

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

WESTERN RESERVE LIFE ASSURANCE
CO, OF OHIO,

Plaintiff,

vs.

C.A. No. 09-470-S

CONREAL, LLC, HARRISON CONDIT,
FORTUNE FINANCIAL SERVICES, INC., and
ANTHONY PITOCCO,

Defendants.

**DEFENDANT FORTUNE FINANCIAL SERVICES, INC.’S
MOTION TO COMPEL MORE RESPONSIVE
ANSWERS TO SECOND SET OF INTERROGATORIES¹**

Defendant FORTUNE FINANCIAL SERVICES, INC. (“Defendant” or “Fortune Financial”) hereby moves this Court for an Order compelling Plaintiff WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO (“Plaintiff” or “WRL”) to provide further answers to Plaintiff’s Second Request for Production of Documents as described below within 30 days from the Order adjudicating this Motion. Specifically, Plaintiff has failed to respond substantively to most requests, has failed to properly identify documents, and relies upon a general reference to documents previously produced in a separate litigation to a different party. Plaintiffs’ responses also feature boilerplate objections and vague responses as a means to dodge its discovery obligations. Additionally, Plaintiff has asserted attorney-client and work product privileges, but has not produced a privilege log as required by Rule 26(b)(5).

¹ Fortune Financial served two sets of interrogatories upon WRL, one in 2011 and a second in 2013, both of which were denominated a “first” set. In order to avoid confusion, Fortune Financial will refer to the 2013 set of interrogatories as the “second” set.

INT. 6 Itemize your alleged damages in this matter, including identifying all documents evidencing those alleged damages, and provide all computations made to determine those damages.

ANS. 6 Western Reserve seeks three categories of damages: policy losses (including post mortem interest); commissions; and legal fees. Policy losses are calculated based on the difference between the amount paid out on the annuity and the market value of the annuity on that date. Commissions are the amounts paid to Fortune Financial Services in connection with the annuities at issue in this case. Legal fees sought in this case represent 1/14 of the total legal fees incurred in connection with plaintiffs' prosecution of C.A. No. 09-470, 09-471, 09-472, 09-473, 09-502, 09-549, and 09-564 ("Related Cases").

Commissions and policy losses are reflected on Exhibit A attached hereto. As of January, 2013, legal fees incurred in connection with this case amounted to \$46,168. Legal fees will continue to accrue.

ARGUMENT WRL's answer and the exhibit WRL attached to the response fails to provide any itemization or the computations used to arrive at its damages figures, and is therefore non-responsive to that portion of this interrogatory.

INT. 7 Itemize all of your litigation costs and attorneys' fees related to this matter, describe the steps taken to segregate fees related to this matter from all other matters pending in the Federal District Court for the District of Rhode Island where Western Reserve is a Plaintiff involving the so-called "STAT" investment scheme," itemize all of your litigation costs and attorneys' fees with respect to all other matters pending in the Federal District Court for the District of Rhode Island where Western Reserve is a Plaintiff involving the so-called "STAT" investment scheme," and itemize your attorneys' fees and costs related to the criminal investigation and prosecution of any defendant named in the Complaint.

ANS. 7 Objection. This interrogatory is overly broad and premature. Western Reserve will submit a bill of costs following entry of judgment. Additionally, fees and costs

“related to the criminal investigation and prosecution” are not likely to lead to the discovery of admissible information. Such fees and costs are billed separately from amounts billed in connection with the Related Cases. Without waiving the objection, see response to Interrogatory No. 7. To date, Western Reserve has not segregated fees in connection with each of the Related Cases.

ARGUMENT This request is not overly broad, as WRL is claiming its legal fees and costs as components of its damages. Additionally, WRL has placed at issue all of its legal fees related to the criminal and civil cases, as it has acknowledged in other discovery responses that it has taken the totality of its fee, and divided by the number of challenged annuities to arrive at its calculation of damages in specific cases. Additionally, WRL may not unilaterally delay responding to this interrogatory because it has not segregated its fees yet. Even if WRL has segregated its criminal and civil legal fees, Fortune Financial is entitled to review all fees to analyze the purported segregation. Its reference to Interrogatory Answer No. 7 is a tautology.

INT. 12 Describe the date and substance of all communications involving Harrison Condit (“Condit”) regarding the Annuity that involve or are known by Plaintiff, including the location and/or mode of each identified communication and persons involved in, copied on, or present for each such communication.

ANS. 12 Objection. A request for information about communications “involving” Harrison Condit is vague. Without waiving the objection, and to the extent this interrogatory seeks information about communications “with” Harrison Condit, see documents labeled WR 1239-40, 1241-45, 1247. To the extent this interrogatory seeks information concerning other internal communications relating to Harrison Condit, such information is subject to attorney client privilege and/or the work product doctrine.

ARGUMENT The interrogatory is not objectionable so the objection should be stricken. To the extent that WRL is invoking any privilege, it should produce a privilege log. *See Fed. R. Civ. P. 26(b)(5).*

INT. 14 State all facts, list all documents and identify all persons with knowledge regarding the allegations contained in Paragraph 48 of the Complaint that Condit and Fortune Financial “acted in concert” with the other defendants to allegedly defraud Plaintiff, including all facts demonstrating any agreement on the part of Condit and/or Fortune Financial to participate in the alleged “STAT” investment scheme,” and the source of the information that allegedly supports these allegations.

ANS. 14 Condit was an agent of Fortune Financial as described in response to interrogatory No. 10 and, as such, his conduct is attributable to Fortune Financial. Additionally, see documents labeled WR 1239-40, 1241-45, 1247.

