

Defendant,
FORTUNE FINANCIAL SERVICES, INC.,
By their Attorneys,

/s/ Jeffrey S. Brenner

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Dated: April 18, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of April, 2012, an exact copy of the within document was electronically filed with the Electronic Case Filing System of the United States District Court for the District of Rhode Island. Service by electronic means has been effectuated on all counsel of record.

/s/ Jeffrey S. Brenner

Background

Fortune Financial is a defendant in two cases – C.A. No. 09-470 S (the “470 Litigation”) and C.A. No. 09-564 S (the “564 Litigation”). The allegations and causes of action in each of these cases are identical with respect to Fortune Financial, and so Fortune Financial will brief both matters simultaneously. The most recent pleading in each case is the Third Amended Complaint.¹ (470 ECF No. 91; 560 ECF No. 57).

This Court’s June 2, 2010 Opinion and Order dismissed the counts of Rescission, Declaratory Judgment, Civil Liability for Criminal Offenses, and Negligence as to all parties. (6/2/10 Op. and Order, p. 47). Of note, the Court dismissed the count for Criminal Offenses and Negligence because the alleged underlying crime, insurance fraud, does not apply to the annuities at issue in these cases. (*See id.*, pp. 40-41). The June 2 Opinion and Order allowed the Fraud and Civil Conspiracy counts proceed as to all parties (the 470 and 564 Complaints do not contain counts for Civil Conspiracy). (*Id.*, pp. 47-48)

This Court’s later Opinion and Order dated February 7, 2012 dismissed the Fraudulent Inducement count as to, *inter alia*, Joseph Caramadre and Raymour Radhakrishnan, and the Fraud In Factum count as to, *inter alia*, Caramadre, Radhakrishnan, and Fortune Financial. (2/7/12 Op. and Order, p. 42). That Opinion and Order also allowed the Civil Liability for Crimes and Offenses to proceed with respect to the alleged forgery of the subject annuities, and “except[ed] those counts dismissed as to certain Defendants in the June 2 Order,” *i.e.* the claims of Civil Liability for Crimes and Offenses based upon insurance fraud. (*Id.*, pp. 42-43). The Court also “reaffirm[ed] the dismissal of all claims previously dismissed but not discussed in the instant Opinion and Order,” to include counts of Rescission and Declaratory Judgment as against Fortune Financial.

¹ This Court recognized that Western Reserve has re-alleged certain dismissed counts in the Third Amended Complaint for the purposes of preserving those counts for appellate review. (2/7/12 Op. and Order, p. 10 n. 9).

As a result of the foregoing, the only remaining counts against Fortune Financial are Fraudulent Inducement, Breach of Contract, Breach of the Duty of Good Faith and Fair Dealing, Civil Liability for Crimes and Offenses with respect to alleged forgery only, and Unjust Enrichment, as further narrowed by the Opinions and Orders. Specifically, this Court has eliminated from the Breach of Contract and Breach of Good Faith and Fair Dealing claims any alleged breaches related to Plaintiff Western Reserve Life Assurance Co. of Ohio's rules and regulations and Ethics Code. (2/7/12 Op. and Order, p. 34). As a result, the only remaining Breach of Contract and Breach of Good Faith and Fair Dealing claims against Fortune Financial relate to Fortune's contractual duty to indemnify Western Reserve as a result of the purported fraudulent conduct of Fortune's supposed agents, and an alleged failure to supervise those agents consistent with a purported contractual duty to do so, thereby somehow failing to prevent the agents' alleged fraudulent activities. (See 6/2/10 Op. and Order, pp. 42-44).

Additionally, this Court held that the Breach of Contract and Breach of Good Faith and Fair Dealing claims were coextensive under governing Florida law, so that these counts are identical as a matter of law. (*Id.*, pp. 44-45). At bottom, all of the remaining claims against Fortune Financial derive from Fortune's alleged participation in the purported fraudulent inducement of Western Reserve and alleged forgery of the annuitant applications. While these claims have survived a Motion to Dismiss, there is absolutely no evidence of forgery by Fortune Financial and it is doubtful that these claims will survive a motion for summary judgment.

The cumulative effect of the Opinions and Orders is a dismissal of all counts against Caramadre and Radhakrishnan in the 470 and 564 Litigations. Both have consequently filed Motions for Entry of Final Judgment Pursuant to Rule 54(b), including final judgment with respect to the Fraud In Factum, Civil Liability for Criminal Offenses for insurance fraud, Rescission, Declaratory Judgment and Negligence counts that are also dismissed as to Fortune Financial. (470 ECF No. 135; 564 ECF No. 103).

Governing Standard

This Court may determine, in its discretion, whether final judgment may enter as to some, but not all, of the multiple claims in these matters:

To meet the demonstrated need for flexibility, the District Court is used as a “dispatcher.” It is permitted to determine, in the first instance, the *appropriate time when each “final decision”* upon “one or more but [fewer] than all” claims in a multiple claims action is ready for appeal. [T]he District Court may, by exercise of its discretion in the interest of sound judicial administration, release for appeal final decisions upon one or more, but less than all, claims in multiple claims actions. The timing of such release is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely familiar with the case and any justifiable reasons for delay.

Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 435-37 (1956) (emphasis in original).

In making this determination, the central inquiries are whether the entry of final judgment will foster judicial economy and will be equitable. *See Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980) (“a district court must take into account judicial administrative interests as well as the equities involved”). This Court should therefore “consider such factors as whether the claims under review are separate from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once” *Id.*

The First Circuit has cited a series of five, non-dispositive factors to be considered in this context: (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that appellate review may be mooted by future developments; (3) the possibility that the appellate court may have to review the same issue on multiple occasions; (4) the presence of a claim that may result in a set-off; and (5) miscellaneous factors such as delay, expense and the like. *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 364 (3rd Cir. 1975) (cited by *Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 43 n.3 (1st Cir. 1988)).

Argument

The factors relevant to this matter militate in favor of the entry of partial final judgment. The matters that remain in these cases are distinct from those claims that this Court had

dismissed. The remaining counts all relate to alleged fraudulent inducement and purported forgery, whereas the dismissed claims present legal issues regarding the characterization of the annuity as an insurance contract or not, and, with respect to the Fraud In Factum count, whether Western Reserve appreciated that the annuity was a contract. Entry of partial final judgment is therefore appropriate on this basis. *See, e.g. Hudson River Sloop Clearwater, Inc. v. Dept. of Navy*, 891 F.2d 414, 418 (2nd Cir. 1989) (54(b) certification appropriate where counts dismissed were distinct from those that remained for trial).

Moreover, entry of partial final judgment fosters judicial economy and is equitable. Otherwise, Caramadre and Radhakrishnan may be defending issues on appeal that also affect Fortune Financial without Fortune Financial's participation. This problem is avoidable with the entry of partial final judgment to Fortune Financial.

Conclusion

There is no just reason to delay entry of final judgment with respect to the dismissal of the counts of Rescission, Declaratory Judgment, Civil Liability for Criminal Offenses and Negligence for insurance fraud, and Fraud In Factum. This Court should therefore grant Fortune Financial's Rule 54(b) Motion for Entry of Final Judgment.

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