UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., HARRISON CONDIT, and FORTUNE FINANCIAL SERVICES, INC., Defendants.	C.A. No.: 09-470-WS
TRANSAMERICA LIFE INSURANCE COMPANY, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., ESTELA RODRIGUES, EDWARD MAGGIACOMO, JR., LIFEMARK SECURITIES CORP., and PATRICK GARVEY, Defendants.	C.A. No.: 09-471-WS
WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., ADM ASSOCIATES, LLC, EDWARD HANRAHAN, THE LEADERS GROUP, INC., and CHARLES BUCKMAN, Defendants.	C.A. No.: 09-472-WS

WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., DK LLC, EDWARD HANRAHAN, THE LEADERS GROUP, INC., and JASON VEVEIROS, Defendants.	C.A. No.: 09-473-WS
WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., NATCO PRODUCTS CORP., EDWARD HANRAHAN, and THE LEADERS GROUP, INC., Defendants.	C.A. No.: 09-502-WS
TRANSAMERICA LIFE INSURANCE COMPANY, Plaintiff, vs. LIFEMARK SECURITIES CORP., JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC. and EDWARD MAGGIACOMO, JR., Defendants.	C.A. No. 09-549-WS

WESTERN RESERVE LIFE ASSURANCE COMPANY OF OHIO, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., HARRISON CONDIT, and FORTUNE FINANCIAL SERVICES, INC., Defendants.	C.A. No. 09-564-WS

CONSOLIDATED REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS ADM ASSOCIATES, LLC, ESTELA RODRIGUES, JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., AND HARRISON CONDIT'S CONSOLIDATED MOTION TO DISMISS THE NEWLY AMENDED COMPLAINTS AND REQUEST FOR RECONSIDERATION

The Plaintiff, Aegon Companies' (Western Reserve Life Assurance Company of Ohio and Transamerica, collectively, "Aegon" or "Aegon Companies") arguments against dismissal of their newly added counts of breach of contract and breach of the implied covenant of good faith and fair dealings are unpersuasive. Extending a theme that they have laced through all of their papers in the three rounds of complaints and dismissal motions, the Aegon Companies maintain that the Court should ignore the actual letter of the law and the terms of their own documents and instead impose disclosure, vetting, and other obligations on the Defendants – including, now, the independent representatives, such as Harrison Condit ("Mr. Condit") – that have no legal or factual support.

I. WRL FAILS TO STATE CLAIMS FOR BREACH OF CONTRACT AGAINST MR. CONDIT AND THE COURT SHOULD DISREGARD THE AEGON COMPANIES' ATTEMPTS TO OBSCURE AND IGNORE THE PLAIN LANGUAGE OF THEIR OWN ETHICS CODE.

The Defendants explained in their opening memorandum that the Ethics Code ("Code") referenced in Mr. Condit's "Producer Employment Application" affords no basis for WRL's breach of contract claims against Mr. Condit because (1) the Code represents WRL's commitment to serve its *customers'* needs in an ethical fashion, but it fails to set forth any special or additional commitment by Mr. Condit or anyone else to WRL; and (2) the language that WRL relies upon is precatory. In response, WRL pleads with the Court to *ignore* the actual language of its own Code, contending that "it is inappropriate to labor over the precise text appearing in the document." *Aegon Companies' Consolidated Objection* (April 25, 2011) (hereinafter "*Aegon's Objection*") at 10. WRL urges the Court to read instead the word "concepts," which it only used once in its producer employment applications, so broadly that it incorporates a wish list of contractual terms that are nowhere to be found in WRL's documents and for which WRL did not negotiate. The Court should reject WRL's latest attempt at legal alchemy to save its claims from dismissal.

