

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
JOSEPH CARAMADRE, et al.	)	
Defendants.	)	

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

Plaintiff, Western Reserve Life Assurance Co. of Ohio (“Western Reserve”), objects to Defendant Fortune Financial Services, Inc.’s (“Fortune Financial”) Motion to Compel More Responsive Answers to Second Set of Interrogatories (“Motion”). (C.A. No. 09-470, ECF Doc. No. 155).

This Court is familiar with the facts surrounding this case. In summary, Western Reserve sued defendants based on their involvement in a scheme designed to earn profits by investing in annuities that paired investors with terminally ill strangers to serve as annuitants.

After a prolonged stay of discovery, Fortune Financial propounded its second set of interrogatories on Western Reserve. It now complains about Western Reserve’s responses to Interrogatories 6, 7, 12, 14, 16, 19, 20, 23, and 24. Fortune Financial’s Motion should be denied because Western Reserve’s objections are proper and its answers are complete.<sup>1</sup>

<sup>1</sup> Fortune Financial’s counsel certifies that he has “repeatedly” spoken with counsel for Western Reserve “in an effort to obtain the requested discovery without court action.” Fortune Financial’s counsel has made general comments about his lack of understanding of the nature of Western Reserve’s claims, but he has never raised the specific complaints outlined in Fortune Financial’s Motion. This lack of meaningful communication would warrant summary denial of Fortune Financial’s Motion pursuant to Fed. R. Civ. P. 37(a)(1).

## INTERROGATORY NO. 6

Fortune Financial complains that Western Reserve's answer to Interrogatory No. 6 is non-responsive because it "fails to provide any itemization or the computations used to arrive at its damages figures." Motion at p.2. Contrary to Fortune Financial's argument, Western Reserve did itemize its damage calculation. In addition to specifying the three categories of damages it seeks (policy losses [including post mortem interest], commissions and legal fees) and how it calculated each category,<sup>2</sup> Western Reserve's interrogatory answers included a chart that provides policy-specific data about, among other things, "premium amount" "market value" as of date of rescission or pay out, "market loss," "PMI" (post mortem interest), "commission," and "Total Loss for Policy including commission." Fortune Financial did not provide the Court with a copy of the chart; it is attached as Exhibit A to Western Reserve's interrogatory answers, which are attached hereto as Exhibit 1.

After Western Reserve provided its interrogatory answers, it provided Fortune Financial with a revised version of the chart that included even more data and made corrections to the chart previously produced.<sup>3</sup> The revised chart is attached hereto as Exhibit 2. Both charts contain the data and computations that Plaintiff complains are lacking. Therefore, Fortune Financial's complaints about the adequacy of Western Reserve's response to Interrogatory No. 6 are unfounded.

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<sup>2</sup> "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 3/13 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." See Western Reserve's answer to Interrogatory No. 6, attached hereto as Exhibit 1.

<sup>3</sup> Western Reserve hand delivered to Fortune Financial the revised chart, along with its responses to Fortune Financial's requests for production, a few hours before Fortune Financial filed the Motion.

## INTERROGATORY NO. 7

Fortune Financial first complains about Western Reserve's objection to the breadth of Interrogatory No. 7, which inquired into all of Western Reserve's fees and expenses incurred in connection with the related civil actions, as well as the criminal action pending against Fortune Financial's co-defendants, Joseph Caramadre and Raymour Radhakrishnan. Western Reserve's objection is warranted, however, because information about fees incurred in connection with the criminal action has no bearing on this matter and is not likely to lead to the discovery of admissible information in this case. Contrary to what Fortune Financial suggests, Western Reserve has not "placed at issue all of its legal fees related to the criminal and civil cases, as it has acknowledged in other discovery responses..." Motion at p.3 (emphasis added). Rather, Western Reserve specified in response to Interrogatory No. 6 that it is only seeking fees in connection with the civil actions.<sup>4</sup> See Exhibit 1.

