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., 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

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

DEFENDANTS' CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTIONS TO DISMISS AND REQUESTS FOR RECONSIDERATION

I. INTRODUCTION

Defendants ADM Associates, LLC ("ADM"), Estella Rodrigues (Ms. Rodrigues),[1] Joseph Caramadre ("Mr. Caramadre"), Raymour Radhakrishnan ("Mr. Radhakrishnan"), Estate Planning Resources, Inc. ("EPR"),[2] Edward Hanrahan (Mr. Hanrahan), and Harrison Condit ("Mr. Condit")[3] (collectively, "Defendants") in the above-captioned matters (collectively, the

[1] Defendants ADM and Ms. Rodrigues, as well as the other owner-investors of the annuity contracts in question in the above-captioned actions (hereinafter collectively, "the Annuity Contracts"), are referred to collectively herein as "the Owners."

[2] Mr. Caramadre, an attorney, his associate, Mr. Radhakrishnan, and Mr. Caramadre's company, EPR, are related parties in that (1) they were not parties to the Annuity Contracts in issue, (2) there are no statements, signatures or any other markings of any kind whatsoever on the relevant Annuity Contracts or applications for Annuity Contracts that are attributed to them, and (3) they are not alleged to have had any business relationship whatsoever with the Plaintiffs. Although the Court referred to these individuals as "Sponsors" of the Annuity Contracts in its *Opinion and Order* of June 2, 2010 (attached hereto as ***Exhibit A***), at 7, we refer to these defendants herein collectively as "the Caramadre Defendants."

[3] Mr. Hanrahan and Mr. Condit are referred to collectively herein as "the Agents," the term the Court used in the *Opinion and Order* (in Defendants' earlier-filed papers, including the memoranda attached hereto, the term "Independent Representatives" is used to refer to these same defendants). These individuals (as well as co-Defendant Edward L. Maggiacomo, Jr.) were the agents of the Owners, representing the Owners through the

"Aegon Civil Actions")[4] hereby file this Consolidated Memorandum of Law in Support of Defendants' Motions to Dismiss and Requests for Reconsideration, seeking dismissal of all counts pending against them in the Aegon Civil Actions.

Defendants hereby incorporate by cross-reference all of their respective arguments which they previously raised in their various memoranda in support of the earlier-filed motions to dismiss the Aegon Civil Actions. For efficiency's sake, Defendants also incorporate the introductory material and the background sections of those memoranda. For the most thoroughly developed introduction to the facts and issues of this case and Defendants' previously articulated arguments in support of dismissal, the Defendants respectfully refer the Court to the Court's *Opinion and Order* (filed June 2, 2010; copy attached hereto as ***Exhibit A***) and *Defendants' Consolidated Reply Mem. of Law in Further Supp. of their Mots. to Dismiss* (filed February 22, 2010; copy attached hereto as ***Exhibit B***).

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application process for the Annuity Contracts. As discussed further below, the Agents had no duties of disclosure to the Plaintiffs and made no affirmative misrepresentations to the Plaintiffs.

[4] Defendants use the term "Aegon" because WRL and Transamerica Life Insurance Company (hereinafter collectively, "Aegon"), the plaintiff-companies that brought these civil actions are both part of the "Aegon Americas" set of companies. See http://www.aegonins.com/.

In addition to the categories of defendants described in footnotes 1-3, *supra*, other relevant parties, individuals and entities referenced in the Plaintiffs' pleadings in the Aegon Civil Actions include:

1. Charles Buckman, Jason Veveiros, and Patrick Garvey, annuitants who Aegon names as defendants but against whom Aegon brings no claims and seeks no damages, and a number of other annuitants, referenced in Aegon's various complaints but not named as defendants. These individuals are referred to collectively hereinafter as "the Annuitants," the term the Court used in its *Opinion and Order*.

2. Defendants Lifemark Securities Corp., The Leaders Group, Inc., and Fortune Financial Services, Inc., the Broker-Dealer companies for the relevant Annuity Contracts. (The Court used the term "Annuity brokerage companies" to refer to this category of Defendants in its *Opinion and Order*).

On a related note, Plaintiff Western Reserve Life Assurance Co. of Ohio ("WRL") removed Conreal LLC ("Conreal") (as well as annuitant Anthony Pitocco) as a named defendant when it amended its complaint in C.A. No. 09-470/S. Conreal was a named defendant in WRL's original complaint in C.A. No. 09-470S but, following the Court's dismissal of all counts against Conreal in the Court's June 2, 2010 order, WRL no longer includes Conreal as a defendant. In C.A. No. 09-502, WRL has included Natco Service Corp. as a named defendant but has raised no claims, and does not seek damages, against this company.

The Defendants now move to dismiss Aegon's newly amended complaints (hereinafter referred to collectively as the "Amended Complaints"), as well as the still-pending unamended complaints in C.A. Nos. 09-472/S and 09-502/S, on the basis of both new arguments and arguments which they previously raised.[5] As an initial matter, the Defendants respectfully request that the Court reaffirm its dismissal, and its grounds for dismissal, of various claims brought against them in the initial complaints but which Aegon still reiterates in the Amended Complaints,[6] for the reasons specified in the Court's *Opinion and Order*. ***Exhibit C***, attached hereto, is a chart summarizing the Court's disposition in the *Opinion and Order* of the various claims then pending.[7]

Beyond this, the Defendants suggest, first, that the Court should dismiss all of the fraud-in-the-inducement and other fraud-based claims against the Caramadre Defendants because they are not alleged to have had any relationship, dealings, or communications whatsoever with Aegon, nor did they have any independent legal duty to make any of the disclosures in question. Moreover, because the Caramadre Defendants are not alleged to have had any business

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[5] The Court may reconsider its earlier rulings at its discretion because the law of the case doctrine is no obstacle to the Court's reexamination of its previous decision regarding the viability of Plaintiffs' fraud claims. "Interlocutory orders, including denials of motions to dismiss, remain open to trial court reconsideration, and do not constitute the law of the case." *Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 42 (1st Cir. 1994). Lower courts may review prior interlocutory orders "as long as that review is not an abuse of discretion." *Harlow v. Children's Hosp.*, 432 F.3d 50, 55 (1st Cir. 2005); *see Sanchez v. Triple-S Mgmt., Corp.*, 492 F.3d 1, 12 n.12 (1st Cir. 2007) (upholding trial court's decision to revisit at summary judgment stage whether plaintiffs pleaded fraud with sufficient particularity; even though court had previously partially denied defendants' motion to dismiss on the same basis).

[6] In circulating their proposed amended complaints for review to the parties in these actions, Aegon explained that it left the dismissed allegations in the newly amended complaints for the sole purpose of preserving its appellate rights.

