UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, Plaintiff, vs. CONREAL LLC, HARRISON CONDIT, FORTUNE FINANCIAL SERVICES, INC., and ANTHONY PITOCCO, Defendants;	C.A. No.: 09-470-WS
TRANSAMERICA LIFE INSURANCE COMPANY, Plaintiff, vs. JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., ESTELLA 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

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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

CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS CONREAL LLC, ESTELLA RODRIGUES, ADM ASSOCIATES, LLC AND DK LLC'S REQUESTS FOR ORDERS DIRECTING ENTRY OF FINAL JUDGMENT

Pursuant to Fed. R. Civ. P. 54(b), Defendants Conreal LLC, Estella Rodrigues ("Ms. Rodrigues"), ADM Associates, LLC ("ADM") and DK LLC ("DK") (collectively "Defendants" or "Investors") file this memorandum of law in support of their Requests for Orders Directing Entry of Final Judgment in their favor on all claims that Plaintiffs Western Reserve Life Assurance Company of Ohio ("WRL") and Transamerica Life Insurance Company ("Transamerica") (both part of the same Aegon Insurance Group and who are hereinafter collectively referred to as "Plaintiffs" or "Aegon Companies") brought against them in the above-captioned actions (collectively referred to as the "Aegon Civil Actions").[1]

The circumstances warrant entry of final judgment in favor of the Investors at this juncture. This Court's recent order on the motions to dismiss is "final" because it disposed of all claims pending against the Investors, including the rescission, declaratory judgment and fraud-based claims. Consequently, the Investors will not simultaneously be contestants before both

[1] The Movants file this identical Consolidated Memorandum in all four of the Aegon Civil Actions captioned above, C.A. Nos. 09-470, 09-471, 09-472, 09-473. As the Court is aware, the Aegon Companies have brought three additional related lawsuits, C.A. Nos. 09-502, 09-549, and 09-564.

this Court and the appellate court. In addition, the legal issues that will be determined on appeal – the implications of the incontestability clauses for the claims against the Investors as contracting parties and the lack of an insurable interest requirement for annuities contracts under Rhode Island law – are ones that the reviewing court will not need to consider a second time. Relatedly, there is no reason to believe that future developments in this Court would moot these issues. Furthermore, the claims against the Investors are sufficiently distinct, both factually and legally, from the pending claims against the other defendants in the Aegon Civil Actions, Mr. Caramadre and his colleagues and the broker companies.[2] Finally, entry of final judgment would prevent unnecessary delays in adjudicating the claims between the Aegon Companies and the Investors.

BACKGROUND

Through the complaints in the Aegon Civil Actions, the Aegon Companies asserted multiple civil claims related to variable annuity contracts that they issued to investors. The Plaintiffs allege that Mr. Caramadre and his colleagues identified certain individuals with terminal illnesses and, in some cases, offered these individuals cash to sign applications for variable annuities, naming themselves or other investors as beneficiaries, and designating the terminally ill individuals as the annuitants. The Plaintiffs' complaints accused Joseph Caramadre, Edward Hanrahan, Raymour Radhakrishnan, Edward Maggiacomo, Harrison Condit,

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[2] As used herein the term "Mr. Caramadre and his colleagues" refers collectively to Defendants Joseph Caramadre, Raymour Radhakrishnan, Estate Planning Resources, Inc., Edward Maggiacomo, Jr., and Harrison Condit. The term "Brokers" refers to Defendants Fortune Financial Services, Inc., The Leaders Group, Inc., and Lifemark Securities Corp.

Note that, with respect to two of the Defendants – Conreal LLC and Ms. Rodrigues – the Aegon Companies brought only rescission claims, coupled with declaratory judgment claims based on a right to rescind the annuity contracts due to the lack of an insurable interest. The Aegon Companies did not bring fraud-based claims against these Defendants, nor did they bring any claims related to the Aegon Companies' contracts with the Brokers; thus the contractual theories and claims for recovery against Conreal LLC and Ms. Rodrigues were entirely distinct from the tort theories of recovery (fraud and such) against Mr. Caramadre and his colleagues and the Brokers and the broker contract-based claims against the Brokers. Cf. LaFazia v. Howe, 575 A.2d 182, 184 (R.I. 1990) ("The tort claim and the claim for rescission afford alternative sources of relief in which, if one is granted, the other is withheld.").

and other parties of fraud for, *inter alia,* allegedly failing to make material disclosures to the Plaintiffs on the annuity applications. See generally, Am. Compl., C.A. No. 09-417; Am. Compl., C.A. No. 09-472; Am. Compl., C.A. No. 09-473; Am. Compl., C.A. No. 09-502, Compl., C.A. No. 09-549, Compl. C.A. No. 09-564; see also *Consolidated Memo. in Response to Defs.' Mot's to Dismiss*, C.A. No. 09-470 at 3, n. 3.