As a fallback, Fortune Financial contends that "even if [Western Reserve] has segregated its criminal and civil legal fees, Fortune Financial is entitled to review all fees to analyze the purported segregation." Motion at p.3. This is not correct. If any "civil action" fees have been incorrectly allocated to Western Reserve's "criminal action" fees, then Fortune Financial will reap the benefit because Western Reserve does not seek to recover those amounts in this case. Conversely, if any "criminal action" fees have been improperly designated as "civil action" fees, then Fortune Financial will have the opportunity to challenge such fees at the appropriate time. There is no basis for Fortune Financial to seek information about fees that Western Reserve does not seek. Therefore, Fortune Financial's Interrogatory No. 7 is overly broad and it is not entitled to further information at this time.

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<sup>4</sup> Western Reserve's fees relating the criminal action were incurred by responding to discovery propounded by the United States Attorney's Office and other governmental agencies.

### **INTERROGATORY NO. 12**

In Interrogatory No. 12, Fortune Financial requests information about conversations “involving” Harrison Condit. The use of the word “involving” makes this interrogatory vague. Western Reserve presumes, and it appears, that Fortune Financial is inquiring about communications directly with Condit and, pursuant to Fed. R. Civ. P. 33(d), has referred to all documents that memorialize conversations with Condit.<sup>5</sup>

It is not clear what additional information Fortune Financial seeks beyond what has been provided. If it is asking about internal conversations between Western Reserve’s attorneys and Western Reserve’s legal team, the interrogatory does not ask for such information. And even if Fortune Financial does make that request, it would be overly broad and unduly burdensome because all such communications would be unequivocally privileged.

### **INTERROGATORY NO. 14**

Fortune Financial complains that Western Reserve failed to properly respond to its interrogatory about the basis for the allegation that Fortune Financial “acted in concert” with its co-defendants. This complaint is misguided. Western Reserve identified the basis for its claims based on the information that currently is available. In doing so, Western Reserve referred to the business relationship between Fortune Financial and Harrison Condit and pointed to documents referencing communications with Condit, wherein he generally acknowledged his involvement in the scheme. Fortune Financial may think that Western Reserve’s current evidence is not persuasive, but that is not a basis for granting a motion to compel.

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<sup>5</sup> Western Reserve also has produced audio recordings of conversations with Condit that took place in the ordinary course of business concerning other annuities. See Response to Document Request No. 1 in C.A. No. 09-564, attached as Exhibit 3 to Fortune Financial’s Motion to Compel in C.A. No. 09-564, docketed as ECF Doc. No. 156 in C.A. No. 09-470.

### **INTERROGATORY NO. 16**

Fortune Financial complains that Western Reserve fails to disclose its “policies or procedures for internal review and approval of annuity applications....” This complaint falls short. In its answer to Interrogatory No. 16, Western Reserve explained that it “relies on its broker-dealers and agents to vet applications and take reasonable steps [to ensure] products are suitable for customers and used for their proper purposes.” Western Reserve’s “policies and procedures” were<sup>6</sup> to rely on its broker-dealers and agents. Fortune Financial may wish that Western Reserve had more robust and defined “policies and procedures” in place, but that does not warrant entry of an order compelling Western Reserve to supplement its response.

### **INTERROGATORY NO. 19**

Fortune Financial complains that Western Reserve’s response to Interrogatory 19 is insufficient because it does not agree that the evidence Western Reserve cites actually demonstrates that Fortune Financial has “knowledge of the alleged misconduct of” Condit. See Motion at p.5. Again, a dispute over the weight of the evidence cited in response to an interrogatory does not justify the issuance of an order to provide a further response. Rather, if Fortune Financial believes that Western Reserve’s claims are not supported by “good” evidence, it can make an appropriate argument to the jury.

### **INTERROGATORY NO. 20**

Despite challenging the propriety of Western Reserve’s objection that Interrogatory No. 20 is vague, Fortune Financial resorts to paraphrasing the interrogatory in its Motion. See Motion at p.6. Now, Fortune Financial suggests that Interrogatory No. 20 really asks for the factual basis for Western Reserve’s contention that Fortune Financial had notice of Condit’s

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<sup>6</sup> The only relevant timeframe would be during the period when the annuities at issue in this case were issued. Western Reserve objected to this interrogatory to the extent that it seeks information regarding “policies or procedures” applicable during different timeframes.

misconduct. Phrased this way, the interrogatory is repetitive of Interrogatory No. 19. Western Reserve has no objection to amending its answer to reiterate its response to Interrogatory 19, but it does object to providing a further response for the reasons discussed above (in connection with Fortune Financial's complaints about Interrogatory No. 19).

