EXHIBIT D

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., ADM ASSOCIATES, LLC, EDWARD HANRAHAN, THE LEADERS GROUP, INC., and CHARLES BUCKMAN, Defendants.	C.A. No.: 09-472-WS

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS JOSEPH A. CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., ADM ASSOCIATES, LLC, AND EDWARD HANRAHAN'S MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants Joseph A. Caramadre ("Mr. Caramadre"), Raymour Radhakrishnan ("Mr. Radhakrishnan"), Estate Planning Resources, Inc. ("EPR"), ADM Associates, LLC ("ADM"), and Edward Hanrahan ("Mr. Hanrahan"), by and through their attorneys, Hinckley, Allen & Snyder LLP, submit this memorandum of law in support of their motion to dismiss all counts that Plaintiff Western Reserve Life Assurance Company of Ohio ("Plaintiff" or "WRL") brings against them in its Amended Complaint. The Court should dismiss the Amended Complaint as to these defendants for several reasons:

(1) The annuity contract at issue contains an incontestability clause that bars Counts I-III, and VII-IX.

(2) The alleged nondisclosures are not actionable as fraud because the Defendants had no legal duty to disclose the information in question to Plaintiff. Moreover, WRL fails to allege fraud with the specificity that Fed. R. Civ. P 9(b) requires and WRL fails to allege, even at a general level, any actual fraud.

(3) Count X (negligence) against Mr. Hanrahan should be dismissed because WRL does not allege that Mr. Hanrahan breached any legal duty that he owed to WRL. Relatedly, the losses alleged in Count X are purely economic and therefore not recoverable under a negligence theory.

BACKGROUND

On October 2, 2009, WRL filed a Complaint asserting multiple claims related to a variable annuity contract that it issued to the investor, ADM. See Exhibit A (composite exhibit of exhibits attached to original complaint; the original complaint is omitted).

On October 16, 2009, WRL filed an Amended Complaint containing the same general allegations and cross-referencing the exhibits to the original complaint. See Exhibit B (Amended Complaint).

WRL is an Ohio company that offers a range of financial products for sale to a national market, including Rhode Island. Exhibit B ¶¶ 1, 19.

One product that WRL offers for sale to the public as part of its national business is a variable annuity, which WRL refers to as the "WRL Freedom Premier III" annuity (hereinafter "WRL annuity"). WRL alleges that the WRL annuity includes "a standard death benefit that is the greater of either the policy[1] value or the cash value of the policy as of the reported death of

[1] WRL's use of the term "policy" is legally inaccurate and unduly prejudicial. In fact, the WRL annuity is an investment vehicle, not a "policy" of any kind, much less an "insurance policy," as WRL elsewhere alleges. See infra, Part IV.

the annuitant." Id. ¶ 20. WRL also offers "an optional Return of Premium Death Benefit, which guarantees that the beneficiaries will receive no less than the amount of the premiums paid, minus any adjusted partial surrenders." Id.

WRL alleges that in September of 2008, Mr. Radhakrishnan met with Defendant Charles Buckman ("Mr. Buckman"), who was supposedly terminally ill with Chronic Obstructive Pulmonary Disease at the time, and compensated him in the amount of $5,000 in exchange for Mr. Buckman's signing as an annuitant of ADM's application for a WRL annuity.[2] Id. ¶¶ 23-24.

In March of 2008, ADM signed and submitted an application to WRL for it to purchase a WRL annuity, an application that Mr. Buckman also signed as the annuitant. The application listed ADM as the proposed owner and beneficiary; and it requested WRL to include a guaranteed "Double Enhanced Death Benefit" in the WRL annuity that ADM sought to purchase. Id. ¶¶ 27, 29; see Exhibit A at *Exhibit C* (Application for WRL annuity, hereinafter "Application").

Although nothing in its application or in the WRL annuity itself called for the disclosure of such information, WRL then alleges that ADM's "application failed to disclose" that Mr. Buckman was terminally ill at the time of the Application; that he had no pre-existing relationship with the investor in the annuity, ADM; and that Mr. Buckman was paid to sign the application as the annuitant. Exhibit B ¶¶ 41-42, 44. WRL also alleges that Mr. Hanrahan falsely represented on the application that he was the agent who sold the WRL annuity to ADM. Id. ¶ 43.

[2] WRL alleges that at all relevant times Mr. Radhakrishnan was an agent or employee of EPR and acting within the scope of his agency or employment relationship, Exhibit B ¶ 25, and that Mr. Caramadre was an agent, officer, director, or employee of EPR and ADM and acting within the scope of his authority, id. ¶ 12.

In fact, WRL's annuity Application contained no questions regarding the annuitant's health status or life expectancy -- and none of the Defendants made any statements of any kind on that topic in the Application. See Exhibit A at *Exhibit C*. Moreover, neither ADM, nor any of the other Defendants, nor the annuitant himself owed any legal duty to WRL to disclose the annuitant's health to WRL. See infra, parts II(A)(1) & (4).

WRL's Application contained no questions regarding the relationship, if any, between the annuitant and the investor, and none of the Defendants made any statements of any kind on that topic in the Application. See Exhibit A at *Exhibit C*. Moreover, the Defendants owed no legal duty to WRL to do so. See infra, parts II(A)(1) & (4).

Neither WRL's annuity nor its Application contained any provisions prohibiting the compensation of an annuitant in exchange for the annuitant agreeing to serve in that capacity; the Application failed to ask any questions on that subject; and none of the Defendants made any statements on that topic in the Application. See Exhibit A at *Exhibit C*. Moreover, they owed no legal duty to WRL to do so. See infra, parts II(A)(1) & (4).

Neither WRL's Application nor WRL's annuity included any requirement that the investor have an "insurable interest" or any other relationship with the annuitant. See Exhibit A at *Exhibits C* and *D* (hereinafter the "WRL annuity"). And, legally, no such interest was required. See infra, part IV.

Most significantly, the WRL annuity contained an "incontestability clause" stating that "This policy shall be incontestable from the Policy Date." Exhibit A at *Exhibit D* § 3 (p. 4). The Policy Date was September 15, 2008, id. at p. 1, yet WRL began this action on October 2, 2009.

In applying for the WRL annuity, ADM, the investor in the annuity, submitted to WRL an initial purchase payment of $250,000, Exhibit B ¶ 31, and thereafter it invested an additional $750,000 by submitting an additional payment to WRL in that amount, thereby investing $1,000,000 through the purchase of WRL's annuity. Id. ¶ 36.

On the basis of these allegations, WRL brings multiple counts against the Defendants, including a count against ADM for rescission of the WRL annuity (Count I), a declaratory judgment that the WRL annuity is void *ab initio* (Count II), fraud (Count III), civil liability for crimes and offenses (Count VII), and civil conspiracy (Count VIII). Id. ¶¶ 40-57, 71-78. WRL also brings claims against Mr. Hanrahan for unjust enrichment (Count IX) and negligence (Count X). Because, for the reasons set forth below, these claims against the moving Defendants are meritless and fail to state a claim on which relief may be granted, the Court should dismiss them.

STANDARD OF REVIEW

When reviewing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court accepts as true the factual allegations of the complaint and construes all reasonable inferences therefrom in favor of the plaintiff. Marrero v. Aragunde, No. 08-1517, 2009 U.S. App. LEXIS 19299, at *5 (1st Cir. Aug. 27, 2009). To survive a motion to dismiss, however, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)), and the Court is "free to disregard 'bald assertions, unsupportable conclusions, and opprobrious epithets.'" In re Citigroup, Inc., 535 F.3d 45, 52 (1st Cir. 2008) (quoting Ruiz v. Bally Total Fitness Holding Corp., 496 F.3d 1, 4 (1st Cir. 2007)). In a case such as this, in which the Plaintiff brings fraud-based claims, Rule 9(b)

requires additionally that the plaintiff plead those claims with particularity. (See Part II(B), below).

