SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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QBE AMERICAS, INC., QBE FINANCIAL INSTITUTION RISK SERVICES, INC. (D/B/A: QBE FIRST), QBE FIRST INSURANCE AGENCY, INC., QBE HOLDINGS, INC., QBE INSURANCE CORPORATION, QBE SPECIALTY INSURANCE COMPANY, NEWPORT MANAGEMENT CORPORATION and SEATTLE SPECIALTY INSURANCE SERVICES, INC.,

Plaintiffs,

-against-

ACE AMERICAN INSURANCE COMPANY, AXIS INSURANCE COMPANY, CATLIN SPECIALTY INSURANCE COMPANY, CHARTIS SPECIALTY INSURANCE COMPANY, CONTINENTAL CASUALTY COMPANY, DARWIN SELECT INSURANCE COMPANY, ILLINOIS NATIONAL INSURANCE COMPANY, LEXINGTON INSURNACE COMPANY, and ZURICH AMERICAN INSURNACE COMPANY,

Defendants.

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Index No.: 653442/2013

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 008, 009, and 010 are consolidated for disposition.

Before the court are three summary judgment motions, those of: (1) defendants Chartis Specialty Insurance Company (Chartis), Illinois National Insurance Company (Illinois) (collectively, AIG) and Lexington Insurance Company (Lexington) [Seq. 008]; (2) plaintiffs (collectively, QBE) [Seq. 009]; and (3) defendant Zurich American Insurance Company (Zurich) (AIG, Lexington, and Zurich are collectively referred to as the Carriers) [Seq. 010].[1] For the reasons that follow, the court grants summary judgment to the Carriers.

[1] Darwin Select Insurance Company's (Darwin) summary judgment motion (Seq. 011) was denied as moot by order dated July 12, 2017 because the claims against it were discontinued.

I. Background & Procedural History

Unless otherwise indicated, the following facts are undisputed.[2]

QBE commenced this insurance coverage action on October 4, 2013. The Carriers filed answers to the complaint in December 2013. Prior to discovery, QBE moved for partial summary judgment on its claims for advancement of defense costs, which the court granted in part by order dated August 27, 2014 (the Prior Decision) (Dkt. 205).[3] The Prior Decision explained:

> This is an insurance coverage action in which QBE seeks indemnification for its participation in alleged kickback schemes involving force-placed insurance. QBE claims it is entitled to coverage in approximately 40 lawsuits and a state government investigation, though other lawsuits and investigations may be pending. To explain, banks usually require mortgage borrowers to purchase insurance to protect the bank's secured interest in the home. If the borrower fails to procure the requisite amount of insurance, the bank will buy it and bill the borrower accordingly. This is called "force-placed" insurance. Over the last few years, borrowers and state governments across the country alleged that banks and insurance companies conspired to overcharge borrowers for "force-placed" insurance. Allegedly, the insurance company would charge an egregiously high rate, the bank would pass on that rate to the borrower, and the insurance company would kick-back a portion of the rate to the bank.

Prior Decision at 2. The court noted that, at the time of the Prior Decision, "QBE ... has and continues to face substantial litigation for allegedly engaging in this scheme." *See id.* To date,

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See Dkt. 493. References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing system (NYSCEF). It should be noted that the parties' briefs refer to the Carriers and the other former defendants, such as Darwin, as the "ICPL Insurers".

[2] *See* Dkt. 384 (joint statement of undisputed material facts).

[3] The court's decision turned on the Darwin Policies providing a duty to defend; the AIG Policies do not. The dispositive legal issues in the Prior Decision are not pertinent to the issues on the instant summary judgment motions and, therefore, are not further addressed.

QBE was named as a defendant in 50 civil actions, has been served with non-party subpoenas in 11 actions, and was the subject of 5 state government investigations.

After extensive discovery, QBE filed a Note of Issue on August 22, 2016. By virtue of settlements with various defendants, AIG is the only remaining primary carrier defendant, and Lexington and Zurich are the only remaining excess carrier defendants. The instant summary judgment motions were filed on November 11, 2016.[4] The court reserved on the motions after oral argument. *See* Dkt. 491 (5/16/17 Tr.).

As an initial matter, counsel are commended for their exemplary, thorough briefs, which address numerous exceedingly complex issues. That said, as the parties recognize, the court need not necessarily rule on all of the issues raised by the parties because some of the court's rulings on certain threshold issues could moot others.

In that vein, as explained herein, the court finds there to be no material question of fact that the FA Exclusion (defined and explained below) applies and precludes QBE from obtaining most of the coverage it seeks in this action (i.e., the civil actions in which it was named as a defendant and the government investigations). The applicability of the FA Exclusion is clear based on how QBE operated its force-placed insurance business, which is manifest from the undisputed facts in the record and consistent with how QBE's business was described in a consent order it entered into with the New York State Department of Financial Services (DFS), pursuant to which, *inter alia*, QBE paid a $4 million civil penalty. *See* Dkt. 442 at 341.

