UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMTRUST NORTH AMERICA, INC. and TECHNOLOGY INSURANCE COMPANY, INC.,

Plaintiffs,

-against-

SAFEBUILT INSURANCE SERVICES, INC. a/k/a SAFEBUILT WHOLESALE INSURANCE SERVICES, INC., THE TAFT COMPANIES, LLC, PREFERRED GLOBAL HOLDINGS, INC., DAVID E. PIKE, DAVID E. PIKE, INC., PHILIP SALVAGIO, SALMEN INSURANCE SERVICES, INC. f/k/a SALVAGIO, INC., CARL M. SAVOIA, JOHN DOE CORPORATIONS 1-5, and JOHN DOES 1-5,

Defendants.

x

SAFEBUILT INSURANCE SERVICES, INC., THE TAFT COMPANIES, LLC, PREFERRED GLOBAL HOLDINGS, INC., DAVID E. PIKE, DAVID E. PIKE, INC. d/b/a PIKE INSURANCE SERVICES, PHILIP SALVAGIO, and SALMEN INSURANCE SERVICES, INC.

Third-Party Plaintiffs,

-against-

NETWORK ADJUSTERS, INC., ROBERT SANDERS, PREFERRED REINSURANCE INTERMEDIARIES, BUILDERS & TRADESMEN'S INSURANCE SERVICES, INC., JOHN DOE BROKERAGES 1-5, JOHN DOE BROKERS 1-5, JOHN DOE CORPORATIONS 6-15, AND JOHN DOES 6-15,

Third-Party Defendants.

x

No. 14 Civ. 09494 (CM)

MEMORANDUM DECISION AND ORDER GRANTING COUNTERCLAIM DEFENDANT AMTRUST'S AND THIRD-PARTY DEFENDANT BTIS' MOTION TO DISMISS

McMahon, J.:

The underlying action commenced when Plaintiffs – Delaware insurance company AmTrust North America, Inc. ("AmTrust") and its affiliate insurer Technology Insurance Company, Inc. ("TIC") – sued Defendants/Third-Party Plaintiffs David E. Pike ("Pike") and Philip Salvagio ("Salvagio"), and a group of companies alleged to be their agents or alter egos, including Safebuilt Insurance Services, Inc. ("SIS"), seeking a declaratory judgment and money damages. Second Am. Compl., Dkt. No. 54 ¶¶ 10, 58-142. The gravamen of Plaintiffs' claim is that Pike and Salvagio fraudulently induced Plaintiffs to act as middle men in a reinsurance program (the "SIS Reinsurance Program" or the "Program") that was supposed to be structured so Plaintiffs were not at risk, but was not – and Plaintiffs were left holding the proverbial bag. Defendants, in turn, have filed counterclaims against AmTrust as well as a third-party complaint against Network Adjusters, Inc. ("Network"), Preferred Reinsurance Intermediaries ("Preferred Re"), Builders and Tradesmen's Insurance Services, Inc. ("BTIS"), John Doe Brokerages 1-5, John Doe Brokers 1-5, John Doe Corporations 6-15, and John Does 6-15[1]. The gravamen of the counterclaims and most of the third-party claims is an alleged scheme in which AmTrust and BTIS used AmTrust's access to SIS policyholder information to steal business from SIS. Third Party Compl. ¶¶ 57-72.

[1] The Third-Party Complaint also asserted claims against Robert Sanders, the Chief Executive Officer of Preferred Re, but Third-Party Plaintiffs have voluntarily dismissed the claims asserted against Sanders. *See* Stipulation of Discontinuance as to Third-Party Defendant Robert Sanders, Dkt. No. 131. To the extent that factual allegations referred to Sanders by name, now that Sanders is now longer a party I will construe those allegations as asserted only against Preferred Re.

Before the Court is Plaintiff AmTrust's and third-party defendant BTIS's motion to dismiss all counterclaims filed against AmTrust and all third-party claims against all third-party defendants. The Court has previously dismissed the third-party claims asserted against Network, *see* Dkt. No. 153 (the "Network Order").

For the reasons that follow, the motion is granted.

BACKGROUND

The factual history of this case is set forth in the Court's opinion and order granting Third-Party Defendant Network's motion to dismiss. *See* Network Order at 2-5. The Court assumes the parties' familiarity with that opinion, and all capitalized terms not defined herein have the meanings ascribed to them there. The following additional background is provided for its relevance to the current motion.

I. Third-Party Claims Against Preferred Re

Third-Party Defendant Preferred Re is a South Carolina corporation, registered to do business in New York, with offices in New York and Nassau counties. Third-Party Compl., ¶ 17. Robert Sanders is Preferred Re's chief executive officer. Third-Party Compl. ¶ 18.

