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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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) Lead Case No. CV-09-8162-PCT-GMS

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) Consolidated with:

In Re: Allstate Life Insurance Company
Litigation

) Case No. CV-09-8174-PCT-GMS

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) **ORDER**

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Pending before the Court are 1) Wells Fargo Bank, N.A.’s Consolidated Motion to Dismiss the Underwriters’ and Town of Prescott Valley’s Counterclaims (Doc. 263), and 2) Underwriters’ Motion to Amend Third-Party Complaint and Counterclaim against Third-Party and Counterclaim Defendant Wells Fargo Bank, N.A. (Doc. 281). As set forth below, Wells Fargo’s Motion to Dismiss is granted in part and denied in part.¹ The Underwriters’ Motion to Amend is granted.

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¹ The Town’s request for oral argument is denied as the Court has determined that oral argument will not aid in its decision. *See Lake at Las Vegas Investors Group v. Pac. Malibu Dev.*, 933 F.2d 724, 729 (9th Cir. 1991).

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1 **BACKGROUND²**

2 This action arises from the offering and sale of revenue bonds used to finance the
3 construction of a 5,000 seat event center in the Town of Prescott Valley, Arizona. In 2005,
4 various parties purchased approximately \$35 million in Bonds pursuant to a set of offering
5 documents entitled the “Official Statements.” The Town of Prescott Valley pledged certain
6 tax revenues to be used to service the Bonds. Wells Fargo Bank, N.A. (the “Trustee”) was
7 appointed as the Indenture Trustee for the Bondholders and gained certain rights and
8 responsibilities in relation to the Bonds pursuant to an Indenture of Trust. The Trustee also
9 signed a “Closing Certificate of Trustee,” in which it acknowledges its acceptance of certain
10 duties and, the Town alleges, warranted the legal effectiveness of the Indenture.

11 In 2009, the majority bondholder, Allstate Life Insurance Company, commenced this
12 action against various parties, including the Town and certain Underwriters. Allstate asserts
13 federal and state securities fraud claims, and common-law claims for fraud, aiding and
14 abetting fraud, and negligent misrepresentation. The Trustee has brought additional claims
15 on the Bondholders’ behalf, including a common-law negligent misrepresentation claim and
16 a claim under the Arizona State Securities Act, A.R.S. § 44-1991. The Trustee’s negligent
17 misrepresentation claim is two-fold. First, the Trustee claims that certain parties, including
18 the Town and various Underwriters, negligently failed to disclose material facts in the
19 Official Statements regarding the economic feasibility of the event center. Second, the
20 Trustee claims that these parties negligently drafted or approved other Bond documents,
21 including the “Indenture, Loan Agreement and related documents,” which created
22 “significant administrative and legal impediments to the collection . . . of the Pledged
23 Revenues [from the Town].” (Doc. 130 at ¶¶ 187, 199).

24 The Town and Underwriters (collectively “Counterclaimants”), meanwhile, have
25 brought counterclaims against the Trustee. (Docs. 230, 237). The Underwriters’ sole
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27 ² For a more detailed description of the background and facts, see the Court’s Order
28 of November 3, 2010. (Doc. 212).

1 counterclaim is for contribution. They make three distinct factual assertions in their
2 counterclaim. The Underwriters first allege that the Trustee “substantially participated” in
3 the creation of the Official Statements and that the Trustee’s negligence in drafting these
4 statements contributed to any damages to the Bondholders. (Doc. 230 at ¶¶ 48, 50). Second,
5 they allege that the Trustee negligently failed to ensure that the Indenture and other related
6 documents created an adequate mechanism for the Trustee to demand and obtain payment
7 of the Pledged Revenues from the Town. (Doc. 230 at ¶ 51). Third, the Underwriters allege
8 that by acting negligently, the Trustee breached its *contractual* obligations to the
9 Bondholders under the Indenture, which requires that the Trustee exercise the care of a
10 “prudent person.” (Doc. 230 at ¶ 52). The Underwriters conclude, therefore, that any loss
11 suffered by the Bondholders in relation to the bonds is the result of the Trustee’s negligence
12 and/or breach of its contractual obligations. (Doc. 230 at ¶ 13). They contend that “to the
13 extent that the Underwriters are found liable for any [Bondholder losses], the Trustee is liable
14 to the Underwriters for contribution.” (*Id.*).