[7] In its *Opinion and Order*, the Court dismissed the fraud-based claims with respect to the Owners because of the Incontestability Clauses in the Annuity Contracts. ***Exhibit A*** at 19-25. The Court also dismissed the rescission and declaratory judgment claims, dependent as they were upon an insurable-interest requirement, because under Rhode Island law there is no insurable interest requirement for annuity contracts. *Id.* at 19. The Court also dismissed Aegon's negligence counts and the claims of civil liability for crimes and offenses, concluding that the economic loss doctrine bars the former and the latter claims cannot stand because the relevant statute R.I. Gen. Laws § 11-41-29(b)(1) does not apply to applications for annuities but, rather, exclusively to applications for insurance. *Id.* at 40-41 and 45-47.

relationship whatsoever with Aegon, they cannot possibly have committed fraud by failing to disclose alleged material facts to Aegon.[8]

Second, much like the Caramadre Defendants, the Agents, who represented the *Owners* in the application process, did not have a business relationship or duty to Aegon that would have required them to disclose material facts about which Aegon did not inquire. The Agents also made no material misrepresentations on the applications for the annuities (the annuity applications for the Aegon Civil Actions are collectively referred to hereinafter as the "Annuity Applications").[9] *See Carolina Casualty Insurance Company v. The Cummings Agency, Inc.*, 110 F.3d 1 (1st Cir. 1997) (affirming dismissal of an insurer's claims against an insurance broker for non-disclosure of information material to the insured risk because the broker had no duty to disclose the information in question to the insurer).

Third, the Defendants respectfully request that the Court reconsider Defendants' argument that Aegon's fraudulent-inducement-based claims are insufficient as a matter of law because purchasers of annuity contracts, their attorneys, and their agents have no duty of disclosure in an arms-length transaction of this sort involving the insurers' contracts-of-adhesion. Closely related to this point, the Defendants respectfully request that the Court reconsider their argument that Aegon waived the right to bring any such claims because Aegon's Annuity Applications did not even inquire about the matters it now claims Defendants should have disclosed.

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[8] The Defendants touched on this issue briefly in their *Consolidated Reply Memorandum*, *see* ***Exhibit A*** at 36, n. 34, but the Court did not address the issue in the *Opinion and Order*.

[9] For the reasons discussed infra, Part III(B) (some of which the Court addressed in the *Opinion and Order*, others it did not address), the Defendants respectfully ask the Court to reconsider its holdings on these points.

Fourth, the Court should dismiss Aegon's newly articulated claims of fraud-in-factum, as well as its rescission and declaratory judgment counts that are dependent upon those allegations, for several reasons. First, Aegon fails to allege the elements of fraud-in-factum even with respect to the Annuitants. The mere allegation that Mr. Radhakrishnan "failed to explain" the nuances of the Annuity Contracts to one or more Annuitants does not establish fraud-in-factum as to any Defendant. More to the point, Aegon utterly fails to allege the elements of fraud-in-factum as applied to itself; manifestly, Aegon understood the terms of its own contracts-of-adhesion, and the precise knowledge-level of the Annuitants (who were not even contracting parties) regarding how those contracts worked had no bearing on the rights or obligations that Aegon possessed under the Annuity Contracts.

In addition, Aegon fails to state their fraud-in-factum claims with sufficient particularity as required by Fed. R. Civ. P. 9(b). Most egregiously, in the three actions in which Aegon suggests implausibly that Defendants engaged in some type of group forgery in obtaining the Annuitants' signatures on the applications, C.A. Nos. 09-549/S, 09-564/S, and 09-470/S, it does so only in the factual *alternative*. The Court should dismiss these claims because Rule 9(b) does not allow a plaintiff to plead alternative factual allegations to support a fraud claim. Moreover, in two of the actions (C.A. Nos. 09-549/S and 09-564/S), Aegon attempts to bring fraud-in-factum claims based on forgery and its alternative fraud-in-factum theory while alleging no specifics whatsoever, even in the alternative, as to either set of fraud-in-factum allegations.[10] Such general allegations also fail to meet the Rule 9(b) standard.

[10] In C.A. No. 09-470/S, Aegon attached an affidavit allegedly provided by the Annuitant, Anthony Pitocco, alleging that the signature on the Annuity Application was not his own. Even in that action, however, Aegon pleads forgery only in the factual alternative. (This is not surprising, given that Mr. Pitocco has subsequently disavowed the authenticity of his purported signature on the affidavit that Aegon presents as an exhibit.). Again, this does not satisfy the standards of Rule 9(b). Moreover, Aegon fails to allege that any specific defendant forged any Annuitant's signature on any application. Rather, using the passive voice, Aegon at best implausibly suggests that Defendants as a group somehow forged Pitocco's signature.

Finally, because the fraud-based claims are invalid, the Court should dismiss the unjust enrichment and civil conspiracy claims, which are derivative.

II. BACKGROUND

By way of additional procedural background beyond that recited in the Defendants' previous submissions, Defendants state as follows:

A. The *Opinion and Order.*

On June 2, 2010, this Court entered an Order dismissing some, but not all, of the claims in the Aegon Civil Actions. *See* ***Exhibit A***; *see* ***Exhibit C***; *see*, *supra*, n. 7. In holding that the Incontestability Clauses in the Annuity Contracts barred Aegon's rescission and fraud-based claims against the Owners, *id.* at 19-25, the Court suggested (taking "no position" on the issue) that Aegon might be able to seek rescission of the policies and/or bring fraud-based claims against some of the Owners (specifically, ADM, DK, Conreal, and Ms. Rodrigues) if it amended its complaints to allege forgery or fraud-in-factum. *Id.* at 41, n. 16.

B. Aegon's Amendments.

On or about September 7, 2010, Aegon moved to amend its complaints in five of the seven Aegon Civil Actions.[11] The Defendants assented to the amendment after securing an agreement that they could, and would, move to dismiss the Aegon Civil Actions following the amendments.[12]

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[11] After conferring with counsel for Aegon, Defendants acknowledge at the outset that Aegon's reference to Mr. Hanrahan in ¶ 55 of the Second Amended Complaint in C.A. No. 09-470/S was a typographical error and that Aegon intended to reference Mr. Condit instead of Mr. Hanrahan. Without demanding further amendment or an errata sheet, Defendants treat that paragraph as though it refers to Mr. Condit.

[12] Though Aegon did not amend two of the seven complaints, specifically, C.A. Nos. 09-472/S and 09-502, the Defendants in those actions renew their motions to dismiss those complaints as well. The same principles advanced herein apply with equal force to the remaining counts in those complaints which, as a matter of law, must be dismissed if the newly amended complaints are dismissed.

The Amended Complaints accomplish the following changes relevant to the Defendants' motions.

1. Fraudulent Inducement.

In four of the Amended Complaints, Aegon re-captions its fraud counts from its earlier complaints as fraudulent inducement claims, and in the fifth newly amended complaint, for C.A. No. 09-470S, Aegon adds the Caramadre Defendants to the re-captioned claim. *See Second Am. Compl.*, C.A. No. 09-470/S at ¶¶ 47-52.

2. Fraud-in-factum.

In each of the five newly amended Aegon Civil Actions, Aegon adds allegations of fraud-in-factum.[13]

For two of the newly amended complaints, Aegon includes fraud-in-factum allegations within both their rescission and declaratory judgment claims and their newly added fraud-in-factum claims. *See Second Am. Compl.*, C.A. No. 09-471S, ¶¶ 50-54, 59, and 66-67; *Second Am. Compl.*, C.A. No. 09-473/S, ¶¶ 51-55, 60, and 67-68.

For the remaining three newly amended complaints, in which Aegon does not bring rescission or declaratory judgment ("DJ") counts against any of the Defendants, Aegon alleges fraud-in-factum only under the fraud-in-factum claims themselves. *See Second Am. Compl.*, C.A. No. 09-470/S, ¶¶ 40-46; *Am. Compl.*, 09-549/S, ¶¶ 130-135; *Am. Compl.*, 09-564, ¶¶ 85-90.