THE REASONS WHY THE COURT SHOULD DISMISS THESE CLAIMS

The Court should dismiss the Amended Complaint for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). The WRL annuity itself bars Counts I-III and VII-IX because it contains an incontestability clause terminating WRL's right to bring such claims as of September 15, 2008, the date WRL issued the contract. Moreover, these claims all depend on the viability of WRL's fraud claim, and the fraud claim fails for two additional reasons. First, WRL fails to allege any facts that are legally cognizable as fraud under the common law. Second, WRL fails to plead fraud with specificity as required by Fed. R. Civ. P. 9(b). The Court should also dismiss count X (negligence) because WRL fails to allege that Mr. Hanrahan owed it any duty with respect to determining, much less disclosing to WRL, the annuitant's health or his relationship vel non to the investor; or that Mr. Hanrahan otherwise engaged in any actionable wrongdoing. Moreover, WRL seeks only economic damages, which it cannot recover in any event under a negligence theory. Finally, applicable law does not require that ADM, as the investor who purchased the annuity, have any "insurable interest" in the annuitant or have selected an annuitant whose health status was at any time disclosed to, much less approved by, WRL. Therefore, WRL may not rescind the annuity on such untenable grounds.

I. THE COURT SHOULD DISMISS COUNTS I-III AND VII-IX BECAUSE THE WRL ANNUITY'S INCONTESTABILITY CLAUSE BARS THESE CLAIMS.

Counts I-III and VII-IX all amount to a challenge to the validity of the WRL annuity. But the Court should dismiss these claims because, in issuing the annuity, WRL's adhesion contract includes an incontestability clause that bars its claims.

Incontestability clauses are common in the insurance industry, and insurers frequently include them in life insurance policies. They are also common in annuity contracts. See SEC v. United Ben. Life Ins. Co., 387 U.S. 202, 206 & n.5 (1967) (listing the annuity contract's "[s]tandard incontestability clauses" as being among the "features" "common to annuity contracts" present in the contract at issue). An incontestability clause is defined as a clause "providing that after the policy has been in force for a given length of time . . . the insurer shall not be able to contest it as to statements contained in the application." Black's Law Dictionary (6th ed. 1990). "The incontestability clause is essentially designed to prevent an insurer from denying the validity of its policy after a specified time based on supposedly false statements or misrepresentations made by an insured in procuring his insurance." 29 Appleman on Insurance § 178.03 (2d ed. 2006). The clauses are uniformly enforced, even when, as here, the insurer belatedly attempts to assert fraud-in-the inducement claims after the contract has become incontestable. Thus, they permit an insurer "to make no defense to any action at law which might be brought to enforce liability on the policies." Prudential Insurance Co. v. Tanenbaum, 167 A. 147, 150 (R.I. 1933); Mohr v. Prudential Ins. Co., 78 A. 554 (R.I. 1910). Of signal importance to this case, such clauses are also enforceable notwithstanding the insurer's claims of deliberate fraud by the person applying for and obtaining the policy. Murray v. State Mutual Life Ins. Co., 48 A. 800 (1901); Paul Revere Life Ins. Co. v. Fima, 1997 U.S. App. LEXIS 6299,

*4 (9th Cir. Apr. 3, 1997); John Hancock Mut. Life Ins. Co. v. Greer, 71 Cal. Rptr. 2d 48 (Cal. App. 1998); McLeod v. Life of the South Ins. Co., 703 So.2d 362, 366 (Ala. Civ. App. 1996) ("The 'principal function [of an incontestability clause] is to cut off defenses such as . . . misrepresentation that go to the existence of the policy after the policy has been in force and effect for a period of time.'"); Lee R. Russ & Thomas F. Segalia, Couch on Insurance § 240:15 (3d ed. 2000); Richard A. Lord, Willison on Contracts § 49.97 (4th ed. 2009) ("[F]raud is one of the defenses [to enforceability of the policy] most frequently alleged by the insurer, but generally to no avail, unless 'fraudulent misrepresentation' is expressly excepted from the scope of the incontestability clause . . . ."). Here, no such exception exists in the WRL annuity.

Although the common law interpreting and enforcing such rules has developed, for the most part, in the insurance context, the same rule should apply to a non-insurance contract such as this one containing such a clause, particularly when, as here, an insurance company has issued the adhesion contract in question. Indeed, some jurisdictions explicitly and statutorily recognize and regulate incontestability clauses in annuity contracts. E.g., Equitable Life Assur. Soc'y of the United States v. Madis, 240 A.D.2d 100, 102-03 (N.Y. App. Div. 1998) (citing N.Y. CLS Ins. § 3210 (2009) ("Any policy of life or non-cancellation disability insurance or contract or annuity delivered or issued in this state that is reinstated shall be incontestable after the same period following reinstatement and with the conditions and exceptions in the policy or contract with respect to incontestability.")). The rules for interpretation of insurance contracts, moreover, are at bottom the same rules established for construction of contracts generally. Zarella v. Minnesota Mutual Life Ins. Co., 824 A.2d 1249, 1259 (R.I. 2003) (quoting Malo v. Aetna Casualty & Surety Co., 459 A.2d 954, 956 (R.I. 1983)). One of those rules is the rule of *contra proferentem*, which instructs that, particularly when contracts of adhesion are interpreted,

contractual ambiguities are to be construed against the drafter of the agreement – in this case, WRL. Elliott Leases Cars, Inc. v. Quigley, 373 A.2d 810, 813-14 (R.I. 1977); see also Zifcak v. Monroe, 249 A.2d 893 (R.I. 1969). Here, the incontestability clause that WRL drafted and included as part of its adhesion annuity indicates that "This policy shall be incontestable from the Policy Date." See Exhibit A at *Exhibit D* § 3 (p. 4). Because WRL brought this action after the Policy Date of September 15, 2008, the incontestability clause bars its claims challenging the WRL annuity's validity, including its fraud-based allegations.

II. THE COURT SHOULD DISMISS COUNTS I-III and VII-IX BECAUSE WRL FAILS TO ALLEGE FRAUD.

In addition to the incontestability clause barring this insurer's claims, they are also deficient as a matter of law for other reasons. Counts I-III and VII-IX all depend on WRL's contention that Defendants committed fraud by inducing WRL to enter into the WRL annuity that it now seeks to invalidate. WRL seeks to rescind the WRL annuity, obtain a declaratory judgment to invalidate it, and recover damages for fraud, while also bringing derivative claims for civil conspiracy, civil liability for insurance fraud, and unjust enrichment – all based primarily on its allegations of material *omissions* from the Application. See Exhibit B ¶¶ 41-42, 44, 83. WRL fails, however, to allege any actual fraud or any other wrongdoing by any of the Defendants, either under the common law fraud standard or with the particularity required by Fed. R. Civ. P. 9(b).