Seeking alternative relief (see supra, n. 2), the Aegon Companies also brought counts for rescission of the contracts, as well as counts for declaratory judgment that the contracts were rescinded and/or void *ab initio*, against the Investors who purchased the contracts. See Amend. Compl. 09-470, ¶¶ 26-36; Amend. Compl. 09-471, ¶¶ 41-53; Amend. Compl. 09-472, ¶¶ 40-51; Amend. Compl. 09-473, ¶¶ 43-54. With respect to ADM and DK, the Aegon Companies also brought fraud-based claims. See Amend. Compl. 09-472, ¶¶ 52-57, and ¶¶ 71-78; Amend. Compl. 09-473, ¶¶ 55-60, and ¶¶ 74-81. As noted above, however, see supra, n. 2; Am. Compl. 09-470, ¶¶ 26-36; Am. Compl. 09-471, ¶¶ 41-53, the Aegon Companies brought no such fraud-based claims against Conreal and Ms. Rodrigues; rather, the Aegon Companies sought to rescind and/or void the relevant contracts based solely on the purported lack of an insurable-interest relationship between these investors and the annuitants.[3]

On June 2, 2010, this Court entered an omnibus order on the various motions to dismiss the Aegon Civil Actions. See *Opinion and Order* (Smith, J.) (June 2, 2010), C.A. Nos. 09-470; 09-471; 09-472; 09-473; 09-502; 09-549; and 09-564 (attached hereto as Exhibit A). In addition to dismissing all counts for negligence and civil liability for crimes and offenses, the Court dismissed all counts against the Investors, including the rescission, declaratory judgment, and, as

[3] The Aegon Companies included in the captions of several of the actions individuals and entities against whom they brought no claims in the bodies of the complaints. These include one investor, Natco Products Corp. (C.A. No. 09-502), and several annuitants, Patrick Garvey (C.A. No. 09-471), Charles Buckman (C.A. No. 09-472), and Jason Veveiros (C.A. No. 09-473). As a means of simplifying the pleadings, a Rule 54(b) order entering final judgment in favor of these parties would also be appropriate.

applicable, fraud-based counts. See id. at 47 ("All Counts for rescission, declaratory judgment that the counts are void, civil liability for crimes and offenses, and negligence are dismissed. The Counts for fraud and civil conspiracy are dismissed as against ADM in case 09-472 and DK in case 09-473.").

ARGUMENT

A. STANDARD OF REVIEW

Pursuant to Fed. R. Civ. P. 54(b),

> [w]hen an action presents more than one claim for relief – whether as a claim, counterclaim, cross-claim, or third-party claim – or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

The rule "inject[ed] some" "required" "flexibility" into the traditional doctrine that "no appeal is permitted until all of the claims in the action have been fully adjudicated," 10 Daniel R. Coquillette, et al., Moore's Federal Practice, § 54.21[2], and vested the District Courts with discretion to act as "dispatcher[s]" of "judgments that would be appealable but for their inclusion in multi-claim or multi-party action[s]," id.; see Spiegel v. Trustees of Tufts College, 843 F.2d 38, 43 (1st Cir. 1988).

A district court may exercise its discretion to certify a judgment under Rule 54(b) after determining that "(i) the ruling in question is final and (ii) there is no persuasive reason for delay." Gonzalez-Figueroa v. J.C. Penney P.R., Inc., 568 F.3d 313, 317 (1st Cir. 2009). Thus, "[w]hen considering the wisdom of Rule 54(b) certification in a given case, the trial court must first assess the finality of the disputed ruling. . . . As an adjunct of this inquiry, of course, it must be shown that the ruling, at a bare minimum, disposes fully 'of at least a single substantive claim.'" Spiegel, 843 F.2d at 42-43 (quoting Acha v. Beame, 570 F.2d 57, 62 (2d Cir. 1978)).

"Once the finality hurdle has been cleared, the district court must determine whether, in the idiom of the rule, 'there is no just reason for delay' in entering judgment." Id. (quoting Fed. R. Civ. P. 54(b)). In making this determination, the Court is to "weigh efficiency concerns, consider the various criteria delineated in our case law, and articulate a cogent rationale supporting certification." Gonzalez-Figueroa, 568 F.3d at 318, n.3 (citing Spiegel, 843 F.2d at 43 & n.3 for relevant criteria). In Spiegel, the "seminal case in this Circuit detailing the preferred practice under Rule 54(b)," Liberty Mutual Ins. Co. v. Greenwich Ins. Co., 331 F. Supp. 2d 8, 12 (D. Mass. 2004) (internal quotations omitted), the First Circuit acknowledged that "the integers which comprise this calculus will vary from case to case." Spiegel, 843 F.2d at 43, n.3. The court cited, however, a "general compendium" of factors, "helpful as a guide," that an earlier Third Circuit case had provided. Spiegel, 843 F.2d at 43, n.3 (citing Chalmers Corp. v. Philadelphia Electric Co., 521 F.2d 360, 364 (3d Cir. 1975)). Relevant factors collected therein include (1) "the possibility that the reviewing court might be obliged to consider the same issue a second time," (2) "the possibility that the need for review might or might not be mooted by future developments in the district court," (3) "the relationship between the adjudicated and unadjudicated claims," and (4) "miscellaneous" factors including "delay." Chalmers, 521 F.2d at 364. "'[I]t will be a rare case where Rule 54(b) can appropriately be applied when the contestants on appeal remain, simultaneously, contestants below.'" Nichols v. Cadle Co., 101 F.3d 1448, 1449 (1st Cir. 1996) (quoting Spiegel, 843 F.2d at 44)).[4]

[4] On the other hand, such cases exist in this circuit. See, e.g., Liberty Mutual Ins. Co. v. Greenwich Ins. Co., 331 F. Supp. 2d 8 (D. Mass. 2004).