[13] The pending complaints in the remaining two actions, C.A. No. 09-472/S and 09-502/S, do not include allegations of fraud in the factum.

Based on these fraud-in-factum allegations, Aegon's newly amended complaints purport to reinstate as a defendant annuity owner Ms. Rodrigues with respect to the rescission/DJ counts only (*see Second Am. Compl.*, 09-471/S).[14]

The substance of the fraud-in-factum allegations are summarized *infra*, Part III(E).

3. Forgery alleged in the alternative.

In C.A. Nos. 09-470/S, 09-549/S and 09-564/S, but not in the other Aegon Civil Actions, Aegon also includes forgery allegations as part of its fraud-in-factum claims. Significantly, in each of these three actions, Aegon pleads forgery *only in the factual alternative* while also alleging a different and factually inconsistent basis for fraud-in-factum. *See Second Amend. Compl.*, C.A. No. 09-470/S ¶ 41; *Amend. Compl.*, C.A. No. 09-549/S, ¶ 130; *Amend. Compl.*, C.A. No. 09-564/S, ¶ 85. This demonstrates that Aegon's alternative allegations represent nothing more than its conclusory and implausible speculation as to both theories of fraud-in-factum. Rule 9(b) does not allow such speculative pleading of the underlying facts in a fraud-based complaint. *See infra*, Part III(E)(2).

Equally notable, in two of these three actions (C.A. Nos. 09-549/S and 09-564/S, the actions involving multiple annuities, hereinafter the "Multiple Annuity Actions") Aegon provides no supporting detail for its fraud-in-factum allegations. It simply avers its conclusory allegations in the speculative alternative, and then applies them generically and across-the-board to all of the multiple annuities at issue on those cases. *See Am. Compl.*, C.A. No. 09-549/S, ¶¶ 24, 37, 40, 53, 56, 69, 72, 85, 88, 101, 104 and 130-135; *Am. Compl.*, C.A. No. 09-564/S, ¶¶ 24,

[14] The amendments in C.A. No. 09-473/S purport to reinstate annuity owner and co-Defendant DK LLC with respect to both the rescission/DJ and the fraud-based counts (*see Second Am. Compl.*, 09-473/S). Aegon did not seek to amend the complaint in C.A. No. 09-472 to bring a rescission/DJ or any fraud-based claim against ADM, the owner with respect to the annuity at issue in that case. Thus, all counts against ADM have been dismissed and no new claims against ADM have been asserted. As noted earlier, *see supra*, n. 4, Aegon also has removed another owner, Conreal, from its newly amended complaint in C.A. No. 09-470/S.

38, 41, 55, 58, 72, 78, and 85-89.[15] Rule 9(b) does not allow this. *See infra,* Part III(E)(2). Nor is it even remotely plausible that all Defendants somehow engaged in a group forgery of the Annuitants' signatures.

III. WHY THE COURT SHOULD DISMISS AEGON'S AMENDED COMPLAINTS

A. THE COURT SHOULD DISMISS AEGON'S CLAIMS AGAINST THE CARAMADRE DEFENDANTS BECAUSE THEY HAD NO BUSINESS OR OTHER RELATIONSHIP WHATSOEVER WITH AEGON AND, THUS, NO DUTY TO DISCLOSE THE INFORMATION AT ISSUE, NO MATTER HOW MATERIAL SUCH INFORMATION MIGHT BE.

In the *Opinion and Order*, the Court granted the Defendants' motions to dismiss the fraudulent inducement claims (then captioned as "fraud" claims) with respect to the Owners, reasoning that the Incontestability Clauses in the Annuity Contracts barred such claims against the Owners. ***Exhibit A*** at 25. Irrespective of the applicability *vel non* of an incontestability clause to third parties, if prospective owners of the annuities themselves are under no duty to volunteer information to the issuer of the annuity merely because the issuer might deem such information to be material in deciding whether to issue the annuity, it naturally follows that their legal advisers and other strangers to the Annuity Contracts, such as the Caramadre Defendants, cannot be liable for fraud where the relevant annuity applications contain no statements attributable to them and they had no business relationship whatsoever to the party now claiming fraud. In short, the Caramadre Defendants had no duty to disclose anything to Aegon – no

[15] Other amendments include the addition of EPR to the unjust enrichment and negligence claims in C.A. Nos. 09-471/S and 09-549/S. The Court should dismiss the newly added negligence claims because they are identical to the negligence claims that the Court previously dismissed based on the economic loss doctrine. *See supra*, n. 7. As detailed below, Part III(F), the unjust enrichment claims are derivative and must fall together with the underlying claims. Finally, it should be noted that Aegon has provided no factual allegations to support its newly added assertion in these same two actions that co-Defendant Edward L. Maggiacomo was, in addition to being an agent for the broker, also an "agent" of EPR. *Second Am. Compl.* 09-471/S ¶ 34; *Am. Compl.* 09-549/S ¶¶ 31, 47, 63, 79, 95 and 111. This is no surprise since Aegon's assertion, which fails to meet the pleading standards of Rule 9(b), is false.

matter how material such information may have been to Aegon – because they are not alleged to have had any relationship or dealings with Aegon on which to predicate such a duty.

Simply put, the Caramadre Defendants cannot be liable for fraudulent inducement – notwithstanding the asserted materiality of the undisclosed information – because they induced no action whatsoever on the part of Aegon, given that (1) the insurance applications nowhere attribute any statements to them (nor does Aegon allege that they made any statements on the annuity applications), and, (2) these parties cannot possibly be liable for fraudulent *non*-disclosures because they had absolutely no business or other relationship with Aegon on which to predicate such a disclosure duty. Whatever relationship the Caramadre Defendants may have had to the annuity owners – lawyer, advisor, "sponsor," or éminence grise – it is insufficient as a matter of law to create a disclosure duty to a third party, such as Aegon with whom (according to the complaints) they had no relationship whatsoever and with whom they had no communications at all concerning the annuities.[16] *See Storch v. Syracuse Univ.*, 165 Misc.2d 621, 628 (N.Y. Sup. Ct. 1995) ("[P]laintiffs have . . . failed to demonstrate that the defendants owed them any sort of duty. Defendants have absolutely no relationship at all, fiduciary or otherwise, with the plaintiffs, and there is ordinarily no duty to disclose information absent such a relationship."); *Magna Bank v. Jameson*, 604 N.E.2d 541, 544 (Ill. App. Ct. 1992) ("[T]here is no duty to speak absent a fiduciary or other legal relationship between the parties."); *Saslow v. Novick*, 19 Misc. 2d 475, 476 (N.Y. Sup. Ct. 1959) ("[T]he duty to disclose only arises when there is a confidential or fiduciary relationship between the parties.").

[16] Having advised his clients with respect to the potential legal and financial advantages of investing in the annuity contracts presumably at issue, it is passing strange to contemplate the possibility that Mr. Caramadre would somehow have the obligation to disclose to third parties such as Aegon information about his clients' investments that would potentially undermine the very advantages that were the subject of his legal representation.

