To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

FOX PAINE & COMPANY, LLC and SAUL A. FOX,

Plaintiffs,

-against-

EQUITY RISK PARTNERS, INC. and HUB INTERNATIONAL INSURANCE SERVICES, INC.,

Defendants.

----------X

Index No. 52607/2014
Motion Date: 6/7/19
Mot. Seq. # 29

DECISION & ORDER

WALSH, J:

DefendantS Equity Risk Partners, Inc. ("ERP") and HUB International Insurance Services, Inc. ("HUB") (together "Defendants") move pursuant to CPLR 3124 for an order compelling Plaintiffs Fox Paine & Company, LLC and Saul A. Fox (together "Plaintiffs") to produce discovery concerning the 2012 Settlement between Plaintiffs and the Paine Parties (as defined in paragraph 88 of the Fourth Amended Complaint ["FAC"]), including the consideration paid. Plaintiffs oppose the motion.

A. Defendants' Contentions in Support of their Motion

In support of their motion, Defendants submit an Affirmation of Marc L. Antonecchia, Esq. dated May 17, 2019, together with various exhibits[1] and a Memorandum of

[1]The exhibits are: (1) the sealed August 8, 2012 Settlement Agreement (Ex. A); (2) the Verified Complaint in the August 2007 Delaware Chancery Court action entitled *Fox et al. v Paine, et. al.*, (Ex. B); (2) the demand for arbitration dated May 5, 2009 in an arbitration before the American Arbitration Association entitled *Fox Paine & Company, LLC v Troy Thacker* (Ex. C); (3) the demand for arbitration dated May 5, 2009 in an arbitration before JAMS entitled *Fox Paine & Company, LLC, et al. v Amy Ghisletta, et al.* (Ex. D); (4) the complaint in the March 2010 California Superior Court action entitled *Fox Paine Capital Fund II GP, LLC v Block*, Civ 498146 (Ex. E); (5) the complaint in the March 2012 Illinois state court action entitled *Fox Paine Capital Fund II GP, et al. v Kevin Schwartz*, 2012CH00138 (Ex. F); (6) the complaint in the March 2010 California Superior Court action entitled *Fox Paine Capital Fund II GP, LLC v*

Law dated May 17, 2019. According to Defendants, discovery concerning the 2012 Settlement between Plaintiffs and the Paine Parties, including the consideration paid, in exchange for Plaintiffs' release of all tort claims (known or unknown) arising prior to the 2012 Settlement

> is material and necessary to determine, pursuant to New York General Obligation Law (GOL) § 15-108, the amount of the set-off to which Defendants are entitled against any damages assessed in this action. Plaintiffs have alleged tort claims against Defendants in which they have alleged the same injuries they previously asserted against the Paine Parties – namely the recovery of attorneys' fees and costs incurred by Plaintiffs in various litigations and arbitrations between Plaintiffs and the Paine Parties prior to the settlement (Defs' Mem. at 1).

Defendants argue that between 2007 and 2012, Plaintiffs and the Paine Parties were adversaries in 14 lawsuits and arbitrations (the "Underlying Actions") and that in those Underlying Actions, "Plaintiffs alleged, *inter alia,* that the Paine Parties breached their fiduciary duties to Plaintiffs and tortiously induced Plaintiff Saul Fox to enter into certain transactions" (*id., citing* Settlement Agreement, Second Recital Clause). It is Defendants' contention that "[t]hose same claims are referenced and raised against the Paine Parties throughout Plaintiffs' Fourth Amended Complaint ('FAC') ... even though the Paine Parties are not defendants in this action as a result of their prior release by Plaintiffs" (*id.*). Defendants further contend that Plaintiffs allege that Defendants aided and abetted the Paine Parties' tortious conduct (*id.*). According to Defendants, Plaintiffs sought as damages in the Underlying Actions the recovery of their attorneys' fees and costs arising from the Underlying Actions and that necessarily, the broad general release executed as a result of the 2012 Settlement "applied to any claim Plaintiffs had against the Paine Parties for their attorneys' fees and costs" (*id.* at 2). Defendants argue that because "Plaintiffs seek to recover the same attorneys' fees and costs they already recovered from the Paine Parties in settling the Underlying Actions," their document request seeking the production of "'[a]ll Documents and Communications concerning the negotiation of settlements or settlement of any claim, suit, or arbitration involving any of the Paine Parties, including but not limited to the negotiations related to the Settlement Agreement between and among various parties including Saul A. Fox and Dexter W. Paine, III dated August 8, 2012'" seeks information relevant and material to Defendants' potential future request to a set-off under GOL § 15-108 of any damage recovery Plaintiffs may receive in the future following a trial in this action (*id.* at 3).

