnell Assoc., Inc.,* 74 A.D.3d at 747, 906 N.Y.S.2d 905 (2d Dep't 2010)).

The minimal facts pled by Plaintiff are insufficient to support a claim for negligence or gross negligence. As stated above, when Plaintiff's conclusory allegations are stripped away, the only facts which remain relate to Defendant Savage's and Defendant Rinaudo's signature on Plan-related documents more than ten years ago. Plaintiff's Amended Complaint contains no

additional facts which identify how this alleged conduct may have amounted to a breach of any duty owed by any of the Defendants to St. Francis. Moreover, Plaintiff has not pled any conduct which "smacks of intentional wrong doing" nor which demonstrates a failure "to exercise even slight care." As such Plaintiff's claims for negligence and gross negligence under New York law should be dismissed to the extent they are not barred by New York's business judgment rule.

IV. CONCLUSION

For the forgoing reasons, the Court should (i) grant the Motion and dismiss the Plaintiff's Amended Complaint with prejudice in its entirety and (ii) grant such other and further relief as the Court deems just and necessary.

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New York, NY

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