15 The Town brings a substantially identical contribution counterclaim against the
16 Trustee, alleging that the Trustee is liable to the Town for contribution due to its negligence
17 and breach of contractual obligations. (Doc. 237 at ¶¶ 59–63). The Town also brings a claim
18 against the Trustee for common law indemnity. The Town makes the same first two
19 allegations in support of its indemnity claim that it and the Underwriters make in support of
20 their contribution claims, namely that the Trustee participated in creating the negligently
21 drafted Official Statements; and negligently failed to create an adequate mechanism for
22 delivery of the Pledged Revenues. (Doc. 237 at ¶¶ 55–58).

23 The Trustee moves to dismiss the counterclaims pursuant to Federal Rule of Civil
24 Procedure 12(b)(6) for failure to state a claim. (Doc. 263). The Underwriters, meanwhile,
25 move to amend their counterclaim to include a claim against the Trustee for negligent
26 misrepresentation. (Doc. 281).

1 **DISCUSSION**

2 **I. The Trustee’s Motion to Dismiss**

3 **A. Legal Standard**

4 To survive dismissal, a claim or counterclaim must consist of more than “labels and
5 conclusions” or a “formulaic recitation of the elements of a cause of action”; it must contain
6 factual allegations sufficient to “raise a right to relief above the speculative level.” *Bell Atl.*
7 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *See also Starr v. Baca*, 652 F.3d 1202, 1216
8 (9th Cir. 2011) (holding that the heightened pleading standard in *Twombly* and *Iqbal* applies
9 to a “complaint or counterclaim”) (emphasis added). While these factual allegations need not
10 be detailed, a claim “must plead ‘enough facts to state a claim to relief that is plausible on
11 its face.’” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting
12 *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
13 content that allows the court to draw the reasonable inference that the defendant is liable for
14 the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*,
15 550 U.S. at 556).

16 **B. Legal Analysis**

17 **1. The Town’s and Underwriters’ Contribution Claims**

18 In their counterclaims, both the Town and the Underwriters seek contribution from
19 the Trustee for the alleged losses suffered by the Bondholders. (Docs. 230, 237). The Trustee
20 argues these counterclaims should be dismissed, contending that a contribution claim
21 requires joint and several liability, and that in this case any liability on the Trustee’s behalf
22 is several only. (Doc. 263 at 7).

23 **a. Choice of Contribution Law**

24 To determine which state’s contribution laws govern this action, the Court applies the
25 choice-of-law rules of Arizona, the forum state. *See Lange v. Penn Mut. Life Ins. Co.*, 843
26 F.2d 1175, 1178 (9th Cir. 1988). Arizona applies the contribution law of the state “with the
27 most significant relationship to the occurrence and to the parties.” *Bill Alexander Ford v.*
28 *Casa Ford, Inc.* 187 Ariz. 616, 618, 931 P.2d 1126, 1128 (App. 1996). *See also*

1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145(2). Unlike substantive causes of
2 action, “[c]ontribution does not involve the injured part[ies], rather it concerns the
3 relationship of tortfeasors to each other.” *Bill Alexander*, 187 Ariz. at 618 (internal citation
4 and quotations omitted). It is sometimes appropriate, therefore, to apply one state’s laws to
5 a substantive cause of action in a case and apply a different state’s laws to that case’s
6 contribution claim. *See, e.g., id.* (“Although Texas law applied in the action between Sandigo
7 and Casa Ford, the contribution action involves other parties and issues.”) (citing *Caterpillar*
8 *Tractor Co. v. Teledyne Indus., Inc.*, 53 Cal. App. 3d 693, 697–98 (1975)). The Court,
9 therefore, rejects the Underwriters’ argument that their right to contribution is necessarily
10 “governed by the same law that governs the underlying substantive cause[s] of action.” (Doc.
11 280 at 5). Although the instant action involves Arizona, California, and Illinois securities
12 laws, it is not necessary to apply all three states’ contribution laws.

13 As stated, contribution involves only the tortfeasors and not the injured parties;
14 therefore state relationships to the injured Bondholders need not be considered in the choice
15 of law analysis. The Court must apply the law of the state with the most significant
16 relationship to 1) the *occurrences* that led to this action and to 2) the alleged *tortfeasors*. *See*
17 *Bill Alexander*, 187 Ariz. at 618.

18 The occurrences that led to this action took place primarily in Arizona. Not only were
19 the Bonds issued by an Arizona political subdivision, but tax revenues for servicing the
20 Bonds were pledged by an Arizona municipality. (Doc. 212 at 2–3). Moreover, the Bond
21 proceeds were used to finance the construction of an event center located in Arizona. (*Id.*).
22 And the Underwriters and Town assert that “a substantial part of the events or omissions
23 giving rise to the claims asserted herein occurred in [Arizona], and the property that is the
24 subject of this action is located in [Arizona].” (Docs. 230 at ¶ 8; 237 at ¶ 11). Arizona
25 therefore has the most significant relationship to the occurrences that led to this action.