[4] It should be noted that a portion of the summary judgment record was permitted to be filed under seal. *See* Dkt. 394. Some of the parties' briefs (e.g., Dkt. 427) were not publicly filed on NYSCEF. *See* Dkt. 394 at 28. To the extent any of the briefs are filed exclusively under seal, a publicly filed version must be e-filed, though such briefs may be redacted so as not to publicity disclose any of the information the court permitted to be sealed (an order to this effect is set forth below).

Moreover, the balance of coverage sought by QBE (i.e., costs incurred responding to non-party subpoenas) does not fall within the definition of covered Loss. The court does not address the myriad issues raised by the parties that are not pertinent to these rulings.[5]

II. The Consent Order

On April 18, 2013, QBE and DFS entered into a consent order (the Consent Order), which resolved DFS's investigation into QBE's "force-placed insurance policies issued in New York State." *See* Dkt. 442 at 321.[6] The Consent Order begins:

> Force-placed insurance is insurance taken out by a bank, lender or mortgage servicer when a borrower does not maintain the insurance required by the terms of the mortgage or applicable law. This can occur if the homeowner allows the homeowners' policy to lapse, or if the bank or mortgage servicer determines that the borrower does not have a sufficient amount of coverage. **Homeowners have reported that when they are charged for force-placed insurance, the premiums are far in excess of the premiums those homeowners were charged for voluntary homeowners insurance.** Yet force-placed insurance often provides far less protection for the homeowner while protecting the lender's or investors' interest in the property. [Footnote 2: In the case of QBE's New York policies, homeowners are not protected for contents of their homes or for third-party liability.] **The high cost of force-placed insurance, including QBE's force-placed policies, is due at least in part to relationships between mortgage servicers and their affiliates and payments by force-placed insurers and their affiliates, including QBE, to such servicers and their affiliates**. While servicers choose the force-placed product for their mortgage loan portfolio, **the high premiums are charged to homeowners, and in the event of foreclosure, costs are passed onto investors**.

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[5] The remaining defendants filed counterclaims seeking reformation of the subject policies to account for alleged mutual mistake. *See, e.g.*, Dkt. 29 at 28-31. Those counterclaims are dismissed without prejudice as moot.

[6] Nearly 600 exhibits to the parties' joint appendix were filed at Dkt. 435-447. Each of these docket entries begins with an index that indicates the first page of the pdf for each exhibit. For instance, Chartis' moving brief [*see* Dkt. 389 at 10] indicates that the Consent Order is exhibit 307; the description accompanying Dkt. 442 indicates that such exhibit may be found there; and the index on the first page of Dkt. 442 indicates that exhibit 307 may be found at page 321 of the pdf. For a master index of which documents correspond to which exhibit number, *see* Dkt. 484.

> Force-placed insurance involves a number of different actors. To start, there are the homeowners whose voluntary homeowners' policies have either been cancelled, have lapsed, or have not been renewed, most often because a homeowner is facing financial hardship. In some instances, insurance is force placed in error or due to a dispute about required coverage. Lenders (banks) from whom homeowners obtained their mortgages employ mortgage servicers as their agents, collecting and distributing payments from borrowers and handling defaults, modifications, settlements, and foreclosure proceedings. Servicers may or may not be subsidiaries of or otherwise affiliated with lenders, and may or may not also own portfolios of mortgage loans.
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> Some lenders and/or mortgage servicers have affiliated insurance agencies or brokers that receive commissions from force-placed insurers for services the agencies or brokers purportedly provide. To the extent those agencies or brokers provide any services, most of those services are not ones that insurance agencies or brokers typically provide.
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> Force-placed insurers perform insurance tracking and placement of force-placed policies. The mortgage servicer provides access to the necessary information for the force-placed insurer to monitor homeowners' insurance policies to ensure that there is adequate coverage in the case of damage or destruction. The force-placed insurers are also generally responsible for corresponding with homeowners to provide necessary information and update records.
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> The two dominant companies that currently [i.e., as of April 18, 2013] perform these services and write force-placed policies in New York as well as nationwide are QBE and Assurant, which together comprise at least 90% of the force-placed insurance market. The force-placed insurers, in turn, cede some of their risk to reinsurers, some of which are also subsidiaries or affiliates of lenders or mortgage servicers. Reinsurance arrangements with lenders or servicers are pursuant to quota share agreements.

Dkt. 442 at 323-24 (emphasis added; paragraph numbering omitted).