As an initial matter, it is not clear why WRL believes that Iowa law applies. *See Aegon's Objection* at 11, n.13. WRL cites no allegations or documentation in support of its footnoted argument that the Producer Appointment Application was sent to Iowa or accepted there. Indeed, at the top of Mr. Condit's Producer Appointment Application there is only a Clearwater, Florida address. *See Defendants' Opening Memo.* (April 6, 2011) at *Exhibit B.* In any event, Iowa and Florida law yield the same outcome as Rhode Island law. All three jurisdictions treat the interpretation of an unambiguous written contract such as this one as an issue of law for the court to determine. *See Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 435 (Iowa 2008);

W.P. Assocs. v. Forcier, Inc., 637 A.2d 353, 356 (R.I. 1994); *Gray v. D & J Indus.*, 875 So. 2d 683, 683 (Fla. 3d D.C.A. 2004). Mr. Condit's Producer Appointment Application references the "concepts" of the Code. There is no need for extrinsic evidence because the Court need only consult the Code itself to understand what this term means, and WRL has alleged no other extrinsic basis for interpreting this term. As outlined in Defendants' opening memorandum and as the introductory paragraph of the Code foreshadows explicitly and multiple times, the Code, in turn, is a document that articulates exclusively a series of *customer-service-oriented* concepts:

> As a Company, we are committed to treating *our customers* fairly and ethically. Our distributors are the individuals and firms authorized to sell our insurance products. You have a responsibility to treat *our customers* fairly and ethically. Our employees who support our agents, brokers and representatives, and serve our *mutual customers* share that responsibility and trust. As distributors and employees, we will apply the following principles and policies of our Code of Professional Conduct.

See Defendants' Opening Memo. at *Exhibit C* (emphasis added). Because the Code concepts, which are precatory, relate only to ethical commitments with respect to Aegon's customers – none of whom have lodged any complaints whatsoever against Defendants – WRL's breach of contract claims, to the extent they are founded on the Code, are baseless.

WRL attempts to save its claims by alleging that Mr. Condit's conduct violated various state regulations and/or a WRL "rule or regulation." But neither allegation has any persuasive force or asserted factual basis to support it. First, WRL has failed to allege any violation of state law. Its complaints allege criminal insurance fraud (*Second Am. Compl.*, C.A. No. 09-564, ¶ 107; *Third Am. Comp.*, C.A. No. 09-470, ¶ 81), forgery (*Second Am. Compl.*, C.A. No. 09-564, ¶ 108; *Third Am. Comp.*, C.A. No. 09-470, ¶ 71), and, in one of the actions, payment of illegal rebates (*Second Am. Compl.*, C.A. No. 09-564, ¶ 78). But this Court has already rejected the first and last of these alleged violations of state law because both are based on statutes that pertain to

insurance policies and not to annuity contracts. *See Court's Opinion and Order* (Smith, J.) (Aegon Civil Actions) (June 2, 2010) at 34-35, n.13 & 40-41. Defendants have already explained why the forgery allegations suffer from a similar infirmity, and we refer the Court to our earlier-filed papers on this point. *See Defendants' Consolidated Reply Memo. in Further Supp. of their Motions to Dismiss and Requests for Reconsideration* (December 20, 2010), at 4-5.

The Court should disregard WRL's reference to a "compliance bulletin" and "guidelines" document as the basis for an alleged violation of WRL's "rules and regulations" s*ee Exhibit D* to *Plaintiffs' Objection to Second Motions to Dismiss,* because the document that WRL references cannot support its claims. First, it is outside the bounds of WRL's complaint and therefore inappropriate for consideration at the dismissal stage. Second, it is not a "rule" or "regulation," but a "compliance bulletin" that sets out "guidelines." *Id.* WRL recognizes the distinction between the such guidelines and company "rules and regulations" in the Producer Appointment Application itself. In paragraph two (2) of the section entitled "Producer Conditional Agreement," WRL references an obligation to comply with WRL "rules and regulations," omitting any reference to compliance bulletins or guidelines. *See Defendants' Opening Memo.* at *Exhibit B.* Further down, in paragraph seven (7), where WRL seeks "producer" agreement to comply with a compliance bulletin, it specifically identifies the relevant bulletin, which is not the guidelines document that Aegon now relies upon. *See id.* Third, there is no assertion that the guidelines were ever sent to, let alone received by, any independent representative anywhere in the country, let alone by Mr. Condit. It is directed, rather, at broker-dealer companies. Fourth, it is a "Florida" document. *Id.* There is no affidavit supporting WRL's position that it was valid in Rhode Island or that it was ever used here. Fifth, it is a 2004 document. *See id.* There is no allegation or evidence establishing that it was in fact a valid "guideline" during the relevant time

period. Sixth – and most telling of all – nothing in this "bulletin" requires independent representatives such as Mr. Condit to do *anything*, let alone to vet annuitants for the very health, relationship, or receipt-of-consideration issues that are the gravamen of Aegon's fraud and breach of contractual claims. In sum, the "guidelines/compliance bulletin" claim is the ultimate red herring, and the Court should dismiss it as baseless.