Preferred Re provides insurance and reinsurance brokerage and consulting services. AmTrust retained Preferred Re under a Master Agreement to look for prospective business opportunities for AmTrust. Pl. Br. at 7, Bryant Decl. Ex. 13. Preferred Re introduced AmTrust to Defendant SIS; eventually, AmTrust and SIS entered into the relationship that underpins this lawsuit. Bryant Decl. Ex. 13, Third-Party Compl., ¶53.

Defendants/Third-Party Plaintiffs have sued Preferred Re for negligence. They allege that Sanders failed to perform sufficient due diligence on the parties and that he "knew or should have known that … [the parties] were not well-suited for one another." Third-Party Compl., ¶¶

54-55. Preferred Re is also included as a third-party defendant on Third-Party Plaintiffs' claims for contribution and indemnification. *Id.* ¶¶143-150.

II. Third-Party Claims Against BTIS/John Does and Counterclaims Against AmTrust

Third-Party Defendant BTIS, a division of AmTrust, is a California corporation registered to do business in New York. It provides insurance policies to small and mid-sized contractors and constructions companies. Third-Party Compl., ¶¶ 22, 24, 57. BTIS is allegedly SIS's primary competitor in the insurance market for small and mid-sized contractors. *Id.* ¶ 60.

Third-Party Plaintiffs allege that AmTrust used commercially sensitive information that AmTrust obtained during the course of an audit of the SIS Insurance Program policies to lure business away from Third-Party Plaintiffs, to BTIS' benefit. Specifically, Third-Party Plaintiffs allege that AmTrust obtained the names of SIS's policyholders during its audit, and provided those names to BTIS. BTIS, in turn, turned the names over to John Doe Brokers 1-5 and John Doe Brokerages 1-5, who allegedly solicited those policyholders to lure their business away from Third-Party Plaintiffs. None of the policyholders are identified in the Third Party Complaint.

Third-Party Plaintiffs claim that at least one policyholder solicited by BTIS and/or the John Does terminated Third-Party Plaintiff Salmen Insurance Services, Inc. ("Salmen") as a "producer," *i.e.*, the entity responsible for selling the insurance policy (and which receives a commission for doing so). In other words, at least one unidentified policyholder did not renew its policy with SIS. This allegedly damaged both SIS (which no longer received the premium payments) and Salmen (which received no commission for a policy renewal). Thus, SIS, Salmen and Pike allege that BTIS and the John Does wrongfully obtained policyholder information in order to undercut SIS and steal SIS's business, for the purpose of damaging Salmen and/or another Third Party Plaintiff, Pike Insurance. *Id.* ¶¶ 57-72, 92-109.

This alleged scheme gives rise to the following counterclaims against AmTrust and third-party claims against BTIS and the John Doe Brokers and Brokerages:

- Counterclaims against AmTrust: (1) Breach of Fiduciary Duty (filed by SIS), (2) Tortious Interference with Prospective Business Relations (filed by SIS, Salmen, and Pike Insurance).
- Third-Party Plaintiff claims against BTIS and the John Doe Brokers and Brokerages: (1) Tortious Interference with Prospective Business Relations (Count III of the Third-Party Complaint, filed by SIS, Pike Insurance, and Salmen), (2) Aiding and Abetting Breach of Fiduciary Duty (Count IV, filed by SIS and Taft), (3) Aiding and Abetting Breach of Contract/Duty of Good Faith and Fair Dealing (Count V, filed by SIS and Taft), (4) Contribution (Count VII, filed by all third-party plaintiffs against all third-party defendants), and (5) Indemnification (Count VIII, filed by all third-party plaintiffs against all third-party defendants).[2]

AmTrust and BTIS filed a joint motion to dismiss all counterclaims filed against AmTrust and all third-party claims against all third-party defendants. For the reasons that follow, the motion is granted.

DISCUSSION

I. Standard of Review

"To survive a motion to dismiss under Rule 12(b)(6) ... a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Mabry v. Neighborhood Defender Svc.*, 769 F.Supp.2d 381, 389 (S.D.N.Y.2011) (citing *Ashcroft*

[2] The contribution and indemnification claims are also filed against John Does 6-15 and John Doe Corporations 6-15, placeholders for individuals and corporations who allegedly benefitted from Third-Party Defendants' actions and/or contributed to the harm suffered by Third-Party Plaintiffs. *Id.* ¶¶ 27-30.

v. Iqbal, 556 U.S. 662 (2009)). "[A] plaintiff's obligation ... requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678.

