IN THE UNITED STATES DISTRICT COURT
FOR THE 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-S
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-S
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-S

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-S
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-S
TRANSAMERICA LIFE INSURANCE COMPANY, Plaintiff, vs. LIFEMARK SECURITIES CORP., JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC. and EDWARD MAGGIACOMO, JR., Defendants; and	)	C.A. No. 09-549-S

WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, Plaintiff, vs.	)	C.A. No. 09-564-S
JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC., HARRISON CONDIT, and FORTUNE FINANCIAL SERVICES, INC., Defendants.	)	

OMNIBUS OBJECTION TO
DEFENDANTS' MOTIONS TO DISMISS AND FOR RECONSIDERATION

Plaintiffs, Transamerica Life Insurance Company ("Transamerica") and Western Reserve Life Assurance Co. of Ohio ("Western Reserve") object to the following motions currently pending[1] in the seven above captioned related actions:

1) Defendants Joseph Caramadre, Raymour Radhakrishnan, Estate Planning Resources, Inc., Edward Hanrahan, Harrison Condit, ADM Associates, LLC and Estella Rodrigues' Motions to Dismiss and Requests for Reconsideration;[2]

2) Motions to Dismiss and Requests for Reconsideration of Defendant Edward Maggiacomo, Jr. (filed in cases 09-471 and 09-549);

[1] Defendant The Leaders Group, Inc. ("Leaders Group") filed a Partial Motion to Dismiss Counts VIII and XI of Western Reserve's Second Amended Complaint in case 09-473. Western Reserve and Leaders Group subsequently stipulated that because Western Reserve is not pursuing those counts against Leaders Group based on this Court's prior Opinion and Order, Leaders Group's motion is moot. *See* 09-473 [DKT. 71]

[2] Caramadre, Radhakrishnan and Estate Planning Resources ("Sponsors") filed motions in all seven cases. Hanrahan, Condit, DK and Rodrigues have joined the Sponsors' motions in cases where they also have been named as defendants. The Sponsors, Hanrahan, Condit, DK and Rodrigues have submitted a "Consolidated Memorandum in Support of Their Motions to Dismiss and Requests for Consideration."

3) Defendant Fortune Financial Service's Motions to Dismiss Plaintiff's Second Amended Complaint (filed in cases 09-470 and 09-564); and

4) Motion of DK, LLC for Judgment on the Pleadings (filed in case 09-473).

Because of the close relationship between these seven actions and the overlapping issues and arguments raised in the defendants' motions, Western Reserve and Transamerica file herewith a consolidated memorandum in support of their objections and respectfully request a joint hearing on the motions.

Respectfully submitted,

/s/ Brooks R. Magratten

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Dated: November 17, 2010

IN THE UNITED STATES DISTRICT COURT
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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-S
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-S
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-S

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-S
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-S
TRANSAMERICA LIFE INSURANCE COMPANY, Plaintiff, vs. LIFEMARK SECURITIES CORP., JOSEPH CARAMADRE, RAYMOUR RADHAKRISHNAN, ESTATE PLANNING RESOURCES, INC. and EDWARD MAGGIACOMO, JR., Defendants; and	)	C.A. No. 09-549-S

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. 09-564-S

CONSOLIDATED MEMORANDUM IN SUPPORT OF PLAINTIFFS' OBJECTIONS TO DEFENDANTS' MOTIONS TO DISMISS AND FOR RECONSIDERATION

Plaintiffs, Transamerica Life Insurance Company ("Transamerica") and Western Reserve Life Assurance Co. of Ohio ("Western Reserve") object to the various motions to dismiss and for reconsideration pending in the above captioned related actions. Because of the close relationship between these seven actions and the overlapping issues and arguments raised in the defendants' motions, Western Reserve and Transamerica submit this consolidated memorandum in order to simplify the Court's consideration of the motions. To further simplify the discussion, Western Reserve and Transamerica are interchangeably referred to throughout this memorandum as "Plaintiff."

Table of Contents

FACTUAL BACKGROUND

Plaintiff refers the Court to the factual synopsis provided in its Opinion and Order dated June 2, 2010 ("Order"). Additional details are provided throughout this memorandum as necessary. To summarize, these cases arises out of a scheme that defendant Joseph Caramadre devised to obtain variable annuity policies for his clients from plaintiff and other insurers. Caramadre and his business associate, Raymour Radhakrishnan, working through Caramadre's business, Estate Planning Resources ("EPR") (Caramdre, Radhakrishnan and EPR are

collectively referred to as "Sponsors") paired up potential investors with terminally ill strangers so the investors could purchase annuities that provided death benefits upon the death of the stranger. The investors ("Owners") would own the annuities; the terminally ill strangers ("Annuitant") would be designated as annuitants and serve as measuring lives for the annuity death benefits.

The Sponsors did the leg-work to have the Owners and Annuitants complete the applications. At least one Annuitant, however, swears that he never agreed to serve as an annuitant and that his signature is forged to the application.[1] Other annuitants state that they had no knowledge of the scheme, how the annuity worked or that the Owners would be profiting from their deaths.[2] Nevertheless, they signed the applications because Radhakrishnan paid them for their signatures.

Because the Sponsors were not authorized to solicit and submit applications for Plaintiff's annuities, however, they had to work with agents who had such power. The agents who agreed to work with the Sponsors are defendants Harrison Condit, Edward Maggiacomo, Jr., and Edward Hanrahan (collectively referred to as "Agents"). The Agents, in turn, received their power to solicit and submit applications for Plaintiff's annuities by virtue of their affiliation with various Plaintiff-authorized brokerage firms: defendants The Leaders Group, Inc.; Fortune Financial Services, Inc.; and Lifemark Securities Corp. (collectively referred to as "Brokerage Companies"), as well as through individual "Appointment Agreements" that they each had with Plaintiff.[3]

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[1] *See* case 09-470, Second Amended Complaint, ¶37.

[2] *See* case 09-470, Second Amended Complaint, ¶27 and case 09-470, Second Amended Complaint, ¶26.

[3] Exhibit C to this memorandum contains the signature pages of Maggiacomo's agreement with Plaintiff and a sample agreement that all Agents would have entered with Plaintiff.

Each having their own necessary role in the scheme, the Sponsors, Agents and Brokerage Companies (collectively "Conspirators") worked together to complete and submit the applications for the annuities at issue. In doing so, the applications contained various misstatements and omissions of material information. Based on the information contained in, or omitted from, the applications, Plaintiff issued the annuities, paid substantial commissions to the Agents and Brokerage Companies and incurred substantial financial losses. Promptly after learning about this stranger-initiated annuity transaction ("STAT") scheme, Plaintiff initiated these seven related actions.