The Consent Order explains that plaintiff QBE Financial Institution Risk Services, Inc. (QBE FIRST) "acts as the program manager for QBE's force placed insurance program and also provides outsourced services to mortgage servicers, including tracking insurance coverage, and administers the claims for QBE's force-placed insurance program." *See id.* at 322. The Consent Order explains:

> In December 2008, [plaintiff] QBE Holdings acquired QBE FIRST, which was then known as ZC Sterling Corporation ("ZC Sterling"). Prior to the acquisition, ZC Sterling managed force-placed insurance programs for other insurers, primarily Zurich in North America underwriting companies, including Empire Fire and Marine Insurance Company ("Empire Fire and Marine"). QBE assumed Empire Fire and Marine's market share after the acquisition. ZC Sterling changed its name to Sterling National Corporation after being purchased by QBE Holdings, and then changed its name to QBE FIRST in 2011.
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> In June 2011, QBE Holdings acquired from Bank of America Corporation ("BOA") the force-placed insurance business of Balboa [Footnote 1: Balboa is defined to refer to BOA's subsidiaries ... [including] Newport Insurance Corporation ("NIC"), and BOA's former subsidiary Newport Management Corporation [(NMC)]], substantially all of Balboa's assets, and [NMC], a BOA subsidiary that provided outsourced services to mortgage servicers, including insurance tracking services. ... QBE manages all of Balboa's force-placed business and Balboa entered a 100% quota share reinsurance agreement with QBE pursuant to which QBE receives Balboa's premiums and assumes the risk of Balboa's force-placed insurance. Balboa's existing force-placed insurance policies are in run off and being transitioned to QBE Insurance. QBE Holdings' acquisition of Balboa's business greatly expanded QBE's market share, and QBE [was, as of April 18, 2013,] the second largest force-placed insurer in New York.

Id. at 322-23 (paragraph numbering omitted); *see* Dkt. 384 at 17-21 (joint statement's explanation of QBE's force-place business and its corporate structure).

The Consent Order then explains QBE's Profit Commissions:

> Empire Fire and Marine and QBE Insurance have paid contingent "profit" commissions to QBE FIRST when loss ratios were kept below a certain figure, which has ranged from 34% to 45.6% -- both significantly below the expected loss ratios Empire Fire and Marine and QBE Insurance filed with the Insurance Department. **This creates a troubling incentive for QBE FIRST to keep loss ratios as low as possible**. As discussed above, Empire Fire and Marine's and QBE Insurance's loss ratios have consistently been below the figure that triggers the contingent commission.[7]

Dkt. 442 at 327 (emphasis added; paragraph numbering omitted).

The Consent Order also addresses other commissions paid by QBE:

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[7] *See* Dkt. 442 at 324-27 (explaining QBE's rates and loss ratios).

> In some cases, QBE has paid commissions to insurance agencies and brokers that are affiliates of mortgage servicers. Typically, the commissions are ten to twenty percent of the premium written on the servicer's mortgage loan portfolio, a percentage that is in line with standard property and casualty commissions. **The evidence from the Investigation indicates that the affiliated agencies and brokers do little or no work for the commissions QBE has paid them**. QBE has done much of the work associated with force-placed insurance, including tracking insurance coverage and communicating with homeowners. **These arrangements could create an incentive for mortgage servicers to purchase higher priced force-placed insurance and for mortgage servicers to place more homeowners into force-placed insurance, because their affiliates earn more commissions as premiums increase.**
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> Commissions paid to affiliates of servicers is a form of reverse competition; when insurers compete for servicers' business by offering higher commissions to servicers' affiliates, **there is no incentive to reduce force-placed insurance premium rates. Commissions are paid to affiliates of servicers because they are a cost of staying in the market, not for any particular work the affiliates perform.**

Id. at 327-28 (emphasis added; paragraph numbering omitted). The Consent Order states that DFS took the position that the discussed "acts and practices" of QBE and Balboa violate Insurance Law §§ 2303, 2324 and 2403. *See id.* at 328.

Finally, the Consent Order sets forth a process by which QBE would establish its force-placed rates going forward. *See* Dkt. 442 at 329-30. It includes a list of "Prohibited Practices" that QBE agreed to cease employing, including, *inter alia*, that QBE "shall not": "issue force-placed insurance on mortgaged property serviced by a servicer affiliated with QBE Holdings"; "pay commissions to a servicer or a person or entity affiliated with a servicer on force-placed insurance policies obtained by the servicer"; "**pay contingent commissions based on underwriting profitability or loss ratios**"; "provide free or below-cost outsourced services to servicers, lenders, or their affiliates … [caveats omitted]"; or "make any payments, including but

not limited to the payment of expenses, to servicers, lenders, or their affiliates in connection with securing business." *See id.* at 331 (emphasis added).

While QBE neither admitted nor denied DFS's findings and allegations in the consent order [*see id.* at 329] and QBE has never been adjudicated as liable in any of the civil actions commenced against it, such a determination is not necessary for the purposes of this case. What matters is whether the structure of QBE's compensation system was as alleged by DFS (nothing in the record suggests otherwise) and falls within an exclusion.[8]

After reviewing the underlying actions (discussed below), there is no question of fact that the subject civil actions and government investigations all concern QBE's problematic compensation system, which allegedly resulted in force-placed insurance premiums being materially higher than what one would expect absent such a structure. The question, thus, is whether in a civil action or government investigation in which that compensation structure is at issue, the subject policies provide for coverage of QBE's defense costs and settlement contributions, or if an exclusion to coverage applies. As noted earlier, and as explained further herein, the court holds that the FA Exclusion applies and that QBE is not entitled to coverage.