II. New York Law Governs the Validity of All Third Party Claims

Because subject matter jurisdiction in this case rests on diversity of citizenship, I must determine which state's law governs each of the claims. AmTrust and BTIS argue that New York state law applies to all claims. They identify California as the only other possibly relevant law, argue that no actual conflict exists between New York and California, and that even if such a conflict did exist, "New York has the superior interests and her law should apply." Pl. Br. at 9.

In contrast, Third-Party Plaintiffs suggest that "New York's conflict of law analysis requires a more nuanced approach," but they do not explain how that "nuanced approach" would lead to a different result. Opp. Br. at 4. They have provided the court with a chart indicating, in a cursory fashion, that any number of different states' laws – including California, Delaware, New York, Maryland, Texas, South Carolina, and Montana – could apply. Between three and six options of state law are proffered for each claim, with no true consideration, but with the insistence that "[AmTrust/BTIS's] Motion glosses over a highly-complex analysis that calls for substantial briefing and legal analysis in its own right." *Id.* But in the end, Third-Party Plaintiffs effectively acquiesce in AmTrust/BTIS' choice of law, by assuming in their brief that New York law applies. *Id.* at 5.

When both parties elect to brief an issue applying the same law, there is no need for the court to engage in choice of law analysis. *See Jalili v. Xanboo Inc.*, 2011 WL 4336690, at *3 (S.D.N.Y. Sept. 15, 2011) (quoting *Federal Ins. Co. v. American Home Assurance Co.*, 639 F.3d

557, 566 (2d Cir. 2011)). The parties brief these issues applying New York law; I will do the same.

III. The Claims Against Preferred Re Are Dismissed

Preferred Re has not moved to dismiss the claims asserted against it. Instead, AmTrust and BTIS have moved to dismiss the claims against Preferred Re.

The general rule is that parties "do not have standing to move on behalf of other defendants." *Kuklachev v. Gelfman*, 600 F. Supp. 2d 437, 455 (E.D.N.Y. 2009). However, cases cited by Third-Party Plaintiffs invoking this general rule have not addressed this specific context, in which a Plaintiff and Third-Party Defendant seek to dismiss claims not asserted against them in a third-party complaint. The one case the parties found that addresses this particular issue – which is also the only case the Court was able to find in its own research – holds that "a plaintiff may move to dismiss a third-party complaint even though the third-party defendant does not seek dismissal of the claim." *Seymour v. Bache & Co.*, 502 F. Supp. 115, 117 (S.D.N.Y. 1980). In *Hart v. Simons*, 223 F. Supp. 109, 111 (E.D. Pa. 1963), the court declined to decide whether a plaintiff, rather than a third-party defendant, could move to dismiss a third-party action, but the court noted that Rule 14 of the Federal Rules of Civil Procedure states that "any party may move to strike the third-party claim, to sever it, or to try it separately."[3] Thus, the (admittedly sparse) authority on this discrete issue of standing suggests that AmTrust and BTIS are within their rights to seek dismissal of the claims against Preferred Re and the other Third-Party Defendants, whether those parties move to dismiss the claims against them or not.

[3] It is not clear from the commentary to Federal Rule of Civil Procedure 14 whether this provision could similarly be applied to a motion to dismiss; the Court notes that there is a difference between dismissing claims and striking insufficient defenses and immaterial or scandalous matter from pleadings (*see* Fed. R. Civ. P. 12(b) and (f)), but "striking" an entire pleading appears to be tantamount to dismissing it.

Furthermore, AmTrust has a meaningful stake in the outcome of claims asserted against Preferred Re. Section 10 of the Master Agreement between Preferred Re and AmTrust provides that AmTrust has a duty to indemnify Preferred Re and hold it harmless against claims arising out of their contractual relationship, which is sufficient to confer standing on AmTrust to move to dismiss the claims against Preferred Re. The policies underlying the doctrine of standing – whether a party has a "personal stake in the outcome" and would suffer an "injury in fact" if the third party claim were sustained – are used to determine whether a party may move to dismiss a claim asserted against another. *See Nat'l Cas. Co. v. Jordache Enterprises, Inc.*, 848 F. Supp. 1112, 1119 (S.D.N.Y. 1994); *see also*, *Ulvedal v. Heidelberg E., Inc.*, 1991 WL 47114, at *2 n.1 (D. Conn. Mar. 6, 1991) (holding that a defendant had standing to move to dismiss an intervening complaint seeking to recover sums paid to the plaintiff when the claims in question could affect the amount the defendant would be liable to the plaintiff). AmTrust indubitably has the most at stake, and would suffer an injury in fact, were the third party claims against Preferred Re to be sustained; it thus has standing to seek their dismissal.