PROCEDURAL HISTORY

The defendants previously moved to dismiss Plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6). After extensive briefing by all parties, the Court granted defendants' motions in part and denied them in part. Specifically, the Court dismissed Plaintiff's claims for rescission, declaratory judgment that the annuities are void, civil liability for crimes and offenses and negligence. As for Plaintiff's claims for fraud and civil conspiracy, the Court dismissed those counts against Owners DK, LLC and ADM Associates, LLC based on an incontestability clause in the annuity contracts.[4] The Court, however, ruled that Plaintiff could pursue those claims against the Sponsors, Agents and Brokerage Companies. The Court also dismissed counts for breach of the duty of good faith and fair dealing asserted against Lifemark in cases 09-471 and 09-549 on the grounds that Lifemark's agreement with Plaintiff was governed by New York law, which does not recognize such a claim in these circumstances. All remaining counts survived. *See* Order at 47-48.

[4] Plaintiff asserted damages claims against ADM and DK in cases 09-472 and 473 respectively because Caramadre is an agent or officer of those companies and his tortious conduct is attributable to them.

In analyzing Plaintiff's fraud claims, the Court recognized that although Plaintiff discussed forgery and fraud in the factum, the pleadings did not articulate discrete counts based on those concepts. Therefore, the Court did not assess the merits of such claims, but acknowledged Plaintiff's right to "amend the Complaints to add fraud in the factum or rescission on grounds of forgery as separate causes of action." Order at 42, n.16.

On September 7, 2010, Plaintiff filed amended pleadings in five of the seven cases. In keeping with the Court's invitation, *id.*, the primary purpose of the amendments was to seek relief for forgery in cases 09-470, 09-549 and 09-564 and for fraud in the factum in all cases except 09-472 and 09-502.[5] The amended pleadings also refer to certain facts that Plaintiff discovered or confirmed after the prior pleadings were filed. In all other material respects, the amended pleadings are no different than the pleadings that were evaluated in the Order. Although the thrust of the pleadings remains unchanged, the relevant aspects of the amendments are summarized below.

C.A. No. 09-470

The second amended complaint in case 09-470 ("470 SAC") adds the Sponsors as defendants and describes the STAT scheme in general. 470 SAC ¶ 2-17. The prior pleadings did not refer to the Sponsors or the STAT scheme because the annuitant in this case, Anthony Pitocco, claimed that his signature was forged to the application and denied having ever met the Sponsors. During a deposition of Mr. Pitocco, however, the Sponsors' and Agent's (Condit) attorneys overtly suggested that their clients were directly involved in the procurement of the

[5] The impetus for the amendments was the Court's tacit invitation to amend the pleadings to assert separate claims for forgery and fraud in the factum. The annuitant in case 09-472, Charles Buckman, claims that he and his wife (the annuitant in case 09-502) were aware of the circumstances surrounding the annuities and their role in the STAT scheme and that their signatures were not forged to their respective applications. Accordingly, Plaintiff did not amend the pleadings in those cases 09-472 or 09-502.

annuity at issue in that case and that they paid Pitocco to sign the application. The amendments account for this.

The 470 SAC also omits counts for rescission and declaratory judgment that the annuity is void. Plaintiff omitted these counts because the Owner, Conreal, LLC, has agreed that the annuity is rescinded. Accordingly, Plaintiff dropped Conreal and Pitocco as defendants.[6]

The 470 SAC, however, added a new claim for fraud in the factum (Count I) against the Sponsors, Agent (Condit) and Brokerage Company (Fortune Financial), and added the Sponsors as defendants in connection with its previously alleged claim for fraudulent inducement (Count II). The forgery of Pitocco's signature also is included as grounds for those counts, as well as for Count VI for civil liability for crimes and offenses.[7] 470 SAC, ¶¶41, 48 & 71.

C.A. No. 09-471

The second amended complaint in case 09-471 ("471 SAC") includes a new, discrete claim for fraud in the factum (Count IV). It also adds fraud in the factum as a separate basis for rescinding the annuity or declaring it void. *See* 471 SAC, ¶¶ 51 & 59.

The 471 SAC also refers to Maggiacomo's role in EPR. *Id.* ¶ 34. Plaintiff added Maggiacomo's connection to EPR in the most recent pleading after obtaining documents that list Maggiacomo as "Vice President" of EPR and identify his email address as: *edm@eprworld.com*. *See* Exhibit A. Based on Maggiacomo's connection to EPR, Plaintiff included EPR as a defendant that is vicariously liable for Maggiacomo's unjust enrichment (Count X) and negligence (Count XI).

[6] The caption in the 470 SAC has been amended to reflect the omission of Pitocco and Conreal and the addition of the Sponsors.
[7] R.I. Gen. Laws § 11-17-1 criminalizes forgery.

The 471 SAC also changes the allegations of Count V to correct the record and refer to the proper contractual agreement between Plaintiff and Lifemark. In its prior pleadings, Plaintiff mistakenly referred to an outdated agreement between the entities that was governed by New York law. The correct agreement, however, is governed by Iowa law. The second amended pleading acknowledges this and the correct contract terms. 471 SAC, ¶¶ 69-74.

C.A. No. 09-472

Plaintiff did not amend this pleading after the Order was issued.

C.A. No. 09-473

The second amended complaint in case 09-473 ("473 SAC") includes fraud in the factum as a basis for rescinding the annuity or declaring it void (Counts I and II). Since that pleading was filed, however, DK and Plaintiff have agreed that the annuity is rescinded. *See* Exhibit B. Therefore, those counts are moot.

However, the second amended complaint also asserts a new separate count against the Sponsors, Agent (Hanrahan), Brokerage Company (Leaders Group) and Owner (DK) to recover damages based on fraud in the factum, Count IV.

C.A. No. 09-502

Plaintiff did not amend this pleading after the Order was issued.

C.A. No. 09-549

The amended complaint in case 09-549 ("549 AC") includes fraud in the factum as a separate damages count (Count II). Additionally, like in case 09-471, the amended complaint refers to Maggiacomo's connection to EPR (549 AC, ¶ 31) and adds EPR as a defendant under Plaintiff's unjust enrichment (Count VII) and negligence (Count VIII) counts. Further, based on

the likelihood that some of the now deceased[8] Annuitants' signatures were forged, like in the case of Mr. Pitocco (case 09-470), Plaintiff added forgery as a basis for Count V for civil liability for crimes and offenses. *See* 549 AC, ¶ 156.

Like in case 09-471, the 549 AC also changes the allegations of Count III to correct the record and refer to the proper contractual agreement between Plaintiff and Lifemark. *Id.* at ¶¶ 137-42.

C.A. No. 09-564

The amended complaint in case 09-564 ("564 AC") includes fraud in the factum as a separate damages count (Count II). Further, like in case 09-549, Plaintiff added forgery as a basis for Count V for civil liability for crimes and offenses. *See* 564 AC, ¶ 108.

THE CURRENT MOTIONS

The Sponsors and Agents have asked the Court to reconsider its ruling concerning their liability in for fraud, unjust enrichment and civil conspiracy in all seven cases. They also challenge Plaintiff's newly articulated fraud in the factum counts in cases 09-470, 09-471, 09-473, 09-549 and 09-564.