II. WRL FAILS TO ALLEGE VALID IMPLIED COVENANT CLAIMS AGAINST MR. CONDIT.

Assuming that either Florida or Iowa law applies, the Court should dismiss WRL's implied covenant claims for the same reasons that the Defendants have already argued with respect to Rhode Island law, including that Mr. Condit's alleged conduct did not subvert the customer-service purposes of the asserted WRL-Condit Agreement. To the contrary, it is WRL that seeks to abrogate its money-back guarantee to its customers, as set forth in the annuity contracts – a provision for which WRL's customers paid premium fees to WRL. *See Defendants' Opening Memo.* at 11-13; *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 700 (8th Cir. 2003) (holding that, under Iowa law, the implied covenant's scope is "circumscribed by the purposes and express terms" of the contract); *Three Keys, Ltd. v. Kennedy Funding, Inc.*, 28 So. 3d 894, 903 (Fla. 5th D.C.A. 2009) (holding that the purpose of the implied covenant is to protect the reasonable expectations of the parties).

Furthermore, as this Court held in the *Opinion and Order*, Florida law "requires claims based on the implied duty of good faith and fair dealing to piggyback on the violation of specific contractual provisions." *Opinion and Order* at 45 (citing *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1318 (11th Cir. 1999) (explaining that under Florida law, an "action for breach of the implied covenant cannot be maintained in the absence of breach of an express term of the

underlying contract.")). Because WRL has failed to allege the breach of an express contractual provision, it has failed to allege a breach of the implied covenant under Florida law.

Under Iowa law, similarly, the covenant "does not give rise to new substantive terms that do not otherwise exist in the contract," *Mattes*, 323 F.3d at 700, because "it is universally recognized [that] the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract," and an implied covenant claim is "doomed" if it "lack[s] . . . support in the text of the contract." *Mid-America Real Estate Co. v. Iowa Realty Co.*, 406 F.3d 969, 974-975 (8th Cir. 2005) (applying Iowa law) (internal citations and quotations omitted). WRL's implied covenant claim is similarly "doomed" because it lacks support in the text of the alleged contract.

In addition, Iowa Supreme Court jurisprudence is characterized by a "'repeated and categorical refusal to recognize a cause of action for breach of an implied covenant of good faith and fair dealing in employment situations.'" *NCMIC Fin. Corp. v. Artino*, 638 F. Supp. 2d 1042, 1074 (S.D. Iowa 2009) (quoting *Nelson v. Long Lines Ltd.*, 375 F. Supp. 2d 944, 968 (N.D. Iowa 2004) (granting motion for summary judgment on implied covenant claim that did not relate to employment termination because Iowa law does not recognize an implied covenant in employment contracts)). The Iowa Supreme Court has extended this rule to the "analogous area" of a contract engaging an individual as a sales representative, holding that such an agreement does not encompass the implied covenant. *Porter v. Pioneer Hi-Bred Int'l, Inc.*, 497 N.W.2d 870, 870-871 (Iowa 1993). The Iowa rule, therefore, precludes WRL's implied covenant claim,

which is based on its allegation of an implied covenant in its relationship with Mr. Condit as an insurance "producer."[1]

IV. CONCLUSION

For these reasons and those previously set forth in the Defendants' prior memoranda, the Defendants respectfully request that the Court dismiss all counts brought against the Defendants in the above-captioned complaints with prejudice.

Respectfully submitted,

DEFENDANTS JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., ADM ASSOCIATES, LLC, ESTELA RODRIGUES, AND HARRISON CONDIT

By their Attorneys,

/s/ Robert G. Flanders, Jr.

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[1] Defendants do not contend, nor do they concede, that Mr. Condit served as WRL's legal agent or that he was employed by WRL. The alleged contractual arrangement between Mr. Condit and WRL is sufficiently similar to the contracts that are the subject of the Iowa rule, however – in particular the sales representative contract in *Porter* – that it is clear that Iowa would not imply a good faith covenant into the relationship.

CERTIFICATION

I hereby certify that on May 18, 2011, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF system.

/s/ *Robert G. Flanders, Jr.*

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