A. Negligence Claim

Third-Party Plaintiffs allege that Sanders (and by extension, Preferred Re), "knew or should have known that … [the parties] were not well-suited for one another" and that he neglected to perform sufficient due diligence on the parties before introducing the companies to each other. Third-Party Compl., 54-55.

Conspicuously absent from the Third Party Complaint is any allegation of fact that could plausibly give rise to the inference that Preferred Re owed any duty whatsoever to Third-Party Plaintiffs – let alone the duty to perform enough due diligence to ensure that SIS and AmTrust would be a good business "fit." Certainly, no agreement is pleaded that imposes on Preferred Re the duty of performing due diligence and suggesting only certain types of business partners. In

fact, there is no allegation of any agreement between Preferred Re and Third-Party Plaintiffs at all!

Preferred Re argues that it is the Third-Party Beneficiary of the AmTrust-Preferred Re Master Agreement, but that is plainly not the case.

In order to be the third party beneficiary of a contract, a party must "establish that the parties to the contract intended to confer a benefit on a third-party." *Subaru Distribs. Corp. v. Subaru of Am., Inc.*, 425 F.3d 119, 124 (2d Cir.2005) (citing *State of Cal. Pub. Employees' Ret. Sys. v. Shearman & Sterling*, 95 N.Y.2d 427, 434–35 (2000)). For a contract to confer third-party beneficiary status, three elements must be established: (1) there must be a valid and binding contract between other parties, (2) the contract was intended for the benefit of some third party; and (3) the benefit to the third party must be sufficiently immediate, rather than incidental, so that it indicates the assumption by the contracting parties of a duty to compensate the third party if the benefit is lost. *Mendel v. Henry Phipps Plaza West, Inc.*, 6 N.Y.3d 783, 786 (2006).

A quick review of the Master Agreement between Preferred Re and AmTrust, relied on by Third-Party Plaintiffs in their brief, Opp. Br. at 18, and attached as Exhibit 13 to the Bryant Declaration in support of AmTrust's/BTIS's motion to dismiss, reveals that it was not entered into for SIS's benefit, and that SIS could not possibly have the right to sue to enforce the agreement. Preferred Re's duties under the Master Agreement are specified in addenda that are entered into each time Preferred Re makes an introduction to AmTrust. Preferred Re and AmTrust entered into such an addendum after Preferred Re introduced SIS to AmTrust "with the intention that [SIS] would produce business *on behalf of AmTrust* with respect to the SIS Program." Bryant Decl. Ex. 13 at 6 (emphasis added). That Addendum specifies the services to be performed by Preferred Re under the Master Agreement. In addition to introducing SIS to

AmTrust (which is first on the list) they include: providing AmTrust with something called the "Program Submission;" providing assistance to AmTrust in managing the Program analysis process from commencement to Program binding; remaining involved post-binding in order to, inter alia, intervene with SIS with respect to various post-binding activities; and "advocat[ing] on behalf of AmTrust in all negotiations related to the Program." *Id.* In short, each and every service to be provided by Preferred Re was to be provided to AmTrust. Preferred Re was to be AmTrust's advocate with SIS during negotiations and its defender should it become necessary to "intervene" with SIS. Under the clear and indisputable terms of the Master Agreement, SIS is nothing more than AmTrust's contraparty; the addendum confers absolutely no rights upon it. *See* Network Order at 11-12 ("Contract language referring to third parties as necessary to assist the parties in their performance does not … show an intent to render performance for the third-party's benefit." (quoting *Subaru Distributors Corp.*, 425 F.3d 119 at 126)).

Furthermore, even if SIS were a third-party beneficiary of the Master Agreement, the contract between Preferred Re and AmTrust did not obligate Preferred Re to undertake due diligence about the propriety of an AmTrust-SIS business relationship. Since Preferred Re had no such duty to AmTrust, one would be hard pressed to conclude that it assumed any duty to perform due diligence for the benefit of SIS, AmTrust's contraparty.

Finally, for Preferred Re to be liable in tort, Third-Party Plaintiffs must allege that Preferred Re violated a duty owed to SIS that is independent of any contractual obligation it may have breached. *See Bayerische Landesbank, New York Branch v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 58 (2d Cir. 2012) ("A breach of contract will not give rise to a tort claim unless a legal duty independent of the contract itself has been violated."). Since Third Party Plaintiffs'

argument is that it was the beneficiary of some contractual duty Preferred Re owed to AmTrust under their contract, it cannot prevail on a claim in tort.

The negligence claim against Preferred Re is, therefore, dismissed with prejudice.