None of the Brokerage Companies have requested reconsideration of the Court's prior ruling. Of the Brokerage Companies, only Fortune Financial has a pending motion.[9] Fortune

[8] All Annuitants identified in cases 09-549 and 09-564 are deceased and the benefits under the annuities have been paid to the owners. Therefore, Plaintiff does not seek to rescind the annuities or have them declared void.

[9] Lifemark answered the newly amended complaints filed in cases 09-471 and 09-549 and has not filed a motion to dismiss. Leaders group answered the pleadings in cases 09-472, 09-473 and 09-502, but in case 09-473, moved to dismiss the counts asserted in the second amended complaint against it for negligence and civil liability for criminal activity. Plaintiff and Leaders Group have since stipulated those counts were dismissed pursuant to the Order and consequently, its motion is moot. *See* 09-473 [DKT. 71]

Financial moved to dismiss the counts for fraud in the factum, negligence and liability for criminal activity alleged in the amended pleadings filed in cases 09-470 and 09-564.

The Owners have taken various approaches in response to the Court's Order and the newest amended pleadings. Estella Rodrigues (case 09-471) and ADM (case 09-472) have joined the Sponsors' motion to dismiss and to reconsider. DK (case 09-473) answered the second amended complaint and subsequently moved for judgment on the pleadings.

Plaintiff has objected to the various motions for reconsideration and to dismiss. For the reasons set forth in detail below and in its memoranda submitted in connection defendants' original motions to dismiss, which are incorporated herein by reference, Plaintiff respectfully requests that the defendants' motions be denied.

ARGUMENT

I. PLAINTIFF PROPERLY ALLEGES A VIABLE CLAIM FOR FRAUD IN THE INDUCEMENT AGAINST THE SPONSORS AND AGENTS[10]

The Sponsors and Agents have asked the Court to reconsider its ruling that they could be liable for fraudulent inducement. Like before, they contend that the fraud claims against them do not satisfy the specificity requirement of Fed. R. Civ. P. 9(b). They also argue the fraud claims fail as a matter of law because they had no duty to disclose material information and they made no affirmative misrepresentations.

[10] The Brokerage Companies do not currently seek dismissal of the fraud claims as plead. Owners Rodrigues (case 09-471) and ADM (case 09-472) have joined in Sponsors and Agents' motion for reconsideration and, thus, are the only other defendants who currently challenge the fraud claims. Plaintiff has not asserted a fraud claim against Rodrigues, however. Therefore, she lacks standing to seek dismissal or reconsideration of that count. Moreover, Plaintiff has not amended the pleading in case 09-472 since the fraud claims against ADM were dismissed based on the incontestability clause. *See* Order at 22. Accordingly, there are no currently pending claims against ADM and its participation in the motion to dismiss and for reconsideration is moot. However, if the Court permits Plaintiff to proceed with it fraud in the factum theory, which would render the annuity void (not just voidable), Plaintiff reserves its right to re-join ADM as a defendant in accordance with footnote 16 of the Order.

All parties agree that Rhode Island recognizes that fraudulent inducement may be predicated on an affirmative misrepresentation, or on concealment of material information. *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 268 (D.R.I. 2000); *Illinois State Trust Co. v. Conaty*, 104 F. Supp. 729, 734 (D.R.I. 1952); *Nat'l Credit Union Admin. Bd. v. Regine*, 795 F. Supp. 59, 70 (D.R.I. 1992) ("Fraud can be grounded in concealment."). To prevail on a claim for fraudulent misrepresentation, "a plaintiff must show: (1) a false or misleading statement of material fact that was (2) known by the defendant to be false and (3) made to deceive, (4) upon which the plaintiff relied to his detriment." *Guilbeault*, 84 F. Supp. 2d at 268; *see also Nat'l Credit Union Admin. Bd.*, 795 F. Supp. at 70; *Women's Dev. Corp. v. City of Central Falls*, 764 A.2d 151, 160 (R.I. 2001); *Nisenzon v. Sadowski*, 689 A.2d 1037, 1046 n.11 (R.I. 1997). When the theory of fraud is based on the concealment of a material fact, as opposed to an affirmative misrepresentation, the plaintiff must demonstrate that the defendant had a duty to disclose the omitted fact. *See Guilbeault*, 84 F. Supp. 2d at 269; *Illinois State Trust Co.*, 104 F. Supp. at 734; *Home Loan & Invest. Assoc. v. Paterra*, 255 A.2d 165, 167-68 (R.I. 1969); *see generally* Restatement (Second) of Torts § 551(1) (1977); 37 Am. Jur. 2d Fraud and Deceit § 204 (2009).

Plaintiff's fraud claims are based on misrepresentations and concealment of facts by the Sponsors, Agents and Brokerage Firms. As the Court recognized in its Original Opinion, Plaintiff's pleadings allege that these defendants worked together to intentionally misrepresent or withhold material information provided to Plaintiff in order to induce it to issue the annuity contracts and pay commissions. The Court's analysis in the Original Opinion is sound and it applies equally to the subsequently amended pleadings, which do not substantively change the theory or allegations or fraud.

A. THE AMENDED PLEADINGS SATISFY RULE 9(b)

The operative allegations supporting the fraud claims in the newly amended complaints are virtually identical to the allegations that the Court reviewed in connection with the Order. Nevertheless, the Sponsors and Agents again contend that the complaints do not satisfy Rule 9(b).

"The clear weight of authority is that Rule 9 requires specification of the time, place and content of an alleged false representation, but not the circumstances or evidence from which fraudulent intent could be inferred." *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 228 (1st Cir. 1980). "This interpretation of Rule 9 comports with its language, harmonizes the rule with Rule 8, which requires that averments in pleadings be concise and direct, and at the same time fulfills a major purpose of Rule 9: to give adequate notice of the plaintiff's claim of fraud or mistake . . . ." *Id.* at 228-29.

Because Rule 8 and Rule 9 must be read harmoniously,

> it is inappropriate to focus exclusively on the fact that Rule 9(b) requires particularity in pleading the circumstances of fraud. This is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the federal rules and the many cases construing them; in a sense, therefore, the rule regarding the pleading of fraud does not require absolute particularity or a recital of the evidence, especially when some matters are beyond the knowledge of the pleader and can only be developed through discovery.

5A Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 1298 (3d ed.). Consequently, under Rule 9, "the pleader usually is expected to specify the who, what, where, and when of the allegedly false or fraudulent representation." *Alternative Sys. Concepts, Inc. v. Synopsys*, 374 F.3d 23, 29 (1st Cir. 2004).