### **INTERROGATORY NO. 23**

Fortune Financial contends that Western Reserve must describe why it did not affect a chargeback of commissions. According to Fortune Financial, it is entitled to discovery into Western Reserve's thought process because Western Reserve has asserted a claim for unjust enrichment and one of the elements of that claim is "the lack of legal remedies." Fortune Financial raises that argument in the wrong context, however. If Fortune Financial believes that a right to affect a chargeback is an available contractual right that defeats a claim for unjust enrichment, then it may file a dispositive motion on that basis. But assuming Fortune Financial were correct on the law, it makes no effort to explain why the "rationale for not assessing charge backs," Motion at p.6 (emphasis added), as opposed to the availability of the remedy, has any bearing on the case. See W. Pinal Family Health Ctr., Inc. v. McBryde, 785 P.2d 66, 70 (Ariz. Ct. App. 1989) (holding that plaintiff's rationale for not filing a lis pendens was factually unrelated to substantive claims and, therefore, not discoverable).

Fortune Financial also makes a passing claim that Western Reserve's thought process is discoverable because Western Reserve "has a duty to mitigate its damages." However, mitigation of damages is an affirmative defense, which is not an issue in a case unless the defendant specifically raises it in its answer. See McFarland v. Brier, 769 A.2d 605, 610 (R.I. 2001) (recognizing that failure to mitigate is an affirmative defense); Fed. R. Civ. P. 8(c) (requiring a defendant to "affirmatively state any avoidance or affirmative defense"). But here,

Fortune Financial has not filed an answer to Western Reserve's complaint and, thus, has not "affirmatively stat[ed] ... an affirmative defense" based on a failure to mitigate. Accordingly, mitigation of damages is not presently an issue.

Even if Fortune Financial did raise that affirmative defense and interject mitigation issues into the case, Western Reserve's "rationale" for not affecting a chargeback is irrelevant. A chargeback might provide a mechanism to allow a plaintiff to recover its losses; it is not a device or strategy that would allow Western Reserve to minimize the amount of harm that Fortune Financial has inflicted. Accordingly, information regarding the thought process surrounding a chargeback is irrelevant and not likely to lead to the discovery of admissible information.

#### **INTERROGATORY NO. 24**

Fortune Financial complains that Western Reserve's response to Interrogatory No. 24 is "non-responsive to that portion of the interrogatory seeking written requirements regarding the health of [sic] annuitant." In its interrogatory answer, however, Western Reserve refers to its Code of Professional Conduct which, although it does not explicitly address an annuitant's health, generally demonstrates that Western Reserve's products should not be sold for the purpose of making money off of a terminal illness of a human who has no relationship to the investor. There is nothing more to add to this interrogatory answer.

#### **CONCLUSION**

For the reasons set forth herein, Western Reserve respectfully requests that Fortune Financial's motion be denied.

Respectfully submitted,

/s/ Michael J. Daly

Brooks R. Magratten, Esq., No. 3585

David E. Barry, Esq., *pro hac vice admitted*

Michael J. Daly, Esq. No. 6729

PIERCE ATWOOD LLP

Attorneys for Plaintiffs

10 Weybosset St., Suite 400

Providence, RI 02903

(401) 588-5113 [Tel.]

(401) 588-5166 [Fax]

[bmagratten@pierceatwood.com](mailto:bmagratten@pierceatwood.com)

[dbarry@pierceatwood.com](mailto:dbarry@pierceatwood.com)

[mdaly@pierceatwood.com](mailto:mdaly@pierceatwood.com)

Dated: October 7, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that on October 7, 2013, I electronically filed the foregoing document with the Clerk of the Court and that it is available for viewing and downloading from the Court's CM/ECF system. All counsel of record have been served by electronic means.

/s/ Michael J. Daly