Ghisletta, Civ 498163 (Ex. G); (7) the complaint in the March 2010 California Superior Court action entitled *Fox Paine Capital Fund II GP, LLC v Thacker*, Civ 498181 (Ex. H), (8) Defendants' Second Notice for Discovery and Inspection dated February 11, 2019 (Ex. I); (9) Plaintiffs' Responses and Objections to Defendants' Second Notice for Discovery and Inspection dated March 1, 2019 (Ex. J); and (10) Plaintiffs' Supplemental Response and Objections to Interrogatory No. 2 of Defendants' Second Set of Interrogatories dated May 13, 2019 (Ex. K).

Defendants assert that the first requirement of GOL § 15-108 – *i.e.*, that the injury arises from tortious conduct – is met because "Plaintiffs' claims and assertions against (i) the Paine Parties in the Underlying Actions for breach of fiduciary duties and tortious inducement; (ii) Defendants in this action for breach of fiduciary duties, aiding and abetting breach of fiduciary duties, fraud, aiding and abetting fraud, negligence; and (iii) the Paine Parties as alleged in this action for breach of fiduciary duties and fraudulent concealment, all sound in tort" (*id.*). Defendants also assert that the second requirement of GOL § 15-108 – *i.e.*, that the party claiming set-off be liable or claimed to be liable for the same injury – is met because in this case, "Plaintiffs seek to recover from Defendants 'costs incurred in defending against litigation fostered, encouraged and bankrolled by proceeds from the HCC Policy'" (*id., quoting* FAC at ¶ 246). In further support, Defendants reference Plaintiffs' Response to Defendants' Second Set of Interrogatories, which provides that Plaintiffs are seeking as damages in this action the attorneys' fees and costs incurred through 2012 from the Underlying Actions. Defendants argue that because the damages claimed in this action are the exact attorneys' fees and costs Plaintiffs sought from the Paine Parties in the Underlying Actions and "which was explicitly considered as part of the 2012 Settlement Agreement," "a set off is necessary to prevent a possibility of a double recovery by Plaintiffs with respect to their fees and costs incurred in connection with the Underlying Actions" (*id.* at 5). Finally, without providing any legal authority for their position, Defendants contend that "Plaintiffs' settlement with the Paine Parties eliminated Defendants' rights to seek contribution from the Paine Parties [under GOL § 15-108(b)]" to which Defendants would have otherwise been entitled under CPLR 1401 (*id.* at 5).

B. Plaintiffs' Contentions in Opposition to Defendants' Motion

In opposition, Plaintiffs submit: (1) an Affirmation of Reed Forbush, Esq. dated May 31, 2019, together with various exhibits;[2] and (2) a Memorandum of Law in Opposition dated May 31, 2019. In his Affirmation, Forbush affirms that Plaintiffs' counsel conducted a reasonable search of Plaintiffs' counsel's records to identify and produce communications with the Paine Parties' counsel in August 2012 pertaining to the negotiation of the 2012 Settlement Agreement and, based on that search, Plaintiffs produced to Defendants 150 emails together with their attachments (Forbush Aff. at ¶ 3).

The crux of Plaintiffs' legal argument is that GOL § 15-108 is inapplicable and Defendants would have no right to a set-off based on the 2012 Settlement because: (1) it is

---

[2]The exhibits are: (1) a true and accurate copy of an email from Michael Delhagen to Reena Boltax and Thomas Legenhausen dated August 29, 2012 with attached letter from Stephen Wagner dated August 29, 2012 that was produced by Twin City in this action (Ex. 1); (2) a true and correct copy of an email chain among Michael Delhagen, Stephen Wagner, Aidan McCormack, John Patterson, Michael Fagan and Lezlie Chimienti dated August 8-9, 2012 produced by ERP in this action (Ex. 2); and (3) a true and correct copy of Defendants' Ex. 76 introduced at the deposition of Jay Pulaski (FPC's corporate representative) taken on October 5, 2016 (Ex. 3).