[8] Nonetheless, as discussed further herein, QBE settled many of the cases, and agreed to pay policyholders amounts that appear to be proxies for inflated premiums. The court will not opine on whether the Consent Order's "Premium Refunds" provision [*see* Dkt. 442 at 333] triggers the Return of Premium Exclusion because the court does not reach the meaning and applicability of that exclusion. It should be noted that the Consent Order provides that QBE shall not "seek ... reimbursement or indemnification, including, but not limited to, payment made pursuant to any insurance policy, with regard to any or all of the amounts payable pursuant to this Consent Order." *See id.* at 341.

III. The Policies

In its Prior Decision, the court provided an overview of the policies issued by AIG:[9]

Chartis and Illinois issued [QBE Holdings] substantially similar primary professional liability policies between 2010 and 2014 (the AIG Policies). Chartis issued a policy for the 2010-2011 period and Illinois issued polices for the 2011-2012, 2012-2013, and 2013-2014 periods.[10] *See* Dkt. 53-56. The first two policies have a $15 million limit while the latter two policies have a $10 million limit, and each policy is subject to a $1.5 million retention. *See* Dkt. 53 at 2. Under the AIG Policies, QBE Holdings and its Subsidiaries are named insureds. *Id.* at 5, 18-19, 22-23. Subsidiary is defined, *inter alia*, to include corporations that become a Subsidiary during the Policy Period (assuming the provided notice requirements are met). *Id.* at 6, 22-23. The AIG Policies cover:

> **Loss of the Insured arising from a Claim first made against the Insured** during the Policy Period and reported in writing to the Company during the Policy Period or within thirty (30) days after the end of the Policy Period ... **for any actual or alleged Wrongful Act of the Insured in the rendering of or failure to render Professional Services**, but only if such Wrongful Act occurs prior to the end of the Policy Period.

Id. at 4. Professional Services are defined as:

> those services rendered or required to be rendered by the Insured for or on behalf of a policyholder or a customer or client of the Named Insured or any Subsidiary thereof pursuant to a contract with such policyholder or customer or client, for a fee, commission or other remuneration or financial consideration which inured to the benefit of the Named Insured or any Subsidiary thereof.

Id. at 5. The AIG Policies further provide that:

> [AIG] shall have the right, but not the duty, to assume the defense of any Claim made against the Insured ... The Insured shall defend and contest any Claim made against it. The Insured shall not admit or assume any liability, enter into any settlement agreement, stipulate to any judgment, or incur any Defense Costs in excess of the Retention, without the prior written consent of [AIG]. Only those settlements, stipulated judgments,

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[9] Since Darwin settled, the court will not discuss its policy. A separate discussion of the excess polices issued by Lexington and Zurich also is unnecessary since they are follow form policies.

[10] QBE's claims are now limited to the 2010-2011 and 2012-2013 policy periods. *See* Dkt. 389 at 9 (chart of policies).

> and Defense Costs in excess of the Retention to which [AIG] has consented in writing, shall be recoverable as Loss under the policy. [AIG]'s consent shall not be unreasonably withheld.
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> If all Insured defendants are able to dispose of all Claims which are subject to one Retention amount for an amount not exceeding the Retention amount (inclusive of Defense Costs), then [AIG]'s consent to such disposition shall not be required for such Claims.

Id. at 4. **The AIG Policies' definition of "Loss" includes Defense Costs.** *See id.* at 5. The AIG Policies, however, further provide that:

> Loss shall not include (1) civil or criminal fines or penalties imposed by law ... (4) **any profit or advantage to which the Insured is not legally entitled**; [and] (5) any liability or cost incurred by any Insured in complying with any judgment, award or settlement for non-monetary relief.

Id. at 5. **The AIG Policies also contain a Fee Arrangement Exclusion [the FA Exclusion]**:

> [AIG] shall not be liable ... in connection with any claim made against any Insured alleging, **arising out of, based upon or attributable to any allegations that any Insured intentionally or negligently permitted, or aided and abetted others in using**, was aware of others using, **or was a participant or connected in any way in the use of any agreement or other arrangement between an insurance broker or insurance agent and an insurance carrier involving the payment of increased fees, commissions or other compensation based on the volume, profitability or type of business referred to the insurance carrier**, whether referred to as a Market Placement Agreement, Market Service Agreement, Placement Services Agreement or Contingent Commission Agreement or similar agreement or arrangement, however named.
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> It is the intent of the parties that this policy shall exclude such loss **regardless of the form, style, or denomination of any such claim** . . . and shall specifically apply but not be limited to claims alleging bid rigging, **bribes or kickbacks**, schemes to provide fictitious quotes, **conflict of interest**, breach of contract, failure to supervise, negligent supervision or negligence of any contract, controlling person liability, breach of fiduciary duty, personal profiting, **improper or undisclosed fees, commission or charges of any kind**, criminal activity, market manipulation, **violation of any law related to the insurance industry**, estoppel or repudiation of any commitment and any other theory of liability.