26 Arizona also has the most significant relationship to the alleged tortfeasors. The
27 alleged tortfeasors affected by the instant contribution claims are the Underwriters, the Town,
28 and the Trustee. At the time of the Bond offering, the Underwriters were citizens of, or had

1 principal places of business in, California, Wisconsin, and Missouri. The Town, however,
2 is a political subdivision of the State of Arizona. (Docs. 130 at ¶ 27; 237 at ¶ 27). And
3 although the Trustee is a citizen of California, it “acted through its employee and agent
4 Nancy Eatros,” a citizen of Arizona. (Docs. 230 at ¶ 15; 280 at 9; 286 at 8). None of the
5 alleged tortfeasors involved in these motions has a connection with Illinois, and only one of
6 the Underwriters and Wells Fargo have any connection with California. In short, not only do
7 two of the alleged tortfeasors have significant ties to Arizona, but the occurrences that led
8 to this action took place primarily in Arizona. The Court will therefore apply Arizona
9 contribution law to both the Town’s and the Underwriters’ counterclaims.

10 **b. Arizona Contribution Law**

11 Under Arizona law, a legally cognizable right to contribution exists only where there
12 is joint and several liability. A.R.S. § 12-2501 (2003). Where liability is not joint and several,
13 there is no common liability to discharge and therefore no “right of contribution.” *Cella Barr*
14 *Assocs. v. Cohen*, 177 Ariz. 480, 484–85, 868 P.2d 1063, 1067–68 (App. 1994). In other
15 words, where liability is several only, it is not possible to hold a defendant to an obligation
16 to pay more than its respective share of damages and “the primary reason for contribution
17 disappears.” *PAM Transp. v. Freightliner Corp.*, 182 Ariz. 132, 134, 893 P.2d 1295, 1297
18 (1995). The purpose of contribution is to prevent one defendant from having to bear the
19 burden of all damages when he was not the cause of all damages. *Id.*

20 Arizona Revised Statutes (“A.R.S.”) § 12-2506 abolishes joint and several liability
21 under most circumstances. *PAM Transp.*, 182 Ariz. at 133. The right to contribution in
22 Arizona has therefore been largely eliminated. *Id.* Under Section 12-2506(D), however, a
23 party remains subject to joint and several liability where “the party and the other person were
24 acting in concert;” (2) the “other person was acting as an agent or servant of the party;” or
25 (3) “the party’s liability for the fault of another person arises out of a duty created by the
26 federal employers’ liability act.” A.R.S. § 12-2506(D) (2003).

1 The Underwriters contend that the Trustee is subject to the “acting in concert”
2 exception. To prove, however, that the Trustee was “acting in concert” with them, the
3 Underwriters must establish that the Trustee participated in committing an *intentional* tort:

4 “Acting in concert” means entering into a conscious agreement
5 to pursue a common plan or design to commit an intentional tort and actively taking part in that intentional tort. Acting in concert
6 does not apply to any person whose conduct was negligent in
7 any of its degrees rather than intentional. A person’s conduct
8 that provides substantial assistance to one committing an
9 intentional tort does not constitute acting in concert if the person
10 has not consciously agreed with the other to commit the
11 intentional tort. A.R.S. § 12-2506(F) (2003) (emphasis added).

9 The only substantive causes of action referenced in the counterclaims are negligence and
10 breach of contract. Neither of these causes of action involve a “conscious agreement . . . to
11 commit an intentional tort.” A.R.S. § 12-2506(F) (2003). Nor do the Counterclaimants allege
12 any facts which make it plausible that the Trustee entered into an agreement to commit an
13 intentional tort. They have therefore failed to plead facts which would trigger the “acting in
14 concert” exception to Arizona’s general ban on joint and several liability.