Like the pleadings at issue in the first series of motions to dismiss, the currently operative pleadings "satisfy the heightened pleading requirements for fraud," "serve the goals of Rule 9(b)" and provide defendants '"with fair notice' of the claim." Order at 26 & 30. There is no question that defendants have full knowledge of the basis of Plaintiff's fraud claim. As this Court succinctly explained, Plaintiff expressly identified the information that was fraudulently withheld or misrepresented and alleged its theory in the case, which is "that each of the parties understood the nature of the fraudulent scheme, and each had his or her part to play in it." Order at 35-37.

The operative pleadings specifically identify the "who, what, where, and when" of Plaintiff's fraud claims. Indeed, the pleadings are notable in their level of detail. They explicitly describe the STAT scheme, how it worked and each defendant's role in it. Caramadre was the mastermind of the scheme;[11] Radhakrishnan was the footsolder who would enlist the Annuitants;[12] the agents would provide the necessary endorsements on the applications and, through their respective brokerage companies, forward them to Plaintiff for consideration.[13] The pleadings carefully recite the misrepresentations and omissions that form the base of the fraud claims[14] and specify precisely how defendants' fraudulent conduct harmed Plaintiff.[15] Based on the pleadings, the Court had no difficulty discerning the nature and basis of Plaintiff's fraud

[11] *See, e.g.*, (470 SAC ¶¶ 12-23); (471 SAC ¶¶ 14-23); (472 AC ¶¶ 13-22); (473 SAC ¶¶ 14-23); (502 Complaint ¶¶ 13-22); (549 AC ¶¶ 12-21); (564 AC ¶¶ 12-23).
[12] *See, e.g.*, (470 SAC ¶¶ 21-23); (471 SAC ¶¶ 25-27); (472 AC ¶¶ 24-25); (473 SAC ¶¶ 25-26); (502 Complaint ¶¶ 24-25); (549 AC ¶¶ 22-24, 38-40, 54-56, 70-72, 86-88, 102-104); (564 AC ¶¶ 22-24, 39-41, 56-58).
[13] *See, e.g.*, (470 SAC ¶¶ 24-26); (471 SAC ¶¶ 28-30); (472 AC ¶¶ 26-28); (473 SAC ¶¶ 27-29); (502 Complaint ¶¶ 26-28); (549 AC ¶¶ 25-27, 41-43, 57-59; 73-75, 89-91, 105-07); (564 AC ¶¶ 25-27, 42-44, 59-61).
[14] *See, e.g.*, (470 SAC ¶48); (471 SAC ¶ 61); (472 AC ¶ 53); (473 SAC ¶ 62); (502 Complaint 41-46); (549 AC ¶¶ 119-23); (564 AC ¶¶ 74-78).
[15] *See, e.g.*, (470 SAC ¶ 52); (471 SAC ¶ 65); (472 AC ¶ 57); (473 SAC ¶ 66); (502 Complaint ¶ 50); (549 AC ¶ 128); (564 AC ¶ 83).

claim and providing – in the defendants' words - "the most thoroughly developed introduction to the facts and issues." Caramadre Mem. at 4. Defendants are equally able to comprehend the allegations against them and respond to the fraud counts. Consequently, the pleadings easily clear the bar set by Rule 9(b).

Contrary to the Sponsors' and Agents' argument, the fact that Plaintiff asserts alternative allegations to support its fraud claim in cases 09-470, 09-549 and 09-564 does not render its pleadings insufficient. With respect to case 09-470, the Annuitant, Mr. Pitocco, has sworn that his signature was forged to the application, that he had no knowledge of the annuity and that he never agreed to serve as an annuitant. *See* 09-470 Complaint, Exhibit B. Radhakrishnan disputes Mr. Pitocco's story, however, and contends that Sponsors paid him to serve as an annuitant just as they did for the other terminally ill individuals in the other related cases. *See* 470 SAC, ¶ 23. In these circumstances, Plaintiff is justified in making alternative allegations to support its fraud claim because, *under either version of events,* the Sponsors and Agents committed fraud.

The Sponsors and Agents also complain that, in connection with cases 09-549 and 09-564 (involving already deceased annuitants), Plaintiff improperly makes alternative allegations of forgery of the annuitants' signatures, or trickery to induce them to participate in the STAT scheme. The alternative allegations in those cases are warranted, however, based on the limited information that Plaintiff has been able to obtain in connection with these related matters. Pitocco swears his signature was forged; other annuitants (Veveiros and Garvey) contend they were hoodwinked into participating. The amended pleadings demonstrate that the annuities are the product of the same STAT scheme that led to the annuities at issue in the related cases. Thus, Plaintiff is justified in assuming and alleging that the Agents and Sponsors employed the

same deceitful tactics to procure and submit the applications in connection with the annuities at issue in cases 09-549 and 09-564.[16]

The Sponsors and Agents' reliance on *Vladimir v. Deloitte & Touche LLP*, 95 Civ. 10319, 1997 WL 151330 (S.D.N.Y. March 31, 1997), does not support their Rule 9(b) argument. Although the court in that case did fault the plaintiff for making alternative factual allegations, it did so specifically because "plaintiffs' counsel has been in possession of . . . papers for three years and has conducted extensive discovery" that resolved the ambiguity in plaintiff's pleading. *Id.* at * 17 and n.14. Conversely, in this case, virtually no discovery has been conducted because of the extraordinary efforts that the Agents and Sponsors have gone through to prevent Plaintiff from obtaining information. Moreover, Plaintiff has resisted interviewing witnesses who may be subject to duplicative questioning by the parties to this case and by law enforcement officers. Thus, in stark contrast to *Vladimir*, the Agents and Sponsors have deprived Plaintiff of the opportunity to obtain the very information they now contends is required.

In these circumstances, Plaintiff's pleadings are sufficiently specific. There is no doubt that defendants know the basis of Plaintiff's fraud claim - the annuitants were either tricked into signing the application or their signatures were forged. And that the applications contain specifically identified affirmative misrepresentations or material omissions. Accordingly, Rule 9(b) requires nothing more of Plaintiff's pleadings.

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[16] Maggiacomo contends that Plaintiff's attorneys violated Rule 11 by failing to exercise due diligence and filing pleadings without a good faith basis to support the allegations. This argument holds no merit given the background of this case, the secretive nature of the STAT scheme and defendants' efforts to stall discovery. Having successfully delayed Plaintiff's efforts to obtain additional information surrounding the annuity applications, Maggiacomo can not credibly complain that Plaintiff's attorneys acted in bad faith based on the information that currently is available, including Maggiacomo's connection to EPR, his signature on the applications, the lack of a relationship between the annuitants and owners, the short timeframe between the issuance of the annuities and the death of many annuitants and the apparent connection to the STAT scheme described in the pleadings in the seven related cases.