B. Other Claims (Indemnity/Contribution)

Third-Party Plaintiffs have alleged a claim for contribution against all third-party defendants: Preferred Re, BTIS, the John Doe Brokers and Brokerages, and Network. I previously granted Network's motion to dismiss the claim for contribution, because Plaintiffs' claims – upon which Third-Party Plaintiffs' claim for contribution is predicated – seek only a contract measure of damages; a Defendant/Third-Party Plaintiff may not seek contribution for such damages. *See* Network Order at 14 (citing *Conestoga Title Ins. Co. v. ABM Title Servs., Inc.*, 2012 WL 2376438, at *6 (S.D.N.Y. June 20, 2012)). That logic applies to bar any such claim against Preferred Re.

The claim for contribution against Preferred Re also fails for a different reason. In order to state a claim for contribution under New York law, the party against whom contribution is sought must have contributed to the "same injury" suffered by the complaining parties – in this case AmTrust and TIC. *Bellis v. Tokio Marine & Fire Ins. Co.*, 2002 WL 193149, at *17 (S.D.N.Y. Feb. 7, 2002). "The breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought." *Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 71 N.Y.2d 599, 603, 523 N.E.2d 803, 805 (1988).

The Third-Party claims against Preferred Re are based on the notion that Sanders should have known that Plaintiffs and Defendants were "not well suited" to participate together in the SIS Reinsurance Program. This claim is completely separate and apart from the grounds upon which AmTrust and TIC sue Defendants/Third-Party Plaintiffs – namely, that Defendants'/Third-Party Plaintiffs' failed to pay third-party administrator fees and adequately

fund the Trusts as required by contract. To find that Preferred Re's alleged misdeeds are somehow partially responsible for that failure would completely vitiate the "same injury" requirement, and this Court will not do so.

The claim for contribution against Preferred Re is, therefore, dismissed.

Third-Party Plaintiffs also seek indemnification, grounded in common law or in contract, from all Third-Party Defendants. I dismissed the common law indemnification claim against Network because Network owed no duty to Third-Party Plaintiffs on which to base such a claim. *See* Network Order at 15. That reasoning, too, applies here; as discussed above, Third-Party Plaintiffs have not properly alleged that Preferred Re owed any Third-Party Plaintiff a duty.

Further, Third-Party Plaintiffs' claim for indemnification by contract fails, as Third-Party Plaintiffs have not pointed – and could not point – to any contractual duty to indemnify them on the part of Preferred Re.

IV. The Counterclaim against AmTrust for Breach of Fiduciary Duty and the Third-Party Claims Against BTIS and the John Doe Brokers and Brokerages for Aiding and Abetting Breach of Fiduciary Duty Are Dismissed

Third-Party Plaintiffs claim that AmTrust owed SIS a fiduciary duty for two reasons: (1) AmTrust and SIS were principal and agent[4], which meant that AmTrust stood in a fiduciary relationship to SIS, and (2) Plaintiffs had "substantial power over SIS, including the right to access certain of SIS's files;" this "imbalance in the position of the parties" allegedly created a fiduciary relationship. Opp Br. at 10-12. Third-Party Plaintiffs allege that AmTrust breached its fiduciary duty by providing SIS policyholder information to BTIS. They also allege that BTIS

[4] The parties agree that the General Agency Agreement and Quota Share Agreement establish that SIS was Plaintiffs' agent. Opp. Br. at 10; Pl. Br. at 11; *see* Cal. Quota Share Ag. § 18.01.

and the John Doe Brokers and Brokerages aided and abetted this breach. SIS Counterclaim, ¶¶ 14-22; Third-Party Compl., ¶ 110-127. Both claims are dismissed.

A fiduciary relationship exists where one person "is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). Typically, arms-length business transactions are not characterized by the "higher level of trust" that characterizes a fiduciary relationship. *Id; Stadt v. Fox News Network LLC, 719 F. Supp. 2d 312, 318-19 (S.D.N.Y. 2010).* Where parties have entered into a contract, courts generally look to that contract to determine the contours of the parties' relationship; if the parties' contract does not create a relationship of higher trust, courts usually will not impose such a relationship on them. However, "it is fundamental that fiduciary liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation." *EBC I.*, 5 N.Y.3d at 20 (internal quotation marks and citation omitted).

It is, of course, well settled that an agent owes a fiduciary duty to its principal. An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship. *Evvtex Co., Inc. v. Hartley Cooper Assocs. Ltd.,* 102 F.3d 1327, 1331–32 (2d Cir.1996); *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 416, 754 N.E.2d 184, 189 (2001); Restatement (Third) Of Agency § 8.01 (2006).