15 In their briefs, the Counterclaimants next contend that the Trustee is rendered jointly
16 and severally liable by the various state securities statutes involved in this action. The
17 Counterclaimants do not allege in the counterclaims themselves, however, that the Trustee
18 committed any substantive securities violations. Although the Underwriters’ make a brief,
19 one-sentence reference in their counterclaim to the joint and several liability provisions of
20 several state securities statutes, they do not allege that the Trustee committed the substantive
21 securities violations which would subject the Trustee to these statutes’ joint and several
22 liability provisions. (Doc. 230 at ¶ 49). For example, one of the joint and several liability
23 provisions mentioned by the Underwriters is A.R.S. § 44-2003. Section 44-2003(A) provides
24 for joint and several liability for “any person, including any dealer, salesman or agent, who
25 made, participated in or induced the unlawful sale or purchase [of securities].” A.R.S. § 44-
26 2003(A) (2003). Section 44-2003(B), however, limits this grant of joint liability, stating that
27 a party “is jointly and severally liable for damages only if the trier of fact determines that the
28 [party] recklessly or knowingly committed a violation of this chapter.” A.R.S. § 44-2003(B)

1 (2003). The Underwriters do not allege in their counterclaim that the Trustee committed a
2 substantive violation of the Arizona Securities Act, much less that the Trustee did so
3 knowingly or recklessly. Nor do the Town or Underwriters plead substantive violations of
4 any other particular securities statutes. They therefore fail to plead facts under which the
5 Trustee would be subject to joint and several liability.³

6 Finally, the Counterclaimants contend that even if the Trustee is not jointly and
7 severally liable for their alleged securities violations, they still have a valid contribution
8 claim against the Trustee under both the Private Securities Litigation Reform Act (PSLRA)
9 and A.R.S. § 44-2003(M). The Town does not cite to these statutes or reference their
10 elements in its counterclaim. Rather, the Town first cites to the PSLRA and A.R.S. § 44-2003
11 in its Opposition to the Trustee’s motion to dismiss. The Underwriters similarly fail to
12 mention the PSLRA or its elements in their counterclaim, and only make a brief reference
13 to A.R.S. § 44-2003. (Doc. 230 at ¶ 49). The parties may not rewrite their counterclaims in
14 their briefs.

15 It is true that—had the counterclaimants asserted the statutes and necessary factual
16 allegations in their counterclaims—the PSLRA and A.R.S. § 44-2003(M) provide securities
17 violators with a statutory cause of action for contribution:

18 A covered person who becomes jointly and severally liable for
19 damages in any private action may recover contribution from
20 any other person who, if joined in the original action, would
21 have been liable for the same damages. A claim for contribution
22 shall be determined based on the percentage of responsibility of
23 the claimant and of each person against whom a claim for
24 contribution is made. 15 U.S.C. § 78u-4(f)(8) (2006); A.R.S. §
25 44-2003(M) (2003).

26 The Town argues that the “same damages” language means that a securities violator is
27 entitled to contribution from any other tortfeasor who contributed to a plaintiff’s damages,
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25 ³To the extent the Underwriters argue that the “alleged misrepresentations pled in the
26 Underwriters’ Counterclaim [] are the same as those pled by Allstate and [the Trustee],
27 which this Court has already held are sufficient to survive . . . motions to dismiss” (Doc. 280
28 at 3, 11–14), they fail to take into account that Allstate and the Trustee not only pled material
misrepresentations, but also pled substantive violations of particular securities statutes.

1 regardless of whether that tortfeasor itself committed a securities violation. (Doc. 283 at
2 9–10). The Town has not provided, however, nor has the Court found, any authority for such
3 a broad interpretation of this language. To the contrary, at least one court has held that “[a]
4 person sued for contribution under the securities laws must meet the same standard as any
5 other person sued under those laws.” *Ray v. Citigroup Global Markets, Inc.*, 2004 WL
6 1794927, at *2 (N.D. Ill. Aug. 4, 2004) (citing *Barker v. Henderson, Franklin, Starnes &*
7 *Holt*, 797 F.2d 490, 495 (7th Cir. 1986)). In other words, that court held that to be liable for
8 contribution under the securities laws, a person must have violated the substantive provisions
9 of those securities laws, including any scienter requirement that such laws might impose.⁴
10 *See Ray v. Citigroup Global Markets, Inc.*, 2004 WL 1794927 at *3 (“A person can be ‘liable
11 for the same damages’ as someone else found liable under the securities laws only if the
12 person acted with scienter.”). As stated, the Town and Underwriters do not allege in their
13 counterclaims that the Trustee committed a substantive violation of the federal or Arizona
14 securities statutes. (*See Docs. 230; 237*).