Rhode Island law on the duty to disclose similarly presupposes an underlying business relationship between the plaintiff and the defendants. *See, e.g., Cardiovascular & Thoracic Assoc., Inc. v. Fingleton*, 1994 R.I. Super. LEXIS 26, *7 (R.I. Super. April 20, 1994) ("[F]raud can be established by silence where the *business relationship* of the parties is such as to create a duty to disclose certain facts." (emphasis added)).

As the Sixth Circuit has explained, a claim of fraudulent nondisclosure

> *applies between parties to a business transaction. We are aware of no case, nor has any been cited, where a party has been held liable for fraudulent nondisclosure that had no direct dealings with the plaintiff.*

Moore v. Fenex, Inc., 809 F.2d 297, 303 (6th Cir. 1987).[17]

Here, with regard to the annuities at issue, the Caramadre Defendants and Aegon are complete strangers – no communications, no relationship, and no dealings whatsoever on which to base any disclosure duty. Thus, the Court should dismiss all claims against these Defendants for failure to state a claim on which relief may be granted.

B. THE COURT SHOULD DISMISS THE CLAIMS AGAINST THE AGENTS BECAUSE THEY OWED NO DUTY TO DISCLOSE AND THEY MADE NO MATERIAL MISREPRESENTATIONS.

For similar reasons, the Defendants respectfully request reconsideration of the adequacy of Aegon's fraudulent inducement allegations brought against the Agents.

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[17] Analogous authority from federal securities law further supports this conclusion. In the recent case of *Pacific Investment Management Co. LLC v. Mayer Brown LLP*, 503 F.3d 144, 148, 150 (2d Cir. 2010), the Second Circuit, following United States Supreme Court precedent, rejected a claim of "scheme liability" under the Securities and Exchange Act, 15 U.S.C. 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, the leading federal securities fraud provisions. The Second Circuit held that a private party may not bring an action under these sections for aiding and abetting fraud, *id.* at 150, and, moreover, "secondary actors" such as (in that case) a law firm and its partner that prepared the documents containing the allegedly fraudulent statements, do not have primary liability for fraud unless the documents themselves *attributed* the fraudulent statements to the secondary actors. *See Pacific Investment*, 503 F.3d at 148, 150. Thus, the Second Circuit affirmed the District Court's dismissal of fraud claims against the law firm of Mayer Brown LLP and its partner, even though they "allegedly participated in the creation of the false statements contained in each of the documents." *Id.* at 149. Here, the facts are more extreme. Aegon does not even allege that the Caramadre Defendants drafted the annuity applications, let alone that the Annuity Applications attribute any statements to them. A cursory review of the Annuity Applications reveals that they do not.

1. The Agents had no duty to disclose.

First, the Agents had no duty to disclose the allegedly omitted information (such as, most prominently, the Annuitants' alleged poor health) because the Agents were agents of the *Owners*, *not* agents of Aegon. In the *Opinion and Order*, the Court did not address this argument, which the Defendants developed in the earlier proceedings. Defendants respectfully request that the Court consider this argument. To avoid unnecessary repetition, the Defendants respectfully refer the Court to ***Exhibit B*** at 29-31 and to *Memo. in Supp. of Mot. To Dismiss*, C.A. No. 09-472/S (filed on November 13, 2009)(attached hereto as ***Exhibit D***), at 18-21,[18] for their reasons on this point and the substantial authorities supporting the proposition that an Agent representing the customer or investor holds no duty to disclose to an insurance company concerning matters about which the insurance company does not inquire. *See also, Carolina Casualty Insurance Company v. The Cummings Agency,* 110 F.2d 1, 2 (1st Cir. 1997) (insurance brokers have no duty to insurers to disclose facts material to the risk insured where the application is silent about such matters).

In addition to referring the Court respectfully to these previously cited authorities and arguments, the Defendants write separately here to respond to the case law which Aegon submitted to the Court on the eve of the Court's hearing on the initial Motions to Dismiss the Aegon Civil Actions. Specifically, in a letter submitted to the Court on March 9, 2010, Aegon cited Florida case law which it viewed as supporting the position that the Agents had duties to disclose to Aegon even if they represented the Owners, not Aegon. *See* ***Exhibit E***, attached. The Florida case and the cases upon which it relies, however, are distinguishable.

[18] Because there is substantial overlap between the analysis contained in the initial memorandum in support filed in C.A. No. 09-472/S and the initial memoranda in the other Aegon Civil Actions, the Defendants attach, for the Court's convenience, only this opening memorandum to this filing.

In each of the cases, the representative (or broker-dealer company) made either a *false statement* or an *incomplete statement or disclosure that was rendered misleading by the nature of the material omitted.* Moreover, it also appears that in these cases the relevant applications *asked* about the matters at issue. These cases do not support the idea that a broker representing an applicant has a duty to disclose in cases like these, in which (1) the applications posed no relevant inquiries, and (2) the agents made no false or incomplete statements.

In the Florida case itself, *Liberty Surplus Inc. Corp. v. First Indemnity Ins. Svcs., Inc.*, 31 So.3d 852, 2010 WL 711712 (Fla. 4th DCA March 3, 2010), the court's summary of the facts suggests that on the original insurance application for malpractice liability insurance, the insurance company asked for the disclosure of claims "initiated within the five-year period prior" to the application. The broker company disclosed only some of the claims, but failed to disclose others. In this circumstance, the court rejected the broker dealer's argument that it could not have committed negligent misrepresentation because the insured alleged "only a nondisclosure of information." *Id.* at 857. In doing so, however, the court explained that this type of "failure [to disclose] is tantamount to supplying false information, because the submission of only three claims when there were actually fourteen is a misrepresentation of [the insured's] claim history." *Id.*

In other words, the broker made a partial, and, therefore a misleading disclosure. Here, in contrast, Aegon alleges no such partial disclosure with respect to the facts at issue and it made no relevant inquiries on the Annuity Applications. Recall once more that the federal securities law standard for fraud similarly requires proof of either (1) a false statement, or (2) an affirmative statement that is true as far as it goes but rendered misleading because of the omission of other information related to the *affirmative* statement. *See* ***Exhibit D*** at 11, n.4.

A similar pattern appears in the cases upon which the Florida case relies:

1. In *St. Paul Surplus Lines Ins. Co. v. Feingold & Feingold*, 693 N.E.2d 669 (Mass. 1998), the broker could be liable for negligent misrepresentation for submitting an application for liquor liability insurance that contained false statements, including a false statement that there were liquor sales of only $180,000 the previous year, when in fact the broker knew there had been liquor sales of $341,000; the application also contained false statements regarding closing hours, the lack of entertainment, a TV, or dancing on the premises.

2. In *Burlington Ins. Co. v. Okie Dokie, Inc.*, 329 F. Supp. 2d 45, 46 (D.D.C. 2004), the application falsely described the business as a restaurant, when in fact it was a nightclub.

3. In *Century Surety Co. v. Crosby Ins. Co.*, 21 Cal. Rptr. 3d 115 (Cal. Ct. App. 2004), the application for construction insurance contained false information regarding loss history.