Id. at 16.

Prior Decision at 3-5 (emphasis added; footnote omitted).[11]

As discussed below, the court finds that the nature of QBE's force-placed insurance business, as described in the Consent Order, amounts to conduct that falls within the plain, unambiguous meaning of the FA Exclusion.

IV. The Underlying Actions

The parties' joint statement sets forth 50 civils actions that were commenced against QBE, the first of which was *Williams v Wells Fargo Financial* (*Williams*), a putative class action commenced in federal district court in Florida on April 7, 2011. *See* Dkt. 384 at 25.[12] It also addresses the 11 civil actions in which QBE was not named as a defendant, but in which QBE was served with third-party subpoenas (i.e., to which QBE responded, thereby causing QBE to incur legal expenses). *See id.* at 45. Addressed as well are state government investigations commenced by New York (which resulted in the Consent Order), Minnesota, Massachusetts, Missouri, and Indiana. *See id.* at 49-51.[13]

Regarding the civil actions in which QBE was named as a defendant, while the allegations and causes of action vary somewhat between the cases, the cases all concern QBE's force-place insurance business. And while the viability of some of the homeowners' claims

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[11] The AIG policy cited to and quoted from in the Prior Decision may be found in the current record at Dkt. 435 at 818.

[12] The court will not address each of the 50 suits, but notes that the relevant procedural history and disposition is set forth in the joint statement. *See, e.g.*, Dkt. 384 at 25 (noting that *Williams* settled, and that QBE contributed nearly $6.5 million to the settlement); *see also id.* at 30 (QBE contributed approximately $6.5 million to settlement in *Hall v Bank of America, N.A.*).

[13] An Assurance of Discontinuance resolved the Massachusetts investigation (Dkt. 485), and a consent order resolved the Minnesota investigation (Dkt. 486). *See* Dkt. 484 at 98.

asserted against QBE were either tenuous or without merit (e.g., cases that were dismissed, such as *Gustafson v BAC Home Loan Services, LP* [*see* Dkt. 384 at 26]), there is no doubt that the propriety of QBE's force-place insurance business was at issue. For instance, the amended complaint in *Williams* alleged that "QBE First is a captive insurance agent and primarily an instrumentality of QBE Specialty" and that "QBE First does nothing to assist in finding the force-placed insurance policy and exists only to provide **kickbacks and/or collect excessive commissions related to the force-placed insurance policies**." Dkt. 436 at 44 (emphasis added); *see* Dkt. 437 at 1184 (complaint in *Tigbao v QBE Fin. Institution Risk Servs., Inc.* alleging: "QBE FIRST primarily purchases FPI [i.e., force-place insurance] from its affiliated insurance company, QBE Insurance Corporation, or from another QBE affiliated FPI insurer. In exchange for placing the FPI coverage with QBE Insurance Corporation or with another QBE-affiliated FPI insurer, QBE FIRST receives a percentage of the net written premium of the FPI policies those insurers write and, in some years, an additional contingent commission based on the profitability of QBE Insurance Corporation."); *see also id.* at 373-74 (second amend class action complaint in *Hall* alleging kickbacks paid by QBE to banks, funded by exorbitant premiums). Likewise, AIG correctly notes that "these contingent profit commissions were found by [DFS] to be wrongful" and were enjoined as "Prohibited Practices." *See* Dkt. 469 at 11; *see also id.* at 12 ("QBE First was merely a pass-through of payments from QBE insurer to a lender client's affiliated insurance agent.").

QBE correctly notes that an issue in some of the civil actions was the lack of a direct duty owed by QBE to the homeowners because QBE was acting as the bank's agent in force placing

the insurance.[14] Nonetheless, the lack of a direct duty between the homeowners and QBE is not dispositive of the FA Exclusion's applicability. The civil actions accuse QBE of aiding and abetting the banks' breach of the fiduciary duties owed to the homeowners and conspiracy (i.e., with the banks) to defraud homeowners by giving into to the "troubling" incentives described in the Consent Order by placing unjustifiably expensive policies to reap higher commissions. *See, e.g.*, Dkt. 436 at 614.