A. WRL'S ALLEGATIONS OF SUPPOSED "MATERIAL OMISSIONS" ARE INSUFFICIENT AS A MATTER OF LAW TO CONSTITUTE FRAUD.

The Court should dismiss Counts I-III and VII-IX because WRL fails to allege actionable fraud under the common law. The Amended Complaint does not allege that the fraud-based counts are predicated on affirmative misstatements by any of the Defendants, with the sole

exception of a statement attributed to Mr. Hanrahan, which is discussed below. Rather, the Amended Complaint contends that the Application for the variable annuity in question failed to disclose information about the health and life expectancy of the annuitant, the alleged compensation paid to the annuitant, and the lack of any pre-existing relationship between the investor and the annuitant. See Exhibit B ¶¶ 41, 42, and 44. The Amended Complaint then alleges that these omissions, standing alone, constitute fraud.[3] As a matter of law, however, these allegations are insufficient to constitute fraud because Defendants owed no duty to WRL to disclose to or communicate with WRL about such matters, and WRL does not allege that any of the moving Defendants did so. In addition, WRL fails to allege that it relied, let alone justifiably, on the omissions, or that the omissions were material.

1. WRL fails to allege common law fraud because the Defendants had no duty to disclose the information.

The elements of common law fraud are well known. "To establish a *prima facie* case of common law fraud in Rhode Island 'the plaintiff must prove that the defendant knowingly "made a *false representation* intending thereby to induce plaintiff to rely thereon," and that the plaintiff *justifiably relied* thereon to his or her damage.'" Zaino v. Zaino, 818 A.2d 630, 638 (R.I. 2003) (quoting Women's Development Corp. v. City of Central Falls, 764 A.2d 151, 160 (R.I. 2001) (quoting Travers v. Spidell, 682 A.2d 471, 472-73 (R.I. 1996))) (emphasis added); see also Nisenzon v. Sadowski, 1994 R.I. Super. LEXIS 46 (March 4, 1994) ("Common law fraud has four elements: 1) a false or misleading statement of a material fact that was 2) known by the defendant to be false and 3) made with intent to deceive, 4) upon which the plaintiff relies to its

[3] In passing, WRL also alleges that compensating the annuitant violated R.I. Gen. Laws § 27-4-6, Exhibit B ¶ 44, but that statute does not apply to the alleged facts. Its provisions barring certain types of payments to insureds pertain to insurance "corporation[s]" and "producer[s]," that make such payments to insureds under insurance policies, but they have no application to owners of annuity contracts or others who compensate annuitants.

detriment."). Accord, Grady v. Goldberg, 2008 WL 821610, *5 (D.R.I. March 27, 2008) (citing Guzman v. Jan-Pro Cleaning Sys., Inc., 839 A.2d 504, 507 (R.I. 2003)).

Fraud "can be grounded in concealment" only under limited circumstances in Rhode Island. National Credit Union Admin. Bd. v. Regine, 795 F. Supp. 59, 70 (D.R.I. 1992). Rhode Island law recognizes fraud claims based on failures to disclose only when the defendant has a pre-existing "duty to speak," a duty which is not alleged to be present here. See Pharmacy Services, Inc. v. Swarovski North America, Ltd., 2006 WL 753055, *3 (D.R.I. March 21, 2006). Specifically, Rhode Island courts have recognized the viability of a fraudulent concealment claim in cases when the defendant is alleged to have made an *affirmative statement* that was misleading in light of the omitted information, and the defendant had a *duty to disclose* the withheld information arising from the special circumstances of the relationship between the parties. See, e.g., In re: Martino, 108 B.R. 394, 400 (D.R.I. 1989); Cardiovascular & Thoracic Assoc., Inc. v. Fingleton, 1995 R.I. Super. LEXIS 26 (R.I. Super. Aug. 23, 1995); see also In re Neurontin Marketing, Sales Practices and Products Liability Litigation, 618 F. Supp.2d 96, 108-09 (D. Mass. 2009) (there can be no fraud for failure to disclose in absence of duty to disclose); Guibeault v. R.J. Reynolds Tobacco Co., 84 F. Supp. 2d 263, 269 (D.R.I. 2000) (Under Rhode Island law, a fraud "claim based on concealment will not lie absent a duty to speak."); Sahin v. Sahin, 758 N.E.2d 132, 138, n. 9 (Mass. 2001) (fraud by omission requires "both concealment of material information and a duty requiring disclosure").[4] Moreover, the applicable rule for contracts of adhesion that insurance companies issue is that there is no duty on the

[4] In significant respects the Rhode Island and Massachusetts case law parallels the federal securities law provisions regarding fraud in the sale of securities. Pursuant to the Securities and Exchange Commission's Rule 10b-5 (17 CFR § 240.10b-5), a material omission is not unlawful unless the omission caused "the statements made" to be "misleading" or there was an independent duty to disclose the information. See Roeder v. Alpha Industries, Inc., 814 F.2d 22, 28 (1st Cir. 1987) ("Even if information is material, there is no liability under Rule 10b-5 unless there was a duty to disclose it."); Polak v. Continental Hosts, Ltd., 613 F. Supp. 153, 156 (S.D.N.Y. 1985 ("Absent a specific duty to disclose, even the most material information imaginable may be withheld from the public.").

consumer/purchaser of such contracts to disclose any particular information to the insurer if the insurance company did not inquire about that information on the application it prepared for the consumer/purchaser to submit. See, e.g., Testa v. Norfolk & Dedham Mut. Fire Ins. Co., 764 A.2d 119, 121 (R.I. 2001).

In the case of Nisenzon v. Sadowski, the Rhode Island Supreme Court found an attorney committed fraud by sending a letter to a lender assuring the lender that the attorney's client intended to repay a loan. Nisenzon v. Sadowski, 689 A.2d 1037, 1046 (R.I. 1997). Significantly, the attorney sent his letter in response to the creditor's previous letter expressing interest in obtaining security in the amount owed. But in responding to the creditor's inquiry, the attorney failed to mention that he, the attorney, already had conveyed the property that the lender presumed would serve as security on the loan from his client to himself. Id. The court explained that "[t]he letter was written at a time when [the attorney] had already acquired the property, yet not only did it fail to disclose [the attorney's ownership], it affirmatively sought to induce the Nisenzons to take no action on their claims against [the client] for several months by dangling before them the prospect that" the client would repay the loan. Id. If the attorney had disclosed his own ownership of the property, this "would have alerted the [lender] that their presumed security for any eventual repayment from [the client] was nonexistent." Id. In short, the omission rendered the attorney's affirmative assurances, provided in response to the creditor's relevant inquiry, misleading. Nisenzon, however, is distinguishable from the case at bar in that WRL does not allege that it made any relevant inquiries or that Defendants provided incomplete or misleading answers or statements of any kind about the alleged omissions in question.

This case is more similar to In re: Martino, in which the court rejected a nondisclosure claim because the plaintiff failed to inquire about the issues. In In re: Martino, 108 B.R. 394,

400 (D.R.I. 1989), the court explained that the defendant's failure to inform the buying partnership in a real estate deal of the fact that he was involved in both sides of the real estate transaction did "not amount to intentional concealment" giving rise to a fraud claim "under Rhode Island law." The court explained that there was no fraud because neither of the plaintiffs "ever questioned" the defendant's involvement in the selling partnership. Id. "Simply put, *[the plaintiffs] never tried to obtain any of the information which they now assert was concealed from them.*" Id. (emphasis added); compare Nisenzon, 689 A.2d at 1046 (attorney drafted letter in response to creditor's letter expressing interest in obtaining security in the amount owed); Paterra, 255 A.2d at 765 (co-endorser inquired about whether life insurance would cover the loan in the event of the borrower's death).