In sum, the cases cited by Aegon further support the Defendants' position that, in circumstances where there is no false or partial misstatement in the applications, a party to an insurance contract (or its agent) has no duty to disclose (*see* Part III(C) (below)).[19]

[19] Aegon does not remedy this defect by suggesting in the newly amended complaints (though not in the other complaints) that there was an indirect "relationship" between the Agents and Aegon by virtue of the fact that the Agents were affiliated with authorized brokers. *See, e.g., Second Am. Compl.* 09-473/S ¶ 55 (referring to "the nature of Mr. Hanrahan's and Leaders Group's relationship with [WRL]"); *Am. Compl.* 09-470/S ¶ 45; *Am. Compl.* 09-564/S ¶ 89. There is always a "relationship" between an insurance company and its authorized agents and brokers; yet, as discussed above, the agents and the brokers with whom insurance companies choose to deal have no duty to disclose.

Moreover, even if the Agents did have a duty to disclose, Aegon may not impose that duty on the Caramadre Defendants on a civil conspiracy or any other theory because Aegon nowhere alleges, even at a general level, that these defendants *knew* that the Agents' conduct violated any duty owed to Aegon. *See Kurker v. Hill*, 689 N.E.2d 833, 837 (Mass. App. 1998) (citing Restatement (Second) of Torts § 876(b)(1977) (person may be liable in tort if he "knows that the . . . conduct [of another person] constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself"). Indeed, as non-parties to any alleged asserted relationship between the Agents and Aegon, how could these Defendants have possessed any such knowledge?

2. The Agents made no material misrepresentations.

As previously argued, the Agents made no material misrepresentations on the Annuity Applications. In its *Opinion and Order*, the Court concluded that Aegon sufficiently crossed the "materiality threshold" by alleging that "with respect to the agents, the fact that they were not the agents who sold the policies, in contradiction of representations on the applications that they brokered the annuity sales and deemed them appropriate." ***Exhibit A*** at 35.

The Defendants respectfully ask the Court to reconsider this conclusion. There was no representation in the applications that the Agents sold the policies. Indeed, the language on the Annuity Applications is to the effect that the investments were "suitable" for the Owners, not that the Agents sold the policies. Moreover, such language was plainly included for the benefit of the Owners and not for the benefit of Aegon. Thus, the Agents' signatures underneath these statements provides no basis for Plaintiffs to bring their fraudulent inducement claims. *See Carolina Casualty Insurance Company*, 110 F.2d at 2 ("We ask a single question. If the [agent] is to be taken as making a representation, why is not this [the application] the place to ask him to make it? The implication speaks loudly.") The suitability language on the applications cannot form the basis of Aegon's fraud claims because nothing it has alleged suggests that the annuity was unsuitable for the owners. And because the Annuity Applications contain no further language bearing on the Agents' roles in the transactions, Aegon can point to no statement supporting its non-disclosure claims, much less one that could plausibly support a fraud claim.

C. EVEN ASSUMING MATERIALITY OF THE ALLEGED OMISSIONS, THE COURT SHOULD DISMISS THE FRAUDULENT INDUCEMENT CLAIMS BECAUSE THERE WAS NO DUTY TO DISCLOSE.

More generally, with respect to all categories of defendants, the Defendants respectfully

request that the Court reconsider its holdings that the Defendants may have had a "duty to speak" because several "fragments" of allegedly withheld information were potentially "material" to Aegon. ***Exhibit A*** at 35. Defendants wish to clarify, at the outset, that it was not their intention, in the earlier proceedings, to rest their "no duty to disclose" argument on a finding that the alleged omissions were immaterial to Aegon's decisions to issue the Annuity Contracts. On the contrary, even if the omitted information was material[20] to Aegon's decisions, there was no duty for Defendants to disclose it.

Simply put, there is no cause of action for "fraud by silence" with respect to undisclosed material facts, absent special circumstances creating a duty to disclose such facts that is not present here. Those circumstances include where there is a fiduciary duty or confidential business relationship between the contacting parties, such as between physicians in a shared medical practice,[21] or where a party actively conceals the facts such that they cannot be discovered upon inquiry (for example, a seller of a home obscuring a basement flooding issue by covering over the floor with a rug).[22] As previously argued, absent such circumstances, there is no general duty between arms-length parties to a business contract to disclose material facts, particularly in the context of an insurer's contract-of-adhesion that a plaintiff-owner is offered on a take-it-or-leave it basis. *See* ***Exhibit D*** at 11-15 and ***Exhibit B*** at 20-28. Moreover, the contracts-of-adhesion at issue here must be construed against Aegon as the drafters of the contracts. *See* ***Exhibit D*** at 8-9.

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[20] "Material" means "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential." *Black's Law Dictionary* 998 (8th ed.).

[21] *See, e.g., Fingleton*, 1994 R.I. Super. LEXIS 26 at *7.

[22] The cases dealing with fraud-by-concealment in the case of realty are numerous. This example is taken from *Posner v. Davis*, 395 N.E.2d 133, 137 (Ill. App. 1979), in which the court explained that silence coupled with *concealing conduct* can constitute fraudulent concealment under such circumstances.

In the *Opinion and Order* the Court relied on *Home Loan and Investment Assoc. v. Paterra*, 255 A.2d 165 (R.I. 1969), for the proposition that "[w]hether or not a duty arises . . . depends upon the 'circumstances of [the] case.'" ***Exhibit A*** at 34. Defendants respectfully submit that the circumstances of *Paterra* are distinguishable, however, and that Rhode Island law does not support a duty to disclose under the circumstances that plaintiffs allege in these cases. In *Home Loan*, unlike the cases at bar, the party accused of fraud "either knew or suspected" that the defrauded party was acting "in reliance on their conversations." *Id.* at 769. In addition, also unlike the situation here, the parties in dispute in *Paterra* were not arms-length bargainers. The family of one of the co-signers on the loan owned and controlled the lender charged with fraud. Given this special relationship "a lending institution owned and controlled by the borrower's family should have explained to the [other co-signer] the kind and type of life insurance it proposed to carry on the loan." *Id.* at 168. In contrast, as the Rhode Island Supreme Court recognized elsewhere in acknowledging the force of a party's argument that there is no duty to disclose when a transaction takes place at arms length, "mere silence in the absence of a duty to speak is not fraudulent" and "even meditated silence may not be fraudulent." *McGinn v. McGinn*, 146 A. 636, 638 (R.I. 1929). In *McGinn* the court further recognized that: "*Many of the 'silence' cases [holding that there was no fraud for failing to disclose material information] rest on the proposition that one party has been remiss in inquiry or has not been led by the other into failure to investigate.*" *Id.* (emphasis added). This suggests strongly that the Rhode Island Supreme Court would not recognize a duty to disclose in an arms-length transaction involving an insurance company that was "remiss in inquiry" regarding the matters in dispute. *See also infra*, Part III(D).