Indeed, neither the title of the causes of action asserted against QBE nor the range of inflammatory nomenclature used to describe QBE's conduct are relevant. Paragraph 2 of the FA Exclusion makes it clear that whether couched as a bribe, kickback, conflict of interest, breach of fiduciary duty, improper or undisclosed fee, or "violation of any law related to the insurance industry," the allegations asserted against QBE, in the parlance of the dispositive first paragraph of the FA Exclusion, arise out of QBE "intentionally or negligently permit[ting], or **aid[ing] and abet[ting] others** in using, **[being] aware** of others using, or **[being a] participant or connected in any way**" (emphasis added) with an agreement among QBE and the lender banks "involving the payment of increased fees, commissions or other compensation based on the volume, profitability or type of business referred to the insurance carrier." There is no question of fact that this accurately describes the allegations in the underlying actions.[15] To avoid this seemingly straightforward conclusion, QBE proffers tortured, unreasonable constructions of the FA Exclusion. The court addresses and rejects them below.

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[14] Some of the cases were dismissed for reasons entirely unrelated to whether the subject compensation structure is legal. *See* Dkt. 384 at 29 ("the *Rothstein* plaintiffs' claims were barred by the filed rate doctrine.").

[15] The only exception, noted earlier, is the non-party subpoena costs, which, in any event, do not fall within the meaning of covered Loss.

V. Legal Standard

A. Summary Judgment

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

B. Interpretation of Insurance Policies

"An insurance agreement is subject to principles of contract interpretation. 'As with the construction of contracts generally, 'unambiguous provisions of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such provisions is a question of

law for the court."" *Universal Am. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 (2015), quoting *Vigilant Ins. Co. v Bear Stearns Cos.*, 10 NY3d 170, 177 (2008), quoting *White v Continental Cas. Co.*, 9 NY3d 264, 267 (2007); *see Oppenheimer AMT-Free Municipals v ACA Fin. Guar. Corp.*, 110 AD3d 280, 284 (1st Dept 2013) ("policies of insurance [] should be analyzed in accordance with general principles of contract interpretation and insurance law"). "Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent or where its terms are subject to more than one reasonable interpretation." *Universal*, 25 NY3d at 680 (internal citations omitted; collecting cases). "[T]he test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy and employing common speech." *Id.*, quoting *Mostow v State Farm Ins. Cos.*, 88 NY2d 321, 326-27 (1996), and citing *Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 (2011).

"Exclusions from policy obligations must be in clear and unmistakable language and if the terms of a policy are ambiguous, any ambiguity must be construed in favor of the insured and against the insurer." *Oppenheimer* 110 AD3d at 284, citing *Pioneer Tower Owners Ass'n v State Farm Fire & Cas. Co.*, 12 NY3d 302, 307 (2009); *White*, 9 NY3d at 267. However, unambiguous exclusions "will be given their plain and ordinary meaning." *Country-Wide Ins. Co. v Excelsior Ins. Co.*, 147 AD3d 407, 408 (1st Dept 2017). And, "although the insurer has the burden of proving the applicability of an exclusion, it is the insured's burden to establish the existence of coverage." *Platek v Town of Hamburg*, 24 NY3d 688, 694 (2015) (internal citations omitted).

VI. Discussion

As an initial matter, as noted above, the bad acts listed in the second paragraph of the FA Exclusion are merely examples of the type of prohibited conduct described in the FA Exclusion's first paragraph. *See* Dkt. 435 at 832 ("It is the intent of the parties that this policy shall exclude such loss **regardless of the form, style, or denomination of any such claim**.") (emphasis added). The second paragraph merely sets forth a non-exhaustive list of examples of conduct prohibited by the first paragraph. The first paragraph defines what is excluded:

> [AIG] shall not be liable to make any payment for loss and/or defense costs **in connection with any claim made against [QBE] alleging, arising out of, based upon or attributable to** any allegations that [QBE] intentionally or negligently permitted, or **aided and abetted others** in using, was aware of others using, or **was a participant or connected in any way** in the use of **any agreement or other arrangement** between an **insurance broker or insurance agent and an insurance carrier** involving the **payment of increased fees, commissions or other compensation** based on the volume, **profitability** or type of business referred to the insurance carrier, whether referred to as a Market Placement Agreement, Market Service Agreement, Placement Services Agreement or Contingent Commission Agreement or similar agreement or arrangement, however named.

Dkt. 435 at 832 (emphasis added).

There is no question that all of the underlying civil actions in which QBE was named as a defendant[16] arise from, are based upon, or are attributable to QBE's participation in an alleged scheme with the lender banks to charge inflated force-placed insurance premiums. *See Country-Wide*, 147 AD3d at 409 ("'In the context of a policy exclusion, the phrase arising out of is unambiguous, **and is interpreted broadly to mean 'originating from, incident to, or having**

[16] The court draws no distinction between cases in which QBE was directly sued by the homeowners or by a co-defendant (e.g., in a third-party action for indemnification) because all such actions, as discussed herein, involved claims made against QBE relating to the subject matter of the FA Exclusion. The court, however, draws a distinction between such cases and cases in which QBE was not a party to the suit, but merely was served with a subpoena.

connection with."") (emphasis added), quoting *Scottsdale Indemn. Co. v Beckerman*, 120 AD3d 1215, 1219 (2d Dept 2014), quoting *Maroney v N.Y. Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 (2005); *see Regal Const. Corp. v Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 (2010) (application of "arising out of ... only that there be **some causal relationship** between the injury and the risk for which coverage is provided." ... "the focus of the inquiry 'is not on the precise cause of the accident **but the general nature of the operation in the course of which the injury was sustained**.'") (emphasis added), quoting *Worth Const. Co. v Admiral Ins. Co.*, 10 NY3d 411, 416 (2008).