Here, as in In re Martino, and in contrast to Nisenzon, the plaintiff fails to allege that it ever "tried to obtain any of the information which [it] now assert[s] was concealed from [it]." In re: Martino, 108 B.R. at 400. Specifically, WRL does not allege that it made any inquiry about the annuitant's alleged health or life expectancy or whether the annuitant received any compensation for serving as the annuitant, or the existence of any familial or other relationship between the annuitants and the investor,[5] and its Application and contract of adhesion demonstrate that it made no such inquiries. Nor, with regard to these topics, does WRL allege that any of the Defendants made any affirmative statements that, together with other

[5] To the extent the Application inquired about relationships it was only with respect to the beneficiary's, and any joint owner's, relationship to the *owner* of the annuity, ADM. See Exhibit A at *Exhibit C* §§2(B) and 3. Thus, when WRL wanted to ask about a relationship in its application it knew how to do so, but it asked no questions about the relationship between the beneficiary or the owner/applicant and the annuitant.

circumstances not present here, might otherwise have given rise to a "duty to disclose."[6] Indeed, the Amended Complaint is bereft of allegations that the answers to the questions in the application are in any way inaccurate. WRL is a major financial institution that offers its products for sale to a broad and national public on a take it or leave it basis. WRL's allegations of material omissions are simply inadequate as a matter of law to constitute fraud.

The rule requiring that the plaintiff actually have inquired about the factual matter that forms the basis of its nondisclosure claim is particularly compelling in a case such as this involving an arms-length transaction and a contract of adhesion that an insurance company offered to the public on its terms and with an application form of its own devising. As one court explained, in holding that the defendant insured did not commit a misrepresentation by failing to disclose two DUI convictions on an application for automobile insurance:

> The general rule regarding the effect of an insurer's inquiry, or lack of inquiry, when taking application for insurance has been stated thusly: "If the insurer propounds questions to the applicant and he makes full and true answers, the applicant is not answerable for an omission to mention the existence of other facts about which no inquiry is made of him, although they may turn out to be material for the insurer to know in taking the risk. Nor can an insurer accepting an application with questions unanswered claim a concealment of matters which the answers to the questions would have disclosed."

Allstate Ins. Co. v. Shirah, 466 So. 2d 940, 943 (Ala. 1985) (quoting 9 G. Couch & R. Anderson, Couch Cyclopedia of Insurance Law § 38:72, p. 388, 389 (2d ed. 1962)). Furthermore, it has "generally been considered [that] the [insurance] applicant's duty has been fulfilled upon making full answers without evasion, suppression, misrepresentation or concealment of the facts *within the reasonable scope of the inquiry*." Southard v. Occidental Life Ins. Co., 142 N.W.2d 351

[6] None of the defendants had any duty to disclose to WRL the facts in question. Moreover, to the extent Mr. Caramadre, Mr. Radhakrishnan, and Mr. Hanrahan individually were involved in the transaction it was in a representative capacity only. As disclosed on the face of the application, for example, Mr. Caramade signed ADM's application in his representative capacity as an agent for ADM. *As individuals*, Mr. Caramadre, Mr. Radhakrishnan, and Mr. Hanrahan *made no representations or omissions whatsoever* to WRL, nor did they have any duty to disclose; they therefore cannot be held personally liable for any of the conduct that WRL alleges in the Amended Complaint.

(Wisc. 1966) (citing 12 Appleman, Insurance Law and Practice, *Duty to Disclose*, p. 392, § 7292) (emphasis added). Thus, in Testa v. Norfolk & Dedham Mut. Fire Ins. Co., the Rhode Island Supreme Court held that the insured made no misrepresentation in the application for automobile insurance regarding where his car was garaged because the insurance application did not address the garaging issue and the insurance company otherwise made no relevant inquiry. 764 A.2d at 121.[7] Here, none of the Defendants communicated with WRL on the factual matters at issue and they owed WRL no duty whatsoever to make the disclosures in question. Indeed, several of the moving Defendants were not even parties to the transaction.

In sum, in the absence of special circumstances not present here, the "general rule" is that "one party to a transaction is under no duty to speak out to the other concerning everything he knows about the matter" -- even if "silence" is "meditated and upon a material fact." Paterra, 255 A.2d at 167. WRL's allegations are insufficient as a matter of law to bring its claims outside this general rule and therefore the Court should dismiss them.

2. WRL also fails to allege any actionable fraud because WRL has not relied, let alone "justifiably," on any of the alleged material omissions in marketing, offering, and agreeing to its contract of adhesion.

WRL's claims also fail because WRL has not relied, let alone "justifiably," on any of the alleged material omissions. As discussed above, WRL marketed and sold this product to a nationwide public in a sophisticated fashion, see Exhibit A at *Exhibit B* (product summary), requiring customers to complete WRL Application forms, see Exhibit A at *Exhibit C* (application), and issuing a WRL annuity with multiple and detailed terms representing a

[7] Although the Rhode Island Supreme Court applied Massachusetts law in Testa, Rhode Island law provides essentially the same legal standard that the court applied in Testa for invalidating an insurance contract based on an alleged misrepresentation in an insurance application. See Evora v. Henry, 559 A.2d 1038, 1040 (1989) (misrepresentation in insurance application is material if the insurer issued the policy based on it).

quintessential contract of adhesion, see Exhibit A at *Exhibit D* (WRL annuity). WRL is a sophisticated participant in the financial markets, selling its products nationally. Exhibit B ¶ 19. It knows how to analyze consumer demand, devise products to exploit that demand, evaluate risks, project revenues and profits, and write its adhesion contracts to its maximum legal advantage. Its decision to market the WRL annuity to the public must be presumed to be the result of a sophisticated analysis that concluded that it would be profitable in that business without restricting its WRL annuity product to annuitants with insurable interests, who are in good health, and who have no ability to receive compensation from serving as such. Its decision to impose no disclosure or eligibility requirements on applicants for these annuities regarding the annuitant's health or the existence of any particular relationship between the investor and the annuitant must be presumed to result from such an analysis. WRL made a business decision that its annuity would be sufficiently profitable in the absence of such restrictive requirements that would potentially curtail its receipt of premium dollars. Its current effort to absolve itself from its obligations under the WRL annuity, and to pursue an array of tort claims against its customers and others, is nothing more than a bad faith attempt to garner a windfall at the expense of its customers.

In this respect the case is analogous to Pharmacy Services, in which the court granted summary judgment against a plaintiff on its misrepresentation claim based on its business partner's (Swarovski crystal's) failure to disclose at the time of contracting that it intended to terminate the plaintiff as an authorized Swarovski dealer in the near future as part of its marketing strategy. Pharmacy Services, 2006 U.S. Dist. LEXIS at * 10. Because the authorized-dealer contract was terminable at will, it did not give rise to "any reasonable expectation that the relationship would continue for any particular time," and the court therefore concluded that there

was no detrimental reliance and no misrepresentation. Id. Here, similarly, there was no provision in WRL's marketing materials, its application, or the WRL annuity regarding, for example, the health status of the annuitant; therefore, WRL cannot establish that it detrimentally relied on this type of information in agreeing to the contract. Simply put, the WRL annuity did not give rise to "any reasonable expectation" regarding Mr. Buckman's health status or the other non-disclosures that WRL now complains of, because this was a choice WRL made when it designed this particular investment vehicle.

In short, WRL simply cannot establish detrimental, let alone justifiable, reliance in this case. Zaino, 818 A.2d at 638 (justifiable reliance is a required element of fraud claim).

3. WRL fails to allege fraud because the omissions, if any, were not even material and WRL waived any such claims by accepting the application.