Additional case law from other jurisdictions, not previously cited by Defendants, further supports the Defendants' position on the "no-fraud-by-silence" issue. *See, e.g., Corporate Prop. Assocs. 14, Inc. v. CHR Holding Corp.*, 2008 Del. Ch. LEXIS 45, * 24 (Del. Ch. April. 10, 2008) ("[M]ere silence about facts material to another party is not fraud unless the party who remains silent has a duty to disclose those facts. In other words, there is no duty to speak absent special circumstances. The duty to speak can arise from the relationship between the parties, such as where there is a fiduciary relationship." (citing Restatement (Second) of Torts, § 551, comment a. ("Unless he is under some one of the duties of disclosure stated in Subsection (2), one party to a business transaction is not liable to the other for harm caused by his failure to disclose to the other facts of which he knows the other is ignorant and which he furthers knows the other, if he knew them, would regard as material in determining his course of action in the transaction in question."))); *Corporate Prop. Auchincloss v. Allen*, 211 A.D.2d 417 (N.Y. App. Div. 1st Dep't 1995) ("Plaintiffs . . . had no duty to disclose the existence of ongoing litigation as there was no fiduciary or confidential relationship between the parties."); *Martin v. Martin*, 883 P.2d 673, 682 (Haw. Ct. App. 1994) ("Plaintiffs had no affirmative duty to speak or do anything. Therefore, the fact that they did not say or do anything is not fraud."); *Zanbetiz v. Trans World Airlines, Inc.*, 219 N.E.2d 98, 102-103 (Ill. App. Ct. 1966) (affirming dismissal of fraud count; explaining that "[w]here there is no obligation to speak, silence cannot be termed 'suppression,' and is not fraud. Either party may, therefore, be innocently silent as to matters upon which each may openly exercise his judgment. . . . Failure to volunteer information does not constitute fraud."); *Moore & Moore Drilling Co. v. White*, 345 S.W.2d 550, 555 (Tex. Civ. App. 1961) ("Where not legally bound to volunteer information, a person is not to be charged with fraud in suppressing it. When, therefore, the parties are dealing at arm's length, there being no confidential relationship,

mere silence is not fraud, either actual or constructive." (emphasis added)); *Saslow v. Novick*, 19 Misc. 2d at 476 ("It is settled law that silence or nondisclosure, even of a material fact, is not fraudulent unless there is a duty to speak. The law requires disclosure to be made only when there is a duty to make it, and the duty is not raised by the mere circumstance that the undisclosed fact is material, and is known to the one party, and not to the other, or by the additional circumstance that the party to whom it is known, knows that the other party is acting in ignorance of it. Clearly, then, the duty to disclose only arises when there is a confidential or fiduciary relationship between the parties." (internal quotations and citations omitted)); *see also* add'l cases cited *infra*, part III(A).

Although the Court cited and relied upon a set of distinguishable cases in which contracting parties were held liable for failures to disclose on insurance applications, ***Exhibit A*** at 31-32,[23] Defendants urge the Court to reconsider its holding on this issue given the principles and authorities just discussed and the more closely analogous case law from the life insurance / undisclosed illness context. The majority rule in this more analogous context on life insurance applications is that there is no duty (in the absence of inquiry) to disclose health conditions of the measuring life, including terminal illness, and an insurance company may not bring claims, *including fraud claims*, on the basis of any such omissions. *See* ***Exhibit B*** at 20-25.[24] The same logic applies with equal force to the other alleged non-disclosures at issue here.

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[23] Notably, two of the cases which the Court cited involved intervening criminal acts and are distinguishable on that basis. In one case, the insured knew that a crime would soon intervene to trigger coverage. *See Harrison State Bank v. U.S. Fid. & Guar. Co.*, 22 P.2d 1061, 164 (Mont. 1933). In another, the insured's own intent was criminal: the insured planned to commit a crime to tap into coverage, by stealing the insured's assets. *See Sun Ins. Co. of N.Y. v. Hercules Sec. Unlimited, Inc.*, 195 A.D.2d 24, 30 (N.Y. App. Div. 1993)). A third case, a lower-court case from the jurisdiction of New York, involved fire insurance. *Lighton v. Madison-Onondaga Mut. Fire Ins. Co.*, 106 A.2d 892, 892-93 (N.Y. App. Div. 1984).

[24] Citing, among other sources, 42 A.L.R.4th 158 ("Most of the courts which have ruled on this question have held that since the insured has no duty to disclose that he or she is suffering from a terminal illness in this situation, the insurer may not avoid the policy."); *Block v. Voyager Life Insurance Co.*, 303 S.E.2d 742 (Ga. 1983) ("failure to

D. CONSISTENT WITH THIS COURT'S RECENT OPINION IN *NATIONWIDE LIFE INS. CO. V. STEINER*, AEGON WAIVED ITS RIGHT TO BRING ITS FRAUDULENT INDUCEMENT CLAIMS BY FAILING TO INQUIRE ABOUT THE MATTERS IN DISPUTE.

Closely related to this argument, Aegon waived its right to assert fraudulent-inducement-by-omission claims by failing to include any relevant inquiries in the Annuity Applications. Although the Court addressed this argument in the *Opinion and Order*, ***Exhibit A*** at 31-33, the Defendants respectfully request that the Court revisit this issue in light of the authorities just discussed (some of which addressed both "no duty of disclosure" and "inquiry/waiver" issues together), as well as the Court's recent opinion in the related matter of *Nationwide Life Ins. Co. v. Steiner*, C.A. No. 09-235/S. *See Opinion and Order* (filed July 13, 2010; copy attached hereto as ***Exhibit F***).

In *Steiner*, this Court held that, when the insurance company accepted the premiums and issued its annuity contract, it waived its right to terminate the annuity contract based on the investor's failure to answer a question posed on the application regarding the relationship between the investor and the annuitant. *Id.* at 16-20. The insurance company could not avoid its obligations under the annuity contract even if the non-disclosed matter was so material that it created an "altered risk" for the company. *Id.* at 17. Here, Aegon seeks to rescind the Annuity Contracts and challenge them based on fraud even though, unlike in *Steiner*, the Annuity Applications at issue in the Aegon Civil Actions were fully answered. As in *Steiner*, the Court

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supply information when no inquiry is made . . . will not raise a defense of fraud or material misrepresentation"); *Southard v. Occidental Life Ins. Co.*, 142 N.W.2d 844 (Wisc. 1966); *Greensboro Nat'l Life Ins. Co. v. Southside Bank*, 142 S.E.2d 551 (Va. 1965); *Mulvihill v. American Annuity Life Ins. Co.*, 328 N.W.2d 402, 402-03 (Mich. App. 1982) (internal quotation omitted) ("Absent an insurer's request for health information or statement of good health, a prospective insured is under no duty to volunteer it. Accordingly, we hold that plaintiff was under no obligation to disclose any knowledge of the impending death of his wife, the insured. The insurance company did not request the information, and plaintiff did not have the duty to volunteer it. If defendant wished to make a duty to disclose knowledge of terminal illnesses a condition of the policy, it should have included such a provision in the policy."); *Federated Life Insurance Co. v. Citizens Bank & Trust Co.*, 593 S.W.2d 97, 99 (Ky.App. 1979).

should not allow Aegon to now rescind the Annuity Contracts, or challenge them on grounds of fraud, because Aegon failed to even ask about the matters it now alleges were fraudulently concealed. The Rhode Island Supreme Court's discussion in *McGinn*, 146 A. 636, *see supra*, Part III(C), regarding the law applicable to plaintiffs who were "remiss in inquiry" further supports the conclusion that under Rhode Island law the waiver rule applies to Aegon's claims. For this reason as well, the Defendants respectfully request that the Court dismiss the fraudulent-inducement-by-silence claims.