undisputed that Plaintiffs never sued ERP prior to this action and ERP was never named as a party in any of the Underlying Actions by anyone else; (2) ERP was never "alleged to be a non-party, joint tortfeasor with any of the Paine Parties and was never accused of having engaged in any of the same conduct, or having participated in any of the acts, transactions or occurrences that were the subject matter of the [Underlying Actions]"; and (3) "it is undisputed that Plaintiffs never asserted in the underlying [Underlying Actions] that the Paine Parties had breached their fiduciary duties by usurping the Fox Parties' insurance proceeds and concealing these insurance claims from the Fox Parties" and "Plaintiffs' claims against the Defendants in this action hav[e] nothing whatsoever to do with the conduct or claims at issue in the [Underlying Actions]" (Plfs' Opp. Mem. at 1-2). Based on the foregoing, Plaintiffs assert that "because Defendants are not 'claimed to be liable in tort for the same injury' for which Plaintiffs sued the Paine Parties in the [Underlying Actions], GOL § 15-108 simply has no application here" (*id.*).

Plaintiffs dispute that they are suing for the same injury as the Underlying Actions because Plaintiffs requested attorneys' fees in their *ad damnums* by arguing: (1) none of Plaintiffs' substantive claims in the Underlying Actions were for the recovery of attorneys' fees (*i.e.*, Plaintiffs were not seeking attorneys' fees as damages for the claims in the Underlying Actions, and therefore, the requirement that the joint tortfeasors must be subject to liability for damages for the same injury is not present); (2) Defendants have not shown that Plaintiffs had any contractual or statutory right to recover attorneys' fees from the Paine Parties on the claims asserted in the Underlying Actions; (3) the 2012 Settlement Agreement makes no reference to attorneys' fees as being any part of the settlement consideration, which, according to Plaintiffs "consisted *entirely* of a relinquishment by the Paine Parties of certain fund interests and the dismissal of its affirmative claims against the Fox Parties" (*id.* at 5-6, *citing* Ex. 1 at TWIN1607-1619 [2012 Settlement contains no cash component]); (4) "GOL § 15-108 does not apply at all to the actions settled in the 2012 Agreement since the Paine Parties' transfer of interests was the equivalent of specific performance of a *contract* – the 2007 Settlement Agreement between Fox and Paine and the Paine parties' employment and partnership agreements" (*id.* at 6); (5) it is absurd for Defendants to argue "that 100% of the consideration paid by the Paine Parties to resolve the [Underlying Actions] was paid to the Fox Parties – not to resolve the primarily contract-related legal issues that were the actual subject of all the pending litigations/arbitrations – but rather, exclusively to compensate them for: (i) giving up tort claims about insurance that they did not even know that they had and had never asserted against the Paine Parties, and (ii) attorneys' fees incurred incidental to the underlying matters without having to first prevail on the merits and then prove any legal right to their recovery"(*id.*); and (6) Defendants' argument that Plaintiffs' settlement with the Paine Parties foreclosed Defendants from seeking contribution from the Paine Parties fails because: (i) "Defendants are not liable in tort for the same wrongful conduct or injury that was asserted against the Paine Parties in the [Underlying Actions]"; and (ii) only tort damages are subject to contribution under CPLR 1401 "(*i.e.*, personal injury, injury to property or wrongful death), none of which are present in the claims against the Defendants" (*id.* at 7).

Finally, Plaintiffs contend that Defendants have already received Plaintiffs' entire file of the negotiations between Plaintiffs' counsel and the Paine Parties' counsel that resulted in

the 2012 Settlement, including the 2012 Settlement Agreement. Plaintiffs further point out that the consideration received is set forth in the Settlement Agreement as well as in communications ERP produced in this action, which evidence that the valuation of the consideration paid was "'approximately $23.6 million, consisting of approximately $17.3 million in Fund II interests, and approximately $6.3 million in the dilution claims'" (*id.* at 8-9, *quoting* Ex. 2 at ERP 51063-51064). Finally, based on the Forbush Affirmation, Plaintiffs argue that they have "produced all of their counsel's communications with the Paine Parties" and "Plaintiffs have gone to great lengths to ensure that no document evidencing the negotiation of the 2012 Agreement was withheld" (*id.* at 9).