15 To the extent that the Counterclaimants identify actual claims against the Trustee that
16 assert the Bondholders were damaged by the Trustee’s actions, the Counterclaimants would
17 not need to invoke the contribution provisions in the PSLRA or state statute to prevent a
18 windfall to the Plaintiffs. In such a case, Arizona state law would require the jury to not only
19 determine the amount of damages, if any to the Bondholders, but to also apportion the
20 percentage of fault for the total damages attributable among each identified tortfeasor that
21 the jury finds contributed to the damage. Each party is then responsible only for its
22 percentage of the total liability. A.R.S. § 12-2506(A) (2003). The Court does not, therefore,
23 adopt the Town’s broad interpretation of these securities statutes’ contribution provisions.
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26 ⁴ Scienter is defined as a “mental state embracing intent to deceive, manipulate, or
27 defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n. 12 (1976). To adequately plead
28 scienter, a party must allege either intentional misconduct or recklessness. *See id.*

1 **2. The Town’s Common Law Indemnification Claim**

2 In addition, the Town brings a claim against the Trustee for common law
3 indemnification. Under Arizona indemnity law, “one who has discharged a common liability
4 [can] seek reimbursement in full from another.” *Herstam v. Deloitte & Touche, LLP*, 186
5 Ariz. 110, 117–118, 919 P.2d 1381, 1388–89 (App. 1996) (emphasis in original omitted).
6 Indemnity, however, “is an all or nothing proposition damage-wise, and hence should be an
7 all or nothing proposition fault-wise.” *Transcon Lines v. Barnes*, 17 Ariz.App. 428, 435, 498
8 P.2d 502, 509 (1972). It exists “neither to apportion damages nor to balance relative degrees
9 of fault, but ‘to give full restitution to one who pays damages but is without personal fault.’”
10 *Id.* at 437. *See also Sprint Communications Co., L.P. v. Western Innovations, Inc.* 618 F.
11 Supp.2d 1101, 1117 (D. Ariz. 2009) (“[Plaintiff] was negligent itself; it cannot claim a right
12 to common law indemnity.”).

13 In this case, the Town seeks indemnification from the Trustee for two different types
14 of Bondholder loss for which the Town may be found liable. First, the Town seeks
15 indemnification for losses related to the omission of material facts from the “Official
16 Statements.” The Bondholders brought claims against the Town for its allegedly negligent
17 omission of material facts from the Official Statements. (Doc. 130 at ¶ 187). In turn, the
18 Town counterclaims that “to the extent that the Town is . . . liable to Bondholders on [these]
19 grounds,” it should receive indemnification from the Trustee because the Trustee
20 “substantially participated” in creating the Official Statements. (Doc. 237 at ¶¶ 56–57). The
21 Town further alleges that it has absolutely no fault in relation to the Official Statements
22 because it “did not undertake or have a duty to prepare . . . or review” them. (Doc. 237 at ¶
23 6). If the factfinder agrees that the Town is not responsible for the contents of these
24 statements, the Town will not be liable for any such negligent omission. If, on the other hand,
25 the Town is held liable for the omissions in the Official Statements, it will be because the
26 factfinder determined that the Town and the Trustee shared the responsibility for creating the
27 Official Statements. And if the Town and Trustee shared the responsibility for creating the
28 Official Statements, then they would also share any fault for the alleged omissions. Although

1 it is possible for one party to be liable for another’s actions even absent personal fault, for
2 example through an agency relationship, the Town has not alleged such a relationship in this
3 case. The Court will not assume that a claimant can prove facts different from those alleged.
4 *See Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519,
5 526 (1983); *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027,
6 1035 (9th Cir. 2005). In short, the Town has not pled facts under which it could be both
7 without personal fault *and at the same time* liable for the omissions in the Official
8 Statements. Therefore the Town’s counterclaim is dismissed insofar as it relates to losses
9 stemming from these omissions.

10 The Town also seeks indemnification, however, for losses related to the Town’s
11 alleged failure to deliver certain pledged tax revenues to the Bondholders. (Doc. 237 at ¶ 58).
12 The Town was obligated to make periodic payments of these tax revenues, if necessary, to
13 secure repayment of the Bonds. (Doc. 283 at 7). The Town alleges in its counterclaim,
14 however, that the Trustee “owed a duty to the Bondholders to ensure that there existed an
15 adequate notice procedure in place to enable the Town to timely budget and pay [these] sales
16 tax revenues.” (Doc. 237 at ¶ 32). The Town further alleges that the Town’s failure to make
17 payments of these revenues was due to the Trustee’s failure to fulfill its duty to “ensure that
18 an appropriate and workable procedure existed . . . to enable the Town to make [the] tax
19 revenue payments.” (Doc. 237 at ¶ 58). The Town has therefore adequately pled that any
20 obligation by the Town for the missed payments should be discharged by the Trustee because
21 it was the Trustee’s unique obligation to ensure that there was a mechanism that would
22 provide timely payment. *See Busy Bee Buffet Inc. v. Ferrell*, 82 Ariz. 192, 196–98, 310 P.2d
23 817, 820–21 (1957) (holding that a party retains its right to indemnity if it breaches its duty
24 “solely through the negligence of the indemnitor”). The Town’s indemnification
25 counterclaim therefore withstands the motion to dismiss as it relates to losses resulting from
26 missed payments on the Bonds.