B. THE MISREPRESENTATIONS AND OMISSIONS ARE MATERIAL AND THE AGENTS AND SPONSORS HAD A DUTY TO DISCLOSE

Once again, defendants attempt to persuade the Court that they cannot be liable for defrauding Plaintiff because, they argue, the omitted or misleading information was immaterial and, regardless of materiality, they had no duty to disclose. This Court correctly recognized in its initial decision that the materiality of the misleading or omitted information is a question for the jury. Order at 37. *See also, Affleck v. Potomac Ins. Co.*, 140 A. 469-70 (R.I. 1928); *Smith v. Beaumier*, 703 A.2d 1104, 1107 (R.I. 1997); *In re Cabletron Sys., Inc.*, 311 F.3d 11, 36 (1st Cir. 2002); *Suskind v. North Am. Life & Cas. Co.*, 607 F.2d 76 84 (concluding that whether concealment of an illness from an insurer "was intentional or material in light of the absence of questions regarding his medical status in the application are issues most appropriately left to the trial court."). Consequently, defendants' "immateriality" argument does not justify dismissal.

Moreover, to the extent defendants complaint that Plaintiff did not specifically inquire about certain information that it contends was fraudulently withheld, this Court properly recognized that "many state courts allow claims for 'fraudulent concealment . . . even without inquiry concerning the concealed material facts by the insurer."' Order at 31 (quoting *Putnam Resources v. Pateman*, 757 F.Supp. 157, 162 (D.R.I. 1991)). As this Court has acknowledged, "fraudulent concealment can make an insurance policy voidable even without inquiry concerning the concealed material facts by the insurer." *Putnam Resources*, 757 F.Supp. at 162 n.1 (citing *Lighton v. Madison-Onondaga Mut. Fire Ins. Co.*, 483 N.Y.S.2d 515, 516 (App.Div. 1984) (non-disclosure of a previous suspicious fire on insured's premises was properly submitted to jury despite lack of inquiry by insurer)).

Contrary to defendants' arguments, Plaintiff did not "waive" its right to pursue fraud claims simply because it did not pose certain basic questions on the application.[17] As Plaintiff explained in its prior memoranda, basic facts and information must be disclosed. This Court properly "reject[ed] the argument that any information [Plaintiff] did not demand on the annuity applications is immaterial as a matter of law." Order at 33.

Defendants' reliance on this Court's analysis in *Nationwide Life Ins. Co. v. Steiner*, C.A. No. 09-3255, Opinion and Order (D.R.I. July 13, 2010), is unavailing. In *Steiner*, an insurer sought to rescind an annuity after acquiring information that was not provided in response to a specific question on the annuity application. The Court reasonably held that, in those circumstances, the insurer waived its right to complain about the omission because it knew its specific questions went unanswered and it failed to follow up. The distinction between *Steiner* and this case is obvious and important. In the *Steiner* case, the fact that an application was returned with specific questions unanswered clearly informed the insurer that it would not be receiving specifically identifiable information. In other words, the incomplete *Steiner* application was a specific warning to the insurer that certain information would not be provided. Conversely, in this case, defendants' silence conveyed no such warning to Plaintiff. Therefore, unlike the insurer in *Steiner* (and the many insurers referenced in the court's citations at pages 18-20 of the *Steiner* decision), Plaintiff did not knowingly and voluntarily enter an agreement based on obviously missing, material information. Consequently, defendants' "waiver" defense carries no water.

[17] Maggiacomo raises this argument under the label of "assumption of the risk." Despite Maggiacomo's unique heading, his argument in this regard is the same as his counterparts', i.e., defendants had no duty to offer any information and Plaintiff, by omitting specific questions to elicit basic and obviously important information, bore the exclusive risk that its agents would act surreptitiously.

C. AGENTS AND SPONSORS ARE LIABLE FOR THE FRAUDULENT MISREPRESENTATIONS AND OMISSIONS

The Conspirators (Agents, Sponsors and Brokerage Companies) each held critical roles in the STAT scheme. The Sponsors identified the terminally ill annuitants, paired them with a willing investor (Owner) and obtained the application with necessary signatures; the Agents signed the application to provide the necessary representation concerning their supposed diligence in reviewing the suitability of the investment; the Brokerage Companies' contractual relationship with Plaintiff was the essential key that allowed the application ultimately to be submitted to Plaintiff. *See* notes 11-15 and accompanying text on p. 14-15, *supra*. Therefore, because these conspirators (individually or through their agents) knowingly worked in concert to carry out their scheme, their individual conduct is attributable to one another.

1. Agents

Agents attempt to avoid liability for their deceitful conduct and their participation in the STAT scheme by disclaiming any duty to Plaintiff. According to the Agents, they were "agents of the Owners, not agents of Plaintiff" and, therefore, fraud claims against them must be dismissed immediately because they owed no duty to be truthful to Plaintiff. Caramadre Mem. at 14. However, Agents can not obtain dismissal - at the pleading stage in particular - simply by claiming an exclusive allegiance to the Owners.

At the outset, the pleadings do not establish a valid principal/agent relationship between the Agents and the Owners. Rather, the pleadings portray a scenario where the Agents' role in the STAT scheme was merely to rubberstamp and sign an application that was arranged and procured by the Sponsors. *See id.* There is no allegation in the pleadings that the Agents had a meaningful – let alone an agency - relationship with the Owners. Their argument, which depends entirely on a claimed relationship with the Owners, depends on a factual determination

that cannot be resolved on a motion to dismiss. *See, e.g.*, *Bostic v. Dalton*, 158 S.W. 3d 347, 351 (Tenn. 2005)("[T]he existence of an agency relationship is a question of fact under the circumstances of a particular case."); *Wallace v. Frontier Bank, N.A.*, 903 So. 2d 792, 801 (Ala. 2004)("A summary judgment on the issue of agency is generally inappropriate because agency is a question of fact…."). Because, at this juncture, the Court must draw all reasonable inferences in favor of Plaintiff, Agents cannot hide behind a purported agency relationship to have fraud claims against them dismissed.

Moreover, even if the Agents represented the Owners, Rhode Island recognizes that an agent may be liable "for acts to which the agent has bound himself or herself-either expressly or impliedly-under a contract, . . . or for acts within the scope of a duty that is otherwise independent of the agency relationship." *Kennett v. Marquis*, 798 A.2d 416, 19 (R.I. 2002) (internal citation omitted). As discussed in Plaintiff's original memoranda, the allegations in the pleadings demonstrate that Agents were serving as "soliciting agents." *See also* Exhibit C, Appointment Agreement ¶ 2 ("You may solicit applications for the company"). Thus, regardless of any relationship with the Owners, they Agents *also* independently owed duties to Plaintiff. *See generally, id.* A soliciting agent is considered an agent of the insurer. *Kenney Mfg. Co. v. Starkweather & Shepley, Inc.*, 643 A.2d 203, 209 (R.I. 1994); *Ginocchio v. Am. Bankers Life Assur. Co. of Florida*, 889 F. Supp. 1078, 1082 n.4 (N.D. Ill. 1995); *Marie Deonier & Assoc. v. Paul Revere Life Ins. Co.*, 9 P.3d 622, 633-34 (Mont. 2000); *Clements v. Ohio State Life Ins. Co.*, 514 N.E.2d 876, 881-82 (Ohio Ct. App. 1986). And the law imposes high duties of fidelity and loyalty on agents with respect to their principals:

> The relationship existing between an insurance company and its agents is fiduciary, and, generally speaking, it may be said that they must exercise good faith and reasonable diligence in discharging the duties and trusts owed their principal and imposed

> upon them by their agency, this being especially true when their instructions are not specific, but clothe them with discretion…. In all transactions affecting the subject matter of the agency, it is the duty of the agent to act with utmost good faith and loyalty. In accepting the agency, the agent impliedly, if not expressly, undertakes to give his or her principal his or her best judgment and decisions.