However, the converse is not necessarily true; a principal does not necessarily owe its agent a fiduciary duty. *Compare* Rest. (Third) of Agency § 8.01 (agent owes principal a "fiduciary duty") *with* Restatement (Third) Of Agency § 8.15 (2006) ("A principal has a duty to deal with the agent fairly and in good faith"). By way of illustration: while a trustee who holds assets in trust for their true owner stands in a fiduciary relationship to the true owner (he is the

agent for his principal), the true owner of the assets does not owe any sort of fiduciary relationship to his trustee – or any duty at all, except not to act in such a way as to render it impossible for the trustee to perform his duty.

The cases Third-Party Plaintiffs cite stand for the premise that a principal must do nothing to "thwart the effectiveness of the agency" – in other words, that a principal must act in good faith towards its agent, specifically as it relates to the agent's fulfillment of its duties on behalf of the principal. *Sidella Exp.-Imp. Corp. v. Rosen*, 78 N.Y.S.2d 155 (App. Div. 1948); *Popkin v. Nat'l Ben. Life Ins. Co.*, 711 F. Supp. 1194, 1202 (S.D.N.Y. 1989). But a duty of good faith is not the same as a fiduciary duty, and the cases cited by Third-Party Plaintiffs do not suggest that a principal/agent relationship necessarily translates to a general fiduciary duty running from principal to agent.[5] *See also Winfield Grp., Inc. v. Erie Ins. Grp.*, 531 F. App'x 92 (2d Cir. 2013) (holding that an insurance company did not owe its temporary agent, another insurance company, a fiduciary duty); *c.f. Metro. Enter. Corp. v. United Techs. Int'l Corp.*, 2005 WL 2300382, at *9 (D. Conn. Sept. 21, 2005) (holding that the duty of good faith a principal owes an agent under Connecticut law, as articulated in the Restatement (Third) of Agency, is not the same as a fiduciary duty).

Third-Party Plaintiffs' second theory – that the imbalance in the position of the parties created a fiduciary duty – is equally flawed. Third-Party Plaintiffs allege that Plaintiffs had "substantial power over SIS" by virtue of AmTrust's right to access (for purposes of auditing the reinsurances program) certain of SIS's files. This, they claim, made AmTrust SIS' fiduciary.

[5] *Popkin v. Nat'l Ben. Life Ins. Co.*, 711 F. Supp. 1194, 1202 (S.D.N.Y. 1989) states broadly that "an 'agency' is a fiduciary relationship," but upon a close reading, *Popkin* does no more than hold that "parties to an agency contract, like those in ordinary contracts, must act in good faith and deal fairly with each other." *Id.*

But Plaintiffs have pled no facts to suggest that the reinsurance program the parties embarked on was anything but an "arm's length business transaction[]." *Id.* Further, SIS's sharing information with AmTrust did not put AmTrust "under a duty to act for or to give advice *for the benefit of [SIS],*" which is the very essence of a fiduciary duty. *Id.* (emphasis added). To the contrary: AmTrust had the right to review SIS policyholder data in connection with the reinsurance program in order to protect its own interests – not for the benefit of SIS. SIS has pleaded no facts suggesting otherwise.

The claim for breach of fiduciary duty is dismissed.

Because "there can be no aiding and abetting if there is no primary liability," Third-Party Plaintiffs' claim against BTIS and the John Doe Brokers and Brokerages for aiding and abetting a breach of fiduciary duty is also dismissed. *Excelsior Capital LLC v. Allen*, 2012 WL 4471262, at *14 (S.D.N.Y. Sept. 26, 2012) aff'd, 536 F. App'x 58 (2d Cir. 2013).

V. The Tortious Interference with Prospective Business Relations Claim Against All Third-Party Defendants Is Dismissed

Third-Party Plaintiffs allege tortious interference with prospective business relations against AmTrust, BTIS, and the John Doe Brokers and Brokerages. SIS Counterclaims, ¶¶ 23-31; Salmen Counterclaim ¶¶ 17-24, Pike Counterclaim ¶¶ 17-24; Third-Party Compl., ¶¶ 92-109. Specifically, Third-Party Plaintiffs claim that AmTrust wrongfully passed confidential and proprietary business information about SIS's policyholders to BTIS, which then solicited those policyholders, who subsequently renewed their policies with BTIS instead of SIS. SIS Counterclaims, ¶¶ 28-30.