WRL's allegations regarding the compensation of the annuitant, the lack of a pre-existing or insurable interest relationship between the investor and the annuitant, and the alleged health status of the annuitant also fail to support a fraud claim for the further reason that these omissions were not material. As one court from the insurance context explains, under the "modern" rule, "the information not asked for" in the application "is presumed to be unimportant [i.e., immaterial] to the insurance company." Southard, 142 N.W.2d at 358. WRL effectively waived any claim of "materiality" by declining to include any questions about these issues in the application form it created for its contract of adhesion. See Russ & Segalia, supra, § 81:39 (there is a presumption that an insurer "waives inquiry into matters concerning information that is not requested"). Moreover, most of the issues that WRL complains of (specifically, the relationship, if any between any of these Defendants and Mr. Buckman, any alleged payments to Mr. Buckman, and the identity of the agent who sold the contract) have no bearing on the risk it

assumed in issuing the contract and therefore cannot have been material to its decision to agree to the contract. See Evora v. Henry, 449 A.2d 1038, 1040 (R.I. 1989) (a misrepresentation is material only if it "induces the insurer to insure the applicant"). For all these reasons, WRL has failed to allege materiality of the alleged omissions.

4. Mr. Hanrahan, as the broker dealer's representative involved in ADM's application for the WRL annuity, had no duty to vet or do anything else with respect to the annuitant and WRL fails to allege that Mr. Hanrahan made any material misrepresentation.

Although WRL alleges that Mr. Hanrahan was involved in the sale of the WRL annuity as an agent of Leaders Group, Exhibit B ¶ 26, the company that WRL alleges it "authorized to sell . . . insurance and annuity products for [WRL]," id. ¶ 59, this involvement did not give rise to any duty to disclose on the part of Mr. Hanrahan. As indicated below, WRL nowhere alleges (except in a general way that does not satisfy Rule 9(b)'s requirements (see id. ¶ 54)) that Mr. Hanrahan had any knowledge regarding the supposed "omissions," such as the annuitant's health condition and life expectancy. Indeed, WRL's Amended Complaint suggests that Mr. Hanrahan had *no* knowledge on any of these issues. See id. ¶¶ 34 ("Buckman did not know, and had never met Hanrahan as of the time the application was signed or submitted."), 35; Count X (alleging Mr. Hanrahan was negligent in failing "to learn and obtain" the information (id. ¶ 83)). Thus, Mr. Hanrahan's alleged indirect relationship to WRL by way of his alleged agency for Leaders Group, cannot serve as a basis for any "duty to disclose" because WRL does not allege that Mr. Hanrahan was even aware of any of the information that it now says was fraudulently concealed from it.

Mr. Hanrahan also had no duty to disclose because, as discussed above, WRL *made no inquiry* on the Application about any of the issues that it now complains of; thus, there was no basis for WRL to conclude that Mr. Hanrahan's mere signature, certifying his review of the

investment's appropriateness for ADM, constituted an omission of any kind, let alone a material omission, with regard to the annuitant's health, compensation, or ADM's relationship vel non to Mr. Buckman. See Exhibit A at *Exhibit C* (p. 10 of 10). WRL asked nothing about these issues, and Mr. Hanrahan certified nothing with regard to them. In this respect, once more, the case overlaps heavily with In re Martino and is starkly distinguishable from Nisenzon and Paterra.

In addition, Mr. Hanrahan had no duty to discover or disclose with respect to such matters because, as the representative for the annuity's owner and investor, ADM, his relevant relationship, if any, was to *ADM*, the investor that purchased the investment, not to the annuitant. There is no contractual or other requirement – and WRL alleges none – requiring an agent for the investor/applicant to have any contact with or knowledge about an annuitant. In short, WRL alleges no basis for any duty on Mr. Hanrahan's part to vet or do anything else with respect to annuitants on WRL's behalf.

Finally, Mr. Hanrahan had no duty to disclose because WRL nowhere alleges that Mr. Hanrahan was *WRL's* agent. Indeed, an independent broker such as Mr. Hanrahan has no duty to disclose information about the applicant or the annuitant to an insurance company. See 11 Eric Mills Holmes, Holmes' Appleman on Insurance, § 68.6 (if there is no "agency relationship" between the sales representative and the insurance company, the former has no "duty . . . to disclose information regarding the insurance applicant."). And the agreement with Leaders Group that WRL relies on in its Amended Complaint specifically states that the broker-dealers, including Leaders Group, the entity that WRL alleges Mr. Hanrahan represented in signing the application, Exhibit B, ¶ 32, "shall be acting as independent contractors and not as agents or employees of WRL." Exhibit C at ¶ 10 (Broker-Dealer Supervisory and Service Agreement

between, among others, WRL and Leaders Group).[8] Moreover, in the insurance context, "when an insurance agent is procuring insurance or completing the application process," as WRL alleges Mr. Hanrahan was doing here, "courts will find the agent represents the insured," not the insurance company, Russ & Segalia, supra, § 45:4, and therefore the agent's duties at the application stage, if any, run to the applicant. The Rhode Island Supreme Court has applied this rule in holding that an agent who, unlike Hanrahan, was involved in *both* applying for the contract *and* issuing the relevant insurance certificate, represented the *insured* at the application stage and the insurer only later, at the certification stage. See General Acc. Ins. Co. of America v. American Nat. Fireproofing, Inc., 716 A.2d 751, 756-57 (R.I. 1998). In addition, "[t]he power to bind the insurer to coverage is a critical distinction between broker and agency status" and "[i]f a person or entity has no binding authority, courts will find the broker represents the insured," Russ & Segalia, supra, § 45:8, yet the WRL-Leaders Group agreement explicitly deprives Leaders Group and its representatives of the power to bind WRL to insurance coverage or annuity contracts, stating that "[a]ll applications are subject to acceptance or rejection by WRL at is sole discretion." Exhibit C at ¶ 7. This, together with the fact that the agreement places no limitations on Leaders Group's right to serve as a broker to WRL's *competitors* with regard to insurance and securities products, see id. ¶ 14 (Leaders Group may serve as broker to "other insurance companies . . . in any jurisdiction with respect to any insurance or securities product, including securities products similar to or identical to those of WRL"), further

[8] This Court may consider Exhibit C, Broker-Dealer Supervisory and Service Agreement, in the context of a motion to dismiss because WRL's Amended Complaint is "expressly linked to" and "admittedly dependent upon" the document. Exhibit B ¶¶ 59-61, 65-66, 67-70 (relying on the Broker-Dealer Service Agreement for breach of contract, declaratory judgment, and breach of implied covenant of good faith and fair dealing claims); Divas Inc. v. City of Bangor, 411 F.3d 30, 38 (1st Cir. 2005) (in determining motion to dismiss, court considered settlement agreement that had not been attached to appellants' complaint); see Shaw v. Digital Equip. Corp., 82 F. 3d 1194, 1220 (1st Cir. 1996) (court "may properly consider the relevant entirety of a document integral to . . . the complaint . . . without converting the motion into one for summary judgment.").

establishes that Mr. Hanrahan, as an alleged Leaders Group representative, did not serve as WRL's agent. In short, Mr. Hanrahan, as an independent broker, stood in the same position as the other Defendants, including the applicant, ADM. He had no duty to disclose anything that WRL chose not to inquire about in its application form for its adhesion contract.[9]

For similar reasons, WRL's sole attempt to allege a misrepresentation, as opposed to an omission, by Mr. Hanrahan is inadequate. WRL alleges that Mr. Hanrahan made a "false" "representation on the application that he was the agent who sold the [WRL] Annuity." Exhibit B ¶ 43. WRL's own allegations, however, directly contradict its position that Mr. Hanrahan was not "the agent who sold the annuity." Id. As to WRL, Leaders Group, and Mr. Hanrahan, the customer for purposes of selling the annuity was, again, *ADM*, the entity that purchased and paid for the annuity, not the annuitant, and WRL alleges that Mr. Hanrahan was involved with these defendants in applying for the annuity, i.e. in selling the investment to ADM. See id. ¶¶ 12, 26. The application is clear on its face and contains no language attributing anything to Mr. Hanrahan other than determining that the investment was appropriate for ADM. Thus, Mr. Hanrahan, by signing the application as a representative of Leaders Group, made no representations of the kind alleged. In any event, any alleged misrepresentation regarding Mr. Hanrahan's conduct as an agent was plainly immaterial. (See supra, Part II(A)(3), discussing meaning of "materiality" requirement).