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1 **II. The Underwriters' Motion to Amend**

2 The Underwriters also move to amend their counterclaim to include a negligent
3 misrepresentation claim against the Trustee. As stated, the Trustee brought a claim for
4 negligent misrepresentation against various defendants, including the Underwriters.⁵ (Doc.
5 130). In its claim, the Trustee alleged that the Underwriters were responsible for the
6 negligent draftsmanship of the Indenture. (*Id.* at 199). The Trustee further alleged that, due
7 to this negligent draftsmanship, “no adequate mechanism existed for the Trustee to demand
8 payment” of the Pledged Revenues from the Town, resulting in damages to the Bondholders.
9 (*Id.*).

10 The Underwriters now seek to bring their own negligent misrepresentation claim
11 against the Trustee. The Underwriters allege that “[t]he Closing Certificate of Trustee, which
12 Wells Fargo signed and provided to all parties to the offering, intending that they rely on its
13 statements,” negligently misrepresented that the Indenture was legally effective. (Doc. 281
14 at ¶ 54). The Underwriters further contend that as a result of the Trustee’s misrepresentation,
15 they face potential legal liability to the Bondholders. (*Id.* at 57). In essence, the Underwriters
16 are contending that the Trustee had an obligation to substantively review the Indenture to
17 ensure that it was legally effective and that the Trustee now seeks to hold the Underwriters
18 liable for its negligent performance of this obligation. Therefore, they argue, the Trustee
19 should be liable, in whole or in part, for any damages resulting from the Indenture’s alleged
20 inadequacies. (*Id.*). The Underwriters therefore move to amend their complaint to include a
21 negligent misrepresentation claim.

22 “The court should freely give leave [to amend] when justice so requires.” Fed. R. Civ.
23 P. 15(a)(2). In deciding this motion, the Court ““must be guided by the underlying purpose
24 of Rule 15 – to facilitate decision on the merits rather than on the pleadings or
25 technicalities.”” *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987) (citation omitted).

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28 ⁵ As determined in the Court’s Order of November 3, 2010, the Trustee’s negligent
misrepresentation claim survived the defendants’ motions to dismiss. (Doc. 212 at 69–70).

1 “Thus, ‘Rule 15’s policy of favoring amendments to pleadings should be applied with
2 extreme liberality.’” *Id.* This liberality “is not dependent on whether the amendment will add
3 causes of action or parties.” *DCD Programs, LTD. v. Leighton*, 833 F.2d 183, 186 (9th Cir.
4 1987). The Court may deny a motion to amend if there is a showing of undue delay or bad
5 faith on the part of the moving party, undue prejudice to the opposing party, or futility of the
6 proposed amendment. *See Foman*, 371 U.S. at 182. Generally, however, “this determination
7 should be performed with all inferences in favor of granting the motion.” *Griggs v. Pace Am.*
8 *Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999).

9 The Trustee’s only objection to the Underwriters’ motion to amend is that such an
10 amendment would be futile. The Trustee argues that the Underwriters’ proposed amendment
11 would be futile for three reasons. First, the Trustee argues that the Closing Certificate of
12 Trustee (“Certificate”) certifies the legal effectiveness of the Indenture only as it relates to
13 the Trustee’s obligations. Second, the Trustee argues that even if the Certificate does
14 warranty the legal effectiveness of the entire Indenture, the Trustee based this warranty upon
15 legal opinions from other parties’ counsel upon which it had the absolute right to rely. Third,
16 the Trustee argues that the Underwriters’ proposed amendment does not satisfy the pleading
17 requirements of Rule 8 or Rule 9.

18 First, the Trustee argues that the Certificate validates the Indenture only as it relates
19 to the Trustee’s obligations. In the Certificate, the Trustee accepts “the duties and obligations
20 of the Trustee.” (Doc. 281, Ex. 1 at 29). One of the duties accepted by the Trustee was the
21 valid execution of the “Trustee Documents,” a defined term which includes the Indenture.⁶
22 As part of this duty, the Trustee certified that the Trustee Documents were enforceable:

- 23 1. **Acceptance of Duties.** The Trustee is duly authorized to
24 accept and does accept the duties and obligations of the Trustee
25 as trustee, paying agent and registrar pursuant to the Indenture;
26

27 ⁶ The term “Trustee Documents” is defined in the Certificate as “the Indenture, the
28 Delivery and Cross Receipt, and [the] Closing Certificate of Trustee.” (Doc. 281, Ex. 1 at
29 29).