E. THE COURT SHOULD DISMISS AEGON'S FRAUD-IN-FACTUM CLAIMS.

The Court should also dismiss Aegon's newly articulated fraud-in-factum claims, as well as its other claims, including its rescission and declaratory judgment claims, which purport to derive from fraud-in-factum. Though the arguments for dismissal of the fraud-in-factum claims overlap substantially from case to case, we break down the cases in this section into groups of cases containing similar allegations.[25]

1. Aegon fails to allege the elements of fraud-in-factum in C.A. Nos. 09-471/S and 09-473/S and it also fails to satisfy Rule 9(b)'s specificity requirements.

In two of the Aegon Civil Actions, C.A. Nos. 09-471/S and 09-473/S, Aegon asserts essentially identical allegations of fraud-in-factum. Alleging that a sub-set of the Defendants

[25] The Incontestability Clauses in the Annuity Contracts also bar the Plaintiffs' fraud-in-factum claims. Although the Court suggested in the *Opinion and Order*, ***Exhibit A*** at 41, n. 16, that the Incontestability Clauses may not apply in the event of fraud-in-factum, the policies supporting the enforceability of incontestability clauses apply with equal force to fraud-in-factum as to other fraud-based claims. Although incontestability clauses can allow some parties to benefit from knowing and intentional fraud, "the protection of the insured generally is a weightier public policy than the antifraud public policy." 15 Grace McLane Giesel, *Corbin on Contracts* § 88.8 (Rev. ed. 2010). Moreover, to allow Plaintiffs to challenge their contracts again, based upon their newly added allegations of fraud in the factum and forgery, would be contrary to over a century of Rhode Island jurisprudence that has held incontestability clauses to be enforceable despite the predictable assertion of fraud claims by insurers looking for any excuse to avoid payment of claims. *See, e.g.*, *Prudential Insurance Co. v. Tanenbaum*, 167 A. 147, 150 (R.I. 1933); *Mohr v. Prudential Ins. Co.*, 78 A. 554 (R.I. 1910); *Murray v. State Mutual Life Ins. Co.*, 48 A. 800 (R.I. 1901).

committed fraud-in-factum with respect to the Annuitants, Aegon attempts to bootstrap those allegations into a fraud-in-factum claim based on its alleged entry into the Annuity Contracts "without knowledge of" their "true character, nature and contents." *See Second Am. Compl.*, C.A. No. 09-471/S, ¶¶ 27, 50, 53-54; *Second Am. Compl.*, C.A. No. 09-473, ¶¶ 26, 51-55. The Court should dismiss Aegon's claims based on these allegations for four separate and independently sufficient reasons.

First, Aegon fails to allege facts, which, if true, would show that any of the Defendants committed fraud-in-factum against the Annuitants. Thus, Aegon alleges, with respect to the Annuitants, that Mr. Radhakrishnan "convinced" the Annuitants to sign the Annuity application in exchange for a payment, that he "did not explain" the Annuity Contracts to the Annuitants, and that the Annuitants "had no knowledge, that [they] would be entering into an annuity contract, how the [Annuities] worked, or what [the Annuitants'] involvement in the Annuit[ies] would be." *Second Am. Compl.*, C.A. No. 09-471/S, ¶ 27; *Second Am. Compl.*, 09-473/S, ¶ 26. Aegon then asserts, based *solely* on these factual allegations, that this conduct constituted fraud-in-factum because the relevant Defendants thereby "conceal[ed] the existence, nature and essential terms of the annuity in order to get [the Annuitants] to sign the application." *Second Am. Compl.*, C.A. No. 09-471/S, ¶ 50; *Second Am. Compl.*, 09-473/S, ¶¶ 51.[26]

Fraud in factum, however, requires a "misrepresentation as to the nature of a writing that a person signs with neither knowledge nor reasonable opportunity to obtain knowledge of its character or essential terms." *R.I. Depositors Econ. Prot. Corp. v. Duguay*, 715 A.2d 1278, 1280 (R.I. 1998) (citing *Black's Law Dictionary* 661 (6th ed. 1990) (citing U.C.C. § 3-305(2))). Here,

[26] Aegon fails to allege, even in the alternative, any alleged group forgery of the Annuitant's signatures in these actions. Rather, the claims rest solely on Mr. Radhakrishnan's asserted failure to explain the contracts to the Annuitants.

however, Aegon has failed to allege that Mr. Radhakrishnan deprived the Annuitants of the "reasonable opportunity to obtain knowledge" of the "character or essential terms" of the Annuity Contracts, *and* Aegon fails to allege that he in any way "misrepresent[ed]" the nature of the writing to the Annuitants. Thus, while Aegon alleges that Mr. Radhakrishnan "did not explain" the terms and conditions of the Annuities, Aegon nowhere alleges that the Annuitants ever asked what the terms of the contract were or that Mr. Radhakrishnan – or any other Defendant – ever refused to explain the terms, ever explained the terms inaccurately, or in any fashion deprived the Annuitants of the chance to review the Annuity Applications, at their discretion, before signing them. Nor does Aegon allege any other facts supporting its contention that the Annuitants somehow lacked the opportunity to review the terms of the annuities further if they had chosen to do so. Because these foundational allegations for their fraud-in-factum claims are insufficient, Aegon's fraud-in-factum claims must fail altogether.[27]

Moreover, the Annuitants were not parties to the Annuity Contracts and therefore had no rights, duties, or obligations – running to or from Aegon – under the contracts.[28] Because the Annuitants' level of understanding of the Annuity Contracts had no bearing on the "true character, nature and contents" of the Annuity Contracts as they applied to Aegon, that consideration cannot form the basis for Aegon's fraud-in-factum claims challenging the Annuity Contracts. Whether the Annuitants were versed in the Annuity Contracts at the level of experienced contract counsel for Aegon or some other insurance company, or whether they

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[27] Indeed, it borders on insulting to suggest that offering the Annuitants payments as compensation for their agreement to sign the Annuity Applications somehow equates to fraudulent concealment of the documents' contents (a "trick" against them), as though the Annuitants were constitutionally incapable of responding to the offered payment in any way other than reflexively to sign.

[28] The following statement that Aegon included near the bottom of the cover page of each and every annuity contract at issue in these actions is about as clear as it gets on this point: *"This is a legal contract between the policyowner and the Company."* *See, e.g.*, C.A. No. 09-502/S, *Complaint* at *Exhibit D* (emphasis added). No mention is made of the annuitant.

simply agreed to sign the Annuity Contracts in exchange for compensation (with no further obligations on their part), the terms of the Annuity Contracts themselves remained unaltered. Those terms were, and remain, the same ones that Aegon drafted when it wrote the contracts, when it sold them to the public, and when it issued them to the Owners in these actions and to a host of other customers in exchange for hefty premium fees and other additional charges.

Furthermore, Aegon, which prepared these contracts of adhesion, clearly had a "reasonable opportunity" to review their terms and conditions. For this reason as well, it has failed to allege the elements of fraud-in-factum.

The heightened pleading requirements of Fed. R. Civ. P Rule 9(b) also support the Defendants' argument that Aegon has failed to plead these fraud-in-factum claims adequately. *See* ***Exhibit D*** at 22-26 (reciting Rule 9(b) standard applicable to all fraud-based claims); *see Rodi v. S. New England Sch. of Law*, 389 F.3d 5, 15 (1st Cir. 2004) (Rule 9(b) requires plaintiffs bringing fraud claims to allege the "who, what, where, and when" of the predicate facts). Boiled down to their essence, Aegon's allegations of fraud-in-factum are based on one, and only one, factual assertion: Mr. Radhakrishan "failed to explain" the annuities to the Annuitants (even though he owed no duty to Aegon to do so). For the reasons just discussed, this allegation, even if true, does not establish fraud-in-factum, and it falls woefully short of the heightened pleading requirements imposed by Rule 9(b).