[9] Even if Mr. Hanrahan did have such a duty, WRL may not impose that duty on the other moving Defendants under a civil conspiracy theory since WRL nowhere alleges, even at a general level, that the moving Defendants *knew* that Mr. Hanrahan's conduct violated any duty to WRL. 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 indirect relationship between Mr. Hanrahan and WRL, how could these Defendants have possessed any such knowledge?

B. WRL FAILS TO ALLEGE FRAUD WITH PARTICULARITY AS REQUIRED BY FED. R. CIV. P. 9(B).

Even if the Court were to find a possibly viable fraud theory alleged in the Amended Complaint, any such theory has not been alleged with the level of particularity required by Rule 9 (b). See Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").[10]

Although "great specificity" is not "ordinarily required" to survive a Rule 12(b)(6) motion to dismiss, "[c]ases alleging fraud and misrepresentation constitute an exception" to this rule. Grady, 2008 WL 821610, at *5 (citing Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 29 (1st Cir. 2004); accord, Rodi v. S. New Eng. School of Law, 389 F.3d 5, 15 (1st Cir. 2004). The Rule's "heightened pleading requirement is an effort "to protect a defendant's reputation from harm caused by meritless fraud claims...". Simonet v. SmithKlineBeecham Corp., 506 F.Supp.2d 77, 90 (D.P.R. 2007) (citing U.S. ex rel Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 226 (1st Cir. 2004) (citing Doyle v. Hasbro, Inc., 103 F.3d 186, 194 (1st Cir. 1996))). See also James Wm. Moore et al., Moore's Federal Practice § 9.03[1][a] (3d ed. 2009) (same). It also helps "to minimize strike suits, and to provide detailed notice of a fraud claim to a defending party." Id. These important policy considerations require that a fraud plaintiff, conduct an adequate, pre-complaint investigation, to assure that the claim is not irresponsible or defamatory. Id. Rule 9(b) requires, at a minimum, that the plaintiff aver the "*who, what, where,*

[10] Rule 9(b) is "read expansively to cover associated claims where the core allegations effectively charge fraud." North Am. Catholic Educ. Programming Found., Inc. v. Cardinale, 567 F.3d 8, 15 (1st Cir. 2009) (applying Rule 9(b) to multiple claims not styled as fraud, including unjust enrichment and tortious interference with business relations claims.). In this case, therefore, these requirements apply not only to Count III (styled as "fraud") but also to Counts I-II, VII, VIII and IX, WRL's claims, respectively, for rescission (a fraud-in-inducement claim), declaratory judgment (same), civil liability for crimes and offenses (alleging insurance fraud), civil conspiracy (to commit fraud), and unjust enrichment (seeking restitution of commissions based on alleged civil and criminal fraud).

and when of the allegedly false or misleading representation." Rodi, 389 F.3d at 15 (emphasis added).

In addition, as the First Circuit has explained,

> Turning then to count I, it purportedly asserts a claim for fraudulent inducement, allowable under Rhode Island law, Guzman v. Jan-Pro Cleaning Systems, 839 A.2d 504, 507 (R.I. 2003), but it fails on its face to meet the requirement that "[i]n all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Rule 9(b)'s heightened pleading standard applies to state law fraud claims asserted in federal court. Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 427 (1st Cir. 2007).

The First Circuit also requires a fraud pleader to specify the basis for inferring scienter:

> Rule 9(b)(6) requires not only specifying the false statements and by whom they were made but also identifying the basis for inferring scienter. Although the rule itself is not pellucid, precedent in this circuit, as in a number of others, is clear: The courts have uniformly held inadequate a complaint's general averment of the defendant's 'knowledge' of material falsity, unless the complaint *also* sets forth specific facts that make it reasonable to believe that defendant knew that a statement was materially false or misleading. Greenstone v. Cambex Corp., 975 F.2d 22, 25 (1st Cir. 1992) (Breyer, J.) (citations omitted), *superseded by statute on other grounds*, Private Securities Litigation Reform Act of 1995, Pub.L. No. 104-67, 109 Stat. 737; see also Romani v. Shearson Lehman Hutton, 929 F.2d 875, 878 (1st Cir. 1991), *similarly superseded by statute on other grounds.*

North Am. Catholic Educ. Programming Found., Inc. v. Cardinale, 567 F.3d 8, 13 (1st Cir. 2009) (emphasis added); see also Grady, 2008 WL 821610, at *4-5

The Rule imposes further requirements in instances where, as here, a plaintiff brings its fraud claims against a group of defendants. A plaintiff generally may not "group all claimed wrongdoers together in a single set of allegations," but, rather, "must make specific and separate allegations against each defendant." Moore, supra, § 9.03[1][f].

As the court explained further in Archdiocese of San Salvador v. FM Int'l, LLC, 2006 WL 2583262 (D.N.H. September 7, 2006):

> As the court noted in its previous order, this standard "'usually requires the claimant to allege at a minimum the identity of the person who made the fraudulent statement, the time, place, and content of the misrepresentation, the resulting injury, and the method by which the misrepresentation was communicated.'" 2006 DNH 22, 2006 WL 437493, at *7 (quoting 2 Moore, supra, § 9.03[1][b], at 9-18 (footnote omitted)). Furthermore, under Rule 9(b) "'[i]f a claim involves multiple defending parties, a claimant may not usually group all claimed wrongdoers together in a single set of allegations. Rather, the claimant must make specific and separate allegations against each defendant.'" Id. (quoting 2 Moore, supra, § 9.03[1][f], at 9-25 (footnote omitted)).
>
> In addition,
>
> Allegations of fraud must be organized "into discrete units that are, standing alone, each capable of evaluation." StockerYale, 453 F.Supp.2d [345, (D.N.H. 2006)] at 350 (quoting In re Boston Tech., Inc. Sec. Litig., 8 F.Supp.2d 43, 55-56 (D.Mass.1998)). And, "where ... 'multiple defendants are involved, each defendant's role in the fraud must be particularized.'" Manchester Mfg. Acquisitions, Inc. v. Sears, Roebuck & Co., 802 F.Supp. 595, 600 (D.N.H.1992) (quoting Shields v. Amoskeag Bank Shares, Inc., 766 F.Supp. 32, 40 (D.N.H.1991)).

S.E.C. v. Patel, 2009 WL 3151143, *4 (D.N.H. September 30, 2009); see also Suna v. Bailer Corp., 107 F.3d 64, 68 (1st Cir. 1997) (holding that, where a plaintiff alleges that the defendant should be held liable for the misrepresentations of a third party, he must plead with particularity those statements that the defendant made to the third party which induced him or her to make the misrepresentations.).