1 (b) ***Execution of Trustee Documents.*** The Trustee
2 Documents have been duly executed on behalf of the Trustee by
3 the person listed on the Official Signing Power Authority
4 attached hereto as Exhibit A, and said person was at the time of
5 the execution of the Trustee Documents and now is the duly
6 elected or appointed, qualified and acting incumbent of such
7 person's office, and the signature, as stated on Exhibit A, is the
8 true and genuine signature of such officer. The Trustee
9 Documents constitute the valid and binding obligations of the
10 Trustee, enforceable in accordance with their terms, except as by
11 bankruptcy, moratorium, reorganization or other laws or
12 decisions of general application affecting the enforcement of
13 creditors' rights generally.

14 The execution and delivery by the Trustee of the
15 Trustee Documents and the performance by the Trustee of its
16 duties under the Trustee Documents have been duly
17 authorized by all necessary corporate action on the part of the
18 Trustee and the execution and delivery of the Trustee
19 Documents and the consummation of the transactions
20 contemplated thereby, and the fulfillment of the terms and
21 conditions thereof, do not contravene the charter or bylaws of
22 the Trustee or conflict with or constitute a breach of or default
23 under any law, administrative regulation, order, consent
24 decree or any agreement or instrument applicable to the
25 Trustee or its property. (Doc. 281, Ex. 1 at 29) (emphasis
26 added).

27 The Underwriters contend that the above language evidences the Trustee's intent to
28 certify the legal effectiveness of the entire Indenture. The Trustee, meanwhile, contends that
the Certificate "pertains only to . . . the *Trustee's* obligations under [the] Indenture." (Doc.
295 at 9) (emphasis added). "The construction of a contract is a question of law where the
terms of the agreement are plain and unambiguous." *Smith v. Melson, Inc.*, 135 Ariz. 119,
121, 659 P.2d 1264, 1266 (1983). A contract is only unambiguous where 1) the language of
the contract and 2) all the circumstances surrounding it make "the intent of the parties []
clear." *Id.*

The Certificate states that "the fulfillment of the terms and conditions [of the
Indenture] do not . . . conflict with or constitute a breach of or default under any law,
administrative regulation, order, consent decree or any agreement or instrument applicable
to the Trustee or its property." (Doc. 281, Ex. 1 at 29). The language does not so clearly refer
only to the Trustee's obligations under the Indenture, that the Court will preclude the
Underwriters, at this stage, from discovering facts and circumstances that may shed some

1 light on the intent of the parties. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148,
2 154, 854 P.2d 1134, 1140 (1993) (holding that where a judge finds that “contract language
3 is ‘reasonably susceptible’ to the interpretation asserted by its proponent, [] evidence is
4 admissible to determine the meaning intended by the parties.”)

5 The alleged circumstances surrounding the certification may shed some doubt on the
6 Trustee’s assertion that the Certificate only warrants the legal effectiveness of the Trustee’s
7 obligations. For example, the Underwriters allege in their complaint that the Trustee, as the
8 sole representative of the Bondholders, “owed a duty to the Bondholders to insure that there
9 existed an adequate notice procedure in place to enable the Town to timely budget and pay
10 sales tax revenues.” (Doc. 281, Ex. 1 at ¶ 25). The Underwriters further allege in their brief
11 that a different party was assigned to provide certificates for each document involved in the
12 Bond offering and that the Trustee was the party assigned to certify the Indenture. (Doc. 312
13 at 4). In short, the language of the Certificate combined with the alleged circumstances
14 surrounding it do not make the scope of the Trustee’s warranty clear. The Underwriters’
15 amendment is not, therefore, futile as a matter of law.

16 The Trustee also argues that the Underwriters’ proposed amendment is futile because
17 the Trustee received two separate opinions from counsel “opining as to the enforceability of
18 the [Indenture],” upon which “the Trustee had the absolute right to rely.” (Doc. 295 at 10).
19 Recognizing that motion to dismiss standards apply, the Trustee seeks judicial notice of these
20 legal opinions and of the Bond Purchase Agreement. (Doc. 296). The Court can take notice
21 of “evidence on which the [Underwriters counterclaim] ‘necessarily relies’ if: (1) the
22 [counterclaim] refers to the document; (2) the document is central to the [counterclaim]; and
23 (3) no party questions the authenticity of the copy attached.” *See Marder v. Lopez*, 450 F.3d
24 445, 448 (9th Cir. 2006). This standard is met with respect to the Indenture and the Bond
25 Purchase Agreement. The opinions of counsel, however, are not referred to in the
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1 Underwriters' counterclaim.⁷ The Court, therefore, does not yet take notice of these
2 documents or any right the Trustee may have had to rely upon them.