C. Defendants' Contentions in Further Support of their Motion

In further support of their motion, Defendants submit a Reply Memorandum of Law dated June 6, 2019. According to Defendants, Plaintiffs "conflate[ ] legal theories of liability with the asserted injury, and suggest that the Court ignore the 'same injury standard expressly set forth in GOL § 15-108 and apply an entirely different standard, *i.e.*, same 'wrongful conduct'" (Defs' Reply at 1). Defendants further assert that Plaintiffs concede the following facts by failing to oppose them:

- Plaintiffs sought to recover their attorneys' fees in the Underlying Actions from the Paine Parties;

- Plaintiffs settled their claims against the Paine Parties and provided a broad general release that precludes claims against the Paine Parties;

- The 2012 Settlement Agreement broadly released all claims, including attorneys' fees, that Plaintiffs had against the Paine Parties, known or unknown, which arose prior to the settlement agreement;

- In the present action, Plaintiffs seek to recover from Defendants the attorneys' fees incurred before the 2012 Settlement Agreement and allegedly incurred in the Underlying Actions;

- Plaintiffs did not assert claims in the present action against the Paine Parties for the tortious conduct alleged against them because, as conceded and admitted by Plaintiffs, the 2012 Settlement Agreement released the Paine Parties from liability on those claims (Defs' Reply at 1).

According to Defendants, the cases on which Plaintiffs rely are distinguishable because "the injuries alleged by the plaintiffs [in those cases] [and not the conduct by the defendants] were different ..." and, therefore, GOL § 15-108 did not apply (Defs' Reply at 3). Alternatively,

Defendants argue that "[e]ven if Plaintiffs were correct that the same 'wrongful conduct' must be alleged in order to trigger GOL § 15-108, their own pleading more than satisfies this requirement. The FAC alleges *ad nauseum* the Paine Parties' purported 'usurpation' of the HCC policy proceeds to pay the Paine Parties' own attorneys' fees incurred in the Underlying Actions. Plaintiffs allege the exact same wrongdoing by the Paine Parties and ERP, accuse ERP of aiding and abetting the Paine Parties' wrongdoing, and allege the same damages flowing from this purported wrongdoing" (*id.* at 4). It is Defendants' contention that it is precisely this situation – *i.e.*, where a release cuts off a joint tortfeasor's right to seek contribution from the settling tortfeasor – that GOL § 15-108 was enacted to protect against by allowing the non-settling defendant a set-off based on its inability to seek contribution (Defs' Reply at 4-5).

In response to Plaintiffs' argument that because the "attorneys' fees sought in the Underlying Actions are not substantive damages and thus not subject to GOL § 15-108...," Defendants argue that "[o]ne of the primary purposes of GOL § 15-108 is to avoid the *possibility* that plaintiff is unjustly enriched by a double-recovery from a non-settling party of moneys already paid by a settling party" and "it is undisputed that in the Underlying Actions Plaintiffs demanded, and then released, their right to recover the same attorneys' fees and costs that they seek here. The release contained in the 2012 Settlement specifically covers claims for 'fees, costs' ... [a]nd the damages claimed in this action are the attorneys' fees and costs that Plaintiffs allegedly expended in the claims related to the Paine Parties, *i.e.*, the same fees and costs that were settled as part of the Paine 2012 Settlement" (*id.* at 5, *citing* Settlement Agreement at ¶¶ 5[a][i] and 5 [b][i]).[3] Defendants further dispute Plaintiffs' argument that the American Rule barred their recovery of attorneys' fees because it "ignores the third-party tort exception recognized under California law (the law that appears to apply to the Underlying Actions)" (*id., citing Lewis v Edmonds,* 190 Cal App 3d 1101, 1104 [Cal Ct App 1987]). According to Defendants, "[u]nder this exception, Plaintiffs were entitled to seek, and appear to have sought, attorneys' fees incurred in litigating and arbitrating tort claims against co-conspirators" and based on the *ad damnum* of the individual demands for arbitration,"Plaintiffs appear to have alleged exactly this type of injury ...." (*id.* at 5-6). It is Defendants' contention that "Plaintiffs claimed in the Underlying Actions that the Paine Parties were collectively co-conspirators in breaching their fiduciary duties to FPC. They alleged as injury amounts attributable to the tortious conduct of other co-conspirators, thereby attempting to obtain the benefit of the third-party tort exception related to attorneys' fees" (*id.* at 6).