> In cases of civil conspiracy to defraud, for instance,
>
> it is necessary to plead fraudulent conspiracy with enough specificity to inform multiple defendants of facts forming the basis of the conspiracy charge. National Egg Co. v. Bank Leumi le-Israel B.M., 504 F. Supp. 305, 308 (N.D. Ga. 1980). Such allegations must "delineate among the defendants (as to) their participation or responsibilities" in making the statements which are the subject of the suit, Lerman v. ITB Management Corp., 58 F.R.D. 153, 155 n. 2 (D. Mass. 1973). Conspiracies described in sweeping and general terms cannot serve as the basis for a cause of action, and may be dismissed. Kadar Corp. v. Milbury, 549 F.2d 230, 233 (1st Cir. 1977).

Van Schaick v. Church of Scientology of California, Inc., 535 F. Supp. 1125, 1141 (D. Mass. 1982).

WRL's complaint fails in several respects under these standards. In the key allegations, found in the rescission count (Count I), WRL fails to allege *who* is responsible for the alleged material omissions, stating only that "the application did not disclose" the matters of which WRL complains. See Exhibit B ¶¶ 41, 42, and 44. But "the application" is not a defendant in this action: individuals and corporations whose business reputations are on the line and already threatened by this action are the Defendants. For compelling policy reasons, Rule 9(b) obligated WRL to specifically lay out its charges against them. WRL does not remedy this defect by alleging that the Defendants acted "in concert," Exhibit B ¶ 53, or that there was a "scheme," id. ¶ 15, or that the Defendants, lumped together as a group, "arranged for the submission" of the Application, id. ¶ 55. This is just the kind of failure to "delineate" each Defendant's "participation or responsibilities in making the statements which are the subject of the suit" that, pursuant to Rule 9(b), is fatal to a fraud-based claim. Van Schaick, 535 F. Supp. at 1141.

WRL also fails to allege with requisite specificity "the basis for inferring scienter." Cardinale, 567 F.3d at 13. WRL's "general averment of the [Defendants'] 'knowledge' of material falsity," id., in the Amended Complaint (Exhibit B ¶ 54), is "inadequate" to meet Rule 9(b)'s specificity requirement. Cardinale, 567 F.3d at 13. Given the absence of any questions in the Application regarding the topics WRL centrally complains of, moreover, the Amended Complaint fails to "set[] forth specific facts that make it reasonable to believe" that any of the defendants "knew that a statement [or omission] was materially false or misleading." Id. Closely related to the last point, WRL's allegations are also deficient with regard to the *what* element: WRL's annuity Application asks nothing, for example, about the health status or life

expectancy of annuitants, so how is the Court to infer from the mere allegation that "the application" failed to disclose facts on this topic that the nondisclosure was "material"? According to the refined actuarial tables of an institution like WRL, every one of us has a health condition and a life expectancy. Where, precisely, does WRL draw the line in deciding that a customer's failure to expound in detail on this subject *sua sponte* constituted "fraud," entitling WRL to file suit? WRL does not specify.

C. WRL'S FAILURE TO ALLEGE FRAUD REQUIRES DISMISSAL OF COUNTS VII, VIII AND IX.

Of course, WRL's failure to allege fraud not only invalidates its rescission, declaratory judgment, and fraud claims (Counts I-III), based as they are on WRL's inadequate fraud allegations, but also it compels dismissal of its derivative claims of civil liability for crimes and offenses, civil conspiracy, and unjust enrichment (Counts VII-IX). In bringing Count VII (civil liability for crimes and offenses), WRL alleges the crime of insurance fraud pursuant to R.I. Gen. Laws § 11-41-29, but the insurance fraud statute, similar to current Rhode Island common law, requires a "written statement" containing "false information." A mere omission, even if material, is not enough. Moreover, it applies only to applications for insurance policies, see R.I. Gen. Laws § 11-41-29, whereas WRL's claims pertain to a WRL annuity, which is not an insurance policy (see infra, Part IV). Therefore, the Court should dismiss Count VII.

The Court should also dismiss Count VIII (civil conspiracy) because, given the infirmities in WRL's fraud claim and its allegations of criminal insurance fraud, WRL has failed to allege that the Defendants had a specific intent to do anything illegal or tortious. See Chain Store Maint., Inc. v. Nat'l Glass & Gate Serv., 2004 R.I. Super. LEXIS 81, 29-30 (April 21, 2004) ("[a] civil conspiracy claim requires the specific intent to do something illegal or tortious.'" (quoting Guibeault, 84 F. Supp. 2d at 268); Read & Lundy, Inc. v. Washington Trust

Co. of Westerly, 840 A.2d 1099, 1102 (R.I. 2004) ("'[c]ivil conspiracy is not an independent basis of liability. It is a means for establishing joint liability for tortious conduct; therefore it requires a valid underlying tort theory.'") (quoting Guibeault, 84 F. Supp. 2d at 268)). Count IX ("unjust enrichment"), dependent by its own terms on the "tortious and criminal acts" in WRL's previously stated fraud-based counts against Mr. Hanrahan, see Exhibit B ¶¶ 79, 81, also fails where those claims fail. See Cardinale, 567 F.3d at 15 (declining to "separately discuss unjust enrichment" claim since an element of the claim was "some wrong that makes the enrichment culpable" and plaintiff failed adequately to allege fraud or breach of fiduciary duty).

III. THE COURT SHOULD DISMISS COUNT X BECAUSE MR. HANRAHAN HAD NO DUTY TO "LEARN AND OBTAIN" INFORMATION ABOUT THE ANNUITANT AND WRL CANNOT RECOVER ECONOMIC LOSSES UNDER A NEGLIGENCE THEORY.

The Court should also dismiss Count X (negligence), which WRL brings against Mr. Hanrahan, for two reasons. First, WRL fails to sufficiently allege that Mr. Hanrahan owed it any duty. Benaski v. Weinberg, 899 A.2d 499, 502 (R.I. 2006) ("A fundamental principle of tort law" is that "'a defendant cannot be liable under a negligence theory unless the defendant owes a duty to the plaintiff.'" (quoting Lucier v. Impact Rec. Ltd., 864 A.2d 635, 638 (R.I. 2005) (internal quotations and citations omitted))). WRL makes a "bald assertion" that Mr. Hanrahan "owed" a "duty" to WRL to "learn and obtain information material to [WRL's] review of the application for the Annuity," specifically information regarding the *annuitant*, including his health condition and life expectancy, his relationship to the investor, and his compensation for signing the Application. Exhibit B ¶ 83. In re Citigroup, 535 F.3d at 53 (courts are free to disregard "bald assertions" in reviewing a complaint pursuant to a motion to dismiss), But WRL points to no provision, contractual or otherwise, giving rise to any such duty running from Mr. Hanrahan to WRL that required him to "learn and obtain" information about the *annuitant*. Mr.

Hanrahan's relevant relationship, if any, was to the *customer* (the investor, ADM), not to the annuitant, and, as WRL's Application form indicates, Mr. Hanrahan was required to and did represent to WRL only that the customer's financial status and investment objectives rendered the annuity suitable for the customer's investment. See Exhibit A at *Exhibit C* (p. 10).

The Court should also dismiss the negligence count because these are precisely the types of risks and losses (WRL alleges it has been "financially harmed," Exhibit B, ¶ 85) that parties to a business relationship must allocate by contract, not via subsequent law suits for negligence. Thus, WRL's claim fails under the "well established . . . economic loss doctrine" which "precludes recovery for 'purely economic losses in a negligence cause of action.'" Triton Realty Ltd. Partnership v. Almeida, 2006 WL 2089255, *3-4 (R.I. Super. July 25, 2006) (applying economic loss doctrine to grant motion to dismiss negligence claim based on defendant insurance company's alleged failure to add plaintiff as insured in response to request allegedly made to insurance agent (quoting Boston Investment Property No. 1 State v. E.W. Burman, Inc., 658 A.2d 515, 517 (R.I. 1995))). The doctrine's application in commercial contexts has recently been reaffirmed by the Rhode Island Supreme Court in Franklin Grove Corp. v. Drexel, 936 A.2d 1272, 1275-78 (R.I. 2007).