2. The Court should dismiss the fraud-in-factum claims in C.A. Nos. 94-549/S, 09-564/S, and 09-470/S for the additional reasons that Rule 9(b) does not allow plaintiffs to bring fraud-based claims in the factual alternative and Aegon otherwise fails to plead fraud-in-factum with the requisite specificity.

In the remaining three amended Aegon Civil Actions, Aegon includes fraud-in-factum allegations patterned on the allegations discussed above (albeit at a more general level). *See*

Second Am. Compl., 09-470/S, ¶¶ 23, 41-45; *Am. Compl.*, C.A. No. 09-549/S, ¶¶ 130-135; *Am. Compl.*, C.A. No. 09-564/S, ¶¶ 85-89. To that extent, these allegations fail to state fraud-in-factum for the reasons just discussed.

Furthermore, as noted earlier, in each of these three actions, Aegon also makes additional implausible allegations of Defendants' group forgery of the Annuitants' signatures on the applications. It pleads forgery, however, only in the factual alternative to the fraud-in-factum theory outlined above. *See Amend. Compl.*, C.A. No. 09-549/S, ¶ 130; *Amend. Compl.*, C.A. No. 09-564/S, ¶ 85; *Second Amend. Compl.*, C.A. No. 09-470/S ¶ 41. Specifically, Aegon alleges that the Defendants "either" "conceal[ed]" the annuities' terms at the time of signing "or" that they somehow collectively forged the Annuitants' signatures. *See id.* The alternative, implausible, and self-contradictory character of these allegations of fraud-in-factum demonstrates that Aegon's allegations rest on mere speculation. Rule 9(b) does not allow such speculative pleading of alternative and self-contradictory facts in a fraud-based complaint, *see Vladimir v. Deloitte & Touche LLP*, 1997 U.S. Dist. LEXIS 3823, *24 (S.D.N.Y. March 28, 1997) ("Alternative fact pleading is insufficient to satisfy the requirements of Fed. R. Civ. P. 9(b)."), and for good reason. This restriction on pleading promotes Rule 9(b)'s purpose of "protect[ing] a defendant's reputation from harm caused by meritless fraud claims," *Simonet v. SmithKlineBeecham Corp.*, 506 F. Supp. 2d 77, 90 (D.R.I. 2007) (citing *U.S. ex rel Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 226 (1st Cir. 2004)), by requiring plaintiffs to settle on their version of the "facts" before they file suit.

Equally important, in the two Multiple Annuities Actions (C.A. Nos. 09-549/S and 09-564/S), Aegon provides no supporting detail for its forgery allegations or its alternative fraud-in-factum allegations. Rather, it simply makes both sets of allegations generically and at the

conclusory level and then applies them across-the-board to all of the multiple annuities at issue on those cases. *See Am. Compl.*, C.A. No. 09-549/S, ¶¶ 24, 37, 40, 53, 56, 69, 72, 85, 88, 101, 104 and 130-135; *Am. Compl.*, C.A. No. 09-564/S, ¶¶ 24, 38, 41, 55, 58, 72, 78, and 85-89.

For two separate reasons, Aegon's lack of specificity is fatal to its fraud-in-factum claims in the Multiple Annuities Actions. First, it shows, even more strongly as to these two cases, that Aegon has no factual basis for bringing any fraud-in-factum claims – let alone, its scurrilous accusations of forgery. Instead, Aegon is merely modeling its complaints on some of the other complaints that it has filed, in hopes the Court will overlook their total lack of a factual predicate and let them proceed with an open-ended fishing expedition regarding these annuities.

Furthermore, the generality of pleadings in the Multiple Annuities Actions fails to meet the familiar Rule 9(b) standard, requiring plaintiffs to allege the "who, what, where, and when" of their fraud-based claims. *Rodi*, 389 F.3d at 15. Indeed, in the Multiple Annuities Actions, unlike in the Aegon Civil Actions discussed above, Part III(E)(1), Aegon fails even to make the minimal (and insufficient) allegation that Mr. Radhakrishnan "failed to explain" how the annuity contracts worked to the Annuitants before the Annuitants signed. Moreover, with respect to their alternative theory of forgery, Aegon fails to allege the existence of an affidavit or any other evidentiary or factual basis of support.[29] This plainly does not satisfy Rule 9(b)'s requirements.[30]

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[29] *See infra*, n. 10, discussing the allegations of forgery in C.A. No. 09-470/S and Aegon's problematic reliance on Mr. Pitocco's disavowed annuitant affidavit alleging that the signature on the annuity application was not his own. Note, once more, that even the forgery allegations in that action are insufficient because Aegon alleges them only in the alternative.

[30] It is evident from Aegon's self-contradictory allegations that it lacked even the minimal factual basis to make these allegations "upon information and belief." Aegon does not, apparently, believe either version of its facts because it alleges facts that contradict one another. In any event, such information-and-belief allegations, had Aegon made them, would themselves have been insufficient under Rule 9(b) unless Aegon further alleged, with specificity, the "who, what, where, and when" of their fraud-based claims, *Rodi v. S. New England Sch. of Law*, 389 F.3d 5, 15 (1st Cir. 2004), as well as the basis for their "information and belief," *see United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.2d. 220, 226 (1st Cir. 2004) ("'[I]nformation and belief' allegations remain subject to the particularity requirements of Rule 9(b). Moreover, allegations of fraud made on information and belief are

F. THE UNJUST ENRICHMENT AND CIVIL CONSPIRACY CLAIMS FAIL BECAUSE THEY DERIVE ENTIRELY FROM AEGON'S OTHER INVALID CLAIMS.

For reasons previously argued, the Court should dismiss the unjust enrichment and civil conspiracy claims because they derive entirely from Aegon's other invalid claims. *See* ***Exhibit D*** at 26-28; ***Exhibit B*** at 38.

IV. CONCLUSION

For these reasons and those previously set forth in the Defendants' previous memoranda in support of their initial motions to dismiss filed in the above-captioned actions, the Defendants respectfully ask the Court to dismiss the complaints in their entirety.

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also subject to the additional requirement that 'the complaint set[] forth facts on which the belief is founded."). Aegon has done neither.

Indeed, reviewing the Multiple Annuities Actions together in the context of all of the Aegon Civil Actions, (two of which – C.A. Nos. 09-472/S and 09-502/S – involve no allegations whatsoever of fraud-in-factum, let alone forgery) it becomes clear that Aegon has no good faith basis for alleging either forgery or its other fraud-in-factum theory in the Multiple Annuities Actions. Thus, it is at least questionable whether Aegon has satisfied even the minimal requirements of Rule 11. *See Citibank Global Markets, Inc. v. Santana*, 573 F.3d 17, 32 (1st Cir. 2009) (Rule 11 "proscribes . . . the assertion of factual allegations without evidentiary support or the likely prospect of such support.").

Respectfully submitted,

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DATED: October 4, 2010

CERTIFICATION

I hereby certify that on October 4, 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.*