In response to Plaintiffs' contention that they already produced documents reflecting the consideration paid under the 2012 Settlement Agreement, Defendants argue that the documents produced so far "are limited to external documents containing general valuations of the overall settlement amount. By their own admission, Plaintiffs have not produced any

---

[3]Defendants further dispute Plaintiffs' argument that 100% of the consideration must be shown to have been paid to compensate for the attorneys' fees and costs since Defendants are entitled to a credit if the injury claimed against ERP is one of the injuries earlier claimed against the Paine Parties (Defs' Reply at 7).

internal documents concerning the 2012 Settlement Agreement, which is a glaring omission" (*id.* at 9) and Plaintiffs are required to produce all material and necessary information in connection with Defendants' request for a set off (*id.*).

DISCUSSION

The Court hereby incorporates the factual and procedural history set forth in this Court's Decision and Order dated April 6, 2018.

"CPLR 3101(a) requires 'full disclosure of all matters material and necessary in the prosecution or defense of an action, regardless of the burden of proof.' The phrase 'material and necessary' is 'to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason'" (*O'Toole v New Chalet, Inc.*, 2012 WL 9388015 at *6 [Sup Ct, Westchester County 2010], *quoting Allen v Crow ell-Collier Publishing Co.*, 21 NY2d 403, 406 [1968]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139 [2d Dept 2010]). "Although the discovery provisions of the CPLR are to be liberally construed, 'a party does not have the right to uncontrolled and unfettered disclosure' ... The party seeking disclosure has the burden to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims ... The court has broad discretion to supervise discovery and to determine whether information sought is material and necessary in light of the issues in the matter (*id.*, *quoting Foster, supra* 74 AD3d at 1140).

The sole basis for Defendants' request that Plaintiffs be required to produce documents concerning the 2012 Settlement of the Underlying Actions is their contention that pursuant to GOL § 15-108, in the event Plaintiffs are successful in obtaining a recovery against Defendants after trial, they would be entitled to receive a set-off of the amount Plaintiffs settled with the Paine Parties. According to Defendants, because by entering into the 2012 Settlement and Release Plaintiffs cut-off their right to seek contribution from the Paine Parties, any liability they may ultimately have to Plaintiffs must be reduced by that amount.

GOL § 15-108 provides, in pertinent part:

> (a) Effect of release of or covenant not to sue tortfeasors. **When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury** ... it does not discharge any of the other tortfeasors from liability for the injury ... death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the

> consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.
>
> (b) Release of tortfeasor. **A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.**
>
> (c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person (GOL § 15-108 [emphasis added]).

It is well settled that under CPLR 1401, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought" and "[t]he 'critical requirement' for apportionment by contribution under CPLR article 14 is that 'the breach of duty by the **contributing party must have had a part in causing or augmenting the injury for which contribution is sought**' ... Thus, contribution is available 'whether or not the culpable parties are liable for the injury under the same or different theories' ... and the remedy may be invoked against concurrent, successive, independent, alternative and even intentional tortfeasors" (*Raquet v Braun*, 90 NY2d 177, 183 [1997] [emphasis added]; *see also Nassau Roofing & Sheeting Metal Co. v Facilities Dev. Co.*, 71 NY2d 599, 603 [1988]; *Utter v South Brookhaven Obstetric & Gynecological Assocs., P.C.*, 135 AD2d 811 [2d Dept 1987]; *Roma v Buffalo Gen. Hosp.*, 103 AD2d 606 [3d Dept 1984]). Thus, in order to get a GOL § 15-108(a) set-off, the two defendants must be subject to liability for damages for the same injury (*i.e.*, compensation for the same wrongful conduct regardless of the legal theory under which it is interposed) (*Koch v Greenberg*, 14 F Supp 2d 247, 270 [SD NY 2014], *affd* 626 Fed Appx 335 [2d Cir 2015]; *Hyosung Am., Inc. v Sumagh Textile Co., Ltd.*, 25 F Supp 2d 376 [SD NY 1998], *affd* 189 F3d 461 [2d Cir 1999]). "Courts in New York have consistently held that,'[t]he section only applies where tortfeasors are liable in tort for the same injury ... [and] that Section 15-108 applies only to 'tortfeasors in the traditional sense of the word'" (*Aktas v JMC Constr. Co.*, 2013 WL 1785529 at *5 [ND NY 2013], *affd* 563 Fed Appx 79 [2d Cir 2014], *quoting Barkley v United Homes, LLC*, 848 F Supp 2d 248, 264 [ED NY 2012], *affd* 557 Fed Appx 22 [2d Cir 2014]).