3 Finally, the Trustee contends that leave to amend should be denied because the
4 Underwriters have not met Rule 9(b)'s pleading requirements. *See* FED. R. CIV. P. 9(b). The
5 Trustee acknowledges that the Underwriters proposed amendment is "styled as an action for
6 negligent misrepresentation." (Doc. 295 at 11). The Trustee contends, however, that the
7 Underwriters' claim contains "fraud-like accusations" and therefore must meet Rule 9(b)'s
8 heightened pleading requirements. (*Id.* at 12). *See Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097,
9 1104 (9th Cir. 2003) ("[I]n a case where fraud is not an essential element of a claim, []
10 allegations ('averments') of fraudulent conduct must satisfy the heightened pleading
11 requirements of Rule 9(b)."). In *W.L. Gore & Associates, Inc. v. GIDynamics, Inc.*, the Court
12 applied Rule 9(b) to a negligent misrepresentation claim. 2010 WL 5184254, at *11 (D. Ariz.
13 Dec. 15, 2010). In that case, the plaintiff claimed that the defendant had promised not to copy
14 the plaintiff's invention, but then nevertheless copied it. The Court held that the
15 circumstances surrounding this alleged promise needed to be pled with more particularity.
16 In that case, however, the plaintiff's negligent misrepresentation claim was "based on the
17 same set of operative facts underlying [a] corresponding claim of fraudulent
18 misrepresentation." *Id.* In the instant case, the Underwriters make no corresponding claim
19 of fraudulent misrepresentation. Moreover, the Trustee does not even attempt to explain
20 which of the Underwriters' accusations are "fraud-like." (*See* Doc. 295 at 12). The
21 Underwriters' proposed claim is not, therefore, subject to Rule 9(b). In addition, the
22 Underwriters' proposed amendment adequately states a claim for negligent misrepresentation
23 under Rule 8. *See* FED. R. CIV. P. 8. This claim is not, therefore, futile.

24 As stated above, however, the Underwriters have failed to state a valid contribution
25 claim. The Court's decision to allow the amendment does not change the analysis of whether

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27 ⁷ The opinions of counsel for which the Trustee seeks judicial notice were referenced
28 in one of the Trustee's counterclaims, but not by the Underwriters' counterclaim, which is
the relevant pleading for the instant motion. (*See* Doc. 296).

1 their contribution claim is valid. To the extent that the Underwriters' negligent
2 misrepresentation claim asserts that the damage to the Bondholders was due in part to the
3 Trustee's negligent certification of the indenture as operative, the jury will be required to not
4 only determine the amount of damages, if any, to the Bondholders, but to also apportion the
5 percentage of fault for the total damages attributable among each identified tortfeasor that
6 the jury finds contributed to the damage. Each party is then responsible only for its
7 percentage of the total liability. A.R.S. § 12-2506(A) (2003). Thus, with each party only
8 being responsible for its own fault, there arises no claim for contribution. The Underwriters'
9 "First Claim for Relief (Contribution)" in the amended counterclaim is therefore denied.

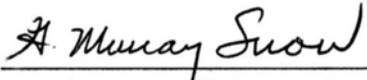
10 CONCLUSION

11 For the above reasons, both the Town and Underwriters have failed to state a claim
12 for contribution. The Town has, however, stated a claim for indemnification with respect to
13 losses resulting from missed payments on the Bonds. The Underwriters' proposed amended
14 counterclaim is not futile.

15 **IT IS THEREFORE ORDERED** that Wells Fargo Bank, N.A.'s Consolidated
16 Motion to Dismiss the Underwriters' Third-Party Complaint and Counterclaim; and Town
17 of Prescott Valley's Counterclaims (Doc. 263) is **GRANTED IN PART AND DENIED IN**
18 **PART.**

19 **IT IS FURTHER ORDERED** that Underwriters' Motion to Amend Third-Party
20 Complaint and Counterclaim against Third-Party and Counterclaim Defendant Wells Fargo
21 Bank, N.A. (Doc. 281) is **GRANTED.**

22 DATED this 18th day of November, 2011.

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25 _____
26 G. Murray Snow
27 United States District Judge
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