ARGUMENT WRL’s answer to Interrogatory No. 9 and the identified documents fail to address WRL’s contention that Condit and Fortune Financial “acted in concert with ” the other defendants, so that this answer is non-responsive. If there is no responsive information to the interrogatory, the answer should state so.

INT. 16 Describe Western Reserve’s process, policies, procedures and/or practices for review and approval of annuity applications like the Pitocco annuity application and WRL annuity, including identifying all documents that contain those processes, policies, practices and/or procedures, and identify the person(s) at Western Reserve who reviewed and approved the Pitocco annuity application.

ANS. 16 Objection. This interrogatory is not limited to a particular timeframe or to “process[es], policies, procedures and/or practices” relating to issues raised in this case and, therefore, is overly broad, unduly burdensome and not likely to lead to the discovery of admissible information. Without waiving the objections, Western Reserve relies on its broker-dealers and agents to vet applications and take reasonable steps products are suitable for customers and used for their proper purposes. See also Broker-Dealer Supervisory and Service Agreement (AEG 13978-14032).

ARGUMENT WRL's answer is non-responsive, as it does not disclose WRL's policies or procedures for internal review and approval of annuity applications for any time period, including when WRL reviewed and approved the annuities at issue and thereafter.

INT. 19 State all facts, list all documents, and identify all persons with knowledge that Fortune Financial failed to abide by the standards contained in §15(b)(4)(E) of the Securities Exchange Act of 1934.

ANS. 19 Objection. This interrogatory seeks a conclusion of law. Moreover this interrogatory is premature because discovery is just underway and remains limited. Without waiving the objection, and subject to Western Reserve's right to supplement this answer as discovery continues, Western Reserve states that based on his relationship with Fortune Financial, Condit was able to broker the sale of Western Reserve's products. In doing so, Condit was subject to supervision by Fortune Financial. Despite purporting to supervise Condit, Condit was an active and knowing participant in the STAT Scheme alleged in the Complaint. There is no evidence that Fortune Financial has reasonably discharged its duties and obligations to supervise Condit to ensure that Condit acted ethically, properly, and lawfully. Individuals with knowledge of Fortune Financial's procedures and lack of enforcement leading to the issuance of the annuities include Condit and representatives of Fortune Financial.

ARGUMENT This answer is non-responsive. The standards of § 15(b)(4)(E) of the Securities Exchange Act of 1934 is incorporated by reference into the WRL-Fortune Financial contract. That standard includes a requirement that the principal have knowledge of the alleged misconduct of the agent. Here, WRL ducks disclosing facts regarding Fortune Financial's alleged knowledge of Condit's purportedly misconduct by claiming that there is "no evidence" of supervision. WRL should be compelled to answer the interrogatory fully or state that it does not have any responsive information. In the event that information is later learned through depositions (after the Stay is lifted), WRL can supplement its answer.

INT. 20 State all facts, list all documents, and identify all persons with knowledge that Fortune Financial had reason to believe that Condit was not following Western Reserve's rules, regulations or code of ethics.

ANS. 20 Objection. This interrogatory is vague. Moreover, a party's "reason to believe" a fact is irrelevant to the ultimate issues in this case and is not likely to lead to the discovery of admissible information. Additionally, this interrogatory is premature because discovery is just underway and remains limited.

ARGUMENT There is nothing vague about this interrogatory, because it seeks the factual basis for WRL's assertion that Fortune Financial had notice of Condit's alleged misconduct. Moreover, WRL may not delay its response (in a case that is over 4 years old) by granting itself an unlimited extension of time to answer when Fortune Financial has responded to Requests for Production and Interrogatories already. In the event that information is later learned through depositions (after the Stay is lifted), WRL can supplement its answer.

INT. 23 Describe why Western Reserve did not effect a chargeback as contained in Exhibit C to the Broker/Dealer Agreement of commissions and/or premiums paid to Fortune Financial and/or Condit with respect to the Annuity.

ANS. 23 Objection. This interrogatory seeks information that is irrelevant and not likely to lead to the discovery of admissible information.

ARGUMENT: WRL asserts an equitable unjust enrichment claim in this case, one of the elements of which is the lack of legal remedies. Moreover, WRL has a duty to mitigate its damages. Here, the WRL-Fortune Financial Agreement expressly allowed WRL to access charge-backs of commissions, something that it failed to do. That failure and WRL's rationale for not assessing charge-backs are directly relevant to these issues.

INT. 24: Identify all written requirements from Plaintiff that a Broker-Dealer, Registered Representative, Licensed Agent and/or Producer must (1) disclose the health of an

applicant and/or annuitant; (2) disclose the relationship of an applicant and/or annuitant with a beneficiary; and (3) ensure that a beneficiary has an “insurable interest” in an applicant and/or annuitant. Please cite the section, paragraph, and/or page from each document.

ANS. 24: See Compliance Bulletin (“We will not accept annuity applications where the contract owner/applicant does not have an appropriate insurable interest in the life of the annuitant.”) and Code of Professional Conduct (AEG 1125-1128).

ARGUMENT: This answer is non-responsive to that portion of the interrogatory seeking written requirements regarding the health of annuitant.

RULE 7037-1 CERTIFICATION

Pursuant to Local Rule 7037-1, undersigned counsel for Defendant, hereby certifies that he made a reasonable and good faith effort to confer with counsel for Plaintiff by repeatedly speaking with Michael Daly in an effort to obtain disclosure of the requested discovery without court action.

/s/ Jeffrey S. Brenner

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

/s/ Jeffrey S. Brenner

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Dated: September 20, 2013

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September, 2013, 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. Notice of this filing will be sent via e-mail to all parties able to accept electronic filings as indicated on the Notice of Electronic Filing or by other means to the counsel listed below:

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_____/s/ Jeffrey S. Brenner