"Under New York law, the elements of a tortious interference claim regarding prospective business [relations] are: (a) business relations with a third party; (b) defendants' interference with those business relations; (c) that defendants acted with the sole purpose of

harming the plaintiff (i.e., with malice), or used dishonest, unfair, or improper means; and (d) injury to the relationship." *Abshier v. Sunset Recordings, Inc.*, 2014 WL 4230124, at *10 (S.D.N.Y. Aug. 5, 2014). If multiple contracts are at issue, the complaint must specify the particular contracts that have been interfered with by defendants. *Flash Electronics, Inc. v. Universal Music & Video Distribution Corp.*, 312 F. Supp. 2d 379, 403 (E.D.N.Y. 2004). Plaintiffs must provide at least some specific facts about the underlying contracts, such as the parties to the contracts or terms of the contracts, to put defendants on notice as to which contracts they are accused of interfering with. *Id.*

The pleading in this case is defective for the same reason the pleading was defective in *Flash Electronics*. In *Flash Electronics*, plaintiffs, DVD distributors that had contracts with Universal Studios, claimed that Universal conspired with co-defendants Ingram and VPD, other distributors, to deny plaintiffs the right to distribute Universal products. *Flash Electronics, Inc.*, 312 F. Supp. 2d at 382. Plaintiffs claimed that Universal requested confidential information about Plaintiffs' customers, specifically in order to pass that information along to Ingram and VPD, who allegedly used defamation, bribes, threats, and coercion to induce those customers not to do business with plaintiffs. *Id.* at 383. The Court dismissed the complaint for failure to plead tortious interference; it held that, although plaintiffs had "alleged a number of facts suggesting wrongful means," they had not provided any information regarding the identities of the customers or any particulars about how the customers had terminated their contracts.

Third-Party Plaintiffs' claims suffer from exactly the same defect, in that they provide virtually no information about the contracts with which BTIS and AmTrust allegedly interfered. The names of customers are not alleged; the policies that were supposedly interfered with are not identified. The complaint alleges that one of the "stolen" policies was mentioned on a March 12,

2015 phone call between BTIS and Salmen, but no other information about the policyholder or terms of the contract are provided, and Third-Party Plaintiffs allege no information whatsoever about any other contracts with which BTIS and AmTrust allegedly interfered. *See* Third-Party Compl., ¶¶ 69-71. Thus, as in *Flash Electronics*, Third-Party Plaintiffs have failed to provide sufficient details regarding the terms of the contracts to state a non-conclusory claim for tortious interference.

Ordinarily one would give a pleader a second chance to provide such details, but in this case Third-Party Plaintiffs cannot possibly plead a valid claim for tortious interference.

Under New York law, a "business competitor" is not liable for tortious interference with prospective business relations as long as "the interference is intended at least in part to advance the competing interest of the interferer, no unlawful restraint of trade is effected, and the means employed are not wrongful." *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (1980). *See also* Restatement (Second) of Torts § 768 (1979). Here, SIS itself pleads that BTIS, which is a division of AmTrust, is its primary competitor in the insurance market for small and mid-sized contractors; the pleadings establish that the alleged interference was intended to advance the business interests of BTIS/AmTrust, and there is no allegation of any unlawful restraint of trade. So the tortious interference claim must be dismissed unless AmTrust and BTIS used "wrongful means" to accomplish their alleged goal, which was to steal customers from SIS.

It goes without saying that "stealing" a competitor's customers is not "wrongful." "'Wrongful means' include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; *they do not, however, include persuasion alone although it is knowingly directed at interference with the contract*." *Guard-Life Corp.*, 50

N.Y.2d at 191 (emphasis added). AmTrust and BTIS are not alleged to have engaged in physical violence, perpetrated any fraud, made any misrepresentation, or commenced any suit or prosecution. They are not even alleged to have engaged in economic pressure. They are alleged to have misused information that AmTrust acquired for a different purpose. But absent some contractual duty to keep such information confidential – and Third-Party Plaintiffs identify no such contractual provision – AmTrust and BTIS have done nothing more than engage in sharp practice. That may be repugnant, but it is not a "wrongful means."

A defendant's violation of a duty of fidelity owed to the plaintiff has also been deemed "wrongful means." *Id.* But we have already established that AmTrust owed no fiduciary duty to SIS; and as SIS' biggest competitor, BTIS even less so.

Third-Party Plaintiffs claim that their situation is akin to that of the plaintiffs in *Flash Electronics* – where the district court held that the Plaintiff had "suggest[ed] wrongful means" – but that is not so. The "wrongful means" alleged in *Flash Electronics* included bribery, threats and coercion of customers to induce them to move their business. *Flash Electronics, Inc.*, 312 F. Supp. 2d at 383. Third-Party Plaintiffs do not allege that BTIS or AmTrust bribed, threatened, or coerced SIS policyholders. Nor do they allege that, as in *Flash Electronics*, the means by which AmTrust obtained SIS customer information was wrongful. They do allege that AmTrust's and BTIS' shared the lawfully-obtained information with the John Does for a purpose not intended, but a quick review of the relevant contracts – the California Quota Share Agreement and the California General Agency Agreement[6] – reveals no confidentiality provision binding AmTrust to keep SIS's customer information confidential or restricting its use.