Couch on Insurance 3D §54:2 (1996).

As soliciting agents, the Agents were well aware of Plaintiff's intention to not issue annuities in the absence of an insurable interest. Indeed, as will be established through additional discovery, Western Reserve specifically informed its agents that it "will not accept annuity applications where the contract owner/applicant does not have an appropriate insurable interest in the life of the annuitant." *See* Exhibit D.[18] The Agents had an obligation to exercise reasonable care in discharging their duties to Plaintiff and to not conceal or deliver false information knowingly or intentionally. *Cf. Kennett v. Marquis*, 798 A.2d 416, 419 (R.I. 2002) (affirming summary judgment for seller's real estate agent because a lack of evidence that agent intentionally misled purchaser).

A Florida appellate court recently highlighted the flaws in the Agents' argument. In *Liberty Surplus Ins. Corp., Inc. v. First Indem. Ins. Services, Inc.*, 31 So.3d 852, 854 (Fla.App. 4 Dist. 2010), the plaintiff insurer sued an insurance broker for fraud after the broker submitted a misleading application for its client/principal to obtain professional liability insurance. The broker attempted to shield itself from liability by arguing hat it could not be liable for misrepresentation because it was working as an agent for the client/principal, rather than for the insurer. The court, however, easily dispatched that argument based on the logical principal that

[18] Regardless of whether the insurable interest doctrine applies to this case as a matter of Rhode Island common law, it is relevant to the question of whether defendants fraudulently concealed information that was material to Plaintiffs' decision to issue the annuities.

"[a]n agent is liable for its own intentional fraudulent acts." *Id.* at 856. Consequently, the broker's purported relationship with the client/principal did not insulate the broker for its fraudulent conduct. Because the complaint alleged that the broker had engaged in a transaction in which it had a pecuniary interest, i.e., receipt of a commission, and knowingly provided false information upon which the insurer relied to its detriment, the insurer's complaint alleged an actionable claim for fraud. *Id.* at 857-58.

Liberty Surplus's holding is consistent with courts around the country that have recognized liability of a broker to an insurer based upon the broker's misrepresentations to an insurer. *See, e.g., Century Sur. Co. v. Crosby Ins., Inc.*, 21 Cal. Rptr. 3d 115, 125 (Cal. Ct. App. 2004) (recognizing that broker can be liable to carrier for broker's misrepresentation in application); *Burlington Ins. Co. v. Okie Dokie, Inc.*, 329 F.Supp.2d 45, 49 (D.C. Cir. 2004) (same); *St. Paul Surplus Lines Ins. Co. v. Feingold & Feingold Ins. Agency, Inc.* 693 N.E.2d 669 (Mass. 1998) (same); *Midland Ins. Co. v. Markel Serv. Inc.*, 548 F.2d 603 (5th Cir. 1977); *St. Paul Fire & Marine Ins. Co. v. Laubenstein*, 169 N.W. 613 614-15 (Wis. 1918) (same).

Here, like the insurer in *Liberty Surplus*, Plaintiff paid the Agents handsome commissions in connection with the annuity transactions. Moreover, the pleadings here, like in *Liberty Surplus*, allege that the Agents made knowing misrepresentations and omissions. Thus, like in *Liberty Surplus*, Plaintiff's pleadings articulate an actionable claim of fraud against the Agents.

The Sponsors and Agents attempt to distinguish *Liberty Surplus* on the grounds that the broker in that case made a *partial* (three of fourteen prior claims against the client/principal) disclosure of the information that was pertinent to the fraud claim, whereas here, the allegations are that the Agents completely withheld information. This argument misses the mark, however.

First, Plaintiff's theory of fraud is based both on material omissions *and affirmative misrepresentations*. Thus, the partial disclosure / complete omission distinction is irrelevant.

Second, the broker's duty of complete disclosure in *Liberty Surplus* was not based solely on its partial disclosure. Rather, the court was guided by elementary '"principals of fair dealing and good faith,"' *id.* at 858, and § 552 of the Restatement (Second) of Torts, which provides that a broker who has a pecuniary interest in a transaction may be liable for supplying "false information for the guidance of others in their business transactions . . . if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Id.* at 856 (quoting § 552 of the Restatement (Second) of Torts). There is nothing in the *Liberty Surplus* decision to suggest that the broker would have avoided liability by concealing *all* of the material information, rather than just *some* of it. Whether the broker concealed eleven or fourteen prior claims against the insured, its concealment was intentional. Because the agent was liable for its own intentionally fraudulent acts, and because the complaint alleged that the broker intentionally withheld material information from the insurer, the insurer properly stated a cause of action for fraudulent misrepresentation. *Id.* at 858.

In this case, like in *Liberty Surplus*, the Agents received commissions from Plaintiff and, at a minimum, had a duty to not knowingly and intentionally conceal material information. The pleadings allege that they did just that. Accordingly, the fraud claims against the Agents should not be dismissed.

2. Sponsors

The Sponsors also are responsible for defrauding Plaintiff. The pleadings alleged that they knowingly and intentionally conspired with the Agents to accomplish the fraud. "Simply put, according to [Plaintiff], Defendants collectively did not tell them they were conspiring to

exploit a loophole in Plaintiffs' annuity products." Order at 37. "Civil conspiracy is … a means of establishing joint liability for tortious conduct." *Read & Lundy, Inc. v. Washington Trust Co. of Westerly*, PC No. 99, 2859, 2002 WL 31867868, 17 (R.I. Super., Dec. 12, 2002) (quoting *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F.Supp.2d 263, 268 (D.R.I. 2000)). Civil conspiracy "requires proof that: (1) there was an agreement between two or more parties and (2) the purpose of the agreement was to accomplish an unlawful objective or to accomplish a lawful objective by unlawful means." *Smith v. O'Connell*, 997 F.Supp. 226, 241 (D.R.I. 1998). As discussed in Plaintiff's original memoranda, the pleadings contain the requisite elements of the Agents' knowing participation in the fraudulent scheme. Consequently, their active role in the conspiracy to defraud Plaintiff is sufficient to subject them to liability for fraud.

II. PLAINTIFF PROPERLY ALLEGES A VIABLE CLAIM FOR FRAUD IN THE FACTUM AGAINST THE AGENTS, SPONSORS AND BROKERAGE COMPANIES.