B. THE COURT SHOULD ENTER JUDGMENT IN FAVOR OF THE INVESTORS BECAUSE THE COURT'S DISMISSAL POSSESSES THE REQUISITE FINALITY AND THERE IS NO JUST REASON FOR DELAY.

As an initial matter, the Court's June 2, 2010 order possessed the requisite "finality." The ruling was "final" in that it "dispose[d] fully of at least a single substantive claim" against the Investors. J.C. Penney P.R., Inc., 568 F.3d at 317 (internal citations and quotations omitted). Indeed, with respect to the Investors there remain no claims or issues for litigation before this Court.

Furthermore, a review of the relevant factors indicates that there is "no just reason for delay" in entering final judgment with respect to the Investors. Fed. R. Civ. P. 54(b).

First, given that only the Investors seek a Rule 54(b) order, granting their request will not result in a situation in which "the contestants on appeal remain, simultaneously, contestants below." Spiegel, 843 F.2d at 44. The contestants on appeal, the Investors, will be entirely severed from the contestants before this Court, Mr. Caramadre and his colleagues and the Brokers. As a result, granting the Rule 54(b) judgment will not generate the kinds of inefficiencies that dual proceedings involving the same parties can sometimes entail.

Second, the Court's dismissal order turned on legal issues that the reviewing court need decide only once. See Chalmers, 521 F.2d at 364 (observing that "the possibility that the reviewing court might be obliged to consider the same issue a second time" is one factor considered in the Rule 54(b) analysis). The Court dismissed the claims against the Investors because (1) the incontestability clauses in the annuity contracts barred the claims against the Investors as contracting parties, and (2) there is no insurable interest requirement for annuity contracts under Rhode Island law. See Exhibit A at pp. 11-25. These issues will not re-surface on any later appeal by the Aegon Companies, Mr. Caramadre and his colleagues, or the Brokers

because these issues bear only on the liability of the Investors *as contracting parties* with respect to the *annuity* contracts.[5]

Third, there is no reason to believe that "the need for review might . . . be mooted by future developments in the district court." Chalmers, 521 F.2d at 364. Whatever the outcome with respect to the Aegon Companies fraud-based claims against Mr. Caramadre and his colleagues and the Brokers and their broker contract-based claims against the Brokers, the Investors' and Aegon Companies' respective rights under the annuity contracts will remain in issue unless and until an appeal between the Aegon Companies and the Investors is concluded.

Fourth, the claims against the Investors are factually and legally distinct from the pending claims against the other defendants to the Aegon Civil Actions. Chalmers, 521 F.2d at 364 (courts consider "the relationship between the adjudicated and unadjudicated claims" in deciding whether a Rule 54(b) order is appropriate). The Aegon Companies' rescission and declaratory judgment claims against the Investors turn primarily on the contractual relationship between the Aegon Companies and the Investors and the alleged lack of an insurable-interest relationship between the Investors and the annuitants. The remaining Defendants (Mr. Caramadre and his colleagues and the Brokers) were not parties to any of the annuity contracts, and, as necessarily follows, the existence vel non of an insurable interest between these remaining Defendants and the annuitants does not form the basis for any of the Aegon Companies' claims. These important factual and legal distinctions between the Aegon Companies' annuity-contract-based claims against the Investors, on the one hand, and their fraud- and broker contract-based claims against

[5] This is true even though Mr. Caramadre and his colleagues and/or the Brokers may ultimately seek review of this Court's holding that the incontestability clauses have no bearing on their liability. Unlike the Investors, they do not seek protection under the Incontestability Clauses based on their status as contracting parties because there is no dispute that they were not parties to the relevant annuity contracts.

the remaining Defendants, on the other hand, weigh in favor of granting the Investors' request for a Rule 54(b) order.[6]

Finally, the Investors' (and the Aegon Companies') interests in avoiding any further "delay" in resolving their dispute also warrants a Rule 54(b) order. See Chalmers, 521 F.2d at 364 (courts weight "miscellaneous" factors including "delay" in making the Rule 54(b) assessment).

CONCLUSION

For the foregoing reasons, the Investors request a Rule 54(b) order directing entry of final judgment in their favor with respect to the Aegon Civil Actions.

Respectfully submitted,

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[6] Moreover, while the Aegon Companies did raise allegations of fraud against two of the Investors (ADM and DK, but not Conreal and Ms. Rodrigues), the legal principles of fraud are not even implicated with respect to those Investors because of this Court's ruling that the incontestability clauses bar the fraud-based claims against them.

CERTIFICATION

I hereby certify that on July 6, 2010, 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.