The Court does not agree with the underlying predicate of Defendants' motion – *i.e.*, that in the Underlying Actions "Plaintiffs alleged, *inter alia*, that the Paine Parties breached their fiduciary duties to Plaintiffs and tortiously induced Plaintiff Saul Fox to enter into certain transactions" and that "[t]hose same claims are referenced and raised against the Paine Parties throughout Plaintiffs' [FAC] ... even though the Paine Parties are not defendants in this action as a result of their prior release by Plaintiffs." A review of the allegations of breaches of

fiduciary/fraud reflected in the pleadings in the Underlying Actions annexed to Defendant's moving papers shows that nowhere is it alleged that the Paine Parties breached their fiduciary duty to Plaintiffs by wrongfully usurping the proceeds of the HCC Policy (*see, e.g.,* Antonecchia Aff., Ex. C at ¶¶ 6, 251, 252, 266, 276, 278, 290, 295, 304, 305; Ex. D at ¶¶ 6, 254, 255, 268, 273, 274, 286, 288-290, 302, 307, 316, 321-327, 330; Ex. F at ¶8). While it is true that Plaintiffs included in their *ad damnums* in the Underlying Actions a request for an award of attorneys' fees,[4] Plaintiffs were not seeking attorneys' fees as damages for the claims asserted in the Underlying Actions and instead the attorneys' fees were sought as an incident of litigation.[5] Further, the injury alleged in the Underlying Actions was not the same injury alleged in this action, which is the alleged wrongful usurpation of the proceeds of the HCC Policy (*Gonzalez v Jacoby & Meyers,* 258 AD2d 560 [2d Dept 1999]). Accordingly, because ERP was not jointly liable in tort for the same injuries alleged in the Underlying Actions, GOL § 15-108 is inapplicable (*Ackerman v Price Waterhouse*, 252 AD2d 179 [1st Dept 1998]). The Court further does not agree that "[t]he damages claimed here are the exact attorneys' fees and costs Plaintiffs demanded from the Paine Parties in the Underlying Actions, which was explicitly considered as part of the 2012 Settlement Agreement. See Settlement Agreement at ¶¶ 5(a)(i), 5 (b)(i)" (Defs' Mem. at 3). The paragraphs cited by Defendants do not state that any part of the consideration paid was to compensate the Fox Parties for the attorneys' fees expended. Furthermore, the requests for attorneys' fees did not constitute the damages recoverable on the substantive claims and, instead, they were boilerplate requests for attorneys' fees and costs as an incident of the litigation that are routinely included in pleadings.[6] Finally, Defendants provide no authority for

---

[4]Defendants also contend that "[t]he damages claimed here are the exact attorneys' fees and costs Plaintiffs demanded from the Paine Parties in the Underly ing Actions, which was explcitly considered as part of the 2012 Settlement Agreement. See Settlement Agreement at ¶¶ 5(a)(i), 5 (b)(I)" (Defs' Mem. at 3).

[5]Antonecchia Aff., Ex. C ("An order directing that Claimants be awarded their costs and reasonable attorneys' fees incurred in connection with the institution and prosecution of this action to the extent permitted by law"); Ex. D ("An order directing that Claimants be awarded their costs and reasonable attorneys' fees incurred in connection with the institution and prosecution of this arbitration to the extent permitted by law, including an award of attorneys' fees pursuant to California Code of Civil Procedure § 1021.5"); Ex. F ["All costs and expenses to which Plaintiffs are entitled, including reasonable attorneys' fees to the extent permitted by law"]). While the Fox Parties cited California Code of Civil Procedure § 1021.5, that provision had no applicability since it involves an award of attorneys' fees in actions which resulted in the successful enforcement of an important right involving the public interest.