Plaintiff's pleadings state proper claims for fraud in the factum. Fraud in the factum occurs when one party makes 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." *Rhode Island Depositors Econ. Prot. Corp. v. Duguay*, 715 A.2d 1278, 1280 (R.I. 1998) (internal quotation marks omitted); *Rhode Island Depositors Econ. Prot. Corp. v. Rignanese*, 714 A.2d 1190, 1196 (R.I. 1998); *FDIC v. Rusconi*, 808 F. Supp. 30, 40 (D. Me. 1992). Fraud in the factum renders a contract void *ab initio*, not just voidable. *Rhode Island Depositors Econ. Prot. Corp. v. Bowen Court Assocs.*, 763 A.2d 1005, 1009 (R.I. 2001).

Working in tandem, the Sponsors, Agents, and Brokerage Companies' committed fraud in the factum. To the extent they forged an Annuitant's signature (case 09-470 and possibly in 09-549 and 09-564), "[c]ourts find fraud in the factum" in cases "involving forgery." *Giannone*

v. Ayne Institute, 290 F. Supp. 2d 553, 563 (E.D. Pa. 2003) (cited in Memorandum and Opinion at p. 41, n.16); *Resolution Trust Corp. v. Forlini*, Nos. 91-3215, 91-3216, 91-3610, 91-3612, 91-3613, 91-3615, 1991 WL 259742, *3 (E.D. Pa. Dec. 12, 1991) ("Forgery is fraud in factum and not fraud in the inducement."). A transaction based on a forged document is void. *Genesee Regional Bank v. Palumbo*, 799 N.Y.S.2d 883, 890 (N.Y. Sup. 2005) (recognizing that a transfer based on a forged title document constitutes "a void transfer"). Therefore, annuities that were issued in connection with applications containing forged signatures are void for fraud in the factum.

With respect to those annuities where the Annuitants acknowledge signing the applications, but deny having any knowledge or appreciation of the circumstances surrounding the STAT scheme, defendants' fraud in the factum manifests itself in two ways. First, by concealing the existence, nature and essential terms of the annuity from the Annuitants in order to get them to sign the application, the applications themselves were void based on the fraud in the factum perpetrated on the Annuitants. Therefore, any purported agreements by those Annuitants to serve as measuring lives under the annuities are void and the applications that they signed lacked all legal significance.

Second, having obtained the Annuitants' signatures under false pretenses, defendants submitted the legally insignificant applications to Plaintiff. Although the applications bore the Annuitants' signatures, thereby conveying that the Annuitants knowingly and voluntarily signed, they were in fact "something quite different." *Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501, 1504 (9th Cir. 1984). The fraud perpetrated on the Annuitants rendered the applications nullities, despite the fact that, by all outward appearances, they were legitimate. In these circumstances, Plaintiff agreed to enter contracts that turned out to be profoundly different

in nature than what the conspirators represented. Rather than entering annuity policies that provided benefits based on the death of a knowing, voluntary and appropriate annuitants, Plaintiff was coaxed into defendants' secretive and abhorrent STAT scheme. Consequently, Plaintiff "ought to be afforded an opportunity to test [its] claim [of fraud in the factum] on the merits." *Foman*, 371 U.S. at 182.

Defendants suggest that Plaintiff's fraud in the factum claims fail because only the Annuitants were duped into signing the applications. Consequently, defendants argue, only the Annuitants would be entitled to relief under the theory of fraud in the factum. As discussed, however, this argument misses the mark. Defendants' deceitful conduct *vis-a-vis* the Annuitants was merely the first step in their scheme to convince Plaintiff to enter the annuity contracts under terms that were fundamentally different than what they appeared to be. Just as a commercial transaction based on a void title is void, *Genesee Regional Bank*, 799 N.Y.S.2d at 890, an annuity contract based on a void application is void. Therefore, in these circumstances, defendants can not avoid liability for fraud in the factum by claiming to have only acted deceitfully to the Annuitants.

III. PLAINTIFF'S CLAIMS FOR UNJUST ENRICHMENT AND CONSPIRACY ARE PROPER

Agents contend that Plaintiff's unjust enrichment and conspiracy counts must be dismissed because the underlying fraud claims fail as a matter of law. As discussed above, in Plaintiff's original memoranda, and in the Court's Order, Plaintiff has alleged proper fraud claims. Moreover, unlike a conspiracy claim, an unjust enrichment claim does not require proof of an underlying intentional tort. Therefore, regardless of the Agent's fraudulent conduct, they can be liable under an unjust enrichment theory.

IV. THE NEWLY AMENDED COMPLAINTS IN CASES 09-470, 09-549 AND 09-564 ASSERT ACTIONABLE COUNTS FOR CIVIL LIABILITY FOR CRIMINAL ACTIVITY BASED ON FORGERY.[19]

Sponsors, Agents and Fortune Financial seek dismissal of Plaintiff's count for civil liability for crimes and offences, R.I. Gen. Laws § 9-1-2, in cases 09-470, 09-549 and 09-564 as alleged in the newly amended pleadings filed in those actions. To the extent those counts are predicated on violation of Rhode Island's insurance fraud statute, R.I. Gen. Laws § 11-41-29, Plaintiff recognizes that the Court already has determined that those counts are dismissed. Plaintiff reasserted those allegations only to preserve its appellate rights and it does not dispute that defendants need not litigate that issue at this time.

However, the newly amended pleadings in those three cases also allege a violation of Rhode Island's criminal forgery statute, R.I. Gen. Laws § 11-17-1. This theory of liability under § 9-1-2 was not contained in the prior pleadings and was not addressed in the Court's Order. Consequently, the Court's prior ruling in connection with Plaintiff's count for criminal acts does not completely resolve that count as it currently exists.

Defendants do not take issue with Plaintiff's reliance on § 11-17-1 to establish liability for criminal activity under § 9-1-2. Rather, their only complaint about Plaintiff's forgery allegation is that it supposedly is an improper alternative allegation. As discussed above, however, Plaintiff's alternative pleading is appropriate in this case. Regardless, it is patent that an allegation that contradicts a charge of forgery may be disregarded in connection with this count. *See* Fed. R. Civ. P. 8(d)(2) ("If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."). Accordingly, to the extent Plaintiff's claims for damages as a result of defendants' "crimes and offenses" is predicated on a violation of Rhode

[19] Forgery is not an underlying basis for liability under § 9-1-2 in the remaining cases.

Island's criminal forgery statute, § 11-17-1, those counts in cases 09-470, 09-549 and 09-564 must not be dismissed.

V. PLAINTIFF DOES NOT SEEK TO RESURRECT CLAIMS FOR NEGLIGENCE.

Fortune Financial moves do dismiss the counts alleged in the amended pleadings for negligence. Plaintiff acknowledges that the Court already has ruled that the negligence counts should be dismissed. Plaintiff does not seek to resurrect negligence counts against any of the defendants at this time. Rather, Plaintiff reasserted its negligence counts in the newly amended pleadings only to preserve its appellate rights with respect to that cause of action.