[6] Both of which, by the way, actually bind TIC and not AmTrust.

Rather, AmTrust's actions, as alleged, are more like those of the defendant in *Winfield Grp., Inc. v. Erie Ins. Grp.*, 531 F. App'x 92 (2d Cir. 2013). In *Winfield*, two insurance agencies entered into an agreement, by which Plaintiff Winfield was a temporary agent of Defendant Erie and serviced Erie's insurance policies. Upon termination of the agreement, Erie sent letters to its policyholders, notifying them of the termination and offering to arrange for replacement coverage with a different servicer. The District Court held, and the Second Circuit affirmed, that Erie had economic self-interest in the so-called "interference" with policyholders contracts, and – as Erie owed its agent no duty of fidelity – the facts alleged did not constitute wrongful means. As such, the claim for tortious interference was dismissed.

The same logic applies here. Third-Party Plaintiffs' only argument that *Winfield* does not control is that Third-Party Plaintiffs have "alleged facts to support the existence" of a duty of fidelity. But, as discussed above, no such duty is properly alleged.

The claim for tortious interference with prospective business relations is dismissed.

VI. The Claim Against Third-Party Defendants for Aiding and Abetting Breach of Contract/Duty of Good Faith and Fair Dealing Is Dismissed

Third-Party Plaintiffs allege that BTIS and the John Doe Brokers and Brokerages aided and abetted Plaintiffs' breach of contract, as well as Plaintiffs' violation of the duty of good faith and fair dealing.[7] Third-Party Compl., ¶¶ 128-134. New York law, however, affords no cause of action for aiding and abetting breach of contract – including aiding and abetting breach of the implied covenant of good faith and fair dealing. *A Star Grp., Inc. v. Manitoba Hydro*, 2014 WL

[7] A duty of good faith and fair dealing is implicit in every New York contract and a breach of that duty is a breach of the contract. *Fleisher v. Phoenix Life Ins. Co.*, 858 F. Supp. 2d 290, 298 (S.D.N.Y. 2012); *Dorset Indus., Inc. v. Unified Grocers, Inc.*, 893 F. Supp. 2d 395, 405 (E.D.N.Y. 2012). Oddly, it appears that Third-Party Plaintiffs failed to assert a counterclaim for breach of contract against AmTrust (at least, the Court can find no such primary claim in the pleadings).

2933155, at *8 (S.D.N.Y. June 30, 2014) aff'd, 2015 WL 4508941 (2d Cir. July 27, 2015); *Ge Dandong v. Pinnacle Performance Ltd.*, 966 F. Supp. 2d 374, 390 (S.D.N.Y. 2013).

Accordingly, these claims are dismissed.

VII. The Claim for Contribution Against the Remaining Third Party Defendants is Dismissed

Third-Party Plaintiffs have alleged a claim for contribution against all Third-Party Defendants. The claim for contribution against BTIS and the John Doe Brokers and Brokerages – the remaining Third-Party Defendants – is dismissed for the same reasons it was dismissed against Preferred Re. *See supra* section III.B.

As was the case with Third-Party Defendants Network and Preferred Re, the claim for contribution fails because Plaintiffs seek from Defendants/Third-Party Plaintiffs only economic (contract) damages.

And as was the case with Preferred Re, the remaining Third-Party Defendants are not alleged to have contributed to the "same injury" suffered by the complaining parties (in this case, AmTrust and TIC). *See Bellis v. Tokio Marine & Fire Ins. Co.*, 2002 WL 193149, at *17 (S.D.N.Y. Feb. 7, 2002). BTIS and the John Doe Brokers/Brokerages are alleged to have wrongfully used confidential SIS information obtained by AmTrust to lure away SIS policyholders. This claim has absolutely nothing to do with AmTrust and TIC's suit against Defendants/Third-Party Plaintiffs, which is purely about failure to fund certain trust accounts and pay third-party administrator fees as required by the trust agreements and SIS Captive Reinsurance Agreement. To suggest otherwise, as Third-Party Plaintiffs do by alleging contribution against BTIS, is complete and utter nonsense.

The claim for contribution against BTIS and the John Doe Brokers and Brokerages is dismissed.

VIII. The Claim for Indemnification Against the Remaining Third-Party Defendants is Dismissed

The claim for indemnification is dismissed for the same reasons that it was dismissed as against Preferred Re. *See supra* section III.B.

CONCLUSION

For the foregoing reasons, the motion to dismiss is granted. The Clerk of the Court is directed to remove Docket No. 92 from the Court's list of pending motions.

Dated: December 1, 2015

U.S.D.J.

BY ECF TO ALL COUNSEL