IV. WRL'S "INSURABLE INTEREST" ARGUMENT IS UNAVAILING BECAUSE THE WRL ANNUITY IS NOT AN INSURANCE POLICY.

WRL cannot save its invalid claims by alleging the lack of an insurable interest between ADM and Mr. Buckman, entitling it to declare the WRL annuity void *ab initio*. See Exhibit B ¶¶ 46-47, ¶ 51. Rhode Island statutory law squarely undermines WRL's assertion that annuity contracts should be equated with life insurance policies and, therefore, subject to the insurable interest requirement. Indeed, Rhode Island statutory law expressly and unambiguously distinguishes annuities from life insurance. Annuities and life insurance have separate and

distinct statutory definitions, such that the definition of "life insurance" does not encompass "annuities," and vice versa. The definition of "annuities" expressly excludes "payments made in connection with a life insurance policy." R.I. Gen. Laws § 27-4-0.1(a). Similarly, the definition of "life insurance" does not encompass, or even reference, "annuities." R.I. Gen. Laws § 27-4-0.1(c). Simply put, the WRL annuity is not a life insurance policy. It is an annuity contract issued by a life insurance company, which scrupulously has avoided, in the 27 pages of the contract's fine print, any reference to life insurance. The WRL annuity's death benefit is not insurance on the life of any person, but a contract measure of the value of the investment by the WRL annuity's owner, which WRL has obligated itself to pay upon the annuitant's death. Thus, the "insurable interest" rule does not apply.

As the mutually exclusive definitional provisions just quoted make clear, the Rhode Island General Assembly recognizes and understands that annuities and life insurance are different and distinct from each other, and that neither encompasses the other. Further reflecting this understanding, some Rhode Island statutes address only annuities.[11] Others address only life insurance.[12] Some statutes explicitly address both.[13] Thus, when the General Assembly wanted a statute to encompass both annuities and life insurance, it knew how to do so, and it carried out such an intent through express statutory language. Similarly, when the Rhode Island legislature

[11] See, e.g., R.I. Gen. Laws § 7-11-1101 (defining variable annuities as securities under Rhode Island Uniform Securities Act); id. § 27-4.5-1 (establishing reserve valuation method for annuities).
[12] See, e.g., R.I. Gen. Laws § 27-4-1 (discrimination in rates and benefits); id. § 27-4-6.2 (setting mandatory provisions for life insurance contracts); id. § 27-4-10 (effect of misrepresentations in applications for insurance); id.27-4-11 (protecting proceeds of policies from creditors); id. § 27-4-13 (preventing provisions in life insurance policies from depriving courts of jurisdictions); id. § 27-4-17 (DBR's annual valuations of policies); id. § 27-4-25 (access to medical information).
[13] See, e.g., R.I. Gen. Laws § 27-4-6.1 (establishing "free look" period and expressly distinguishing between "life insurance policy" and "annuity contract"); id. § 27-4-12 (allowing prevention of beneficiaries from alienating or encumbering benefits); id. § 27-4-13.1 (interest rates); id. § 27-4-24 (requiring filing of forms with insurance commissioner); id. § 27-4-26 (interest rates).

wanted to address only life insurance, without encompassing annuities, it did so through express statutory language that encompassed only life insurance and not annuities.

Rhode Island's "insurable interest" statute is an example of a situation in which the General Assembly intended to address only life insurance policies and not annuities. The word "insurance" appears numerous times in that statute; in stark contrast, the word "annuities" does not appear anywhere in that statute, not even once. Indeed, the sentence that sets forth the insurable interest requirement references only "insurance" – specifically, "insurance contract[s] upon the life or body of another individual" – but the word "annuities" does not appear. R.I. Gen. Laws § 27-4-27(a). Thus, the insurable interest requirement set forth in the statute applies only to life insurance, but not to annuity contracts.

Rhode Island's insurable interest statute is consistent with the statutes of almost every other state, which impose an insurable interest requirement on life insurance, but not on annuities. See, e.g., Cal. Ins. Code § 10110.1; Del. Code Ann. tit. 18, § 2704; Fla. Stat. § 627.404; N.J. Stat. Ann. § 17B:24-1.1; Va. Code Ann., § 38.2-301.[14] Some states (not Rhode Island) provide exceptions in limited, specified circumstances. For example, some states grant minors of a certain age the right to contract for annuities, but also impose the requirement that the beneficiary of such annuities have an insurable interest in the minor. E.g., Ala. Code § 27-14-5. Federal law also provides certain exceptions. One example is the Survivor Benefit Plan, which specifically creates a product called an "insurable interest annuity." See 10 U.S.C. § 1448(b). These exceptions demonstrate that legislatures know how to apply the insurable

[14] Moreover, the only two states, Alaska and Nebraska, that apply their insurable interest statutes to annuities in all circumstances have enacted statutory language that *expressly* encompasses both annuities and insurance contracts. See Alaska Stat. § 21.42.020(d); Neb. Rev. Stat. § 44-704. See also *Memorandum Opinion and Order*, In re: McClure v. McClure, Bankr. No. 98-14932 (Bankr. D.K.S. December 22, 1999) (finding annuity contract did not qualify as "insurance" under Kansas law because premium not based on age, health, or life expectancy but on owner's investment), avail. at http://www.assetprotectionbook.com/mcclure.pdf.

interest requirement to annuities, and when that is the legislative intent, the exceptions are expressly set forth in the statute. These exceptions also demonstrate that those legislatures recognize that their general statutory provisions on insurable interest do *not* apply to annuity contracts.

The Court should not convert WRL's annuity into a life insurance policy for an additional reason: WRL chose *not* to include any insurable interest requirement in its marketing materials, in the annuity application, or in the myriad provisions of its lengthy adhesion contract. See Exhibit A at *Exhibits A-C*. The WRL annuity, as well as the application (see supra, n. 5), demonstrates that WRL knew how to impose or inquire about a "relationship" requirement when it chose to do so; for example, by imposing separate procedures for the distribution of death proceeds when the beneficiary is the deceased Annuitant's surviving spouse, when the beneficiary is a different individual than the owner, and when the beneficiary is not a natural person. See Exhibit A at *Exhibit C*, § 10 (p. 15). But, despite the fact that this is the quintessential contract of adhesion in which WRL could have included any lawful provisions that it desired, WRL chose not to impose an insurable interest or relationship requirement as a predicate to offering the contract to the public at the price that WRL set. Because it chose not to do so, WRL has no basis to ask the Court to create or impose such a provision on its behalf. See Quigley, 373 A.2d at 813-14; see also Rumbin v. Utica Mut. Ins. Co., 757 A.2d 526, 529 n. 6 (D. Conn. 2000) (annuity contract that is preprinted and standardized, and that provides no opportunity for negotiation, is a contract of adhesion).

CONCLUSION

For the foregoing reasons, Defendants Joseph A. Caramadre, Raymour Radhakrishnan, Edward Hanrahan, Estate Planning Resources, Inc. and ADM Associates, LLC respectfully request that this Court dismiss all counts against them in Plaintiff's Amended Complaint.

Respectfully submitted,

JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., ADM ASSOCIATES, LLC, AND EDWARD HANRAHAN,
By their Attorney,

/s/ Robert G. Flanders, Jr.

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Dated: November 13, 2009

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2009, a copy of the within document 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.