The First Department in *Country-Wide* noted that "[t]o determine the applicability of an 'arising out of' exclusion, the Court of Appeals [in *Mount Vernon Fire Ins. Co. v Creative Hous. Ltd.*, 88 NY2d 347, 350-52 (1996), adopted the following] 'but for' test ...:

> [I]f the plaintiff in an underlying action or proceeding alleges the existence of facts clearly falling within such an exclusion, and none of the causes of action that he or she asserts could exist but for the existence of the excluded activity or state of affairs, the insurer is under no obligation to defend the action.

Country-Wide, 147 AD3d at 409 (citations and quotation marks omitted).

There is no question of fact that QBE's force-placed insurance compensation structure was implicated by the homeowners' claims of being charged inflated premiums. Critically, it is of no moment whether QBE would have been held liable in the underling civil actions, and, likewise, it is irrelevant that some of the civil actions were dismissed as against QBE. Neither issue is dispositive under the plain meaning of the FA Exclusion, and neither issue is dispositive under the *Mount Vernon* standard. The FA Exclusion is not triggered by a finding of liability; it is implicated so long as the allegations in the lawsuits against QBE have any alleged connection

to conduct delineated in the FA Exclusion. *See Country-Wide*, 147 AD3d at 409. That is clearly the case here.

There is no merit to QBE's contention that because it was both the program manager/managing general agent ***and*** the broker, the payment of commissions from one QBE subsidiary to another excuses its alleged malfeasance and precludes application of the FA Exclusion. To be sure, QBE contends, and the Carriers do not meaningfully dispute, that the genesis of the FA Exclusion is the "Spitzer cases". *See* Dkt. 427 at 29-30 (explaining agreement reached in lawsuits brought by former New York Attorney General Eliot Spitzer prohibiting contingent commission arrangements with *unaffiliated* insurers and managing agents). That fact, however, is not dispositive. The FA Exclusion clearly concerns all compensation between a broker and a carrier. *See* Dkt. 435 at 832 ("**any** agreement or other arrangement **between an insurance broker or insurance agent and an insurance carrier**") (emphasis added). There is no basis to conclude that QBE is off the hook because the broker and carrier were QBE affiliates. The FA Exclusion draws no such distinction. If anything, QBE has it backwards, as the incentive to game the system by inflating premiums to maximize commissions is exacerbated when the malfeasance can be accomplished with intracompany transactions.[17] Moreover, while the Spitzer cases may have been the impetus for the FA Exclusion, the FA Exclusion is not, as it could have been, drafted so narrowly as to only cover the exact conduct in the Spitzer cases.[18]

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[17] It should be noted that the notion that the underlying actions and government investigations did not also implicate compensation paid by QBE to non-QBE entities is simply false; such forms of compensation are addressed in the portions of the Consent Order recited earlier.

[18] QBE, it should be noted, does not explain why the FA Exclusion could only have been meant to address the issues in the Spitzer cases, but not other similar types of problematic compensation incentives. Surely, insurance companies do not lack the imagination to ponder permutations of risk that do not entirely mirror the exact fact pattern of the most recent scandal. For an industry

As discussed, the court is required to apply the plain meaning of an unambiguous insurance policy.[19] If the FA Exclusion was meant to carve out affiliated brokers and carriers, it would have said so. It does not. On the contrary, the FA Exclusion purports to cover "any" compensation agreement between the broker and the carrier. By insisting that compensation paid between affiliated brokers and carries is not covered by the FA Exclusion, QBE is proffering a limitation on the exclusion that has no basis in policy and is at odds with its plain meaning.

There also is no merit in QBE's argument that the civil actions did not concern allegations that the commissions were dependent on the "volume, profitability or type of business referred to the insurance carrier." The Consent Order explains that a major problem with QBE's force-placed insurance compensation structure was its dependence on profitability metrics that created "troubling" incentives to inflate premiums. QBE makes much of the fact that the pleadings in many of the civil actions lacked the detail regarding QBE's compensation structure found in the Consent Order. That is both unremarkable and irrelevant. It is unsurprising that the plaintiffs in those cases, at the time their complaints were filed (i.e., prior to discovery which, possibly, would be narrower than what DFS could demand be produced from

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specializing in guarding against future uncertainty, that would be an odd approach to risk management.