VI. DK, LLC IS NOT ENTITLED TO JUDGMENT ON THE PLEADINGS

DK is uniquely situated in that it is the only defendant/Owner that has answered the amended pleading (case 09-473) and moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). Specifically, DK contends that, based on the allegations in the amended pleading and in its answer, it is entitled to judgment declaring the annuity void *ab initio* or voidable based on mutual mistake. Curiously, despite its effort to terminate the annuity or declare it a nullity, DK also seeks dismissal of Plaintiff's counts for rescission or a declaration that it is void. DK also joins the other defendants' arguments that Plaintiff's fraud in the factum claims must be dismissed.

Plaintiff's Second Amended Complaint in case 09-473 includes counts against DK for rescission (Counts I), declaratory judgment (Count II), fraudulent inducement (Count III), fraud in the factum (Count IV), civil liability for crimes and offenses (Count VIII) and civil conspiracy (Count IX). Plaintiff included DK as a defendant in connection with the damages counts (Counts III, IV, VIII and IX) because defendant Caramadre is the managing member of DK and is alleged

to have been acting within the scope of his authority for that company at all relevant times. *See* 473 SAC ¶ 13. Accordingly, his tortious conduct may be imputed to DK.

Plaintiff acknowledges that Counts I, II, III, VIII and IX were dismissed as against DK in the Court's Order. Plaintiff does not seek to resurrect Counts I, II or VIII at this time. Rather, those counts were realleged to preserve Plaintiff's appellate rights. Moreover, since the Second Amended Complaint was filed, DK and Plaintiff have agreed that the annuity is rescinded. *See* Exhibit B. Thus, Counts I and II are moot. The only counts currently pending against DK are for fraudulent inducement (Count III), fraud in the factum (Count IV) and civil conspiracy (Count IX).

"The standard for evaluating a Rule 12(c) motion for judgment on the pleadings is essentially the same as that for deciding a Rule 12(b)(6) motion. '[T]he trial court must accept all of the nonmovant's well-pleaded factual averments as true, and draw all reasonable inferences in his favor.' 'Judgment on the pleadings under Rule 12(c) may not be entered unless it appears beyond a doubt that the nonmoving party can prove no set of facts in support of her claim which would entitle her to relief."' *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 22-23 (1st Cir. 2007) (internal citation omitted).

A. DK IS NOT ENTITLED TO JUDGMENT DECLARING THE CONTRACTS RESCINDED OR VOID

DK has answered the Second Amended Complaint [Docket #60]. It did not assert any counterclaims for rescission, declaratory judgment or other relief. Rather, in its motion for judgment on the pleadings, it argues why it too believes the annuities ought to be rescinded or declared void. And, as discussed above, the parties have agreed that the annuities are rescinded

and Plaintiff has tendered, and DK has accepted, a full return of premiums. Consequently, Plaintiff's Counts I and II are moot.

There being no dispute over these issues, and DK having failed to assert any affirmative counts against Plaintiff,[20] there are no pending justiciable claims for rescission or declaratory judgment upon which to grant DK the relief it seeks.

B. DK IS NOT ENTITLED TO JUDGMENT IN CONNECTION WITH PLAINTIFF'S COUNTS FOR FRAUD, FRAUD IN THE FACTUM OR CIVIL CONSPIRACY

In the Order, the Court dismissed counts against DK for fraud and civil conspiracy based on the incontestability clause appearing in the annuity. Those counts against DK are revived under the second amended complaint, however, because the annuity contract was rendered void for fraud in the factum and consequently DK can not hide behind the incontestability clause for protection.

A contract that is void *ab initio* is never in force and its terms cannot be enforced. *See Guarantee Trust Life Ins. Co. v. Wood*, 631 F. Supp. 15, 19-20 (N.D. Ga 1984)("the Court concludes that the policies are void *ab initio* as against public policy… [T]he incontestability clause in this case is simply not applicable…"); *Amex Life Assur. Co. v. Superior Court*, 930 P.2d 1264, 1271 (Cal. 1997)("Incontestability does not apply to a policy which is void *ab initio*."); *Beard v. American Ageny Life Ins. Co.*, 550 A.2d 677, 689 (Md. 1988)("The invocation of an incontestability provision presupposes a basically valid contract and thus incontestability does not apply to a contract which is void *ab initio*." (internal citations and quotations omitted)); *Wood v. New York Life Ins. Co.*, 255 Ga. 300, 307, 336 S.E. 2d 806, 811-12 (1985) ("The

[20] In its motion to dismiss, DK requests that the Court direct Plaintiff to return the $1 million premium payment, plus interest. To the extent DK seeks an additional interest payment, it has yet to assert a single affirmative claim against Plaintiff that could arguably compel entry of a money judgment in its favor.

incontestability clauses…presuppose the existence of a contract 'in force.' However, an insurance contract that is void *ab initio* as against public policy is never 'in force', cannot be ratified or affirmed, and is not subject to being enforced by the courts."); *Kemper v. Equitable Life Ins. Co. of Iowa*, 171 N.E. 2d 536, 537 (Ohio Ct. App. 1960) ("[I]f the policy is invalid in its inception…the Insurance Company is not liable, notwithstanding the incontestability clause."); *Tulipano v. U.S. Life Ins. Co. in City of New York*, 154 A.2d 645, 650 (N.J. Super. 1959) ("It is generally been held that an insurance policy violative of public policy or good morals cannot be enforced simply because the incontestability period has run."); *Henderson v. Life Ins. Co. of Virginia*, 179 S.E. 680 (S.C. 1935); 44 C.J.S. Insurance §352 (2007) ("A policy issued to a person who has no insurable interest is void, from its inception, and is not rendered valid by a clause declaring it incontestable after the lapse of a specified period of time."); 44 Am. Jur. 2d Insurance §767 (2003)("An insurance policy which is invalid as being violative of public policy cannot be validated by the agreement of the parties that it shall be incontestable after a stated time."); K.A. Drescher, *Annotation: Insurance: Incontestable Clause As Excluding A Defense Based Upon Public Policy*, 170 A.L.R. 1040 (1947). Because defendants' fraud in the factum renders the entire annuity – including the incontestability clause - void, DK is no longer allowed to slink beneath the immunity cover provided by the incontestability clause. Accordingly, DK, like the Agents, Sponsors and Brokerage Companies, is liable for its tortious conduct.

CONCLUSION

For the above reasons, Defendants' motions to dismiss or to reconsider should be denied.

Respectfully submitted,

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Dated: November 17, 2010

CERTIFICATE OF SERVICE

I certify that the within document was electronically filed with the clerk of the court on November 17, 2010, and that it is available for viewing and downloading from the Court's ECF system. Service by electronic means has been effectuated on all counsel of record.

/s/ Michael J. Daly