[6]Defendants' argument, raised for the first time in reply, that these damages were part of Plaintiffs' substantive damages based on the "tort of another" theory has not been considered by this Court because it was improperly raised for the first time in reply (*Gottlieb v Wynne,* 159 AD3d 799 [2d Dept 2018]; *Wal-Mart Stores, Inc. v U.S. Fid. and Guar. Co.,* 11 AD3d 300 [1st Dept 2004]). Furthermore, even if the argument were considered, the Court does not agree that the theory had any applicability to the Underlying Actions given the allegations of wrongdoing

their contention that by entering into the 2012 Settlement and Release, Plaintiffs cut off Defendants right to seek contribution from the Paine Parties in the event Defendants are found liable as joint tortfeasors for aiding and abetting the Paine Parties' breach of fiduciary duties. Indeed, the Court sees no reason why Defendants could not seek contribution in the event they are ultimately found liable to Plaintiffs. Because the Court sees no basis for Defendants to be entitled to a set-off of the amount provided in the 2012 Settlement pursuant to GOL § 15-108, the Court shall deny Defendants' motion as such disclosure is neither material nor necessary to Defendants' defense of this action.

CONCLUSION

The court has read the following documents with regard to this motion:

(1) Notice of Motion dated May 17, 2019; Affirmation of Marc L. Antonecchia, Esq. dated May 17, 2019, together with the exhibits annexed thereto;

(2) Memorandum of Law in Support of Defendants' Motion to Compel dated May 17, 2019;

(3) Affirmation in Opposition of Reed Forbush, Esq. dated May 31, 2019, together with the exhibits annexed thereto;

(4) Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Compel dated May 31, 2019; and

(5) Reply Memorandum of Law in Further Support of Defendants' Motion to Compel dated June 6, 2019.

Based upon the foregoing, and for the reasons stated above, it is hereby

---

against the Paine Parties in those actions (*see Vacco Indus., Inc. v Van Den Berg,* 5 Cal App 4th 34, 57 [Cal Ct App 1992]; *see also Hogan v DeAngelis Constr., Inc.*, 2009 WL 1398646 [Cal Ct App 2009]; *Clear Channel Outdoor, Inc. v Advertising Display Systems*, 2004 WL 2181793 [Cal Ct App 2004]; *MJT Sec.. LLC v Toronto-Dominion Bank*, 2006 WL 1236661 [9th Cir 2006]; *Watson v Department of Transp.*, 68 Cal App 4th 885 [1998]; *Los Angeles Community College Dist. v Roosevelt Lofts, LLC,* 2016 WL 6875919 [Cal Ct of Appeal 2016]; *Palacio Del Mar Homeowners Assn., Inc. v McMahon*, 2008 WL 5061495 [Cal Ct App 2008]). In arguing that Plaintiffs sought to obtain attorneys' fees under the tort of another theory, Defendants concede that this is predicated on Plaintiffs claim "in the Underlying Actions that the Paine Parties were collectively co-conspirators in breaching their fiduciary duties to FP." However, the tort of another theory simply does not apply in such joint tortfeasor situations.

ORDERED that the motion of Defendants Equity Risk Partners, Inc. and HUB International Insurance Services, Inc. to compel Plaintiffs to produce all documents concerning the 2012 Settlement between Plaintiffs and the Paine Parties, including without limitation, documents concerning the consideration paid to Plaintiffs and the value of such pursuant to the Settlement, is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
August 23, 2019

ENTER

HON. GRETCHEN WALSH, J.S.C.

APPEARANCES:

BOIES, SCHILLER & FLEXNER, LLP
Attorneys for Plaintiffs
By: Courtney R. Rockett, Esq.
Patrick J. Rohan, Esq.
Jeremy C. Vest, Esq.
Reed Forbush, Esq.
333 Main Street
Armonk, New York 10504

HOLLAND & KNIGHT, LLP
Attorneys for Defendants Equity Risk Partners, Inc.
and HUB International Insurance Services, Inc.
By: Mark L. Antonecchia, Esq.
John M. Toriello, Esq .
Sheila (Qian) Shen, Esq.
31 West 52nd Street
New York, New York 10019