[19] The court may not (and does not) consider the parol evidence (e.g., deposition testimony of QBE's insurance expert) proffered by the parties because the meaning of the FA Exclusion is clear and unambiguous, i.e., it can only be reasonably interpreted in one way. *Universal*, 25 NY3d at 680; *see W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 163 (1990) ("extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face."); *see Impala Partners v Borom*, 133 AD3d 498, 499 (1st Dept 2015) ("Only where a contract term is ambiguous may parol evidence be considered to clarify the disputed portions of the parties' agreement.").

QBE), lacked DFS's extensive knowledge.[20] *Williams*, for instance, was filed in April 2011 (the amended complaint was filed in August 2011) [*see* Dkt. 384 at 25], but DFS's investigation did not even begin until October of that year, and the Consent Order was not executed until April 2013, two years after *Williams* was commenced. Nothing in the record refutes the Consent Order's description of QBE's force-placed insurance compensation structure, nor has QBE explained or submitted evidence refuting the existence of the compensation incentives the Consent Order was meant to remediate.

Simply put, when the plaintiffs in the civil actions complained about their premiums being excessive, the true factual predicate of their claims (whether pleaded or not) was the way their force-placed polices were priced by virtue of QBE's incentive to inflate premiums.[21] Ergo, the civil actions fall squarely within the FA Exclusion's prohibition on coverage for actions concerning commissions dependent on profitability. Likewise, the FA Exclusion also precludes coverage for the state government investigations, which concern the same subject matter.

While the same would appear to be true of the civil actions in which QBE was not named as a defendant, but incurred legal expenses responding to subpoenas, there is an added wrinkle in those cases. The FA Exclusion only prohibits coverage for "defense costs in connection with **any claim made against [QBE]** alleging, arising out of, based upon or attributable to [the conduct addressed in the latter part of the FA Exclusion]" (emphasis added). The actions in

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[20] That said, as Zurich correctly contends, some of the actions did include claims outlining how QBE agreed to divvy up compensation with the banks. *See* Dkt. 425 at 16-17.

[21] It is of no moment that premiums were not priced on a policy-holder specific basis, and instead priced years earlier when the master insurance policies were issued. *See* Dkt. 417 at 10. The master policies formed the basis for the very force-placed insurance business model that gave rise to QBE's pricing incentives. The fact that such terrible incentives were baked into the model does not cleanse the price of homeowners' individual premiums.

which QBE was not a named defendant lacked "any claim made against [QBE]." Consequently, the FA Exclusion does not apply.

Nonetheless, as the Carriers correctly contend, the inapplicability of the FA Exclusion is irrelevant because the subject policies do not cover costs incurred in responding to non-party subpoenas. As set forth earlier, while Loss is defined to include defense costs, the policies only cover a "Loss of the Insured **arising from a Claim first made against the Insured** for any actual or alleged Wrongful Act of the Insured in the rendering of or failure to render Professional Services." *See* Dkt. 435 at 821 (emphasis added). "Claim" is defined to mean: (1) "a written demand for monetary damages" or "a judicial, administrative, arbitration, or other alternative dispute proceeding in which monetary damages are sought." *See id.* at 820-21 (emphasis added). While the lawsuits in which QBE was subpoenaed fall within the definition of Claim, such lawsuits are not Claims "made **against** [QBE]" (emphasis added), because, in such cases, no monetary damages were sought from QBE. The subpoenas themselves were not Claims because they merely sought discovery, and they were not assertions of monetary damage claims against QBE.[22] QBE, therefore, is not entitled to coverage for its legal costs in responding to those subpoenas.

In sum, QBE is not entitled to any coverage from the remaining defendant Carriers, either because of the applicability of the FA Exclusion or because the legal costs sought are not covered Losses. *See Maroney*, 5 NY3d at 471 ("in policies of insurance ... if any one exclusion

[22] Conversely, to the extent the state government investigations involved such states serving subpoenas on QBE, the Carriers concede that the subpoenas were within the scope of the investigations and, therefore, fall within the scope of a Claim against QBE. *See* Dkt. 414 at 31. Nonetheless, as discussed, the fact that the subpoenas are covered Claims is trumped by the applicability of the FA Exclusion. It also should be noted that, as QBE concedes, it cannot seek coverage for the $4 million civil penalty paid to DFS because the definition of Loss expressly excludes civil fines. *See* Dkt. 435 at 821.

applies there can be no coverage.") (citation and quotations marks omitted). As a result, the court will not reach the myriad other issues raised by the parties because they are moot. Accordingly, it is

ORDERED that summary judgment is granted to defendants Chartis Specialty Insurance Company, Illinois National Insurance Company, Lexington Insurance Company, and Zurich American Insurance Company, plaintiffs' summary judgment motion is denied, and the Clerk is directed to enter judgment dismissing plaintiffs' claims against said defendants with prejudice and dismissing said defendants' counterclaims without prejudice as moot; and it is further

ORDERED that within two weeks of the entry of this order on NYSCEF, any party that filed a brief exclusively under seal shall publicly file a redacted version of that brief in a manner consistent with the court's sealing orders.

Dated: September 18, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.